



EMPLOYMENT TRIBUNALS

Claimant: Ms E Merson

Respondent: United Lincolnshire Hospitals NHS Trust

Heard: via Cloud Video Platform in the Midlands East region

On: 12 October 2022

Before: Employment Judge Ayre sitting with members
Ms N Pratt
Ms K Mcleod

Appearances

For the claimant: In person,
For the respondent: Mr N Grundy, counsel

JUDGMENT

The unanimous decision of the Tribunal is that the claimant is ordered to pay the sum of £20,000 to the respondent in respect of its costs.

REASONS

Background

1. In a judgment sent to the parties on 30 May 2022, following a five day hearing and two days of deliberation in chambers, the Employment Tribunal

unanimously dismissed all of the claimant's allegations of disability related harassment.

2. On 21 June 2022 the respondent applied for a costs order against the claimant on the basis that the claimant had acted unreasonably in both bringing and conducting the proceedings, and that the claim had no reasonable prospect of success. The respondent has submitted a Schedule of Costs totalling £36,745.61. Of that sum, £18,340 was incurred after the respondent sent a costs warning letter to the claimant on 24 February 2022, with the remainder having been incurred before that date.
3. The claimant resists the application for costs and the case was listed for a Costs Hearing. The claimant gave evidence at the hearing, and we were presented with a bundle of documents running to 96 pages. Both parties also made oral submissions to supplement their written submissions.

Findings of fact

4. After leaving the respondent's employment in September 2019 the claimant began working as a courier in November 2019. From May 2020 until 2 September 2022, she worked full time for the Priory Hospital in Lincolnshire as a healthcare support worker. By September 2022 she was earning £10.20 an hour.
5. The claimant continues to work for the Priory Hospital, but on a part time basis. She remains on their 'bank' of staff, on a zero hours' contract, and typically works one shift a week at the hospital, earning approximately £125 for an 8-hour shift, and £175 for a 12 hour shift.
6. The claimant left full time employment at Priory Hospital in September 2022 to begin a four-year graduate entry medical degree at the University of Nottingham. She has a student loan of £10,330 for the first year of the course and will be eligible to apply for NHS bursaries for the remaining years of her course.
7. The claimant owns her own house, which she purchased at a reduced price of £90,000 from her father in 2017. There is an outstanding mortgage of approximately £70,000 on the house and her monthly mortgage payment is £302.62. The house was valued at £110,000 when she bought it, and houses of a similar size on the street are currently selling for approximately £140,000 now. The claimant described her house as being in a poor state of repair.
8. The claimant lives with her husband who works full time and earns approximately £21,000 a year. They share living costs.
9. The claimant has approximately £1,600 in her bank account. She has an 11-year-old car with approximately 135,000 miles on the clock. She has no stocks, shares or other investments.

10. The claimant has had legal advice on her claim. Very early on in the proceedings she sought advice on the merits of her claim from a solicitor. The week before the final hearing she took advice from another solicitor. Her father paid for that advice.
11. On 24 February 2022 the claimant received a costs warning letter from the respondent's solicitors. That letter was headed 'without prejudice save as to costs' and warned the claimant that the respondent considered her claim to have no reasonable prospect of success and that they would be making an application for costs. It invited the claimant to withdraw her claim and indicated that if she did not, no application would be made for costs.
12. The claimant took advice from a solicitor in relation to the letter. She chose not to reply to the letter and continued to pursue her claim.
13. The claimant was a member of a trade union during the course of her employment with the respondent, and until two months after her employment ended. She received advice, support and representation from her local trade union representative, right up to the time at which she was dismissed. She asked the trade union for advice on her claim to the Employment Tribunal and said that the union had 'washed their hands' of her on the day she was dismissed. She received no advice or support from the union after her dismissal.
14. The respondent incurred legal fees of £33,705.61 in defending the claim through to the final hearing, and a total of £36,745.61 through to the conclusion of the costs hearing. Of those fees, £18,405.61 were incurred prior to the sending of the costs warning letter, and £18,340 were incurred afterwards.

The law

15. The rules governing applications for costs are set out in Rules 74 to 78 and Rule 84 of Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("**the Rules**"). The relevant rules for the purpose of this application are:
 - a. Rule 77 (Procedure):

"A party may apply for a costs order... at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application."
 - b. Rule 76 (When a costs order or a preparation time order may or shall be made):

“(1) A Tribunal may make a costs 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, or*
- (b) any claim or response had no reasonable prospect of success...”*

c. Rule 78 (The amount of a costs order):

“A costs order may –

- (a) Order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;*
- (b) Order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles...”*

d. Rule 84 (Ability to pay):

“In deciding whether to make a costs...order, and if so in what amount, the Tribunal may have regard to the paying party’s...ability to pay.”

16. Costs remain the exception rather than the rule in Employment Tribunal proceedings. In deciding whether to make an order for costs, the Tribunal must first consider whether the conduct of the claimant falls within Rule 76. If it does, the Tribunal must then go on to consider whether to exercise its discretion to make an award of costs and, if so, how much. The mere fact that a party’s conduct has been unreasonable or that a party has pursued a claim which did not have reasonable prospects of success does not mean that a costs award will automatically follow.

Application for costs

17. The respondent applied for a costs order both on the ground that the claimant had acted unreasonably in bringing and conducting the proceedings (Rule 76(1)(a)) and on the ground that the claim had no reasonable prospects of success (Rule 76(1)(b)).

18. The claim contained 66 allegations of harassment, some dating back to 2016, none of which the tribunal upheld. Four of the allegations were withdrawn by the claimant during the hearing, and in evidence the claimant accepted that a fifth allegation was not one of harassment, but she refused to withdraw it.
19. The case brought by the claimant was, in the respondent's submission, very wide-ranging, including allegations of harassment by 11 named individuals plus unidentified members of the respondent's HR team. The Judgment recorded that the claimant had made exaggerated and serious allegations of behaviour which, if true, would have amounted to physical assault and which the claimant admitted in cross-examination were not true.
20. The Judgment also recorded that the claimant had interpreted normal and reasonable steps taken by the respondent as acts of harassment when, taking account of all the circumstances, her interpretation of events was not reasonable. The Tribunal had, the respondent said, preferred the evidence of the respondent on every occasion where there was a conflict of evidence, and had found the respondent's witnesses to be genuine and credible.
21. Mr Grundy referred in his submissions to numerous paragraphs in the Judgment in support of his argument that the claimant had acted unreasonably in conducting the proceedings. For example, he referred to the finding at paragraph 294 (in relation to Allegation 55) that the claimant accepted she did not have any evidence to support an allegation of harassment and to the findings at paragraphs 183-5 (Allegation 28) that the claimant had acknowledged in evidence that Helen Wilson had in fact complimented her, and that this did not amount to harassment, but the claimant would not withdraw the allegation.
22. The respondent also submitted that the claimant's claim was based on hearsay and her own unreasonable perception of reasonable and supportive treatment by the respondent. The respondent is a public body which has spent a large amount of money defending the claim.
23. The respondent also pointed out that it had sent a costs warning letter to the claimant and made a 'drop hands' offer made prior to the final hearing, which the claimant had not accepted.

The claimant's response to the application

24. The claimant resisted the application for costs. She argues that she has significant long-term mental health issues which cause her difficulties concentrating and understanding, and is disabled by reason of depression, OCD and anxiety. She pointed out that she is a litigant in person, that the respondent had not pleaded in its ET3 that her claim had no reasonable prospect of success and had not applied for strike out or a deposit order.

25. The claimant also submitted that she had made it clear that all she wanted was an apology and that the respondent could have saved the costs of defending the claim if it had offered an apology. She acknowledged however that an apology had been offered on 9 March 2021, almost 12 months before the final hearing.
26. The hearing did not take place until almost two years after the issues had been identified at a preliminary hearing, and the claimant was not responsible for the delay nor any associated costs incurred by the respondent, in her submission. The costs warning letter had only been sent two working days before the start of the final hearing.
27. The claimant says that at all material times she held an honest and genuine belief that her claim had reasonable prospect of success, and that the Tribunal had accepted that the claimant had a genuine belief in her claim. It was not, she argues, unreasonable or unusual for a small number of allegations to be withdrawn during the course of the hearing. She genuinely believed she had been harassed and was entitled to pursue her claim.
28. The claimant referred us to the case of *Gee v Shell UK Ltd [2003] IRLR 82* in which the Court of Appeal held that an Employment Tribunal was wrong to indicate to a claimant that she was at risk of a costs award if she persisted with a claim, because there is a high threshold to be met before a costs award can be made. Costs orders are the exception rather than the rule in Employment Tribunals.
29. Finally, the claimant asked the Tribunal to take account of her ability to pay when considering whether to make a costs order and, if so, the amount of any such order. The claimant says that she has limited financial means.

Conclusions

30. Having considered carefully the submissions of the parties, the legal principles summarised above, and the evidence before us, the unanimous decision of the tribunal is that the claimant is ordered to pay £20,000 costs to the respondent.
31. The tribunal finds both that in conducting these proceedings the claimant acted unreasonably and that she chose to pursue a claim which had no reasonable prospects of success.
32. The claimant appears to be a person who is in full control of her actions. She has had access to support from her trade union and has had the ability to obtain legal advice. She is clearly an intelligent and articulate individual, and this has been demonstrated both in the way that the proceedings have been conducted and in the fact that she is now studying medicine at university.

33. It appears to us that the claimant uses her mental health in support of an argument when it suits her to do so. For example, in the final hearing she argued that her former employer should not have performance managed her because of her mental health. She now argues that there should be no costs award against her because of her mental health.
34. Whilst we have every sympathy for the fact that the claimant has experienced poor mental health, she is clearly an intelligent and capable person, who is able to study medicine, and to represent herself competently during a five-day Tribunal hearing. Contrary to her submissions, based on her conduct of the proceedings we find that she is capable of concentrating and understanding the concept of harassment, and the tribunal process and proceedings.
35. We have some difficulty believing the claimant and in particular what the claimant says about her income. In her response to the costs application the claimant said that she was not able to take legal advice after receiving the costs warning letter from the respondent. This was not true. In evidence at the costs hearing and only in response to a direct question from the Employment Judge, she disclosed that she had discussed the cost warning letter with the solicitor she spoke to in the week before the final hearing.
36. There appears to us to be a level of vindictiveness in the actions of the claimant, something that we do not say lightly. The claimant has in our view not been entirely honest and has pursued allegations against colleagues without caring about the impact of those allegations upon them. For example, she publicly accused Helen Wilson of dragging her across a corridor. This is an extremely serious allegation to make and were it to be true it would amount to criminal conduct.
37. At the final hearing she admitted that Helen Wilson had not literally dragged her. She did not however withdraw this allegation. She subsequently sought to dismiss the fact that she had made such a serious allegation which was not true by saying that it due to a different interpretation of the word 'dragged'. In our view she knew very well what she was saying and chose to maintain the allegation that Helen Wilson had dragged her. The claimant has taken no responsibility for her actions even today.
38. We accept the respondent's submissions that the claimant behaved unreasonably in bringing a claim that had no reasonable chance of success in their entirety. The claimant made multiple serious allegations that were based upon nothing more than her misplaced belief. The respondent is a public body that has used significant funds defending this case, funds that could have been used to treat patients.
39. We have considered the claimant's ability to pay a costs order. The claimant owns her own house and there is considerable equity in that house. The claimant has been working and continues to work and has sufficient financial

stability for her to choose to give up full-time work in order to take up four years of studying.

40. We have considered that the claimant was a litigant in person, however she did have advice from her trade union, and she also had advice from a solicitor. Her father paid for her legal advice and she has received some financial support from her family.
41. The fact that the respondent did not apply for a strike out in this claim should not in our view be a defence to a costs application. Discrimination claims are notoriously fact sensitive and normally require the hearing of evidence before they can be determined. The higher courts have urged Tribunals to be particularly cautious before striking out discrimination claim. It is therefore unlikely that, even if the respondent had made a strike out application, that application would have been successful, particularly given the number of allegations made by the claimant.
42. The claimant is correct in her argument that costs orders are the exception rather than the rule in Employment Tribunal proceedings. This is, however, an exceptional case. It involved 66 allegations against a large number of individuals, some of whom the claimant was not even able to identify and going back over several years. The claimant had no evidence to support many of the allegations yet continued to pursue them. The Tribunal had to make findings on 62 of the allegations.
43. The respondent has been put to significant cost by these proceedings and has had to call a number of senior managers to give evidence.
44. For the above reasons we find that the claimant acted unreasonably in the conduct of this litigation and that the claim had no reasonable prospects of success. We also find that this is a case in which it would be appropriate for the Tribunal to exercise its discretion to make an award of costs.
45. We have considered the claimant's financial means, both when deciding whether to make a costs order and when deciding the amount of that order. We are satisfied that the claimant has enough equity in her house and is financially secure enough to pay a costs order, as evidenced by the fact that she has chosen to give up work to begin a four-year course.
46. We considered whether to refer the matter to the County Court for an assessment of costs but have decided not to. It seems appropriate to us to make an award of £20,000 which covers the costs that the respondent has incurred since sending the costs warning letter, together with a small award in respect of the period prior to the costs warning letter.
47. The claimant is therefore ordered to pay to the respondent the sum of £20,000 in respect of the costs that the respondent incurred in defending this claim.

Employment Judge Ayre
Date: 27 October 2022