



EMPLOYMENT TRIBUNALS

Claimant: Richard Brown
Respondent: The Church of England Children's Society
Judge: Employment Judge Liz Ord

COSTS JUDGMENT

The claimant's application for a preparation time order is refused.

REASONS

The Application

1. The claimant makes his application on the basis that the response to his claim had no reasonable prospects of success and, based on his submissions, he also appears to rely on unreasonable conduct.
2. The parties agreed that this matter be dealt with on the papers.

The Law

3. The Employment Tribunals Rules of Procedure 2013 contain a discretionary power to award costs. The circumstances in which a costs order or preparation time order may be made are set out in rule 76(1), which relevantly provides:

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; or
- (b) Any claim or response had no reasonable prospect of success;
or

(c)

Caselaw

4. I have considered relevant authorities, including those cited by the respondent.
5. An award of costs is the exception rather than the rule in Employment Tribunal proceedings, as acknowledged in *Gee v Shell UK Limited* [2003] IRLR 82.

Conduct

6. There is a three stage procedure to consider - *Haydar v Pennine Acute NHS Trust* UKEAT 0141/17/BA). The first stage is to decide whether the threshold has been reached for a party's conduct to fall within rule 76(1), whether by way of unreasonable conduct or otherwise; if so, the second stage is to decide whether it is appropriate to make an award; and if so, the third stage is to decide how much to award.
7. At the discretionary stage, when deciding whether unreasonable conduct should result in an award of costs, the Court of Appeal held in *Barnsley Metropolitan Borough Council v Yerrakalva* [2012] ICR 420 that the tribunal should have regard to the nature, gravity, and effect of the conduct. The vital point in exercising discretion is to look at the whole picture, and in doing so to identify the conduct, what was unreasonable about it and what effects it had.
8. *McPherson v BNP Paribas (London Branch)* 2004 ICR 1398, CA provides - when exercising its discretion under the grounds of "conduct", a tribunal should take into account the "nature, gravity and effect" of a party's unreasonable conduct as factors relevant to the exercise of discretion (paragraph 40).
9. *Dyer v Secretary of State for Employment* UKEAT/183/83 (unreported) provides – whether conduct is unreasonable is a matter of fact for the tribunal. Unreasonableness has its ordinary meaning and should not be taken by tribunal to be the equivalent of vexatious.

Prospects of success

10. In *Opalkova v Acquire Care Ltd* EAT 0056/21, the EAT considered the test for determining whether an employer's response has no reasonable prospects of success. There are three key questions (see paragraph 24):
 - a. First, objectively analysed, when the response was submitted did it have no reasonable prospect of success, or alternatively at some later stage, as more evidence became available, was a stage reached at which the response ceased to have reasonable prospects? This question is objective and is the threshold for making a preparation time order under Rule 76(1)(b).

- b. Secondly, at the stage when the response had no reasonable prospect of success, did the respondent know that was the case?
- c. Thirdly, if not, should the respondent have known?

These questions are relevant whether the matter is analysed on the basis that the response had no reasonable prospects of success or that the respondent was guilty of unreasonable conduct in defending or maintaining the defence to the claims (paragraph 25).

- 11. In *Radia v Jefferies International Ltd* EAT 0007/18, the EAT emphasised that the test is whether the claim had no reasonable prospect of success, judged on the basis of the information that was known or reasonably available at the start. Thus, the Employment Tribunal must consider how, at that earlier point, the prospects of success in a trial that was yet to take place would have looked (paragraph 67).

Discussion and Conclusions

- 12. In the Employment Tribunal, an award of costs/preparation time order is the exception rather than the rule and the bar for obtaining costs is high.
- 13. I will consider each of the claimant's points in support of his application, dealing with both the "conduct" aspects and those concerning "prospects of success".
- 14. The claimant says that the respondent failed to provide key evidence, although he has not identified what this is. Nonetheless, it is likely to relate to the selection criteria for alternative employment and the automatic wiping of rejected applications. I am aware of no other missing documents. Whilst this was unfortunate, it was because of the automated system, but it did not prejudice the claimant. This did not equate to unreasonable conduct.
- 15. Whilst the claimant points out that the respondent proceeded to a hearing anyway without these documents, this was a matter for the respondent, and it did not render its response unmeritorious. Consequently, the lack of documentation in this regard did not cause the response to have no reasonable prospects of success and nor was it unreasonable behaviour.
- 16. With respect to the contention that the respondent failed to engage with ACAS prior to the submission of the claim, it was not obliged to do so. This does not reach the necessary threshold for unreasonable conduct.
- 17. Similarly, as for the submission that the respondent made little attempt to find a solution and offered only £500 in settlement, the respondent was not obliged to make any offers at all. This was a negotiating tactic and the fact that it was low cannot be classed as unreasonable conduct.
- 18. As regards the respondent's threats to attempt to recover costs from the claimant, the respondent explained in an acceptable manner the circumstances under which it would pursue such a course of action. This

kind of correspondence is often used in litigation and the claimant was not prejudiced by it. Again, it does not reach the high bar for unreasonable conduct.

19. As for “prospects of success” generally, the respondent clearly had an arguable case, which merited full hearing. The fact that it was unsuccessful in its response is insufficient for the claimant to secure costs.
20. Specifically, whilst the claimant states the respondent failed to follow its own policy, this was an arguable matter, which was dealt with appropriately at the liability hearing. It is not a reason to award costs.
21. Considering all of the above matters both individually and cumulatively, I conclude that the claimant has not demonstrated that:
 - the respondent conducted the proceedings unreasonably, by acting vexatiously, abusively, disruptively or otherwise unreasonably;
 - the respondent had no reasonable prospects of success.
22. Therefore, the claimant’s application fails at the first stage and there is no need for the tribunal to consider any subsequent stages.

Employment Judge Liz Ord
Date 6 April 2023

JUDGMENT SENT TO THE PARTIES ON
11 April 2023

FOR THE TRIBUNAL OFFICE