EMPLOYMENT TRIBUNALS

Claimant: Ms G Oksuzoglu

Respondent: London Borough of Haringey

Heard at: Watford Employment Tribunal

On: 26 July 2022 (in chambers)

Before: Employment Judge Quill; Mr S Bury; Ms S Goldthorpe

Appearances
Written Submissions only

COSTS JUDGMENT

The Claimant's application for costs is refused

REASONS

1. The history of this matter is set out in our remedy judgment and we will not repeat it here.

2. During the remedy hearing, the Claimant indicated an intention to make an application for costs. She did not seem to have the supporting documents with her and, in any event, the Respondent's counsel opposed dealing with the application on the day as he did not have instructions.

3. The remedy judgment was sent to parties on 15 June 2021. The Claimant sent an email to tribunal on 9 June 2021. In breach of the rules, this was not copied to the Respondent. However, EJ Quill treated it as a valid application (the possibility of an application having been flagged up during the hearing) and ordered it to be sent to the Respondent for comments.

4. The Respondent's comments dated 2 August 2021 were received. Amongst other things, the Respondent disputed that the Claimant's communication of 9 June 2021 contained sufficient information to justify an award in her favour. Indeed, it disputed that it even contained sufficient information so that it could properly respond.

5. A hearing to consider the application was ordered.

6. On 2 March 2022, the Claimant wrote to tribunal and the Respondent to say that she could not attend a hearing. On EJ Quill's instructions, a letter was sent stating that the hearing would not take place for at least 3 months, and setting out her options if she did not think she would be well enough to attend on the proposed new dates.

7. By email dated 31 March 2022, sent to the Respondent, the Claimant stated that she would consent to the matter being dealt with without a hearing. By letter 17 May 2022, the Respondent also consented to that. By letter dated 26 May 2022, the tribunal confirmed that the decision would be made in the absence of the parties.

8. Therefore the panel convened on 22 July 2022 (by video) to make its decision based on the written submissions only, and in the absence of the parties.

9. Rule 76 states, in part:

> 76.— When a costs order or a preparation time order may or shall be made
>
> (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
>
> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;
>
> (b) any claim or response had no reasonable prospect of success; or
>
> (c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.
>
> (2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.
>
> (3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment
>
> if—
>
> (a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and
>
> (b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

10. Thus the rule sets out circumstances in which a tribunal either "must" or else "may" consider making an award of costs.

11. If the tribunal decides that the relevant threshold is met (such that it "must" or else "may" consider an award), it does not necessarily follow that an award will actually be made. Costs are the exception rather than the rule. The discretion as to whether to make an award or not is to be exercised judicially, taking account of all relevant circumstances and ignoring all irrelevant circumstances.

12. In Opalkova v Acquire Care Ltd EA-2020-000345-RN, the EAT stated that, when considering whether the criteria in 76(1)(b) are met then each claim/response should be analysed separately. In other words, even if a single claim form and/or single response form deal with several separate complaints, then each one still should be considered separately for the purposes of Rule 76(1)(b).

Analysis and conclusions

13. We are satisfied that none the criteria in rules 76(1)(c), 76(2) or 76(3) are met.

14. Our decision on Rule 75(1)(b) takes into account the EAT guidance in Opalkova. For the Equality Act claims, the fact is that ultimately (as a result of the combined effects of the Tribunal's liability decision and the Employment Appeal Tribunal decision) the respondent was successful. Thus the Respondent did not pursue a response which had no reasonable prospects of success for those.

15. The Claimant did succeed on the unfair dismissal claim. As stated in the liability judgment:

> The claimant was unfairly dismissed when her employment was terminated for reasons of capability on the 27th of May 2016

16. That decision was not affected by the EAT decision.

17. As discussed more fully in our remedy judgment with reasons, the specific facts of the termination decision are discussed in paragraphs 140 to 142 of the liability decision. The facts that led up to it, and subsequent appeal, are also addressed in detail. In the analysis of the unfair dismissal claim the tribunal decided that the Respondent had a potentially fair reason for the dismissal (capability) and that it had carried out a reasonable investigation (paragraphs 190 to 192). The specific reasons for the dismissal being unfair are dealt with in paragraph 193. There was a finding of contributory fault in the liability decision and the Polkey decision was raised in the liability decision and decided at the remedy phase.

18. Just because a party loses, it does not follow that their claim/response had no reasonable prospects. The Respondent sought to argue that the history of the matter up to the decision date justified an immediate dismissal with payment in lieu of notice. That argument failed on the facts, but it was not fanciful or far-fetched or misconceived. The threshold in section 76(1)(b) is not met.

19. Furthermore, the Respondent did not act unreasonably in choosing to defend the claim as a whole, and did not act unreasonably in choosing to defend the unfair dismissal complaint in particular.

20. There was no conduct of the litigation by the Respondent which satisfies the criteria in Rule 76(1)(a).

21. Thus, our decision is that there is no basis for a costs award in this case, and the application is refused for that reason.

22. For completeness, we briefly considered how we might have exercised our discretion had we decided that any of the criteria in Rule 76 had been met. It is slightly artificial to do so, because our decision was that, in fact, the Respondent had not pursued unreasonable arguments or otherwise conducted the proceedings unreasonably. We would have been unlikely to award the costs of the hotel stay or printing etc, given the lack of documentation. In any event, we would have had to apply some reduction to reflect that part of those would have been attributable to the claims which failed. We are not satisfied that the costs of the GP report were necessitated by the unfair dismissal claim, or caused by the Respondent's conduct of its defence to that claim. Some of the invoices supplied relate to the EAT proceedings, and we would not have made any award for those in any event. In relation to the invoices which appear to relate to the tribunal claim/hearing, we do not consider that the sums claimed are inherently excessive for the work apparently done but, again, if making any award at all, we would have reduced to take account of our opinion that the Respondent should not have to make a contribution to the Claimant's costs of pursuing the unsuccessful claims, given that a complaint for unfair dismissal alone would have required a significantly shorter hearing. All that being said, it is the panel's opinion that, even had the threshold been met, we would not have exercised our discretion to award costs. Costs are the exception rather than the rule and we have not been satisfied that there were any particular aspects of the Respondent's conduct, or of the circumstances as a whole, that would merit an award in this case.

Employment Judge Quill

Date: 26 July 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS