EMPLOYMENT TRIBUNALS

Claimant: **Craig Pryce**

Respondent: **New Leaf Initiative CIC**

Heard at: **West Midlands** **On: 19th April 2024**

Before: **Employment Judge Steward**
Ms Hicks
Ms Bannister

Representation

Claimant: In Person
Respondent: In Person

COSTS JUDGMENT

The decision of the Tribunal is:

1. The Respondent's application for preparation time costs is well founded and is upheld.

2. For the reasons given below, the Claimant is ordered to pay to the Respondent £2640 by way of preparation time costs.

REASONS

Introduction

3. The Respondent applies for a preparation time order ("PTO") under rules 74-79 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules") for preparation time costs ("PT Costs") totalling over £29,000 (even though they accept the limit is £20,000).

4. The Respondents sought an oral hearing which took place on the 19th of April 2024. Neither party was represented at the hearing though the Claimant did have the help of a solicitor's firm to prepare his written submissions. Both parties had the opportunity to set out their respective positions in detail in both

oral and written submissions. A means assessment was carried out with regard to the Claimants ability to pay without any prejudice to the ultimate decision.

5. Though a non-legally represented party may apply for preparation costs they cannot claim for time spent at any final hearing (R.75(2)).

The Law

6. Under Rule 76 an employment tribunal has a discretion to make a PTO if either the following provisions apply

   (i) Rule 76(1)(a) 'a party has acted vexatiously, abusively, disruptively, or otherwise unreasonably in bringing or conducting of proceedings (or a part thereof)

   (ii) Rule 76(1)(b) 'a claim or response had no reasonable prospect of success'

7. Rule76 obliges a tribunal to apply a three-stage test to consider:(1) whether the ground / basis for PT costs is made out; and (2) if so, whether to exercise the discretion to award PT costs. This two-stage test is well-established in respect of applications under rule 76(1)(a) of the Rules **(Monaghan v Close Thornton Solicitors EAT 0003/01**) but applies equally to applications under rule 76(1)(b). The final stage (3) is to determine the level of the PTO.

8. It is important to recall that even if one (or more) of the grounds for awarding costs or a preparation time order is made out, the tribunal is not obliged to make an order. Rather, it has a discretion whether to do so.

9. As the Court of Appeal reiterated in **Yerrakalva v Barnsley MBC 2012 IRLR 78**, costs in the tribunal are the exception rather than the rule. It commented that the tribunals' power to order costs is more sparingly exercised and is more circumscribed than that of the ordinary courts, (where the general rule is that costs follow the event).

10. The purpose of costs is of course to compensate the receiving party and not to punish the paying party. Questions of punishment are irrelevant both to the exercise of a tribunals' discretion as to whether to make an award and to the nature of the order that is made **(Lodwick v Southwark LBC 2004 ICR 884).**

11. There are very many factors which a tribunal is permitted to consider when deciding whether to award costs or not. This includes:

    (a) Whether the paying party was legally represented.

    (b) The nature of the conduct giving rise to the application.

    (c) The effect of such conduct.

    (d) The merits (or lack thereof) of a claim / response.

    (e) Whether the paying party knew or ought to have known of the defects in their case.

(f) Whether the receiving party had applied for strike out or a deposit order and pursued / secured it;

(g) Whether there had been a costs warning, either by the other side, or the tribunal **(Rogers v Dorothy Barley School UKEAT/0013/12).**

(h) Whether the receiving party has conducted its case appropriately. (See **Yerrakalva,** in which the judge criticised the respondents for going "over the top in defending the case", and it was considered that the tribunal should have factored such criticisms into the exercise of the discretion.)

(i) The paying party's ability to pay (Rule84).

12. In any given case, different factors may be relevant, but these are some which have been considered relevant to the discretionary exercise.

13. .Where the case falls into a category in which costs may be awarded, case law has emphasised that the tribunal has a wide and unfettered discretion and the EAT will not use "legal microscopes and forensic toothpicks" to "tinker" with it (per **Yerrakalva**).

14. Given that costs are compensatory, it is necessary to examine what loss has been caused to the receiving party. In this regard the Court of Appeal in **Yerrakalva** held that costs should be limited to those "reasonably and necessarily incurred". At paragraph 41 it was stated that:

"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."

15. As noted by the EAT in **Howman v Queen Elizabeth Hospital Kings Lynn EAT 0509/12** when having regard to a party's ability to pay, a tribunal needs to balance that factor against the need to compensate the other party who has unreasonably been put to expense.

20 Rule 84 does not oblige a tribunal to consider a party's ability to pay, it merely permits the tribunal to do so. However, in **Jilley v Birmingham and Solihull Mental Health NHS Trust and ors EAT 0584/06** it was held that if a tribunal decides not to take into account a party's ability to pay after having been asked to do so, it should say why. If it does decide to take into account ability to pay, it should set out its findings on the matter, say what impact these have had on its decision whether to award costs or on the amount of costs, and explain why.

21 Under Rule 79, a preparation time order is calculated in two stages: (1) The tribunal assesses the number of hours in respect of which a payment should be made. It will take into account any information provided by the receiving party on the time they spent that falls within rule 75(2) along with its own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to matters such as the complexity of proceedings, the number of

witnesses and documentation required; (2) The tribunal then applies an hourly rate to that figure. The rate was set at £33 in July 2013, and increases by £1.00 on 6 April each year thereafter. Therefore, the current hourly rate is £44.

22. A PTO may also be awarded against a party under R.76(1)(a) where the party (or his or her representative) has acted unreasonably in bringing or conducting proceedings. 'Unreasonable' has its ordinary English meaning and is not to be interpreted as if it means something similar to 'vexatious' — **Dyer v Secretary of State for Employment EAT 183/83*.*** It will often be the case, however, that a tribunal will find a party's conduct to be both vexatious and unreasonable.

23. It may be that a party's conduct, taken as a whole, amounts to unreasonable conduct. **In Sahota v Dudley Metropolitan Borough Council EAT 0821/03**, for example, S lied in his evidence, introduced new matters at a whim and, when faced with a cause or a point which was lost, would not concede it, meaning that the length of the hearing was unnecessarily prolonged. An employment tribunal concluded he had behaved unreasonably and made a costs order of £9,000 against him. This decision was upheld by the EAT, which also ordered him to pay an additional £1,000 towards the cost of the appeal.

Application of the Law to the facts of this case.

23. The Claimant brought claims for Harassment on the grounds of disability and Direct Disability Discrimination for failure to make a reasonable adjustment in not providing an auxiliary aid namely dragon speech recognition software and yellow overlay paper. In the Claimants original written submissions regarding liability, he stated that the Harassment would boil down to who the tribunal believed. We stated at the time that the credibility of the witnesses was one aspect of the case but also the overall context of various factual issues was central to credibility.

24. The Claimant was employed as a Tutor and Training Co-Ordinator. However, it was abundantly clear that the Claimant adopted the role as a 'disability champion' for the Respondents. His employment application form is littered with references to his ability to help people who were disadvantaged due to disability i.e.

"…. *creates resources and individual support plans for those who suffer mental ill health to those who have EHCPs plans* (pages 90-91 main bundle*)……..engaging those deemed most vulnerable in society…..who have a disability* (pages 90-91)…..*i have worked closely with individuals with additional learning needs and disabilities* (page 92)……..*In terms of my IT skills I have an excellent understanding of how to record information and manage my caseload digitally…..*(Page 93)

24. Miss O'Brien had suggested in her statement of evidence that the Claimant had positioned himself as the disability lead due to a dissertation

on neurodiversity and his professional experience which included being the learning co-ordinator for Gloucestershire CC focused on Disability and Inclusion as born out in the Claimants own application for the post. The Claimant also took it upon himself to increase the Respondents disability confident rating (Pages 186-190 main bundle). The Respondents state that the Claimant was their 'disability champion' and this is something we accept. This provides the context. We believe that the Claimant was very attuned to issues of disability and would have addressed any issues pertaining to himself.

25. Against that context we were extremely surprised to see that the Claimant had completed the health questionnaire (page 104 in the main trial bundle) by confirming that he has dyslexia and dyspraxia but when specifically asked what adjustments he needed the Claimant put

"*No just spelling and sense of direction affected".*

There is no request for any other adjustments. There is no request for yellow overlay paper or dragon software. The claimant has clearly worked in several positions, and we found it unlikely that he would essentially assess his requirements while working in the role? That does not seem logical. If the claimant required these adjustments, then we find they would have been requested from the outset. If they had been requested from the outset, we find they would have been provided. We were told the yellow overlay paper was freely available in the cabinet. There are examples of requests the claimant has made in the bundle for items that have been provided by the respondents. We don't find that the claimant requested dragon software or the overlays at the start of the employment. We do not find that these items were ever requested by the claimant. There is no written evidence of this. We found the Respondents witnesses more reliable in this regard and the Claimant and his wife were not convincing witnesses. At the costs hearing the Claimant produced a written submission that suggested the phrase used in the judgment 'not convincing' regarding the Claimant and his wife did not amount to a finding that they had lied. We do not accept this. If an individual has not been convincing, then they have been unable to convince someone of the fact or truth of something. Hence you have been unconvincing. When asked if this was an interpretation the Claimant could accept, he could not give a logical answer disputing the same.

26. The suggestion that Mrs Pryce overheard the claimant and the respondent discussing adjustments and heard the respondent speaking to the claimant in a condescending and patronising manner we do not accept. We also found it implausible that she wanted to apply for a role working closely with Ms O'Brien. Mrs Pryce said this was because she thought the claimant was being manipulated and wanted to see for herself. We also found that the claimant was fully aware that Mrs Pryce had applied for the job. At page 212 there is an email from Mr Harper to Ms O'Brien that makes it clear that the claimant had raised with Mr Harper the role with Ms O'Brien. The discussion of this role in emails shows that the

claimant and Mrs Pryce were corresponding by a joint email. In our view Mrs Pryce wanted to apply for the role not for any reason to see for herself what was taking place but because she was considering the position as a suitable one for her. This period was also the same period that the claimant and Mrs Pryce looked after the respondent's dog when she was on holiday. This was also in August 2022 when Mrs Pryce was in the process of applying for the job. The text exchange regarding the dog shows a friendly relationship. They show the respondent trying to accommodate the issues the claimant was having looking after the dog. The respondent is on holiday and trying to manage the situation in a cordial manner from Palma. There is no hostility whatsoever from her. It begs the question if the relationship was so bad between the claimant and the respondent why on earth would he be looking after her dog?

27. None of the Respondents witnesses had ever heard Ms O'Brien speak to the Claimant in the way that he alleges. We have considered the conduct of the Claimant overall and we do find it was unreasonable. The Claimant was live to issues of disability and would have asked for reasonable adjustments from the start of his employment if he needed them. He could also have asked for them as he progressed in his employment, but he never did. To complete the health questionnaire in the way that he did coupled with the fact that we preferred the evidence of the Respondents where it was in dispute with the Claimant and his wife (evidence of the nature of the relationship at the time they were looking after the dog, Mrs Pryce reasons for applying for a role working alongside Ms O'Brien) meant that the claim for Direct Discrimination Failure to Provide Reasonable Adjustments was unreasonable. The Claimant and Mrs Pryce were simply not reliable witnesses but the version of events they gave were completely illogical and contradictory to such an extent that this aspect of the claim was unreasonable when taken as a whole.

28. Given that Rule 76(1)(a) has been satisfied by the Respondent should we exercise our discretion and make a PTO. Though not represented at the final hearing itself the Claimant was represented during the currency of the proceedings and his final written submissions at the substantive hearing were prepared by his solicitors. We found the conduct of the Claimant unreasonable for all the above reasons. This conduct completely undermined the Claimants reliability even on paper and meant that the claim for Direct Disability Discrimination had little merit. Oral evidence was still required to see if the Claimant stuck by or modified his position or conceded it. He was incapable of doing so. As a result, the proceedings and the final hearing were prolonged determining these issues. The issue of Harassment was arguably a separate issue. That had to be determined by an evaluation of the cogency and reliability of the Claimant, his wife and the Respondents witnesses. We find that the Claimant would have known the defects in the Direct Discrimination case (which would have also impacted credibility regarding the Harassment case). We have considered that no application was made by the Respondents for strike out or deposit order, but we also accept they were not represented. We have also considered the Claimants ability to pay. In all the circumstances we do exercise our discretion to make a PTO.

29.

(i) The Respondent Ms O'Brien. She presented as somebody who is rightly proud of what she has achieved and passionate about the business. It's a business that assist some of the most vulnerable people who have been through the criminal justice system. I believe she is a forthright person. She has been through the system herself and I imagine she does need to be robust especially with the people she seeks to assist. I noted on the last day of the hearing she jumped up to resolve a noise problem in the room next door on two occasions. I imagine she is somebody who is extremely hands on in the business and drives it forward. I thought she was an impressive witness. I did not have a sense that she misled she was trying to help which sometimes spilled over into comment and sometimes a critic of the claimant. I thought the comment 'weak' had a clear context related to his work and not his disability as can be discussed later.

(ii) Mr Harper. Was another impressive witness. He did not hear any comments concerning harassment and no reasonable adjustments requested. Mr Harper's own values are important to him, and he would not work for an organisation that displayed the behaviour as alleged by the claimant. Throughout the bundle all the correspondence between the claimant and Mr Harper is positive and it's clear that the claimant was able to approach Mr Harper. There is nothing in the bundle to suggest that the claimant was suffering any harassment from the respondent or anybody else.

(iii) Nadine Williams. Another impressive witness who in our view was forthright and could stand up for herself. She described the Claimant as the 'tech guy' who was 'set up' etc. She is also dyslexic and has been provided with reasonable adjustments when asked. She was never afraid of the respondent.

(iv) Lynne Harris. She never heard anything bad said by Marie Clare. She didn't know the claimant was dyslexic and never heard dragon software mentioned. Nobody ever heard that request.

30. The respondent has accepted that she called the claimant 'weak'. She deals with this in paragraph 14 of her statement. The context was the were the problems in looking after the respondent's dog. The claimant and his wife could not control the dog and had to eat dinner in the bathroom. This was described as 'weak' in the context of the way the claimant had acted with learners in the academy. The issue of

assertiveness and communication had been a persistent theme as noted in both the probationary extension meetings aforesaid. This is the only comment we find the respondent made and we do not find that it was made in the context of harassment. We also do not find that the effect of the comment would have been detrimental to the claimant as it was the only comment and clearly in the context of the dog sitting/issues the claimant has in the workplace. It was not reasonable for this comment to have the effect it did on the claimant.

Conclusion

31. Given the above we do not find that the comments allegedly made by the respondent to the claimant were made other than the comment 'weak' however we do not find that this was made in an attempt to harass the claimant as alleged but in the context of paragraph 30 above.
32. We also do not find there was direct discrimination as a result of failing to make a reasonable adjustment for the reasons set out. We find the claimant never requested the dragon speech software or yellow overlay paper. If he had these would have been provided.
33. In the circumstances the claim fails.

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Employment Judge Steward

23rd April 2024