Case no: 3322552/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Antar Zaka	**v**	Weetabix Ltd

Sitting in chambers at: Cambridge

On: 20 November 2024

Before: Employment Judge L Brown

Members: Mrs Smith
Mr Holford

COSTS JUDGMENT

1. The application for costs made by the Respondent against the Claimant in the sum of £20,000.00 fails, and there is no order for costs.

REASONS

Introduction

2. Judgement was sent to the parties on the 14 August 2023, and written reasons were requested in accordance with Rule 62(3) of the Rules of Procedure 2013, and the written reasons were provided and sent to the parties on the 14 September 2023.

3. By a costs application made by the Respondent on the 11 September 2023, and following the conclusion of the hearing on the 28 June 2023 but not brought to this Tribunals attention until the 30 July 2024, the Respondent applied for costs against the Claimant in the sum of £20,000.00.

4. The final hearing of this matter took place in person over three days in Cambridge between the 26-28 June 2023. Oral Judgment was given and the Claimant's claims for a failure to make reasonable adjustments, unfavorable treatment arising from disability, and unauthorized deductions all failed and were dismissed.

5. The basis of the Respondents application was as follows:-

(i) the Claimant has acted unreasonably in bringing the proceedings against the Respondent (Rule 76(1)(a) of the ET Rules); and

(ii) the Claimant's claim had no reasonable prospect of success (Rule 76(1)(b) of the ET Rules).

We request that this application is determined on the basis of written representations only, so as to avoid the need for the parties to attend a hearing and incur the additional associated costs.

No Reasonable Prospect of Success / Unreasonable Conduct

The Respondent has always maintained that the Claimant's claim had no reasonable prospect of success, and, accordingly, that it was entirely unreasonable for the Claimant to have continued to pursue his claim against the Respondent.

Having formed this view, the Respondent then made significant efforts to draw this fact to the Claimant's attention. In particular, the Respondent wrote to the Claimant, via his representative, on two occasions on a without prejudice (save as to costs) basis:

On 7 January 2022, after the Claimant's claim was received on 23 November 2021 – this letter explained that, having considered the Claimant's pleaded claim, and in light of its grievance appeal outcome letter dated 29 October 2021, the Respondent had formed the view that the Claimant's claim had no reasonable prospect of success. In particular, the Respondent explained:

In respect of the Claimant's claim for unlawful deduction of wages, that it considered that this claim would fail on the basis that: (i) the Claimant, contrary to the Respondent's bereavement leave policy, did not "formally request or take any bereavement leave in order to support his family or to attend his mother's funeral"; and (ii) the Respondent had already made a discretionary payment of three days' bereavement leave to the Claimant when it was under no obligation to do so.

In her oral judgment dismissing the Claimant's claim, Employment Judge L Brown addressed these exact points, finding that: (i) the Claimant did not make a valid request for bereavement leave; and (ii) the Respondent had acted "generously" in making a discretionary payment of three days' bereavement leave to the Claimant.

In respect of the Claimant's claim for failure to make reasonable adjustments, that it considered that this claim would fail on the basis that:
(i) the Respondent had already paid the Claimant two-and-a-half months' additional company sick pay over and above his contractual entitlement; and
(ii) the Claimant's suggestion of discounting the days that he was absent from work shielding for the purposes of calculating his entitlement to company sick pay was not a reasonable adjustment (as per O'Hanlon v Commissioners for HM Revenue & Customs [2007] EWCA Civ 283; [2007] IRLR 404).

Again, in her oral judgment dismissing the Claimant's claim, Employment Judge L Brown addressed these exact points, finding that, in circumstances where the Respondent had already paid the Claimant over and above his contractual entitlement to company sick pay, if the Tribunal had decided to extend the Claimant's sick pay period again, it would have risked entering into the same 'wage fixing' warned against in O'Hanlon, and that it would not have helped the Claimant to return to work (and instead this was just a "financial issue" for the Claimant).

• On 6 June 2023, around three weeks before the final hearing in this matter – this letter explained that the Respondent's view remained that the Claimant's claim had no reasonable prospect of success, and that nothing had emerged through the disclosure process, and there was nothing in the Claimant's witness statement, that had persuaded the Respondent to change its view. The letter also explained that the Respondent was due to incur its Counsel's brief fee over the following two weeks, and therefore that this was, in effect, the final opportunity for the Claimant to withdraw his claim without risking costs consequences.

Both letters made clear that if the Claimant did not withdraw his claim and it was subsequently unsuccessful at the Employment Tribunal, then we would be advising our client to make an application for an Order that the Claimant paid the legal fees and other costs that our client had incurred (and would continue to incur) in defending the Claimant's claim.

The Claimant's representative did respond to our first letter on 28 January 2022, also on a without prejudice (save as to costs) basis, but did so in order to dismiss the points raised in our letter dated 7 January 2022 and to reject our offer of a 'drop hands' settlement. As noted above, Employment Judge L Brown ultimately agreed with our interpretation of what is, in our view, settled law in respect of these claims.
Copies of both of our letters are enclosed with this application, together with a copy of the response from the Claimant's representative dated 28 January 2022.

The Respondent avers, therefore, that, in light of clear correspondence outlining why the Claimant's claims would fail, and despite retaining the benefit of representation throughout these proceedings, in failing to withdraw his claim and continuing to pursue the proceedings against the Respondent, the Claimant has acted unreasonably.

Application for Costs
The Respondent further avers that the Claimant's unreasonable conduct has led to the Respondent incurring significant legal costs from 17 January 2022 onwards, this being the first working day after the deadline for the Claimant to respond to the Respondent's initial settlement offer (which was 14 January 2022).

These costs total £25,637.48, and they include costs in dealing with disclosure, preparation of the final hearing bundle, preparation of witness statements, and attendance at the final hearing from 26 to 28 June 2023 (including Counsel's costs).

The Respondent therefore requests that the Tribunal makes a costs award against the Claimant in the sum of £20,000, on a summary assessment basis, in accordance with Rule 76 of the ET Rules.

Application for Costs
The Respondent further avers that the Claimant's unreasonable conduct has led to the Respondent incurring significant legal costs from 17 January 2022 onwards, this being the first working day after the deadline for the Claimant to respond to the Respondent's initial settlement offer (which was 14 January 2022).

6. In response the Claimants Trade Union representatives made the following points:-

We object to the Respondent's application for a costs order under r.76(1)(a) and r.76(1)(b) of the Employment Tribunal Rules.

In their application dated 11 September 2023, the Respondent makes its application on the basis of either the Claimant acted unreasonably in bringing proceedings or that the claim had no reasonable prospect of success.

We do not intend to rehearse the facts of this case as set out in the panel's judgment but in summary the case arose against the unforeseen background of the Covid pandemic. The Claimant was immunocompromised, and it was accepted that he fell within the definition of someone who was clinically extremely vulnerable at that time. The government had advised such people to 'shield' which meant taking certain precautions to avoid the risk to their health including by not attending their workplace.

The Claimant's workplace remained open but in accordance with the guidance, he could not attend. The Respondent covered the absence by implementing the Company's sick pay provisions, although technically the Claimant was not 'sick', he was 'shielding'. It is accepted that the Respondent paid for a period in excess of the 67 days and so the whole period of 'shielding' was paid. However, shortly after the end of shielding, the Claimant had an operation related to his disability. For obvious reasons that could not have happened during his time shielding.

Medically, the Claimant required a further 17 days away from work post-operatively to recuperate and to avoid the risk of infection due to his heightened vulnerability. However, as the original limit of 67 days payable for sick leave in any one year had been exceeded by 'shielding' this meant that for his 17 days absence he received no pay. The situation had arisen not because he was sick but because he was following the government guidance as a disabled person. He felt that his treatment was different to that of colleagues who were not disabled and did not have to 'shield' and therefore he began proceedings against his employer.

Whilst the panel found that the pandemic did not give rise to 'exceptional' circumstances which was referred to in the authority of O'Hanlon, the Claimant reasonably believed that his circumstances were different to Mrs O'Hanlon who had been sick for the whole of her absence and wanted sick pay extended. We believe that it was reasonable for the Claimant to test the point in a tribunal.

Therefore, we ask the tribunal to find that the Claimant did not act unreasonably in bringing proceedings or that the claim had no reasonable prospect of success.

If the tribunal believes that the threshold of r.76(1)(a) or r.76(1)(b) is met for a costs order to be made, then the Claimant would ask the tribunal not to exercise its discretion to make a costs order.

The Claimant accepts that the Respondent sent two costs warning letters (7 January 2022 and 6 June 2023). A reply was provided to the first letter and was attached to the Respondent's costs application. As the contents of the reply remained valid in relation to the second letter, no response was provided to the second letter. As they are entitled to the Respondent was presenting a 'robust' defence to the claim by asking the Claimant to discontinue. The claim itself was for 17 days pay (£3774 gross) or in the alternative, 4 days pay (£880 gross) plus some injury to feelings (Schedule of Loss on p.54 of the bundle). The Claimant is a little surprised at the commercial wisdom of spending over £25,000 against such a small claim.

The Claimant continues in the Respondent 's employment. He continues to be disabled. He is a factory operative. We will be providing a Schedule of his earnings and assets. We suggest that his continued employment is a matter that the tribunal are entitled to consider which approaching the matter of discretion as it cannot be ruled out that he will need to ask for adjustments for his disability in the future and a costs order would make it less likely that he would feel able to approach his employer. Further, we suggest that the tribunal are able to consider his earnings against which costs of £25,000 is a very substantial sum. Whilst the terms of the Unions assistance mean that we indemnify him for costs, we are a non-profit organisation.

Finally, the Respondent has sent a breakdown of the costs charged. Whilst it is accepted that it difficult to compare costs of a solicitor firm with those recorded by a trade union the time costs for the case handler at the trade union were significantly lower, with most of the work done in house by a salaried employee. The costs schedule from the Respondent only records fees and not time, although that could be deduced from the amount each lawyer had charged. It appears that the time spent by the Respondent's solicitors was possibly excessive, although it is accepted they had conduct of putting together the bundle. Further, the Claimant's barrister (call 1988) charged £1700 plus VAT so there quite a disparity with Respondent's Counsels fees.

The Law

7. Rule 75 ET Rules provides:

> *(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.*

8. The power to make a costs order is in Rule 76 which provides:

> *(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;*

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

9. Rule 84 ET Rules provides:

> *"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".*

10. In *Gee –v- Shell UK Limited [2003] IRLR82* Sedley LJ said:

> *"It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to ordinary people without the need of lawyers and that in sharp distinction for ordinary litigation in the United Kingdom losing does not ordinarily mean paying the other side's costs".*

11. Costs orders are the exception rather than the rule in employment tribunal proceedings, but that does not mean that the facts of the case must be exceptional (*Power v Panasonic (UK) Ltd* UKEAT/0439/04).

12. Such awards can be made against unrepresented litigants, including where there is no deposit order in place or costs warning (*Vaughan v London Borough of Lewisham* UKEAT/0533/120).

13. In terms of abusive, disruptive or unreasonable conduct, "unreasonableness" bears its ordinary meaning and should not be taken to be equivalent of "vexatious" (*National Oilwell Varco UK Ltd v Van de Ruit* UKEAT/0006/14).

14. In *Millan v Capsticks Solicitors LLP & Others* UKEAT/0093/14/RN the then President of the EAT, Langstaff J, described the exercise to be undertaken by the Tribunal as a 3-stage exercise, which in essence is as follows:

    14.1 Has the putative paying party behaved in the manner proscribed by the rules?

    14.2 If so, it must then exercise its discretion as to whether it is appropriate to make a costs order, (it may take into account ability to pay in making that decision).

    14.3 If it decides that a costs order should be made, it must decide what amount should be paid or whether the matter should be referred for assessment, (again the Tribunal may consider the paying party's ability to pay).

15. In **Scott v Inland Revenue Commissioners 2004 ICR 1410, CA**: Lord Justice Sedley observed that 'misconceived' for the purposes of costs under the Tribunal Rules 2004 included 'having no reasonable prospect of success' and clarified that the key question in this regard is not whether a party thought he or she was in the right, but whether he or she had reasonable grounds for doing so. The Court of Appeal held that the employment tribunal's decision in this particular case not to award costs against S should be reconsidered, as it

was not clear that the tribunal had directed its attention to the questions of whether S's case was doomed to failure or, if it was, from what point.

Conclusions

16. There are three stages in determining whether or not to award costs under Rule 76 ET Rules; first, whether the party has reached the threshold of establishing that a party had acted vexatiously, abusively or disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; and that a claim had no reasonable prospects of success. Second, if the threshold has been reached, the tribunal will go on to consider whether it is appropriate to make an order for costs. Finally, if it is appropriate to make an order for costs, the tribunal will go on to consider the amount of such order.

Threshold - Are There Grounds for Making a Costs Order?

17. It is incumbent on the Tribunal to satisfy itself that the conditions in Rule 76(1) (a) and (b) apply before any order can be considered.

18. The Claimants conduct was impugned in relation to the assertion that it was unreasonable of him to bring the proceedings under Rule 76.1(a) in that it was said it fell into the category of whether or not, *' a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing or conducting of proceedings (or part thereof) — rule 76(1)(a)* and they also said that pursuant to rule 76(1)(b) that there were *'..no reasonable prospects of success..'*

19. We did not find that the Claimant *'acted… unreasonably in the bringing … of the proceedings,'* or that there were '… *No Reasonable Prospects of Success*.'

20. In the Respondents submissions they said in particular as follows:-

> *' **No Reasonable Prospect of Success / Unreasonable Conduct***
>
> *The Respondent has always maintained that the Claimant's claim had no reasonable prospect of success, and, accordingly, that it was entirely unreasonable for the Claimant to have continued to pursue his claim against the Respondent.*

21. In setting out their application in this way the same arguments then pursued were applied to both s.76(1) (a) and (b) by the Respondents.

22. We therefore asked ourselves was the bringing of these claims by reference to the alleged weakness in them all such so as to mean that the very bringing of the claims amounted to unreasonable conduct? In addition we asked ourselves at the same time, as the same question overlapped with the first question, whether the claims never had any reasonable prospect of success? In particular in accordance with the case of **Scott v Inland Revenue**

Commissioners, which although it preceded the 2013 Rules of Procedure still sets out the pertinent test in these types of costs applications which is were the claims brought by the Claimant always *'doomed to failure'* or did they become doomed to failure at some point in the case?

23. The Respondent averred that the claim failed for the very reasons they said it would fail, and they recited this Tribunals judgment setting out that their predictions of why it would fail were in effect the bedrock of our Judgment.

24. It is of course correct that the claim failed in part on the claim for a failure to make reasonable adjustments because of the leading case of *O'Hanlon v Commissioners for HM Revenue & Customs [2007] EWCA Civ 283; [2007] IRLR 404.*

25. However it cannot in our judgement have been a foregone conclusion that all the claims would fail. This was dependent on our findings of fact and the oral evidence we heard. None of the claims were doomed to failure at any point in the judgement of this Tribunal.

26. In relation to the unauthorized deduction from wages claim and in relation to the bereavement leave this rested on findings of fact that we made on the circumstances at the time that the bereavement leave was requested, and whether the three days they granted him were compliant with their policy. We had to interpret how the policy worked, which was a discretionary policy, and how it was applied in the circumstances of his particular bereavement leave that he requested while on unpaid sick leave. In particular we made a finding that the request for bereavement leave could not be made retrospectively, as occurred in this case, and that in order for it to be validly made it had to be made in advance.

27. We also, on the issue of limitation on this claim, had to decide if the exercise of discretion under this bereavement policy was exercised at the date the request was refused or was exercised at the date of the failure to pay him the bereavement pay. We found that in this case that time started to run when he was not paid in full for the bereavement leave he requested on the date payroll was run that month, and on the date he was in fact paid, and it was therefore brought in time.

28. Whilst the claim for payment for bereavement leave in full ultimately failed we did not find it was unreasonable of the Claimant to bring the claim. It was a very fact specific Judgment that we reached, and which also depended on our interpretation of the wording of the policy, and to some extent on the oral evidence we heard from the Respondents. We did not find that the Claimant acted unreasonably in bringing this claim nor did we find that it had no reasonable prospects of success from the outset to conclusion.

29. On the claim brought for the failure to make reasonable adjustments, by extending the company sick pay policy, we had to judge if such an adjustment contended for was reasonable. We found that he had already been given 67 days plus another two months sick pay when having an operation and recovering, plus another 14 days for shielding during Covid, and that the contention that it should be extended further was not a reasonable adjustment that the Respondents should have to make.

30. We also considered the argument that this use of company sick pay under the Respondent's policy occurred during the covid pandemic and the pandemic itself was an extraordinary event. In our judgement the Covid pandemic was an extraordinary event, but it was not in and of itself extraordinary for the claimant to have to shield and use up his company sick pay.

31. However we did not find it unreasonable for him to bring a claim that his time spent shielding should not be deducted from his company sick pay allowance by virtue of him being immunosuppressant. In particular reference had been made in submissions by the Claimant to the case of *G4S Cash Solutions (UK) Ltd v Powell [2016] IRLR 820* which involved an engineer who, following a back injury, was reassigned to a less well-paid role but with his pay preserved. After a year in the adjusted position the employer wanted to reduce his pay. Mr Powell succeeded before the EAT in contending that it was a reasonable adjustment to continue his pay protection. HHJ Richardson, considering the statutory guidance and the previous case law, held at para 44:

'I can see no reason in principle why section 20(3) should be read as excluding any requirement upon an employer to protect an employee's pay in conjunction with other measures to counter the employee's disadvantage through disability. The question will always be whether it is reasonable for the employer to have to take that step.'

32. This was a finely balanced decision in this case as there was at least some force in the argument that an unwell disabled claimant should not be required by its employer to use up their company sick leave entitlement when they were clinically vulnerable due to an unexpected event such as an pandemic and that the employer should have taken a further step of stripping out the shielding sick leave that the Claimant had been obliged to take when calculating his entitlement.

33. Ultimately we found that while the pandemic itself was extraordinary many clinically vulnerable employees had to shield and this fact of the Claimant having to shield and thus lose some company sick pay allowance was not of itself extraordinary. However this was not a forgone conclusion that the fact of the covid pandemic and him having to shield was not extraordinary. We spent some time deliberating over this and whether it was a reasonable adjustment that the Respondents should have made to extend his company sick pay further. It was not a claim that in our judgement should never had been brought,

and that was unreasonably brought, and we find that he was entitled to test this point in Tribunal.

34. We did not find that the Claimant acted unreasonably in bringing this claim nor did we find that it had no reasonable prospects of success from the outset to conclusion.

35. As to the claim for unfavorable treatment arising from disability we had to judge whether or not the detriment he complained of, i.e. losing his company sick pay due to having to shield, was something that could be justified as a proportionate means of achieving a legitimate aim by the Respondent. This was fact sensitive and depended on the evidence that was before us, i.e., what were the consequences of extending any company sick pay further for the Claimant, and how did the Respondents reach that decision? The outcome of this claim was also not a foregone conclusion. It depended on the oral evidence of the Respondents and the justification of the decisions taken.

36. We did not find that the Claimant acted unreasonably in bringing this claim nor did we find that it had no reasonable prospects of success from the outset to conclusion and in particular we found that at no time were the claims 'doomed to failure'.

37. We therefore find that under Rule 76.1 (a) and (b) the claims did have reasonable prospects of success from the outset to conclusion, and that the Claimant did not act unreasonably in the bringing of the proceedings, and that the threshold test was not reached for making a costs order under these two limbs.

38. The application for a costs order of £20,000.00 against the Claimant is therefore refused.

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Employment Judge L Brown
23 November 2024

Judgment sent to the parties on:
9/12/2024

For the Tribunal:
N Gotecha

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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