



EMPLOYMENT TRIBUNALS

Claimant: Mr D Adams

Respondent: NRCPD

Sitting at: London South

On: 6th March 2023
(determination without a hearing)

Before: Employment Judge Nicklin

Representation (on paper application for costs)

Claimant: Ms A Brown, Counsel

Respondent: Mr C Crow, Counsel

JUDGMENT ON COSTS APPLICATION

The Respondent's application for an order that the Claimant pays the Respondent's costs of the hearing dated 13th January 2023 is dismissed.

REASONS

Background to application

1. By a claim form presented on 13th February 2022 the Claimant brought claims of indirect disability discrimination and failure to make reasonable adjustments. The case was not listed for a case management hearing when the notice of claim was issued by the tribunal. On 20th May 2022, Employment Judge Martin directed that there shall be an open preliminary hearing to *consider* the following aspects of the ET3 and Grounds of Resistance:

- 1.1. Section 54 of the Equality Act 2010 – whether the Respondent is a qualifications body;

- 1.2. Limitation and time limits;
 - 1.3. Employment status; and
 - 1.4. Restraint of trade.
2. The open preliminary hearing (“OPH”) was listed before me on 13th January 2023 to consider the above matters. It is apparent that, given the direction says “to consider” these issues and the hearing was only listed for 3 hours, the tribunal had not directed that all of these matters would be finally determined on evidence at the hearing.
 3. The parties were both represented at the OPH by counsel (as identified above). Both parties agreed at the hearing that these matters could not all have been resolved at the hearing. In any event, the scope of the issues had narrowed (as confirmed at the hearing) to the point that the tribunal would need to consider:
 - 3.1. What were the substantive issues to be determined by the tribunal at the final hearing?
 - 3.2. How the tribunal should proceed with any issue as to time limits (i.e. at the OPH, a later OPH or at final hearing); and
 - 3.3. Any further case management.
 4. I gave the Claimant and his counsel some time (40 minutes) during the OPH to consider and identify the issues and claims. Unfortunately, counsel only having been recently instructed, they could only be identified in broad terms and further clarity was needed in respect of the PCPs to be relied upon. In the event, I made case management orders to list the case for a case management hearing which will be heard in private on a date which has been given to the parties.
 5. At the end of the hearing, the Respondent’s counsel indicated that he was instructed to apply for a costs order in respect of his attendance fee owing to the lack of progress at the OPH. This was on the basis that such progress had been hampered by the issues not being satisfactorily clarified by the Claimant in advance of (or at) the OPH. There was insufficient time to consider submissions and give a decision on this application at the end of the hearing. The parties therefore agreed that the Respondent would submit a written application after the hearing, the Claimant would reply in writing and this would then be referred to me to determine on the papers (i.e. without a hearing).
 6. Unfortunately, there was an administrative delay in the written application being placed before me by the tribunal. I apologise to the parties for the delay in receiving this judgment as a result. I have dealt with the application as promptly as possible upon receiving all of the documentation submitted by the parties.

The Respondent's application

7. By a written submission dated 13th January 2023, the Respondent applied for an order for costs against the Claimant, pursuant to Rule 76(1)(c), Rule 76(2) or alternatively Rule 76(1)(a) of the tribunal's Rules of Procedure. The Claimant opposes the application by his counsel's written submission dated 19th January 2023.
8. Having regard to the fact that both parties consented to this application being dealt with on paper, it is in accordance with the overriding objective to determine this application without a hearing.
9. I have had regard to the record of the preliminary hearing and case management orders dated 23rd January 2023. I have carefully considered all of the written representations made by both parties and reconsidered any relevant documents in the OPH bundle.

The Respondent's submissions

10. The Respondent seeks counsel's fee for the hearing on 13th January 2023 (in the sum of £1,393 inclusive of VAT) on the basis that the Respondent's costs of the hearing were wasted as a result of the Claimant's failure to particularise his case prior to and/or at the OPH on 13th January 2023. The effect was that the case could not be effectively progressed beyond matters which were capable of agreement between the parties.
11. The Respondent says:
 - 11.1. There is a need for sufficiently clear pleadings because the tribunal only has jurisdiction in relation to acts/omissions of which complaint is made.
 - 11.2. By reference to Chandhok v Tirkey [2015] IRLR 195 (para 16), the EAT observed that:

...The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely on their say so...It sets out the essential case. It is that to which a Respondent is required to respond...
 - 12.3 The pleading is unclear as to the precise PCP relied on in the indirect discrimination claim, what the Claimant relies on as the basis for arguing group disadvantage and/or how the Claimant claims individual disadvantage.
 - 12.4 Similarly, the failure to make reasonable adjustments claim is unclear as to the PCPs relied on and the substantial disadvantage. The Respondent describes these as the minimum requirements of the pleading.
 - 12.5 The Claimant accepted at the OPH that the PCPs need to be particularised. In the original Particulars of Claim, the PCP appears to be a general policy

applied by the Respondent's Complaints Committee which is unclear (insofar as it is a claim within sections 19 and 20/21 of the Equality Act 2010).

12.6 The Claimant had the benefit of some legal advice in relation to the formulation of his Particulars of Claim.

12.7 The application is made on the basis of an alleged failure to remedy the deficiencies in the pleading by or at the OPH. The Respondent relies on the following chronology:

<i>9th September 2022</i>	Notice of hearing sent to parties (for the OPH)
<i>7th December 2022</i>	The Respondent confirmed its position in relation to the issues to be considered at the OPH and highlighted the need for a list of issues (in its application to Amend the Grounds of Resistance).

12.8 Both parties and the tribunal were of the view at the OPH that the issues needed to first be identified. The Respondent says that the Claimant should have come to the hearing with a list of issues or at least prepared to confirm orally what the issues are (to be recorded later on).

12.9 After 40 minutes had been given for the Claimant's counsel to take instructions on the issues, the Claimant sought 7 days to complete the list. The Respondent says that was, in effect, a postponement/adjournment application given that nothing else could proceed until the issues had been clarified.

12.10 The progress made at the hearing came about through agreement/concession and did not require a hearing. The directions subsequently made concerned the clarification of the Claimant's case and the listing of a further hearing in March 2023.

12. The Respondent therefore seeks the costs wasted for the OPH under Rule 76(1)(c) (on the footing that the hearing has been postponed or adjourned on application of a party less than 7 days before the date on which the OPH began); or Rule 76(2) (on the footing that the Claimant was in breach of an order or practice direction or because the OPH was adjourned on the Claimant's application to do so); or, alternatively, Rule 76(1)(a) (on the footing that the failure to be able to clarify the claims despite being professionally represented amounts to unreasonable conduct).

The Claimant's submissions in response to the application

13. The Claimant opposes the application and points out that this is a case concerned with alleged failures to make reasonable adjustments for the Claimant as a person with disabilities. The tribunal is reminded of the importance of safeguarding accessibility to justice, including those who suffer disadvantage. The Claimant says that the Respondent's application is contrary to the overriding objective and does not account for the fact that the Claimant has been an unrepresented litigant and the Respondent's own alleged failings in engaging with the Claimant.

14. The Claimant relies on the following points:

- 14.1. The Claimant was not legally represented at the time of the OPH being listed (the Claimant says that the notice of hearing was sent on 22nd September 2022, although it is dated 9th September 2022).
- 14.2. No directions were given to the parties as to the preparation of the OPH or the tribunal's expectations.
- 14.3. Whilst the Respondent wrote to the tribunal on 7th December 2022 (as above), it did not write directly to the Claimant inviting him to provide further and better particulars or to produce or agree directions for the OPH or invite him to produce or agree a draft list of issues.
- 14.4. As the Respondent did not enquire of the Claimant in this regard, the Claimant was not given a costs warning or advise him that failure to cooperate may result in a costs application/order. The Claimant says that the Respondent could have written to the tribunal seeking directions for the preparation of the OPH. It is said that it is not reasonable to expect an unrepresented Claimant to consider that the 7th December 2022 letter puts him on notice as to what may be required of him and/or that he was at risk of a finding of unreasonable conduct.
- 14.5. The Claimant also points to the wider context. He says that the Respondent's own appeal process had continued during this time (before a legally qualified chair) and only completed following a hearing on 23rd December 2022. He also says that the appeal panel was due to meet on the same day of the hearing and publish its decision within around 30 days. The Claimant says that the Respondent would have been aware that these matters were potentially relevant to the claim.
- 14.6. The Claimant also says that his disabilities are relevant to the difficulty he says he encountered in engaging with the appeal process and, consequently, the tribunal process (although I note that the issue of disability may remain in dispute and I make no findings about disability in this judgment).
- 14.7. The Claimant instructed counsel the day before the hearing and this meant there was insufficient time to take instructions. In any event, the Claimant says that the Respondent only served a skeleton argument the day before the hearing and had failed to engage with him to deal with the list of issues.

15. The Claimant says that this cannot be a case of unreasonable conduct in the circumstances.

Law

16. Rule 76 of the tribunal's Rules of Procedure provides:

76.—(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)...

(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.

17. Rule 77 (procedure) provides:

77. *A party may apply for a costs order or a preparation time 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.*

18. Rule 84 provides as follows (in respect of a party's ability to pay):

84. *In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.*

19. In determining a costs application of this sort, there is a two-stage test. Firstly, I must consider whether the relevant statutory threshold is made out (under Rule 76(1)(c), 76(2) or 76(1)(a)). If I decide that one of those tests is made out, I must go on to exercise my discretion, having regard to all the circumstances, as to whether or not to make a costs order. Where the first threshold is satisfied it does not automatically follow that an order should be made. If an order is to be made, I must then go to determine the amount (see Ayoola v St Christopher's Fellowship, UKEAT/0508/13/BA, 6th June 2014, unreported, per HHJ Eady QC (as she then was)).

20. The tribunal can take into account ability to pay on the question of whether to make a costs order and also, if appropriate, on the amount.

21. The purpose of such an award is to compensate the receiving party, not punish the paying party.

Discussion and conclusions on the application

22. In my judgment, the first threshold to make a costs order (under any of the grounds relied on by the Respondent) in relation to the hearing on 13th January 2023 is not made out and the application must therefore fail. This is because:

- 22.1. I am not satisfied, for the purposes of Rule 76(1)(c) or 76(2), that the Claimant can be taken to have applied for a postponement or adjournment of the OPH by his request for time to prepare the list of issues. It is right to say that the list of issues needed to be clarified and, with those in hand, it would then be possible to consider how the tribunal should proceed with any time limit issues, but the Claimant did not seek to return for a further OPH. In the event, the tribunal decided that a closed case management hearing would be necessary and this later hearing will review a number of matters including some issues not before the tribunal on 13th January, such as disability. The two-day final hearing has been converted into an OPH for now but this was not at the specific request of the Claimant.
- 22.2. Given that the Claimant's position at the hearing was that the case may develop as a result of the Respondent's appeal process (the outcome of which had not been provided at that point), there was a likelihood that the list of issues would require finalisation after the OPH and the Respondent would, in any event, need an opportunity to consider whether its Grounds of Resistance required further amendment in reply. In light of these post-hearing tasks and the unresolved question of disability (and whether this would require consideration at a further OPH or at final hearing) it is apparent that further work and, on balance, a further hearing of some sort, would be required to ensure this case had been adequately prepared for a final hearing. In my judgment, this is not, therefore, a case of a simple application to adjourn because the Claimant required more time with his newly instructed legal representative. This was the first appearance of the parties before the tribunal in a case requiring case management which had been listed as an OPH with a broad range of issues for consideration/discussion.
- 22.3. I am also not satisfied that the Claimant is in breach of an order or practice direction (if this is so contended). No specific order or practice direction has been identified in the application and, further, it is noteworthy that the directions made by Employment Judge Martin (for the listing of this OPH) did not include any orders instructing the Claimant as to how he should prepare for the hearing.
- 22.4. As to the alternative basis under Rule 76(1)(a): unreasonable conduct – I accept the Claimant's submissions that the circumstances giving rise to the Claimant not having prepared a list of issues by the time of the OPH do not amount to unreasonable conduct for the following reasons:
- 22.4.1. The Claimant was not represented at the time he was given notice of the OPH and the notice of hearing gave him no instruction as to how he should prepare or what was required of him;

- 22.4.2. His ET1 was accompanied by a Particulars of Claim. As an unrepresented litigant, it would not be obvious that these would be insufficient or that he was required to prepare a list of legal and factual issues without direction;
- 22.4.3. Whilst the Respondent made a written application in respect of its Amended Grounds of Resistance on 7th December 2022, this makes only a passing reference to a list of issues being the first consideration at the OPH and the determination of the same being 'achievable' within the 3-hour listing. There is no other evidence before the tribunal to show that the Claimant was on notice as to what would be required at the hearing;
- 22.4.4. The Claimant's counsel was instructed the day before the hearing. It was of assistance to both parties and the tribunal that the Claimant was represented at the OPH. Whilst the Claimant could have possibly arranged this earlier, I do not have information before me as to why that did not happen. In any event, had the Claimant attended unrepresented without a list of issues, the tribunal would have spent much of the allocated hearing time clarifying the issues directly rather than considering the subsequent matters which will now be reviewed at the next hearing;
- 22.4.5. Unfortunately, for whatever reason, the Respondent (which has been represented throughout) did not prepare a draft list for the Claimant to consider, update, amend or complete. Until the Claimant instructed counsel such a list would have assisted the parties and the tribunal to further the overriding objective. The Respondent was not, of course, subject to an order to prepare a first draft, but, whilst he was unrepresented, the legal complexity of the claims brought under sections 19 and 20/21 of the Equality Act 2010 is such that this may have assisted the Claimant to prepare for the OPH (and therefore assisted the tribunal and the Respondent) prior to him instructing counsel.

23. Accordingly, I do not find that any of the Rule 76 gateways for this application are made out. The application for costs is therefore dismissed.

Employment Judge Nicklin

Date: 6th March 2023