

RESERVED COSTS JUDGMENT



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Vaughan
Respondent: USDAW Trade Union

Heard at Leeds Employment Tribunal on 20 May 2024

Before Employment Judge Deeley
Mr D Crowe
Mr J Howarth

Appearances
For the Claimant: in person
For the Respondent: Mr Todd (Counsel)

COSTS ORDER

1. The claimant shall pay to the respondent costs of £1426.91.

EXTENDED REASONS

Introduction

1. These reasons should be read in conjunction with the Tribunal's detailed liability judgment which was sent to the parties on 26 January 2024 (the "**Reserved Judgment**").
2. The respondent submitted an application for £5896.38 costs to the Tribunal (copied to the claimant) dated 22 February 2024 under Rules 76(1)(a) and 76(1)(b) of the Employment Tribunal Rules of Procedure. The basis for the respondent's application was that:
 - 2.1 the claim had no reasonable prospect of success; and/or
 - 2.2 the claimant acted unreasonably in pursuing her claim.
3. The claimant objected to the respondent's costs application in her email of 27 February 2024. The Tribunal considered the claimant's written submissions, oral submissions from both parties and documents produced by both parties regarding the costs application. The Tribunal also heard witness evidence from the claimant regarding her financial means.

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Issues

4. The issues for the Tribunal to decide were:
 - 4.1 Is the threshold for making a costs order met, in particular:
 - 4.1.1 did the claimant behave unreasonably in her conduct of the claim?
 - 4.1.2 did the claims have no reasonable prospect of success?
 - 4.2 If so, should the Tribunal make a costs order?
 - 4.3 If so, for how much?

Legal principles

5. The relevant parts of Rules 76 and 84 of the Employment Tribunal Rules of Procedure 2013 state:

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

(1) A Tribunal may make a costs 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.

...

84 Ability to pay

In deciding whether to make a costs ... order, and if so in what amount, the Tribunal may have regard to the paying party's ... ability to pay.

6. In considering first of all whether to make a costs order, the following principles apply:
 - 6.1 Litigants without legal representation are not to be judged by the standards of a professional representative - the Tribunal must make an allowance for inexperience and lack of objectivity: see *AQ Limited v Holden* [2012] IRLR 648 EAT.
 - 6.2 The test is whether a claim had no reasonable prospect of success, judged on the basis of the information that was known (or reasonably available) at a particular point in time: see *Radia v Jeffries Ltd* EAT 0007/18.
 - 6.3 The Tribunal must identify the unreasonable conduct, say what was unreasonable about it and say what its effect was: see *Yerrakalva v Barnsley MBC* [2012] ICR 420 CA. However, it is not necessary to link the costs awarded to costs caused by unreasonable conduct, i.e. the receiving party does not have to prove that the unreasonable conduct caused particular costs: see *Macpherson v BNP Paribas* [2004] ICR 1398 CA.

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7. If the Tribunal decides that a party's conduct falls within Rule 76(1)(b), the Tribunal must then consider whether it is appropriate to exercise its discretion in favour of awarding costs against that party and, if so, the amount of any such award. We note that:
- 7.1 Costs in the Tribunal are the exception, rather than the rule: see *Yerrakalva*.
 - 7.2 The Tribunal can take into account whether a party sent a 'costs warning letter': *Oko-Jaja v London Borough of Lewisham* EAT 417/00.
 - 7.3 The purpose of costs are to compensate the party who makes the application and not to punish the paying party: see *Lodwick v Southwark London Borough Council* 2004 ICR 884.
 - 7.4 The Tribunal is not required to limit any costs order to a sum that the paying party can afford to pay: *Arrowsmith*. The Tribunal must, however, give proper consideration to such matters as future earning capacity and the alternatives to making a whole costs order: see *Herry v Dudley Metropolitan Council* [2017] ICR 610.

Did the claimant's claim have no reasonable prospect of success?

8. We concluded that from 4 January 2024, the claimant had sufficient information to realise that her claim had no reasonable prospect of success. The key reasons for our decision are:
- 8.1 following the two preliminary hearings, Employment Judge Rostant noted that the claimant's sole complaint was that of direct sex discrimination relating to the financial arrangements relating to her car around the time of her retirement. This was a relatively straightforward claim in legal terms, involving questions of: (i) less favourable treatment; and (ii) whether such less favourable treatment was because of the claimant's sex;
 - 8.2 Mr Miller's email of 4 January 2024 confirmed that an additional male comparator (Mr O'Neill) had been subject to the same financial arrangements as the claimant. The claimant therefore knew (or should have known) that any difference in treatment was not due to her sex.
 - 8.3 we were shown emails during this hearing that showed that Mr Miller had previously disclosed this information in emails to the claimant's former solicitor, however we accept the claimant's evidence that she was not aware of those emails until today;
 - 8.4 Mr Miller also clarified in his email of 4 January 2024 that no 'additional payments' had been made to either of the two senior male comparators (Mr Gorle or Mr Ireland);
 - 8.5 the claimant was unable to adduce any evidence or provide a cogent explanation as to why she believed any difference in treatment between her and the two senior male comparators was due to a difference in sex. Please refer to the conclusions set out at paragraphs 81-85 of the Reserved Judgment;

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- 8.6 the claimant has represented herself for the majority of these proceedings, save for a short period in August/September 2023 when she was represented by solicitors. However, she is a former full time trade union official and has represented herself at both the second preliminary hearing and the final hearing of this claim.

Was the claimant's conduct unreasonable?

9. In the alternative, we concluded that the claimant acted unreasonably in pursuing her claim after she became aware of the existence of the additional male comparator (Mr O'Neill), following Mr Miller's email of 4 January 2024. The reasons for this conclusion are in large part similar to the reasons why we concluded that the claimant had sufficient information to realise that her claim had no reasonable prospect of success from 4 January 2024. We have not repeated those reasons in the interests of brevity.
10. The respondent sought to argue that the claimant acted unreasonably in refusing a settlement offer made through ACAS on 28 July 2023 (in respect of which both parties waived privilege at the final hearing of this claim). However, we concluded that the claimant's refusal at that stage did not amount to unreasonable conduct because:
- 10.1 the respondent's calculation referred to the value of the equivalent electric car as at June 2023, rather than the date of the claimant's retirement arrangements letter on 17 March 2023;
- 10.2 at that point in time, the respondent had not yet presented its response and the claimant had not received any legal advice regarding her claim.

Should a costs order be made?

11. The Tribunal concluded that it should exercise its discretion to make a costs order. We considered that the claimant's ability to pay could be taken into account when deciding how much to award and that it did not prevent the making of a costs order in principle.
12. The Tribunal took into account factors including that:
- 12.1 the claimant is an able and articulate individual, who worked as a full time union official (Area Organiser) since 2005, having previously acted as a volunteer representative from 1999;
- 12.2 the claimant had the opportunity to take legal advice (albeit briefly) from her former solicitors in August/September 2023.
13. In all the circumstances, the Tribunal considered that it was appropriate to make a costs order in this case.

For how much?

14. The Tribunal took into account the Claimant's ability to pay a costs order. The claimant stated that she and her husband owned her own home, they held some joint savings for

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their grandchildren (in her husband's name) and that they let a holiday caravan. She gave details of her pension (approximately £1200 per month gross, less approximately £35 per month tax) and the income that her husband received for the work that they both carried out in fostering children (approximately £500 per fortnight gross). The claimant also provided details of her outgoings and said that she and her husband had around £200 per month left after paying their bills (including the caravan costs).

15. The respondent provided a short schedule of costs. The Tribunal did not make any detailed assessment of those costs. However:
 - 15.1 the Tribunal noted that the respondent could only apply for costs to be awarded if they had actually been incurred. The respondent could not therefore claim for Mr Miller's costs at a notional rate, bench-marked against an equivalent private practice solicitor. The respondent stated that Mr Miller's pay equated to around £40 per hour, based on his salary divided by his contracted working hours;
 - 15.2 in any event, the respondent stated that Mr Miller's time related to preparation time for preliminary hearings (3.5 hours) and preparation time for the final hearing (6.5 hours, consisting of hearing file and witness statements). The Tribunal noted that all of these matters took place before 4 January 2024 and concluded that no award would be made for this time;
 - 15.3 the respondent stated that the amounts for Counsel's fees included VAT, which in fact the respondent was able to recover. They also stated that £1100 of Counsel's fees related to the two preliminary hearings which took place before 4 January 2024. We therefore awarded £1350 for Counsel's fees and £16.91 for Counsel's travel expenses;
 - 15.4 the respondent also claimed for their witnesses' travel and food expenses for the final hearing. We awarded £60 for travel expenses because the respondent did not provide a breakdown of those sums and we accepted the claimant's evidence regarding rail fares from the respondent's office to the Leeds Tribunal.
16. We therefore concluded that the claimant should be ordered to pay £1426.91. Such a sum could be repaid, for example, at the rate of £50 per month over a 2-2.5 year period.

**Employment Judge Deeley
20 May 2024**