



EMPLOYMENT TRIBUNALS

Claimant

Mr J Mayanja

Respondent

v Bradford Metropolitan Borough Council

COSTS HEARING

Decided on the Papers at Leeds by CVP On: 5 April 2023

Before: Employment Judge O'Neill

With Ms J Hiser

Mr G Corbett

Appearance:

For the Claimant: Not present

For the Respondent: Not present

JUDGMENT

The claimant shall pay to the Respondent costs in the sum of £2000.

REASONS

Introduction

1. The claimant brought claims for breach of contract, direct discrimination because of race, Indirect discrimination because of race, harassment – race, and victimisation. The claims were heard by this Tribunal on 17-19 October 2022 and all failed. The Respondents now seek costs in the sum of £4640, having sent the claimant a costs warning letter before the hearing.

Law

2. Rule 76 Employment Tribunals (Constitution and Rules of Procedure) 2013 provides among other things

(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; or

(b) any claim or response had no reasonable prospect of success

3. Costs remain the exception in the Employment Tribunal **as set out in Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78**, at *'The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had'*.

Material before the Tribunal

4. The costs application was decided on the papers and the Tribunal had before it
 - The Reserved Decision
 - The application for costs 12 December 2022
 - The email 4 October 2022 respondent to claimant
 - The costs warning letter 6 October
 - Letter to parties from Tribunal 13 March 2023 and 30 January 2023
 - Respondent's written representations 27 March 2023
 - The claimants written representations 17 March 2023
 - The claimants written representations 28 March 2023
 - The claimants request for a postponement 4 April 2023

Application to Postpone

5. The claimant applied on 4 April 2023 to postpone this costs consideration by 10 working days which would have deferred consideration to next Tuesday ie an additional 10 working days from today. The tribunal considered this application carefully but decided to go ahead with the cost determination today and refuse the application to postpone.

6. The claimant has never appeared to object to the matter being dealt with on the papers. On 30 January 2023 he was first ordered to give reasons by the 14th of February 2023 as to why cost should not be paid. He made no representations. On 13th of March 2023 he was given a further opportunity to produce reasons and arguments of affordability by the 27th of March 2023. We took into account the representations he had submitted on the 17th of March and on the 28th of March 2023.
7. In the circumstances we are satisfied that this was a case suitable for being decided on the papers and the claimant had ample time to make all necessary representations and his application is refused.

Findings

8. The claimant brought claims for Breach of contract, Direct discrimination because of race, Indirect discrimination because of race, Harassment – race, and Victimisation. The claims were heard by this Tribunal on 17-19 October 2022 and all failed.
9. The claimant represented himself and although a litigant in person was not without experience as a representative given his working history in the Advice sector. The respondent was represented by an in-house solicitor and by Counsel at the hearing. They are legal representatives within the meaning of the Rule 74.
10. The amount claimed by way of costs related only to the period after the costs warning letter and comprised Counsel's fee for the Hearing of £2600 plus VAT and the Council's Solicitor costs of £2040 for attending at the Hearing, instructing Counsel and preparing for trial. This totalled £4640 which the Tribunal finds to be reasonable.
11. The claimant describes himself as of black African ethnicity. He applied for the post of Refugee and New Communities Integration Officer with the respondent council and asserted that an unconditional offer had been made to him which he had accepted but the offer was withdrawn and he was not appointed.
12. The Tribunal found that no unconditional offer had been made but after the interview and test stages the claimant was informed that he was the preferred candidate in an ongoing selection process. That process included the provision of satisfactory references and the respondents did not appoint because of the references which threw up inconsistencies between the factual basis of the references and the information supplied by the claimant.
13. The claimant was bitterly disappointed not to have been appointed as he had done so well at the interview stage when he had emerged as the preferred candidate. However, there were significant inconsistencies between the information he had given in his application and that supplied by the referees and the claimant admits to having given incorrect information about his salary and job history.

14. Having sent the claimant a cost warning letter on 6 October 2022 applied to the Tribunal for costs on 12 December 2022 in the following terms

'I refer to the above case which was heard in the Leeds Employment Tribunal from 17 to 19 October 2022 inclusive. I write further to receiving the Reserved Judgment of Employment Judge O'Neill which was sent to the parties on 15 November 2022. I attach a copy of said judgment for ease of reference.

Having considered the judgment and noting that all elements of the Claimant's claim have failed, I am writing on behalf of the Respondent to make an application for a costs order under Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

I make this application on the grounds that (a) the Claimant acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing of the proceedings, and/or (b) that the Claim had no reasonable prospect of success.

In particular, I have noted that the Tribunal has found (at paragraphs 58 and 66 of the judgment) that the Claimant has fabricated the claim of harassment and also was evasive and inconsistent in his evidence, changing core evidence at a very late stage in proceedings.

In support of my application, I also attach a copy of a "without prejudice save as to costs email" which I sent to the Claimant on 6 October 2022. In that email, I alerted the Claimant to the fact that the Respondent may make a costs application if he proceeded with his claim and it was ultimately unsuccessful.

I confirm that I am copying this email to the Claimant and shall advise him that any objection to this application should be sent to the Tribunal as soon as possible.

Please let me know if you require any further information from me at this stage'.

15. The costs warning letter of 6 October 2022 was framed in the following terms

'I write further to my email below to inform you that the Respondent believes, especially having now had sight of your witness statement, that your case is entirely without merit. The Respondent will be instructing its barrister on Monday next week and will at that point incur the brief fee for the hearing. The Respondent writes to put forward the following offer:-

If you contact ACAS and/or the Employment Tribunal and formally withdraw your claim in full before 10am on Monday, 10 October 2022,

then the Respondent is prepared to agree that it will not pursue you for its costs incurred in defending your claim to date.

If you decide to continue with your claim, then the Respondent reserves the right to draw this email to the attention of the Employment Tribunal Judge should you:-

*(a) fail to attend the Employment Tribunal on Monday, 17 October 2022;
or*

(b) you attend the final hearing, but your claim is ultimately unsuccessful.

In either of those circumstances, the Respondent reserves the right to rely upon this email to support its application for a costs order to be made against you pursuant to Rule 76 of the Employment Tribunals Rules of Procedure 2013. The costs application would be made on the grounds that you acted unreasonably in continuing with the proceedings and/ or that your claim had no reasonable prospect of success.'

A costs order from an Employment Tribunal may include fees (including legal fees), charges, disbursements or expenses that have been incurred by or on behalf of our client, including expenses that any witnesses incur in connection with attendance at the tribunal.

I strongly recommend you to seek independent legal advice as to the merits of your claim and its weaknesses, if you have not already done so.'

16. Before sending the costs warning letter the Respondents had emailed the claimant in the following terms

*'In paragraph 18 of your witness statement, you refer to accepting a job offer from the Council by email on 19 October 2021. As you will be aware, the hearing bundle does not include a copy of this email and Mrs Clipsom has confirmed to me that she never received such an email from you. **Please can you provide me with a copy of this email by return so that it can be added to the hearing bundle.** I also note that you state in paragraph 18 "I still have evidence of all these calls". Please can you confirm and share with me what this evidence is?
I look forward to hearing from you.*

No such email was ever produced and did not exist.

17. The claimant made the following representations on 17 March 2023 in summary terms that

- Costs should be the exception
- More particulars of the application are required before the claimant can respond
- Yerrakalva guidance – para 41
- Costs do not follow the event
- Appealed to EAT

18. The claimant has provided the following representations on 28 March 2023

'I can confirm receiving the respondents' fanciful and 'misguided costs order' against me, that is nothing but a complete waste of this Tribunal's time as having no reasonable prospects of success not in accordance with Rule 76(1) spirit.

Seeking ET redresses only furthers purposive and objective ERA & HRA conventional rights 1996 & 1998 respectively.

None of her misguided grounds would arguably be construed as 'unreasonable' in either bringing or conduct of proceedings.

Other ET claims relied upon epitomises the misguided nature of her claims, two claims are still live subject to rule 3(10), none ever failed initially under s37 respondent is conflated 'Civil Restraining Orders' for 'costs orders' under the ET Procedure where costs are 'exceptions rather than the rule'.

19. At the substantive hearing the Tribunal found the claimant had

19.1 fabricated the harassment claim,

19.2 not sent an email of acceptance of offer on 19 October 2021 notwithstanding his assertion in his statement and at the start of the Hearing had insisted that he had done so although during the Hearing he agreed that he had not.

19.3 Failed to produce a copy of the key email of 19 October 2021 while insisting it existed when it later transpired that no such record existed or had been sent.

19.4 Failed to produce the recordings or transcript of the voicemail messages which he insisted existed and during the Hearing accepted they did not exist.

19.5 The claimant admitted to having been untruthful in the salary details he had supplied to the respondent

19.6 In his submission he changed the whole basis of his contract claim and confirmed that he was no longer relying on an unconditional offer of contract made on 18 October 2021 and accepted by him on 19th of October 2021. He had conceded that he had sent no e-mail of acceptance on the 19th of October 2021, he had no recording or transcript of the voicemail messages from 18 October 2021 and the telephone records show that the telephone messages were too short to be a conversation in which the employment offer had been made.

20 The claimant failed to review his position on receipt of the costs warning letter of 6 October 2022 notwithstanding the fact that he knew or should have known that no email or telephone transcript existed of 18 and 19 October 2021 and that he had sent no email and there had been no telephone conversation with Ms Clipsom. He was alerted by email on 4 October 2022 of the respondent's position but did nothing to correct his own position but continued to found his contract claim and the background to the discrimination claims on his untruthful assertion of an offer made on 18 October 2021 and accepted by him by email the following day.

Conclusions

20. We find that the claims in contract and harassment had no reasonable prospect of success and that the Claimant acted unreasonably in that he

20.1 fabricated the harassment claim

20.2 constructed the contract claim on a basis which he knew to be untrue ie the telephone offer on 18 October 2021 and the email of acceptance on 19 October 2021

20.3 pretended to the respondent in the preparation stages to have evidence which did not exist ie transcripts and recordings of key telephone conversations and copy email of 18 and 19 October 2021.

21. The Tribunal has not been given details of the claimant's financial circumstances but recall from the substantive hearing that he produced a schedule of loss in which he stated he had been made redundant and we infer that he has had a period of unemployment.

22. We have also taken into account that the claimant was bitterly disappointed not to have been appointed as he had done so well at the interview stage when he had emerged as the preferred candidate. Although there were significant inconsistencies between the information he had given in his application and that supplied by the referees and although the claimant admits to having given incorrect information about his salary and job history, a person in his position might well consider that such treatment calls for an explanation and for that reason we have decided against ordering the total amount sought.

23. In the circumstances we order costs limited to £2000.

Employment Judge O'Neill

5 April 2023