



EMPLOYMENT TRIBUNALS

Claimant: Mrs S N Laique
Respondent: Al Iman Community Educational Services Ltd.
Heard at: Judge in Chambers – Reading ET
On: 18 October 2023
Before: Employment Judge G. King

COSTS JUDGMENT

1. The Claimant shall pay the Respondent's costs in the sum of £300.00.

REASONS

The Application

1. The Claimant's claim was originally listed for 1 February 2023. The claim was to be heard via CVP before a Judge from the Employment Tribunal's Virtual Region.
2. I was assigned to sit in the Virtual Region on 1 February 2023 and allocated this case.
3. The Claimant said she was representing herself, but was supported by her husband, who was in attendance at the hearing. The Respondent was represented by Mr Hoyle - litigation consultant.

4. After preliminary matters have been dealt with, the Claimant gave her evidence. She confirmed her statement under oath. Mr Hoyle then started his cross-examination.
5. It was during the Claimant's cross-examination that the Claimant's husband could be heard muttering to the Claimant. I had to ask him to stop communicating with the Claimant during her evidence. Despite this warning, the Claimant's husband could continue to be heard communicating with the Claimant when she was answering Mr Hoyle's questions. I therefore asked that her husband sit at the back of the room away from the Claimant, which he did.
6. As cross-examination continued, the Claimant's husband could be seen typing on his mobile phone. The Claimant was repeatedly looking down at something off-camera, and I suspected that she was receiving messages from her husband on her own phone. I asked her husband to put his phone away during the hearing.
7. After cross-examination resumed, the Claimant appeared to be writing notes for her husband to read over her shoulder. Both Mr Hoyle and I were concerned that the Claimant's husband was influencing her evidence. Mr Hoyle made an application for the hearing to be adjourned part-heard, and to be relisted for an in-person hearing, as this was the only way in which it was possible to be assured that the Claimant was giving evidence without being influenced by her husband. I granted the application, as I was not satisfied that a fair hearing could take place in the circumstances.
8. The matter was relisted for 17 and 18 April before me in the Reading Employment Tribunal. All the parties, or parties' representatives, had to attend in person, as did the Judge. The Respondent's main witness attended in person. Two witnesses for the Respondent attended remotely.
9. The Respondents have made a costs application on the basis that the Claimant's conduct amounted to unreasonable conduct, and it was this unreasonable conduct that caused the hearing to be adjourned and relisted. The Respondent says that the relisted hearing, and the fact that the Respondent's witnesses had to attend in person, have put the Respondent to additional expense.

The Law - Costs

10. Rule 75 of the Employment Tribunal Rules of Procedure 2013 sets out the definition of a preparation time order: -
 - (1) ...
 - (2) A preparation time order is an order that a party ('the paying party') make a payment to another party ('the receiving party') in respect of the receiving party's preparation time while not legally represented. 'Preparation time' means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

- (3) A Costs Order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

11. Rule 76 sets out the test to be applied by the Tribunal in considering whether to grant a costs application: -

- (4) 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;
 - [or
 - (e) 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.]
- (5) 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.

...

12. Rule 77 sets out the procedure for determining such applications: -

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.

13. The principle in the Rules is that “costs” (the Tribunal will use this term as shorthand for both costs and preparation time) do not follow success as they do in other areas of civil litigation. Rather, the Tribunal has power to make awards of costs in the circumstances set out in the Rules. In this case, the relevant provision is Rule 76(1)(a) which gives the Tribunal a discretion to award costs of the conduct of a party meets the threshold test set out in the Rule.

14. The Tribunal’s discretion to award costs is not fettered by any requirement to link any unreasonable conduct to the costs incurred (*McPherson v BNP Paribas (London Branch)* [2004] ICR 1398 and *Salinas v Bear Stearns*

International Holdings Inc [2005] ICR 1117, EAT). However, that is not to say that any issue of causation is to be ignored and the Tribunal must have regard to the “nature, gravity and effect” of any unreasonable conduct (*Barnsley Metropolitan Borough Council v Yerrakalva* [2012] IRLR 78).

15. The Tribunal takes into account that the “no reasonable prospect of success” provision is not the same as that when assessing whether a claim should be struck out or not. In those cases, the Tribunal has not heard full evidence, and so the test for strike out is a high bar. In assessing whether or not a claim has no reasonable prospect of success when considering an argument for costs the Tribunal has the benefit of having heard all the evidence in relation to the Claimant’s claims and the Respondent’s response to those claims

Deliberation

16. As noted above, the hearing was relisted due to the conduct of the Claimant and her husband. Despite warnings, the Claimant and her husband continued to try to discuss the Claimant’s answers during her evidence. The Claimant was also observed to be writing notes which her husband was then attempting to read. I am satisfied that this was not a one-way process on behalf of the Claimant’s husband. I am satisfied that the Claimant was also attempting to communicate with him and pass messages to him during her evidence. I am satisfied that it was this conduct alone that caused the necessity of the hearing being adjourned and relisted in-person.
17. Such conduct on behalf of the Claimant, in my view, does amount to unreasonable conduct. The gateway for making a costs order is therefore open.
18. I do accept that the Respondent has incurred costs due to its witnesses having to travel to Reading Employment Tribunal in person.
19. Before making any costs order, however, the Tribunal is obliged to make enquiries into the paying party’s ability to pay. The Claimant has confirmed that she is currently not working but is getting a carer allowance. That allowance is £76 per week.
20. The Tribunal has a discretion, even if the threshold for making a costs order is met, to decide whether or not to make such an order. If such an order is made, the Tribunal has discretion to decide what the appropriate level of costs payable should be, based on the paying party’s ability to pay.

21. Having considered the nature, gravity and effect of the Claimant's unreasonable conduct, and balance this with the Claimant's current financial situation and ability to pay, the Tribunal orders that the Claimant shall pay the Respondent's costs in the sum of £300.00

Employment Judge G. King

Date: 18 October 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON
23 October 2023

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FOR THE TRIBUNAL OFFICE