



EMPLOYMENT TRIBUNALS

Claimant: Ms D Hickey

Respondent: Myspace Housing Solutions Limited

Heard at: Manchester Employment Tribunal (On the papers)

On: 04 October 2023

Before: Employment Judge M Butler
Ms L Atkinson
Ms V Worthington

JUDGMENT ON COSTS

1. The claimant is ordered to pay the respondent £20,000 in costs.

REASONS

INTRODUCTION

1. Liability in these proceedings were determined by the same tribunal that considered this costs application, with judgment being made on 06 December 2022 and sent to the parties on 08 December 2022. The decision was that the claims in their entirety failed and were dismissed. In total there were some 17 live allegations at the final hearing (see schedule of allegations appended to the back of the original judgment), which spanned across a number of different legal complaints: direct sex discrimination, direct disability discrimination, harassment related to sex, harassment related to disability, a failure in the respondent's duty to make reasonable adjustments, victimisation, being subjected to a detriment on the grounds of having made a protected disclosure and of automatic unfair dismissal for making protected disclosures.
2. The respondent made an application for costs by letter dated 04 January 2023.
3. By letter dated 17 January 2023, the tribunal wrote to the parties. This was to give the claimant the opportunity to respond to the application and to seek her views as to whether she was content for the application to be dealt with on the papers. A

response was required by 24 January 2023.

4. Although there is no copy on the tribunal file, we can only presume that the claimant responded to this letter to inform the tribunal that she was content for the application to be determined on the papers, as the respondent emailed the tribunal on 30 May 2023 to present written submissions in support of its application along two statements of costs, whilst explaining that these had been provided following the claimant having confirmed that was content for the application to be considered on the papers. No email from the claimant to the contrary was received.
5. The claimant, by letter dated 11 July 2023, was directed to submit her response to the application by 14 July 2023. And it was explained to the claimant in that letter that if she wanted the tribunal to take into account her financial means and ability to pay when determining the application then she would need to produce any supporting evidence on which she relies on by that same date. This letter also confirmed that the application would be determined on the papers.
6. It appears that Employment Judge Butler had directed the above letter to be sent to the claimant on 19 June 2023, but that it was not actioned until 11 July 2023, which did give the claimant very little time to comply.
7. On 17 July 2023, the respondent wrote into tribunal to inform it that they had not been copied into any submissions made by the claimant and requested the application to proceed.
8. The claimant emailed the tribunal on 18 July 2023, apologising for the delay in responding to the letter of 11 July 2023, but explaining that she would need more time. She explained that she had not checked her emails at the time, and that she would need more time as a litigant in person.
9. Although the respondent objected to an extension of time (email of 18 July 2023), EJ Butler decided to extend time for the claimant to present her submissions to the tribunal to 11 August 2023.
10. The respondent emailed the tribunal on 15 August 2023. This explained that they again had not received copy of any submissions made by the claimant.
11. The tribunal had not received any submissions by the claimant at the date that this application was being determined. Nor has the tribunal had any further communication by the claimant to explain why there have been delays or seeking a further extension.

COSTS APPLICATION

12. The application for costs was brought on two grounds: that the claims had no reasonable prospects of success and on the unreasonable conduct of the claimant.
13. In respect of the claims having no reasonable prospects of success, this was advanced broadly in the following ways (although the submissions made are broken down into the specific allegations):
 - a. That the claimant's own evidence would not support the allegations made.
 - b. That the claimant failed to adduce any evidence of a causal link to a protected characteristic in the allegations of discrimination
 - c. When looked at sensibly and in the round, the claimant should have known that the claims brought were bound to fail.

14. In terms of unreasonable conduct, the respondent advances this in the following ways:
- a. That it was unreasonable conduct to pursue complaints that were manifestly doomed to fail.
 - b. The claimant's approach toward settlement. This was despite having legal representation for almost two years. That there were two costs warnings (09 May 2022 and 09 August 2022). And that despite explaining on what basis the respondent considered the claims brought to have no reasonable prospects of success, the claimant rejected to offers off settlement made.

RESPONSE TO APPLICATION

15. The tribunal received no response from the claimant. There are no submissions made by the claimant in respect of the costs application before the tribunal at the time that this decision was made.

THE RULES

16. The power to award costs by the Employment Tribunal is contained within the Employment Tribunals Rules of Procedure Regulations 2013. Rule 76 specifically deals with the grounds for which a costs order can be made. Rule 78 deals with the 'amount' of a costs order and Rule 84 deals with the 'ability' of the paying party to pay a costs order.
17. Under Rule 76 (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”.
18. Under Rule 78(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; (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 ...”
19. Under Rule 84, 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.

RELEVANT PRINCIPLES

20. In terms of general principles that we have reminded myself of in advance of considering this application, these include:
- a. costs are the exception, not the rule;
 - b. costs are designed to compensate the receiving party for costs unreasonably incurred, not to punish the paying party for bringing an unreasonable case, or for conducting it unreasonably.
 - c. we should follow a 3-stage process: first, we should decide whether the threshold in Rule 76 had been crossed. Secondly, we should then consider as an exercise of discretion whether that conduct merited a costs order; it

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was not automatic that because we had the power, we should exercise it. Thirdly, if we decided to make a costs order, we should consider the appropriate amount of costs incurred by the respondent in defending the unreasonable claims.

21. There is no principle that a claimant knows or should know that a claim has no reasonable prospects of success. However, where a party does or should know then this may well be a factor taken into account by the tribunal.
22. The tribunal should not disregard questions of causation. However, when considering whether the tribunal needs to apply a strict causal test when considering unreasonable conduct and the amount of costs to be awarded, Mummery LJ in **McPherson v BNP Paribas (London Branch) [2004] EWCA Civ 569** stated:

“40. The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring [the receiving party] to prove that specific unreasonable conduct by [the paying party] caused particular costs to be incurred.
23. In **Kopel v Safeway Stores [2003] IRLR**, the EAT explained that unreasonably refusing an offer of settlement can give rise to a finding of unreasonable conduct for the purposes of costs.
24. Mr Boyd referred the tribunal to the case of **Power v Panasonic (UK) Ltd UKEAT/0439/04/RN**, identifying that a tribunal may consider a party to have acted unreasonably where an offer of what could be obtained at tribunal was made, the offer rejected and a costs warning has been given.
25. With regard to the paying party's ability to pay, Rule 84 allows the tribunal to have regard to the paying party's ability to pay, but it does not have to, see **Jilley v Birmingham and Solihull Mental Health NHS Trust and Single Homeless Project v Abu UKEAT/0519/12**.
26. Lord Justice Mummery had set out the general principle to follow at this third stage, in his judgement in **Yerrakelva v Barnsley MBC [2012] ICR 420**, at paragraph 41:

‘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. The main thrust of the passages cited above from McPherson’s case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment Tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed.’
27. Last but not least, discretion must be exercised so as to give effect to the overriding objective (rule 2) to deal with cases justly and fairly, having regard to: (a) ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense.

ANALYSIS AND CONCLUSIONS

Did the claims have no reasonable prospects of success?

28. Given our findings in the liability judgment, we are satisfied that the claims brought by the claimant had no reasonable prospects of success. We agree with the submissions made by Mr Boyd that the claimant ought to have known that the claims in their entirety were bound to fail, particularly given the evidence she gave herself.
29. Turning to each in turn, to amplify some of the tribunal's reasoning, but whilst maintaining a proportionate approach to the tribunal's reasoning:
 - a. Item 1: comments about the claimant's hearing loop. This allegation on the face of it, at least as a bare allegation did appear to have some prospects of success. However, given the circumstances around this comment and the actions of the claimant after it of which the claimant knew at the time. And that the comment followed on naturally from the claimant's own observations at that meeting, this claim had no reasonable prospects of succeeding.
 - b. Item 2: the Declarations of Interest Form. A claim brought based on Mr Melia seeking clarification of two ambiguous terms, when that was part of his role and which the claimant then followed through on, as being a detriment had no reasonable prospects of success. And this was compounded by no evidence presented by the claimant from which the tribunal could conclude a that there was some link to either sex or disability.
 - c. Item 3: no involvement in Chair interview. Given that this did not form part of the claimant's role, this allegation had no reasonable prospects of success. And this was compounded by no evidence presented by the claimant from which the tribunal could conclude a that there was some link to either sex or disability.
 - d. Item 4: the issue concerning inaccurate minutes. The claimant produced no evidence to support any findings from which the tribunal could conclude a that there was some link to either sex or disability or a protected disclosure. This allegation therefore had no reasonable prospects of success.
 - e. Item 5: Frequency of meetings. The claimant's own evidence was that Mr Goodson continued to meet the claimant during October and November 2019. And therefore this allegation had no reasonable prospects of success.
 - f. Item 6: circumvented from giving advice. The claimant's own evidence did not support that she had been circumvented from giving advice. In fact, she provided advice and was given further opportunity to produce more to be considered. This claim therefore is found to have no reasonable prospects of success.
 - g. Item 7: 'the prank'. . The claimant produced no evidence to support any findings from which the tribunal could conclude a that there was some link to either sex or disability or a protected disclosure. This allegation therefore had no reasonable prospects of success.

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- h. Item 9: Comment from Mr Goodson that 'if I had known she was deaf I would never have hired her'. The claimant identified a third party who witnessed this matter and chose not to call such important evidence. This was part of the reasoning of the tribunal in finding that this did not happen. This claim therefore is found to have no reasonable prospects of success.
- i. Item 10: Not amending the claimant's restrictive covenants. The claimant accepted in evidence that the restrictive covenants were inserted for business reasons. And agreed to them. There was no review mechanism in the claimant's contract. The claimant brought no evidence to support that other employees were allowed to undertake paid work. This allegation therefore had no reasonable prospects of success.
- j. Item 12: Mr Goodson requesting a progress update within 3 days. The claimant's own evidence did not support this specific allegation. The claimant understood the context of seeking an update, namely an upcoming In-Depth Assessment. And this was compounded by no evidence presented by the claimant from which the tribunal could conclude that there was some link to either sex or disability, any protected act or a protected disclosure.
- k. Item 13: not being allowed to meet the regulator. Given that the claimant understood that it was not part of her role to meet with the regulator, this claim is found to have had no reasonable prospects of success. And further, no evidence was adduced that any such exclusion was because of her sex or disability, or for having done a protected act or on the grounds of having made a protected disclosure.
- l. Item 16: No breaks during a meeting. The evidence supported that this was simply not accurate. This claim is found to have had no reasonable prospects of success.
- m. Items 14,15, 17 and 18: redundancy situation. There was no evidence adduced by the evidence that supported a finding other than that this was a genuine redundancy situation. These allegations therefore had no reasonable prospects of success.

Unreasonable conduct. Has the claimant conducted the proceedings unreasonably?

- 30. Given the above, the claimant's decision to pursue claims that had no reasonable prospects for success is also found to be unreasonable conduct. Especially in circumstances where the respondent was given two costs warnings, which identified the inherent weaknesses in the claimant's allegations and made offers of settlement.
- 31. In those circumstances, the tribunal does consider that it was an unreasonable refusal to settle the claim, which also amounts to unreasonable conduct.

Discretion as to making a costs order

- 32. The next question we ask ourselves, having found that there are grounds for making a costs order, is whether to making one is appropriate in this case. We consider that it would be appropriate to make a costs award in this case for the following reasons:
 - a. Although costs are the exception rather than the rule, this is one of those

exceptional cases where a costs order is appropriate.

- b. The claimant had access to professional legal advice for a large proportion of the proceedings. The claimant was represented when her claim form was presented on 27 March 2020, and continued to be represented until 16 March 2022, when her professional representatives came off record.
- c. The claimant was put on notice early on in the process that the respondent would be applying for costs if she continued to pursue the claims. This was first on 09 May 2022. And secondly on 09 August 2022.
- d. The claimant has not made any submissions as to why the tribunal should not use its discretion to award costs.
- e. It cannot be in the interests of justice to permit a claimant to bring and maintain a claim that they should know is not well-founded. And the claimant should have known when she had all the evidence before her (or in discussion with her representatives), or when in receipt of the costs warning letters.

Ability to pay

33. The claimant has submitted no evidence relating to her financial means and/or income and outgoings. The claimant was given the opportunity to do so. In these circumstances the tribunal has not taken into account the claimant's means in either its decision to use its discretion to award costs or in the amount to be awarded.

What amount of costs should the claimant be ordered to pay?

34. The tribunal again reminded itself that the purpose of an award for costs is to compensate the party in whose favour the costs award is made, and not to punish the party ordered to pay the costs.

35. As far as the ability to pay is concerned, for the reasons outlined above, the claimant has not produced any evidence in this respect and therefore cannot be taken into account.

36. The tribunal was presented with the respondent's current schedule of costs. This was in two parts. The first related to costs save for preparation for the costs hearing. This ran to a total of £128,047.80. In respect of preparing for the costs hearing itself, the figure stands at £2,274.

37. Although the tribunal appreciates that the claim involved multiple allegations of discrimination, and across different guises of discrimination, involved a multiple day hearing, and involved 9 witnesses for the respondent, the total figure does appear rather a large figure in the circumstances of this case.

38. When considering whether to refer this matter for a detailed assessment or to undertake a summary assessment, we have concluded that it would be appropriate to exercise our discretion for summary assessment. This is a claim that commenced in March 2020, and would not be fully resolved until at least 4 years after that date (although we anticipate it would take much longer). This allows the parties to bring these proceedings to an end. Further, we consider that a summary assessment would be in accordance with the overriding objective in saving costs to both parties, in avoiding any further delay and in saving time.

39. In these circumstances, and although we do consider the costs schedule to be

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somewhat excessive for a claim of this nature, we assess that the claimant should be ordered to pay £20,000 as a contribution to the respondent's costs. This is a proportionate sum to the complexity and importance of the issues being determined.

Employment Judge **M Butler**
Date_03 November 2023_____

JUDGMENT SENT TO THE PARTIES ON
9 November 2023

FOR THE TRIBUNAL OFFICE

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