



EMPLOYMENT TRIBUNALS

Claimant: Ms Viola Szekelyhidi

Respondent: Golders Green College & School of English Ltd

Heard at: Watford (In person)

On: 27-28 November 2023
7 December 2023

Before: Employment Judge Bansal (sitting alone)

Representation

Claimant: Ms Robin Moira White (Counsel)

Respondent: Mr Alan Williams (Solicitor)

RESERVED JUDGMENT ON COSTS

The claimant's application for costs is refused

REASONS

Background

1. By Judgment given orally on 7 December 2023, the claimant was successful in her claims for unfair constructive dismissal; notice pay and unlawful deduction of wages. At the request of the claimant written reasons were sent to the parties on 3 January 2024.
2. At a Remedy Hearing held on 7 December 2023, by consent the respondent agreed to pay the claimant the sum of £26,926.03. A Judgment confirming this settlement was sent to the parties on 3 January 2024.

The costs application

3. At the Remedy Hearing held on 7 December 2023, the claimant made an application for costs in the sum of £15,990.50 plus vat, for the solicitors costs and Counsel's fees of £1700 plus vat.

4. Ms White, for the claimant made the application on the grounds that the respondent had acted unreasonably by (a) defending the claims to a final hearing as the defence on each of the claims had no reasonable prospects of success; (b) by not calling their material witness Mr D S Delmonte to give evidence, and (c) by seeking to mislead the Tribunal by including a second version of the Employee Handbook which had not been seen in the workplace. Ms White further contended that the respondent by not calling Mr D S Delmonte to give evidence at by final hearing severely weakened the respondent's prospects of defending the claim at all. Effectively, the claimant's contention was that the respondent should have settled the claims and not put the claimant to the expense of having to prove her case at a final hearing.
5. For the respondent, Mr Williams argued that the respondent did not act unreasonably in defending the claims. In relation to the unfair constructive dismissal claim, the respondent was entitled to defend the claim, and given the disputed issues these had to be fully ventilated at a final hearing and findings of fact made by the Tribunal. Mr Williams only became aware of Mr D S Delmonte absence a few days before the hearing, but that was the respondent's decision. Nonetheless, the hearing was conducted expeditiously as the cross examination of the claimant was limited. There was no evidence that the respondent sought to misled the Tribunal about the Employee Handbook. Mr Williams opposed the application and reminded the Tribunal that that the purpose of any costs award is not punitive.

The Law

6. The Employment Tribunal's power to award costs is contained within the Employment Tribunals Rules of Procedure Regulations 2013.
7. Rule 76(1) provides that a Tribunal may make a costs order 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.
8. Rule 77 provides that an application can be made at any stage up to 28 days after the date on which the judgment determining the proceedings in respect of the party was sent to the parties. The paying party must be given a reasonable opportunity to make representations in response.
9. Rule 78(1) provides that a costs order may 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.
10. Rule 84 provides that the Employment Tribunal may have regard to the paying party's ability to pay.
11. The award of costs is an exception, rather than a rule. 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.

12. There is a three-stage process when considering a costs application:
 - a. The rule 76;
 - b. Exercise of discretion. The Tribunal must consider as an exercise of discretion whether the conduct merits a costs order; and
 - c. The appropriate amount of costs incurred.
13. Lord Justice Mummery stated, at paragraph 31 of his judgment in Yerrakelva v Barnsley MBC [2012] ICR 420: “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.”
14. The case of McPherson v BNP Paribas [2004] IRLR 558 established the need to consider the nature, gravity and effect of the claimed unreasonable conduct. There is no need to show a precise causal link between the unreasonable conduct and the costs incurred.
15. In Kapoor v Governing Body of Barnhill Community High School, UKEAT/0352/13 Singh J held that the receiving party does not have to prove that any specific unreasonable conduct by the paying party caused any particular costs to be incurred.

Analysis and Conclusions

16. As stated in Para 11 above, the correct starting position is that an award of costs is the exception rather than the rule.
17. I have to have regard to the three stage process, namely:
 - (a) Is the cost threshold triggered, e.g. was the conduct of the party against whom costs is sought unreasonable? and if so,
 - (b) ought the Tribunal exercise its discretion in favour of the receiving party, having regard to all the circumstances?, and if so,
 - (c) the amount of costs to be awarded.
18. I consider first whether the cost threshold is triggered. Based on my findings of fact and judgement it is clear the respondent's defence to the complaints of unlawful deduction of wages and unpaid holiday pay had no reasonable prospects of success. These complaints should have been settled before this hearing. The claimant should not have had to prove this complaint. However, in the context of the evidence heard and considered by the Tribunal, this was not the substantive complaint. The respondent in evidence did not dispute the sum claimed for unpaid holiday pay, but had wrongly assumed the payment had been made. As for the deduction of wages, there was a dispute between the parties about the terms of the new contract. I had to make a finding of fact on this.
19. The main and substantive complaint was that of unfair constructive dismissal. There were 7 separate incidents upon which I had to make findings of facts

based on the documentary evidence presented and live evidence of the parties witnesses. The burden of proof was on the claimant to establish that she had been constructively dismissed. I therefore had to hear from the witnesses and make findings of facts as set out in the Judgment. Even though, I made findings of fact in support of the claimant’s claim, I do not conclude that the respondent’s response had no reasonable prospects of success.

- 20. I have also given consideration to whether the respondent has acted unreasonably in defending the claims despite not calling Mr D S Delmonte to give evidence, and by disclosing and including a second version of an Employee Handbook which has not been seen in the workplace. Ms White has claimed this was disclosed to mislead the Tribunal. First, dealing with the Employee Handbook, I do not conclude that the respondent mislead the Tribunal. The respondent did not, in evidence, refer to or rely upon this Handbook in evidence.
- 21. The respondent did not call Mr D S Delmonte. By not doing so, it weakened its defence and chances of successfully defending the claims. Mr Williams took the decision to severely limit cross examination of the claimant, and not to challenge the claimant’s evidence. This approach reduced the length of the hearing and also assisted the claimant case. It was the respondent’s prerogative to approach and conduct the hearing in this way. This in my judgment is not unreasonable conduct.
- 22. On the basis I am have not found that the costs threshold has been triggered, the application for costs is refused.

Employment Judge Bansal
Date 6 March 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON
7 March 2024.....

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 FOR THE TRIBUNAL OFFICE