



EMPLOYMENT TRIBUNALS

Claimant: Mr. M. King

Respondent:

1. Profusion Media Limited
2. Ms C Zimmerman
3. Mr A Dent
4. Mr K Ronan
5. Ms N Cramp

COSTS JUDGMENT

1. The Tribunal makes an award of costs under Rule 76(1)(a) of the Tribunal Rules 2013 of **£700** against the Claimant and in favour of the First Respondent.
2. The costs are payable by the Claimant to the First Respondent within 28 days of this judgment being sent to the parties.

REASONS

BACKGROUND AND FACTS

3. The Claimant was employed by the First Respondent as Data Strategy Director from 28 February 2022 until 1 February 2023, following his dismissal on 1 December 2022. His claim was presented to the tribunal on 21 April 2023.
4. There have been three preliminary hearing in this dispute:
 - 4.1 6 July 2023 – a hearing of about 90 minutes conducted by EJ Craft (“**the July PH**”)
 - 4.2 16 October 2023 – a hearing of approximately one day conducted by EJ Spencer (“**the October PH**”);
 - 4.3 20 December 2023 - (but incorrectly dated 20 October 2023 in the case management orders that were issued) - the “**December PH**”
5. The December PH was for one day to:
 - 5.1 To hear, if required, any application made by the Claimant (no later than

27 November 2023) to amend his claim. This application was unsuccessful.

- 5.2 To consider the Respondent's application to strike out the claims against the named Respondents. This application was unsuccessful.
 - 5.3 To consider an application by the Claimant to add a Mr C Wijeratna (non-executive director of the First Respondent who dealt with the Claimant's grievance appeal) as a further respondent to the claim. This application was unsuccessful.
 - 5.4 to list the case and give final directions for the preparation of the case to a hearing.
6. At the July PH it was noted:
- 1.1 *the Claimant on 26 and 30 June 2023, made two applications to amend his claim and sought to join in a further Respondent (Mr C Wijeratna, a Non-Executive Director of the First Respondent who dealt with the Claimant's grievance appeal).*
 - 1.2 *[...]*
 - 1.3 *The Tribunal and the parties were not in a position to address the issue for which the July PH had been listed, or to consider the applications to amend the claim, or issues the Respondent may raise as time limits, strike out application and merits.*
2. The October PH was listed at the July PH to determine if the Claimant was at the material time a disabled person within the meaning of Section 6 of the Equality Act 2010 by reason of his bi-polar disorder and ADHD. Before the October PH the Respondent conceded these disabilities. The majority of the time at the October PH was therefore spent agreeing the issues to be determined in the claim (the "LOI").
3. At the October PH EJ Spencer:
- 3.1 Refused the Claimant's application to amend as being insufficiently clear and insufficiently particularised;
 - 3.2 Directed the Claimant, if he continued to pursue an application to amend, to:
 - 3.2.1 *set it out clearly but briefly;*
 - 3.2.2 *explain why he did not present claims for age discrimination, sex discrimination, or race discrimination or any other matters that require an amendment in his original particulars of claim;*
 - 3.2.3 *explain (as applicable) why he was not aware of the relevant facts at the time that he presented his claim, when he discovered such facts and why those facts lead him to believe that the Respondent had committed*

an act of unlawful discrimination on the basis of these additional characteristics /additional facts.

- 3.3 Gave guidance on the information that any amendment application should contain and made the important distinction between background and alleged acts of discrimination.
4. EJ Spencer commented in her Case Management Discussion comments:

4. [...] As I explained to the parties, when considering amendments it is necessary to understand what claims are already pleaded in order to understand whether the application to amend contains substantial amendments, rather than further particulars of a claim already pleaded, so that the balance of hardship test can be properly applied.

5. Most of the hearing time was spent identifying the issues in the existing claim and these are set out below. Once we had identified those issues, we began to look at the amended claim.

6. Unfortunately, it became apparent that the amended claim was too broad and too vague to form a proper application to amend. The Claimant in his amended particulars of claim

6.1 Claims less favourable treatment by Natalie, Kevin, Alistair (none of whom had been named in the original particulars of claim) but without identifying what that less favourable treatment was.

6.2 seeks to introduce a new claim of victimisation.

6.3 seeks to introduce new claims of direct discrimination because of race, age and gender.

6.4 seeks to introduce a new claim of failure to make reasonable adjustments.

6.5 seeks to introduce new factual complaints.

6.6 seeks to add a sixth Respondent.

7. These are very substantial amendments, but the Claimant has not clearly set out the actions which he says amounts to the new causes of action which he seeks to introduce . If he wishes the Tribunal to consider his application to amend, he must clearly state, by reference to each new pleaded head of claim, which acts amount to direct sex discrimination/direct age discrimination/victimisation etcetera, who was responsible or did those acts, when they were done, and the basis of his belief that they amount to discrimination because of a protected characteristic. The who, what, when and why questions must be answered in respect of each pleaded act of less favourable treatment or detriment, so that the Respondent can know the case that they would have to answer if the amendments were permitted. Equally, if he is now seeking to claim failure to

make reasonable adjustments, he should set out what was the requirement or rule (a PCP) of the Respondent that put him at a substantial disadvantage as a disabled person, compared to persons without his particular disability and, if possible, what steps he says the Respondent should have taken to avoid that disadvantage.

8. *If the Claimant is able to obtain some legal advice an assistance with drafting his application that would be beneficial. However, even without such assistance, the Claimant was in a relatively highly paid position and should be able to set out clearly the legal and factual basis of the proposed amendments and an explanation as to why those claims were not included in the original claim. If it is his case that he was not aware of the factual matters which give rise to those complaint at the time when he presented his claim form, he should explain clearly what new facts he has discovered, when he discovered them, and why they lead him to believe that he has a relevant claim.*
9. *As I explained to the Claimant his case is not necessarily strengthened by adding a whole host of new claims unless they are really strong claims and can distract a Tribunal from what he may regard as his core case.*

5. For the December PH I was provided with, amongst other things:

5.1.1 The Claimant's 26 June 2023 application to amend (pages 96 – 133) ("**First Application**").

5.1.2 The Claimant's 30 June 2023 application to amend (pages 136– 148) ("**Second Application**").

5.1.3 An 11 November 2023 application to amend (pages 180 – 227) – i.e. the application to amend which the Claimant wanted me to determine at the December PH ("**Third Application**").

6. The Claimant had clearly put a lot of work into his amendment application and the other documents he submitted to assist with the understanding of that amendment application. I took into account that that he is not a lawyer or legally trained and that the law in this area is complex. However, I determined that I could not consider (or allow) the Claimant's amendment application because it was insufficiently clear. The Claimant himself described it as a complex and multifaceted account and narrative.

7. I note that EJ Spencer in her note of the Case Management Discussion at the October PH said (see the end of the agreed LOI):

At the hearing on 16 October 2023 the Claimant sought to add further detriments to the list set out above; namely that (i) the Respondents had manipulated the grievance process and outcome to provide an inaccurate picture of what had happened and (ii) changed the reason for dismissal

that there was an unfair appeals process and that they presented false notes of the appeal process. Those complaints are not in the claim (nor were they in the amended particulars of claim) and if they are to be pursued should be included as part of the Claimant's application to amend referred to above.

8. At this December PH the Claimant sought to do the same thing and said that there were a large number of issues missing from the LOI. I made clear that I was not reopening the LOI.

RESPONDENTS' APPLICATION FOR COSTS

9. The Respondents made their application for costs on 19 December 2023 (before the December PH) and supplemented it with correspondence dated 22 December 2023. It was agreed with the parties that the costs application would be considered on written submissions (paragraph 68 of the case management orders that I issued after the December PH). The Claimant set out his response to the Respondents' costs application in an 11 page document sent to the Tribunal on or about 19 January 2024.
10. The Respondents pointed out, amongst other things, that the December PH was the third time that an amendment application from the Claimant had come before the Tribunal and said that the Claimant, having been unsuccessful in that application, should be required to pay the Respondents' costs under rule 76(1)(a) of the Employment Tribunal Rules of Procedure 2013. The costs claimed related to the Claimant's First Application, Second Application and Third Application to amend including the costs incurred in attending the October PH and December PH on the basis that the Claimant acted unreasonably in his conduct of the proceedings. They in particular complained that:
 - 10.1 the Claimant had acted unreasonably by continuing to submit substantial applications to amend his claims and raising new allegations against the Respondents, despite efforts by the Respondents to respond to and clarify the issues in question.
 - 10.2 On 27 November 2023, the Claimant provided his revised application as ordered by the Tribunal which was 48 pages long and failed to comply with EJ Spencer's orders in that it was neither brief nor clear. They said it failed to establish clear legal points and introduced new claims speaking to almost every type of discrimination against a large proportion of colleagues working at the First Respondent.
 - 10.3 The documents relating to the First and Second application to amend already amounted to 49 pages.
 - 10.4 The Claimant has had ample support from the Tribunal in clarifying and particularising his claim and the Third Application was not clear as requested by the Tribunal.
 - 10.5 The Claimant had already had his Second Application refused on the basis it was "insufficiently clear and insufficiently particularised" and yet the Claimant repeated the same approach for his Third Application.

- 10.6 had the Claimant set out his claim clearly in the first instance or, failing that, provided a clear application to amend his claim as prompted at several stages of the proceedings, the Respondents would not have been required to go to the effort and expense of the substantive level of engagement and preparation surrounding the October PH and the December PH;
- 10.7 had the Claimant complied with the Second Order to submit a clear and brief application to amend his claim as directed by the Tribunal at the October PH, the Respondents would not have been subject to an unreasonable and avoidable delay of the process.
- 10.8 This led the Respondents to incur additional costs, such as the following:
- 10.8.1 reviewing the extensive Applications submitted by the Claimant;
 - 10.8.2 preparing full bundles for the October PH and the December PH;
 - 10.8.3 preparing responses to the applications in relation to the October PH and December PH;
 - 10.8.4 general case management for the October PH and December PH; and
 - 10.8.5 attending and instructing Counsel for the October PH and December PH.
11. I accept the Respondents' submission that they provided the Claimant with notice of their intention to seek costs in their submissions dated 11 December 2023 and that EJ Spencer at the October PH stated that the Respondents might apply for costs against the Claimant if his amendment application was unsuccessful at the December PH (the Respondents provided a copy of a note of the hearing prepared by Counsel at the October PH to this effect).
12. As referenced above, subsequent to the December PH the Respondents submitted, in support of their earlier application for costs:

At the PH, the Claimant confirmed (as per paragraph 21.1 of the Order), that whilst the Claimant has been a litigant in person for parts of the claim, he was represented by a solicitor when raising a grievance (on 18 January 2023) prior to his dismissal (on 1 February 2023) and a barrister in preparing his claim to the Tribunal lodged on 21 April 2023 (and it was confirmed by the Claimant that the barrister prepared the draft that was ultimately submitted – paragraph 26 of the Order). In addition, the Order further notes that the first data subject access request was replied to on 15 March 2022 [2023] which predated the Claimant's claim. The Respondents therefore submit that the Claimant had knowledge of the events relating to his claim at this stage prior to lodging his applications to amend dated 26 June 2023; 30 June 2023; and 11 November 2023.

The Respondent submits that the Claimant had sufficient knowledge, guided by legal representation, to correctly identify the acts in which he wanted to bring his claim and the subsequent applications to amend his

claim were conducted unreasonably which led to costs incurred by the Respondents and a delay of the proceedings.

The Respondents are still seeking costs despite not being successful at seeking to remove Respondents 2-5 from the proceedings. The Respondents submit that the removal of the named Respondents (2-5) was dealt with initially in their Grounds of Resistance and this aspect of the Claimant's application to amend (being the inclusion of the Sixth Respondent (Charlie Wijeratna)) was a separate and simple application, that was dealt with swiftly and could have been dealt with earlier had the Claimant's applications to amend not complicated matters. The Respondents contend that this aspect of his applications to amend was not in itself unreasonable, however it was the unreasonable conduct and manner the Claimant acted in despite "the clear guidance and direction that the Claimant had received from the Tribunal to date and in particular the comments from EJ Spencer at the October PH" (paragraph 20 of the Order) and legal advice.

13. As also reference above, the Claimant submitted an 11 page response to the costs application on 19 January 2024 which I have taken into account.

THE LAW

14. The application was made under Rule 76(1)(a) of the Tribunal Rules 2013 (the Rules).
15. The Rules provide:

"Definitions

74. (1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.

(2) "Legally represented" means having the assistance of a person (including where that person is the receiving party's employee) who

(a) has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates' courts;

(b) is an advocate or solicitor in Scotland; or

(c) is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland.

(3) "Represented by a lay representative" means having the assistance of a person who does not satisfy any of the criteria in paragraph (2) and who charges for representation in the proceedings.

Costs orders and preparation time orders

75. (1) A costs order is an order that a party (“the paying party”) make a payment to

(a) another party (“the receiving party”) in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;

(b) the receiving party in respect of a Tribunal fee paid by the receiving party; or

(c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.

(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.

When a costs order or a preparation time order may or shall be made

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; or

(b) any claim or response had no reasonable prospect of success; or

(c) 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.

(2) 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.

(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—

(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and

(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

Procedure

77. 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.

The amount of a costs order

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; ...

(c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;

(d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or

(e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

(3) For the avoidance of doubt, the amount of a costs order under subparagraphs (b) to (e) of paragraph (1) may exceed £20,000.

16. The Tribunal's discretion in respect of costs awards is broad, but is to be exercised having regard to all the circumstances: **AQ Ltd v Holden [2012] IRLR 648, EAT.**

17. In **Yerrakalva v Barnsley MBC [2012] IRLR 78, CA [41]**, Mummery LJ said:

"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 my judgment in McPherson was to reject as erroneous the submissions to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct and the specific costs being claimed. In rejecting that submission, I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances."

18. If the ground relied upon is that a party behaved unreasonably, after **McPherson v BNP Paribas (London Branch) [2004] ICR 1398, CA [40]**, per Mummery LJ.

"...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"

19. Therefore there need not be a causal link proven between the conduct complained of and the specific costs incurred. There just needs to be a review of the whole picture and that the adverse conduct caused an increase in costs generally. The costs award is not obliged to reflect the full costs incurred by the innocent party, which are attributable to the unreasonable conduct decided upon.

20. In deciding whether to make an award of costs, a litigant in person is not to be judged by the standards of a legal professional: see ***Vaughan v London Borough of Lewisham & Others [2013] IRLR 713*** at paragraph 25. In ***AQ Ltd v Holden 2012 IRLR 648*** the EAT stated that the threshold tests governing the award of costs are the same whether a litigant is or is not professionally represented, but that the application of those tests should take this factor into account. However, a litigant in person can be found to have behaved unreasonably even when proper allowance is made for their inexperience and lack of objectivity.
21. In deciding whether the conduct of litigation is unreasonable, the Tribunal must bear in mind that in any given situation there may be more than one reasonable course to take. The Tribunal must not substitute its view for that of the litigant: ***Solomon v University of Hertfordshire, Hunter and Hammond (UKEAT/0258/18-19/DA)*** at para 107.
22. In addition, incompetent presentation of a case causing an increase in costs incurred by the opposing party is not necessarily unreasonable conduct: ***Francois v Castle Rock Properties limited UKEAT/0260/10.***
23. Dishonesty and deliberate mistruths are likely to be unreasonable conduct and should usually result in a costs order but do not automatically do so. All the circumstances including the impact the dishonesty had on the proceedings and costs incurred should still be considered before exercising discretion ***Kapoor v Governing Body of Barnhill Community School [2014] All ER (D) 261 (Feb).***
24. There is also ***Presidential Guidance on costs (Presidential Guidance; General Case management – Guidance Note 7 Costs)*** which I have taken into account.

ANALYSIS AND CONCLUSIONS

Is the jurisdiction to make a costs award is engaged?

25. I consider that given:

25.1 the Claimant had had legal advice in preparing his claim;

25.2 the Claimant was given clear guidance on his amendment application at the October PH and warned at that hearing by EJ Spencer that the Respondents might apply for costs against the Claimant if his amendment application was unsuccessful at the December PH; and

25.3 the Respondents (having seen the Claimant's written application sent on 27 November 2023) warned the Claimant on 11 December 2023 that they would pursue costs against him;

it was unreasonable for the Claimant to press ahead with his application to amend from that point. This is particularly so given that the application was even more lengthy and unclear than his previous unsuccessful application.

26. I find that the jurisdiction to make a costs award is engaged as regards the

Claimant's conduct after 11 December 2023.

If there is jurisdiction should I exercise my discretion to do so?

27. I do not consider that the Claimant was being deliberately unreasonable and have taken into account that it is accepted by the Respondents that he has bi-polar disorder and ADHD and that those conditions amount to disabilities. I have also taken into account that the Claimant is not a lawyer and did not in December 2023 have the benefit of legal advice. In that regard I have reminded myself of the guidance in **AQ Ltd v Holden 2012 IRLR 648**.
28. I nonetheless conclude that the high threshold is met for a costs award to be made and that I should exercise my discretion to award costs against the Claimant in the circumstances. I consider that the Claimant acted entirely unreasonably in presenting such a lengthy application to amend at the December PH which so particularly failed to comply with the guidance given to him by EJ Spencer (that the application be clear and brief).

If I exercise my discretion how much should I award?

29. The Claimant did not provide me with any information as to his ability to pay a costs award.
30. The Respondents applied for costs totalling £8,550.5 (excluding VAT) and making clear that this amount excluded costs which do not relate to the Claimant's amendment applications. This comprised solicitor fees for the period up to and including 11 December 2023 totalling £6,450.51 (exclusive of VAT) and counsel fees of £700 for attendance at the October PH and counsel fees of £1,400 for attendance at the December PH.
31. I consider that an award of **£700** is in the interests of justice in the circumstances. This equates to counsel fees incurred for attendance at the December PH less £700 to take into account that the hearing would have been needed for the other purposes for which it was listed.
32. The Claimant is not ordered to pay the VAT incurred by the First Respondent on these costs because my understanding is that the First Respondent is registered for VAT and can therefore recoup that tax.

Employment Judge Woodhead

Date 26.03.24

Sent to the parties on:

5 April 2024

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For the Tribunals Office

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>