EMPLOYMENT TRIBUNALS

Claimant: Ms L Muhumza

Respondent: Royal Hospital Chelsea

COSTS JUDGMENT

1. The claimant must pay the respondent's costs in the sum of £200.
2. As the claimant has paid a deposit of £20, this will be set off against the costs, leaving her with £180 to pay.

REASONS

1. On 17 February 2023, Employment Judge Walker made a deposit order requiring the claimant to pay £20 in order to continue with her single claim of race discrimination. The basis for the deposit order was her conclusion that the claim had little reasonable prospect of success, both because it appeared to have been presented out of time and because of its lack of substantive merits. Employment Judge Walker also directed that there be a hearing to determine whether the Tribunal had jurisdiction to hear the claimant's claims.

2. At a public preliminary hearing on 4 May 2023, I dismissed the claimant's claim as I found that it had been presented out of time and it was not just and equitable to extend time.

3. Mr Curtis applied for the respondent's costs of the three hearings which had been listed. He applied only for counsel's brief fees, which amounted to £850 per hearing plus VAT.

4. The basis for the application was that the claimant had pursued claims with no reasonable prospect of success after she had been issued with a deposit order. By virtue of rule 39, the claimant's continued pursuit of the claims after the deposit order was deemed to be unreasonable conduct unless the contrary was shown. The respondent was also seeking some costs prior to the deposit order being made on the basis that it would have been obvious from the outset that the claims were doomed.

5. Because we had reached the end of the hearing day and I wished the claimant to have a proper opportunity to make any representations she wished to make on her own behalf and to provide evidence of her means, I made directions for that to be done in writing.

6. Although I subsequently extended the time period for the representations to be made because I was concerned the claimant and/or her lay representative, Mr Akinsanmi, had not understood the importance of providing evidence as to means, I did not receive any representations or evidence.

7. Mr Akinsanmi wrote to the Tribunal on the claimant's behalf on 3 August 2023 asserting that I was harassing him on the issue but also making reference to information provided to Employment Judge Walker as to the claimant's means.

8. On enquiry, I ascertained that the information provided to Employment Judge Walker was that:

   - the claimant had income of £1,500 per month;
   - she paid monthly rent of £750;
   - she had three children aged between 19 and 23 who were all students;
   - she paid £80 per month for gas, £12 for water, and £65 for electricity;
   - her travel costs were £23 per week;
   - her monthly food costs were £300;
   - she paid £100 monthly for council tax.
   - She owed £3000 in rent arrears.

Law

9. The Tribunal Rules enable a represented party in employment tribunal litigation to make an application for a costs order and an unrepresented party to make an application for a preparation time order.

10. The test which the Tribunal must apply is the same in both cases and can be found in Rule 76. The relevant parts of the rule for the purpose of this hearing are 76(1)(a) and (b) which say:

    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) any claim or response had no reasonable prospect of success

11. The Tribunal must consider an application in two stages:

- it must first decide whether the threshold test is met, ie in this case did the claim have no reasonable prospect of success / was the conduct of the proceedings unreasonable?
- if it is satisfied the test has been met, it should then decide if it should exercise its discretion to award costs.

Each case depends on the facts and circumstances of the individual case.

12. Although the 'threshold test' is the same whether a litigant is or is not professionally represented, the decision in AQ Ltd v Holden [2012] IRLR 648, EAT requires the Tribunal to take the status of the litigant into account.

13. The value of a costs order is determined by Rule 78(1) which says:

"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*"

14. Awards are intended to be compensatory, not punitive *(*Lodwick v Southwark London Borough Council [2004] IRLR 554). This means that where costs are claimed because a party has acted unreasonably in conducting a case, the costs awarded should be no more than is proportionate to the loss caused to the receiving party by the unreasonable conduct. In other words, the party is entitled to recover the cost of any extra work that had to be undertaken because of the unreasonable conduct. The causal relationship between the conduct and the costs should not be subject to very minute analysis: Yerrakalva v Barnsley Metropolitan Borough Council and anor 2012 ICR 420, CA.

15. Rule 84 is also relevant. It says:

*"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.'*

16. Affordability is not as such the sole criterion for the exercise of the discretion and 'a nice estimate of what can be afforded is not essential': Vaughan v London Borough of Lewisham and ors [2013] IRLR 713, EAT. In that case, the

claimant was out of work and the questions which were reasonable for the Tribunal to ask were:

- was there a reasonable prospect of the claimant being able, in due course, to return to well-paid employment and thus to be in a position to make a payment of costs?
- if so, what limit ought nevertheless to be placed on her liability to take account of her means and of proportionality?

17. Where a costs application is based on the merits of the case, the Tribunal should take into account what the party knew or ought to have known about the merits of the case. A factor relevant to the exercise of the discretion may be whether there has been any warning of a risk of costs, but such a warning is not a prerequisite to the making of an order; nor is it a prerequisite that the receiving party must have put the paying party on notice of any application.

18. Rule 39(5) of the Employment Tribunals Rules of Procedure 2013 provides:

If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—
(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and
(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.

Conclusions

19. The claimant had provided no material on the basis of which I could conclude that she had not acted unreasonably in pursuing her claim after the deposit order was made, so the threshold test was met for the period after the deposit order was made.

20. Taking into account the claimant's status as a litigant in person and the complexity of the law applying to her claim, although I considered that it had no reasonable prospect, it did not seem to me that the claimant should reasonably have known that prior to the deposit order hearing. I was not persuaded that it would be appropriate to award any costs in respect of the period prior to the issuing of the deposit order.

21. I concluded that some order for costs was appropriate given the claimant continued to pursue the claim after the deposit order but did not address at the public preliminary hearing the issue of why it would be just and equitable to extend time, for example. She gave no evidence on her own behalf on this or any other matter relevant to jurisdiction. It appeared that the claimant and/or Mr Akinsanmi had not engaged with the issues raised by Employment Judge Walker; certainly they did not address them at the hearing in front of me.

Instead I considered that Mr Akinsanmi tried to obscure the real issues in the case by making an unmeritorious application for specific disclosure.

22. I also took into account the claimant's very limited means and concluded, having regard to all of the factors identified, that an award of costs in the sum of £200 would be proportionate.

Employment Judge Joffe
31/08/2023

Sent to the parties on:

31/08/2023

For the Tribunal Office: