



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Miss Caprice Wilton

AND

Respondent

Job Solutions Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY

ON

29 April 2024

By CVP – Video and Audio

EMPLOYMENT JUDGE N J Roper

MEMBERS: Ms V Blake
Ms E Smillie

Representation

For the Claimant: In person, Assisted by Relay UK

For the Respondent: Mrs G Cross, Director

ORDER

The respondent's application for a preparation time order is refused..

RESERVED REASONS

1. In this case the respondent seeks a preparation time order in respect of the time spent in successfully defending this action against the claimant.
2. This has been a remote hearing on the papers. The form of remote hearing was by Cloud Video Platform, and also by telephone conference. An in-person hearing was not held because it was not practicable, and all issues could be determined in a remote hearing, and the parties consented to a remote hearing of this nature.
3. Adjustments for the Claimant at this Hearing:
4. The claimant suffers from mutism and is non-verbal. Her requests for adjustments in connection with this hearing were accommodated in the following respects. Although the hearing was listed to be determined in person, albeit remotely by CVP video, the claimant requested that she attend by way of telephone only, and not by video. In addition, the claimant requested that she could be assisted by the good offices of Relay UK who act as an intermediary and are able verbally to articulate typed messages from the claimant, who can hear the proceedings, but who cannot respond verbally. At the request of the claimant therefore the hearing proceeded by way of the tribunal panel and the respondent attending in person (albeit remotely by video), and the claimant attending by telephone only with the proceedings relayed by Relay UK. We thank Relay UK for their assistance.

5. In addition, the claimant was reminded that she could rely solely or partly on written submissions, and she has also produced detailed written submissions which have been considered in full by this Tribunal.
6. The Judgment
7. The claimant brought proceedings against the respondent alleging disability discrimination. The case was heard on 24 and 25 July 2023 and by unanimous decision this Tribunal dismissed the claimant's claims in their entirety by Judgment dated 25 July 2023, which was sent to the parties on 10 August 2023 ("the Judgment").
8. The Application for a Preparation Time Order
9. The respondent was not legally represented throughout these proceedings. The respondent has made an application dated 22 August 2023 for its preparation time on the basis that the claimant has acted abusively or otherwise unreasonably in issuing these proceedings and/or in the manner in which they have been conducted. The claimant opposes that application.
10. By email dated 20 November 2023 the respondent was directed to confirm whether it still intended to pursue its application, and if so to set out what grounds were relied upon by reference to Rule 76(1), together with a schedule of the hours undertaken. The respondent's letter in reply applied for 150 hours preparation time "at the current rate" to reflect the work undertaken in three respects: correspondence between the parties throughout the duration of the proceedings; preparation of documents in multiple formats as requested; and meetings at the respondent's offices to prepare the case and the statement of Mrs Pym. By letter dated 13 December 2023 the respondent was directed to provide a breakdown of the hours claimed, setting out each day when preparation work was claimed to have been done, for exactly how long, and engaged in exactly what activity in preparation for the claim. The respondent did not reply to that direction. A reminder was sent to the respondent by email dated 21 December 2023. The respondent did not reply to that reminder. Meanwhile the claimant continued to oppose the application, and then provided evidence as to her means by way of the letter from JobCentrePlus confirming that the claimant was unable to work, and indeed not required to work, and was in receipt of Employment and Support Allowance.
11. The claimant's detailed submissions in response to the application which she provided today gave further detail information as to why she considered the claim was not unreasonable, and also gave further information as to her limited financial means.
12. The Rules
13. The relevant rules are the Employment Tribunals Rules of Procedure 2013 ("the Rules").
14. Rule 75(2) provides: "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 the final hearing.
15. Rule 76(1) provides: "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.
16. Under Rule 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.
17. Under Rule 79(1) the Tribunal shall decide the number of hours in respect of which a preparation time order should be made, on the basis of – (a) information provided by the receiving party on time spent falling within rule 75(2) above; and (b) the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the

- proceedings, the number of witnesses and documentation required. Under Rule 79(2) the maximum hourly rate for preparation time costs is currently £43.00 per hour.
18. 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.
 19. The Relevant Case Law
 20. We have considered the following cases: Gee v Shell Ltd [2003] [2003] IRLR 82 CA; McPherson v BNP Paribas [2004] ICR 1398 CA; Monaghan v Close Thornton [2002] EAT/0003/01; Vaughan v London Borough of Lewisham [2013] IRLR 713 EAT; Brooks v Nottingham University Hospitals NHS Trust [2019] WLUK 271, UKEAT/0246/18; NPower Yorkshire Ltd v Daley EAT/0842/04; Radia v Jefferies International Ltd [2020] IRLR 431 EAT; AQ Ltd v Holden [2012] IRLR 648 EAT Kapoor v Governing Body of Barnhill Community High School UKEAT/0352/13; Nicholson Highland Wear v Nicholson [2010] IRLR 859; Barnsley BC v Yerrakalva [2012] IRLR 78 CA; Shield Automotive Ltd v Greig UKEATS/0024/10; Jilley v Birmingham and Solihull Mental Health NHS Trust [2008] UKEAT/0584/06; Single Homeless Project v Abu [2013] UKEAT/0519/12.
 21. The Relevant Legal Principles
 22. The correct starting position is that an award of costs is the exception rather than the rule. As Sedley LJ stated at para 35 of his judgment in Gee v Shell Ltd "It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to people without the need of lawyers, and that in sharp distinction from ordinary litigation in the UK, losing does not ordinarily mean paying the other side's costs ..." Nonetheless, an Employment Tribunal must consider, after the claims were brought, whether they were properly pursued, see for instance NPower Yorkshire Ltd v Daley. If not, then that may amount to unreasonable conduct. In addition, the Employment Tribunal has a wide discretion where an application for costs is made under Rule 76(1)(a). As per Mummery LJ at para 41 in Barnsley BC v Yerrakalva "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." However, the Tribunal should look at the matter in the round rather than dissecting various parts of the claim and the costs application, and compartmentalising it. There is no need for the tribunal to find a causative link between the costs incurred by the party making the application for costs and the event or events that are found to be unreasonable, see McPherson v BNP Paribas, and also Kapoor v Governing Body of Barnhill Community High School in which 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.
 23. When considering an application for costs the Tribunal should have regard to the two-stage process outlined in Monaghan v Close Thornton by Lindsay J at paragraph 22: "Is the cost threshold triggered, e.g. was the conduct of the party against whom costs is sought unreasonable? And if so, ought the Tribunal to exercise its discretion in favour of the receiving party, having regard to all the circumstances?"
 24. In Brooks v Nottingham University Hospitals NHS Trust the EAT confirmed that dealing with an application for costs requires a two-stage process. The first is whether in all the circumstances the claimant has conducted the proceedings unreasonably. If so, the second stage is to ask whether the tribunal should exercise its discretion in favour of the claiming party, having regard to all the circumstances. In the case of reasonable prospects of success, the first stage is whether that ground is made out, and if it is, then to apply the exercise of discretion as to whether or not to award costs.
 25. There is considerable overlap between the two grounds in Rules 76(1)(a) and (b). This was analysed by HHJ Auerbach in Radia: [61] It is well established that the first question for a tribunal considering a costs application is whether the cost threshold is crossed, in the sense that at least one of Rule 76(1)(a) or (b) is made out. If so, it does not automatically follow that a costs order will be made. Rather, this means that the Tribunal may make a costs order, and shall consider whether to do so. That is the second stage, and it involves

- the exercise by the Tribunal of a judicial discretion. If it decides in principle to make a costs order, the tribunal must consider the amount in accordance with Rule 78. Rule 84 provides that, in deciding both whether to make a costs order, and if so, in what amount, the Tribunal may have regard to ability to pay. [62] ... There is an element of potential overlap between (a) and (b). The Tribunal may consider, in a given case, under (a) that a complainant acted unreasonably, in bringing, or continuing the proceedings, because they had no reasonable prospect of success, and that was something which they knew; but it may also conclude that the case crosses the threshold under (b) simply because the claims, in fact, in the tribunal's view, had no reasonable prospect of success, even though the complainant did not realise it at the time. The test is an objective one, and therefore turns not on whether they thought they had a good case, but whether they actually did."
26. The threshold to trigger costs is the same whether a litigant is or is not professionally represented, although in applying those tests, the EAT has held that the status of a litigant is a matter which the tribunal must take into account – see AQ Ltd v Holden in which Richardson J commented: "Justice requires the tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. As [counsel] submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought about by a professional adviser. Tribunals must bear this in mind when assessing the threshold tests in [rule 76(1)(a)]."
 27. Ability to Pay:
 28. 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.
 29. Conclusion
 30. Applying the above legal principles our unanimous decision is as follows. In the first place, the correct starting position is that in the Employment Tribunals an award of costs is the exception rather than the rule. Costs do not follow the event: the fact that the respondent successfully defended the claimant's claims in this case does not of itself mean that it is entitled to repayment of its preparation time in defending the proceedings.
 31. The respondent's application is effectively on the basis that it was put to the time and trouble of defending these proceedings which were unsuccessful. However, we are not satisfied that the wording of Rule 76(1) is met. The respondent has not persuaded us that the claimant has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings or the way that the proceedings have been conducted. Neither has the respondent persuaded us that the claim had no reasonable prospect of success from the outset.
 32. In the circumstances we are unanimous that the first step of the two-stage process outlined in Monaghan v Close Thornton is not met, namely: "Is the cost threshold triggered, e.g. was the conduct of the party against whom costs is sought unreasonable?" That being the case, there is no need for us to proceed to the second stage and consider whether or not to exercise our discretion in order to make a preparation time order in favour of the respondent.
 33. For these reasons our unanimous decision is that the respondent's application for a preparation time order is hereby dismissed.

Employment Judge N J Roper
Dated 29 April 2024
Judgment sent to Parties on 16 May 2024

For the Tribunal office