Case Numbers: 2200179/2022
2211483/2022

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Ms R Meade	**AND**	(R1) Westminster City Council (R2) Social Work England

COSTS HEARING

Heard in person on 12 and 13 February 2024 and deliberations in Chambers on 28 February 2024.

Before: Employment Judge Nicolle

Non-legal members: Ms N Sandler and Ms P Breslin

For the Claimant: Ms N Cunningham, of Counsel
For the Respondents: Mr S Cheetham KC, of Counsel

Judgment

1. The Claimant is awarded costs of £3000 for which the First and Second Respondent are jointly and severally liable. Payment of the award should be made within 28 days of this judgment being promulgated.

Reasons

The amounts claimed

2. The Claimant has not provided a schedule of costs but is seeking £187,200. It is anticipated that this sum may increase given that it presumably does not include the remedy hearing, and any hearing for the detailed assessment of costs. Ms Cunningham confirmed that the sum claimed as financial loss of £42,672 is not claimed as legal costs in the alternative.

3. The Claimant has raised circa £134,000 by way of crowdfunding from over 5000 separate pledges. There is no basis upon which the funds raised by crowdfunding can be separately attributed to the costs of the proceedings and other costs which the Claimant seeks to recover as damages.

4. A significant proportion of the Claimant's total costs of circa £235,000 remain unpaid given that the crowdfunding has been paid directly to her solicitors and the Claimant and her husband have paid over £20,000 from their own funds.

The Claimant's application

5. In a letter dated 6 February 2024 the Claimant's solicitors made an application under Rule 75. They rely on both no reasonable prospects of success and unreasonable conduct.

No reasonable prospects of success

6. They contend that the Respondents sought to reformulate the charges to fit their developing understanding of the law particularly after the judgment of the EAT in Forstater on 10 June 2021. It is argued that the Respondents progressively moved from contending that the Claimant's beliefs were transphobic, to accepting, albeit reluctantly, her right to hold gender critical views, but not to manifest them, to belatedly contending that it was not the manifesting of her beliefs, but the objectionable nature of that manifestation, which was the issue.

Unreasonable conduct

7. The Respondents' respective original grounds of resistance dated 17 and 18 February 2022, were more than eight months after the EAT's judgment in Forstater.

8. Further, reference is made to the threat of costs applications against the Claimant to intimidate her into accepting an inadequate offer of settlement with no admission of liability.

The Law

9. The relevant Provisions are in the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 (the Rules).

Definitions

74.—(1) “Costs” means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party).

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;

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.

(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.

(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;

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

Relevant case law

10. The following propositions relevant to costs may be derived from the case law:

11. There is a two-stage exercise to making a costs order. The first question is whether a paying party has acted unreasonably or has in some other way invoked the jurisdiction to make a costs order. The second question is whether the discretion should be exercised to make an order (Oni v Unison ICR D17).

12. Costs orders in the employment tribunal are the exception rather than the rule (Gee v Shell [2003] IRLR 82, Lodwick v Southwark [2004] ICR 844).

13. While a precise causal link between unreasonable conduct and specific costs is not required, it is not the case that causation is irrelevant. In Yerrakalva v Barnley MBC [2012] ICR 420 Mummery LJ said:

> "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 my judgment in 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. 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".

14. The EAT in Radia v Jefferies International Ltd EAT 0007/18 gave guidance on the approach to costs applications on the basis of no reasonable prospects of success. It emphasised that the test is whether the claim had no reasonable prospect of success, judged on the basis of the information that was known or reasonably available at the start. The tribunal must consider how, as that earlier point, the prospects of success in a trial that was yet to take place would have looked.

The parties' submissions

Claimant

15. Whilst Ms Cunningham acknowledges that prior to the EAT's judgment in Forstater the Respondents had more of an excuse that it ceased to apply with effect from 10 June 2021. She says that the Respondents were self-evidently pursuing hopeless defences. She refers specifically to the duration of the Claimant's suspension and the effect that had on her. She says that it is not a numbers game and that the most important elements of the claim succeeded.

16. She referred us to paragraphs 275 and 276 of the Tribunal's liability judgment which I will set out below:

> In reaching our conclusions we consider it to be self-evident from the contemporaneous documentation, chronology and other evidence that the Respondents considered that the Claimant's gender critical views were unacceptable, and did not constitute beliefs that she was entitled to manifest whether in the workplace, in respect of which there is no evidence that that she did, or in a personal capacity. We consider that the Respondents very belated acceptance that the Claimant's gender critical views were protected beliefs, and beliefs she was entitled to manifest, but not in a way which caused an inappropriate level of offence, represented an attempt to circumvent the EAT's judgment in Forstater.
>
> Whilst we acknowledge that there are limitations on the right to freedom of speech, and the manifestation of protected beliefs, we do not consider that the threshold was reached in this case. Further, we consider that the Respondents' defence of the claim was compromised by the contemporaneous concerns and decision-making process being principally predicated on the view that the beliefs/views expressed were unacceptable, rather than on the basis of an acknowledgement that the Claimant was entitled to her beliefs and the manifestation of them, but that certain Facebook posts were unacceptable with the reasons why those individual posts, but not others, were unacceptable being clearly and consistently set out. As we have set out above there was no such analysis and consistency. Whilst the Respondents selectively highlighted certain posts, and the interpretation placed on them, this was not in our opinion, the primary basis for the decision-making at the time, but rather individual examples given by the Respondents at different stages of the respective procedures of concerning posts e.g. the JK Rowling and this this "Girl Guides/Boy Scouts" posts.

Respondents

17. Mr Cheetham asserts that the Tribunal must ask itself whether the responses to each of the complaints, successful or otherwise, had no reasonable prospect of success, it cannot look at the claim as a whole (Opalkova v Acquire Care Ltd UKEAT 0056/21). He acknowledges that the acceptance that the Claimant's beliefs amounted to protected beliefs came late in the day. However,

he disputes that this necessarily led to the hearing taking additional time or further costs being incurred.

18. He says that there is no suggestion in the Tribunal's liability judgment that the Respondents' witnesses had been dishonest.

19. He says that there would be no basis for the whole of the Claimant's costs being awarded, as at least certain parts of the defences were at least arguable, demonstrated by not all of the individual elements of the claims succeeding.

Conclusions and discussion

20. We have carefully considered whether the Respondents' conduct involved defending the claim where they had no reasonable prospect of success or whether they were culpable of otherwise unreasonable conduct. Whilst we consider that the Respondents had no reasonable prospect of success, and were culpable of unreasonable conduct, in not acknowledging that the Claimant's gender critical beliefs were protected beliefs until three days prior to the full merits hearing it does not follow that this delay caused the Claimant to incur any significant additional costs. We do not consider that the Respondents had no reasonable prospect of success of defending the claim on the grounds that the manifestation of the Claimants beliefs was, at least in some respects, objectionable. Whilst we found against the Respondents in this respect it does not automatically follow from such a finding that the defence had no reasonable prospect of success. Nor does it follow that the Respondents were culpable of unreasonable conduct in maintaining such a defence and not in effect conceding liability in advance of the full merits hearing.

21. We consider it significant that the Claimant did not at any point from the grounds of resistance being filed by the Respondents on 17 and 18 February 2022 respectively make an application for the strike out of the Respondents' defences on the basis that they had no reasonable prospect of success.

22. We do not consider that the First Respondent's costs warning letters to the Claimant were unreasonable conduct. We take account of the fact that such costs warning letters are a standard part of litigation. Further, the Claimant was at all times legally represented and would have the benefit of legal advice that the threat of her being responsible for the First Respondent's costs could effectively be set aside and should be seen as a litigation tactic. Whilst we acknowledge that the Claimant and her husband may, nevertheless, have had concern regarding their potential financial liability we do not consider that this in itself justifies a costs award. Further, we do not consider that there is any logical basis for attributing any part of the Claimant's costs to the cost warning letters. As such it would be a wholly artificial exercise to make an award of costs to her as result of such correspondence.

23. We acknowledge the Respondents' contention that no significant additional costs were incurred by the Claimant as a result of their belated concession that the Claimant's gender critical beliefs were protected beliefs. We acknowledge that the length of the hearing would largely have been the same given that the

Tribunal still needed to consider the questions regarding the manifestation of the Claimant's protected belief and whether any of her communications were outside the legitimate manifestation of those beliefs as a result of their objectionable content.

24. Nevertheless, we consider that at least some additional costs would have been occasioned as a result of the Claimant, and her legal team, having to prepare to argue that the her gender critical beliefs were protected beliefs. However, we consider that these costs would have been relatively limited given that the position was in effect unarguable subsequent to the EAT's judgment in Forstater. Therefore we consider that a relatively nominal award of £3,000 should be made in respect of the Claimant's overall costs. Whilst there is no precise basis to calculate this sum we consider that in the context of the overall sum of £187,500 being claimed that this is an appropriate figure.

Employment Judge Nicolle

Dated: **1 March 2024**

Sent to the parties on:

1 May 2024
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For the Tribunal Office