CASE NO: 2601309/2018

EMPLOYMENT TRIBUNALS

Claimant: Miss Manjeet Kaur Panesar

Respondents: Leicestershire County Council

Record of a Costs Hearing at the Employment Tribunal

Heard at: Nottingham

Costs Hearing: 24 March 2023

Heard on the papers by agreement of the parties

Before: Employment Judge M Butler

Members: Mr K Rose
Mr A Greenland

Representation

Claimant: Being dealt with on the papers
Respondent:

JUDGMENT ON COSTS

1. The unanimous Judgment of the Tribunal is that the Claimant is ordered to pay to the Respondent the sum of £20,000 in costs. £3,500 having already been paid, the balance payable by the Claimant is £16,500.

REASONS

BACKGROUND

1. At a Preliminary Hearing before Employment Judge Adkinson on 4 December 2020, a Deposit Order was made against the Claimant in terms that if she wished to pursue all of her allegations, the total sum of the deposits to be paid was £3,500. The Claimant appealed against that Order but the Employment Appeal Tribunal dismissed the Appeal because it was made out of time.

2. The substantive hearing was held over 10 days in 2021 and this Tribunal dismissed all of the claims. Reserved Judgment was sent to the parties on 10 November 2021.

3. The Respondent submitted a costs application within the time limit set out in Rule 77 on 8 December 2021. By an Order sent to the parties on 14 December 2021, the parties were required to prepare for a Costs Hearing on a date to be fixed. Included in the Orders was a requirement that the Claimant submit a response to the application by 1 February 2022.

4. The Costs Hearing was subsequently listed for 5 May 2022. The Claimant had not complied with the Order to respond to the costs application. Instead, Mr Blakey, on behalf of the Claimant, made a number of applications of which no prior notice had been given to the Respondent or the Tribunal including an application for the return of the Claimant's deposit and for the Claimant's costs in respect of this litigation. Those applications were refused.

5. It was apparent at the hearing on 5 May 2022 that much further information was required from the Claimant as to her means, assets and outgoings. Further orders were made in this regard.

6. The Costs Hearing was listed again for 25 July 2022 but, once more no orders had been complied with as the Claimant was ill. The hearing was postponed until 24 November 2022 when the Claimant was still ill and further information was still required. The Claimant was required by Order to provide further information and the parties were asked whether they wished there to be another Costs Hearing or whether the Tribunal should make its decision based on the papers submitted to them. The parties agreed that the issue should be decided on the papers.

7. On 6 February 2023 Mr Blakey submitted further applications along with the information required by the Tribunal. These were described as a "cross application" for the return of the deposit of £3,500 paid by the Claimant together with criticisms of the initial Deposit Order and why she maintains it should not have been made, criticisms of the Respondent's conduct during the litigation, criticisms of the Tribunal in the substantive hearing and its Judgment, further allegations against the Respondent in respect of the issues in the substantive hearing and a proposal to make a late appeal to the Employment Appeal Tribunal.

8. The Employment Judge replied to these applications and comments made on behalf of the Claimant by pointing out that the Employment Tribunal is not an Appellate Court and any issues as set out should have been the subject of an Appeal, in time, to the Employment Appeal Tribunal. It was accordingly made clear that these applications made by Mr Blakey would not be considered by the Tribunal in determining the Respondent's application for costs.

THE RULES

9. Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides:

   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 the proceedings (or part) have been conducted; or

   b) Any claim or response has no reasonable prospect of success or

   c) ……

   2) A Tribunal may also make such an order where a party has been in breach of any order or any practice direction or where a hearing has been postponed or adjourned on the application of a party."

10. Rule 78 provides:

   "1) 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."

THE RESPONDENTS APPLICATION

11. The Respondent's application for costs runs to 24 pages. Briefly, the application contains a number of allegations relating to the unreasonable conduct of the Claimant including:

   i) Repeated failure to comply with the Tribunal's orders;

   ii) Repeatedly requesting adjournments and postponements without good cause;

   iii) Producing a witness statement of just two pages which had a direct bearing on the length of the hearing and caused additional costs to be incurred by the Respondent;

   iv) Seeking to bring in to evidence a witness statement made by one of the

Respondent's service users during the hearing itself;

v) Mr Blakey snorting aloud towards one of the Respondent's witness while she was giving evidence;

vi) Mr Blakey continuing to ask leading questions of the Claimant notwithstanding being warned about such conduct by the Employment Judge;

vii) Bringing or pursuing unmeritorious claims as clearly indicated by the making of the Deposit Order by Employment Judge Adkinson.

THE CLAIMANT'S RESPONSE TO THE APPLICATION FOR COSTS

12. The Claimant's response to the application was eventually submitted by Mr Blakey on 6 February 2023. As noted above, it mainly comprised an application for the return of the deposit in the sum of £3,500 and criticised the Respondent, Employment Judge Adkinson and this Tribunal. It set out potential points of Appeal which are in any event well out of time and did not address in any detail the points of the Respondent's application.

THE CONDUCT OF THE CLAIMANT

13. Our starting point is the Judgment of Employment Judge Adkinson at the hearing on 4 December 2020. Judge Adkinson noted from the documents before him that the Claimant had performed poorly in her role with the Respondent and, before that, in a similar role for Nottinghamshire County Council in which she was subject to performance monitoring procedures. The Judge further noted that it was quite apparent that the Claimant had been offered support and guidance by the Respondent and there was considerable detail to support this finding. Judge Adkinson also noted that there was evidence that a member of staff of the Respondent reported that the Claimant was making unfair claims of racial discrimination against her and her Line Manager to other members of the team and was possibly having conversations with vulnerable service users along the same lines.

14. Judge Adkinson concluded that the documentary evidence before him presented a strong case for the Respondent because the documentary trail showed a history of the same sort of issues in relation to the Claimant's ability to do her role to a satisfactory standard from her employment with Nottinghamshire County Council continuing to her employment with the Respondent. That documentary trail also showed that the Respondent provided training and offered support and showed no evidence *"that even suggests that anything that happened was because of her race or because she did a protected act".*

15. At paragraph 112.4 of his Judgment, Judge Adkinson said,

"As things stand it seems that Miss Panesar's case is no more than what she considers to be adverse things happening to her and she has a particular protected characteristic or can point to an alleged protected act. That alone is not going to be

enough to reverse the burden of proof".

Further, at paragraph 112.5 the Judge said,

"Even if the burden is moved, the long history disclosed in the documents suggests strongly there is a clear alterative explanation for what happened that is not connected to her race or any protected act".

The Judge then confirmed he was satisfied that the claims had little reasonable prospect of success and made a Deposit Order.

16. We further note that, prior to that Preliminary Hearing, the Respondent sent to the Claimant a without prejudice save as to costs letter giving her the opportunity to withdraw her claims without an application for costs being made against her if she did withdraw them at that stage. Despite this, and despite Employment Judge Adkinson's conclusion that her claims had little reasonable prospect of success, the Claimant paid the deposit of £3,500 and continued to pursue those claims.

17. Following on from this, the Claimant then attended the first day of the hearing with a totally inadequate witness statement of less than two pages. Mr Blakey argued that a long witness statement was not necessary because the one provided made reference to all of the relevant facts. As recorded in the Judgment, however, in many instances the documents referred to in the statement in turn referred to other documents which would have made reliance on the witness statement totally impractical. The Tribunal allowed the Claimant to give evidence in chief purely in the interests of justice and this took several days during which time Mr Blakey had to be told on several occasions not to ask leading questions of the Claimant.

18. As recorded in the Judgment, the Tribunal found the Claimant's evidence throughout to be totally unreliable. It was noted that on 40 occasions she could not remember incidents or events particularly when the documentary evidence did not support her claim. In particular, she sought to challenge written records of meetings saying they were inaccurate when at the time she had signed them and returned them to her Line Manager agreeing with them.

19. But arguably the most concerning aspect of the Claimant's approach to this case, and in which Mr Blakey was clearly complicit, was the incident involving the Respondent's service user who we referred to as "Mrs T". A witness statement was signed by this vulnerable lady on the day on which the Employment Judge noticed the Claimant was not attending her own hearing and Mr Blakey said she was attending to another matter and would arrive later. We do not repeat here what is recorded in the Judgment apart from to note that this witness statement, which had apparently been drafted several weeks before the hearing, was not disclosed to the Respondent or the Tribunal in accordance with the Tribunal's Orders, and because of Mrs T's vulnerability it is highly unlikely she had any idea what she was signing. This was conduct which was so deeply concerning to the Respondent's witnesses and Mrs T's daughter, her carer, that a safe-guarding investigation had to be held.

20. It is not for the Tribunal to determine on what basis the Claimant chose to continue with her claims in circumstances where she had already been told they had little reasonable prospect of success. Orders of the Tribunal were not complied with but adding the incident with Mrs T into the equation, the Tribunal can only conclude that the Claimant's conduct and pursuit of her claims was unreasonable and, in relation to Mrs T, abusive.

21. As the Tribunal concluded, in relation to the burden of proof, the Claimant completely failed to show any facts from which we could potentially conclude that she had been the victim of race discrimination at the hands of the Respondent and its witnesses. This was noted in no uncertain terms by Employment Judge Adkinson at the previous Preliminary Hearing. Before us, her claim did not come close to navigating that first hurdle.

22. As mentioned above, we cannot speculate as to the Claimant's motive in continuing with her claims. It may have been that this motivation fell within the scope of the Judgment in Benyon v Scadden [1999] IRLR 700 where Lindsay J said,

"A party who, despite having had an apparently conclusive opposition to his case made plain to him, persists with the case down to the hearing in the "Micawberish" hope that something might turn up and yet does not even take such steps open to him to see whether anything is likely to turn up, runs a risk, when nothing does turn up, that he will be regarded as having been at least unreasonable in the conduct of his litigation".

23. In the case before us, absolutely nothing changed between the Preliminary Hearing before Judge Adkinson and the substantive hearing before this Tribunal.

THE CONDUCT OF MR BLAKEY

24. In their application for costs at paragraph 12, the Respondent cites "Harvey, PI (1044) in setting out factors that might induce a Tribunal to award costs. These include excessive prolixity and time wasting, unduly lengthy cross-examination of witnesses, calling unnecessary witnesses and making outrageous and unsubstantiated allegations. Mr Blakey began the hearing by making an application for a postponement on the basis that the hearing was by video. He wrongly referred to the President's Road Map for the future of video and attended hearings as being Presidential Guidance. He complained about the arrangement of the furniture in the Court Room. He complained about not being able to look witnesses in the eye when cross-examining them. Although representing the Claimant throughout these proceedings, he did try to argue that he did not represent her at one of the hearings relating to costs. He had failed to comply with Orders of the Tribunal and was clearly complicit as he had full knowledge in the issues surrounding Mrs T. His cross-examination of witnesses usually began with a recap of his own experience in Local Government and proceeded with questions which were so long that both the witness and the Tribunal completely lost track of the question. But towards the end of the hearing, whilst cross-examining one of the Respondent's witnesses, he made a snoring sound seemingly because he did not like the answer to his question. This was frankly the most outrageous conduct and was disrespectful to the Respondent's witness and the Tribunal.

25. In the Tribunal's view, both the conduct of the Claimant and Mr Blakey was in the main unreasonable and on occasion abusive.

RULE 39(5)

26. Rule 39(5) provides;

"If a Tribunal at any stage following the making of the Deposit Order decides the specific allegations or arguments against the paying party for substantially the reasons given in the Deposit Order –

(a) The paying party shall be treated as having acted unreasonably I pursing that specific allegation or argument for the purpose of Rule 76, unless the contrary is shown;

(b) The Deposit shall be paid to the other party……"

27. In this case the Tribunal found her evidence to lack credibility. In his Deposit Order, Employment Judge Adkinson said at paragraph 8,

"The documentary evidence strongly suggests that the Respondent's employees did not act or omit to act as they did because of the Claimant's race or because she did a protected act. Rather they suggest a long standing history of poor performance existing before the Claimant's first allegation of discrimination or harassment".

He continued at paragraph 9,

"Thus. the Claimant's case turns on her oral evidence being able to demonstrate that the documents either wrongly record what happened or do not reflect the real situation and that in fact the Respondent was motivated (at least in part) by her race or by her doing a protected act. There seems little prospect her oral evidence will overcome difficulties with the long history demonstrated by the documentary evidence".

At paragraph 10, EJ Adkinson struggled to see how the alleged detriments claimed by the Claimant were actually detriments in the first place.

28. It is abundantly clear that the Tribunal, having heard the Claimant's oral evidence, entirely endorsed the reasons for the making of the Deposit Order. We found there was absolutely no evidence of race discrimination, harassment or victimisation nor was there any evidence of a fundamental breach of any implied or express term in the Claimant's contract of employment. Thus, the very reasons for making a Deposit Order were entirely borne out in the substantive hearing and the fact that the Claimant pursued her claims was unreasonable.

THE CLAIMANT'S MEANS

29. In exercising their discretion to make a costs order, a Tribunal may take into account the Claimant's means. It took a considerable amount of time to obtain all the information ordered to be given. The Claimant is currently on sick leave as a result of her as yet undiagnosed illness. That apart, she owns a one bedroom flat near Birmingham City Centre with equity worth around £70,000 and the rental income is approximately double the monthly mortgage repayments of around £290.

She did not give any evidence of savings despite having told Employment Judge Adkinson that she had around £9,000 in savings at the end of 2020. This amount would have been reduced by £3,500 in respect of the deposit he ordered and which she chose to pay.

30. Before this Tribunal she also introduced a new debt as a result of being the victim of a fraud some time ago. She gave no evidence on the amount outstanding in respect of which monthly payments of £350.00 are made to Stepchange. She offered no explanation as to amounts she has received from N Satpal or J Padam. As of 16 December 2022, she had a credit balance of £1,774.12 in her current account. As of this date she was also giving her husband pocket money of £140.00 per month. She also continues to pay monthly gym membership. She lives with her husband and his family members in London.

31. In the light of the financial information given by the Claimant, we consider she has sufficient assets to satisfy a Costs Order in the sum claimed by the Respondent.

THE AMOUNT OF THE COSTS ORDER

32. The Respondent was put to significant costs in resisting the claims which were unreasonably brought and continued by the Claimant. Ms N Owen of Counsel was instructed to represent the Respondent and her fees alone approach £30,000. These fees have not been challenged nor, in our view, would such a challenge have a reasonable prospect of success. They were entirely reasonable given the work involved by Ms Owen.

33. The Respondent has sensibly restricted their costs application to £20,000 to avoid formal assessment in the Civil Courts. We consider those costs to be reasonable in all the circumstances and particularly given the unreasonable conduct of the Claimant. We are unanimously of the view that £20,000 should be ordered to be paid by the Claimant. The deposit paid by the Claimant of £3,500 has already been to the Respondent under Rule 39(6) and credit must be given for that payment. This leaves a balance of £16,500 to be paid by the Claimant.

Employment Judge M Butler

Date: 17 May 2023

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