EMPLOYMENT TRIBUNALS

Claimant: MR MATTHEW JAMES PARKES

Respondent: CADBURY UK LIMITED

JUDGMENT AND REASONS (COSTS)

Heard at: Birmingham (on the papers) **On:** 28 February 2025

Before: Employment Judge N. Clarke
Mrs W. Ellis
Mrs L. Clark

JUDGMENT

1. The claim had no reasonable prospect of success, and the Claimant acted unreasonably in maintaining the proceedings after 20 August 2024.

2. The Claimant is ordered to pay the Respondent £5,000 in costs under Rule 74 within 8 weeks of receipt of this order.

REASONS

Introduction

3. We heard the Final Hearing in this case between 3 and 6 September 2024 and gave our decision with oral reasons, dismissing the claims.

4. The Respondent applied for costs by letter of 7 October 2024 and invited us to determine the application on the papers. The Claimant responded by email of 14 October 2024, objecting to the application but consenting to the matter being dealt with on the papers.
5. The parties were invited to provide any further written representations by 21 February 2025, which they both did.
6. We considered the parties' submissions in making our decision and had regard to documents from the Final Hearing bundle.

Background

7. Early Conciliation took place between 14 and 24 April 2023. The claim was presented on 24 May 2023.
8. The Agreed Issues were set out at Page 44 of the Final Hearing bundle and were, broadly:

    8.1 Time limits: whether claims were in time, whether there was conduct extending over a period and whether time should be extended.
    8.2 Direct Disability Discrimination, being by acts of Paul Golden ("PG") at the end of 2019, early 2020, February 2020 and June 2022.
    8.3 A failure to make reasonable adjustments claim in relation to shift patterns
    8.4 Harassment related to disability: by acts of Beverley Harrison-Barker ("BHB" in September/October 2019 and November 2021.

9. On 30 May 2024, the Claimant applied to add claims by way of amendment. That application was refused on 20 August 2024.
10. The Claimant withdrew the Reasonable Adjustments claim during the Final Hearing before us.

11. As to the other claims, we concluded:

11.1 In the Harassment claim

11.1.1 That, as a finding of fact, BHB had not told the Claimant not to reveal his HIV status because of the stigma attached and that this claim therefore failed.

11.1.2 That BHB had suggested to the Claimant that he ask first aiders to wear gloves in a light-hearted or jokey manner if the situation arose, but that this did not have the purpose or effect of violating his dignity and that it would not have been reasonable to have that effect.

11.1.3 That BHB had asked whether the Claimant could take his medication at a different time, but that it did not have the purpose or effect of violating the Claimant's dignity and it would not have been reasonable to have had that effect.

11.2 In the Direct Disability Discrimination claim

11.2.1 That the actual comparators relied on were not appropriate.

11.2.2 That the Claimant was not treated less favourably because of his disability using a hypothetical comparator.

11.2.3 That the Claimant had not satisfied the first limb of the burden of proof provisions, approaching the case on the *Bahl* basis.

11.2.4 In any event, none of the treatment complained of was done on the basis of the Claimant's disability.

11.3 On time jurisdiction

11.3.1 The claims were out of time.

11.3.2 The Claimant knew or ought to have known about the appropriate time limits for presenting claims in April 2020 or not 2022.

11.3.3 There was no good reason for the delay in presenting the claim.

11.3.4 There was no conduct extending over a period,

11.3.5 It was not just and equitable to extend time.

Costs application

12. The Respondent's application is made on the basis that the claim had no reasonable prospect of success and that the Claimant was unreasonable in bringing the proceedings (Rules 76(1)(a) and (b) of the 2013 Rules, and 74(2)(a) and (b) of the 2024 Rules).
13. The Respondent describes is "primary contention" as being the Claimant's "insistence on continuing with his claim even though it was brought to [his] explicit attention as early as 22 January 2022 via a cost warning letter .. that his claim had no reasonable prospect of success.
14. The Respondent argues:

    14.1 That it has always maintained that the Claimant's claim had no reasonable prospect of success.
    14.2 That it was unreasonable for the Claimant to have, accordingly, continued to pursue the claim, and
    14.3 That the Respondent drew this fact to the Claimant's attention in Without Prejudice correspondence.

15. The Claimant argues:

    15.1 That he did not act unreasonably, and his claims had a reasonable prospect of success.
    15.2 That offers of settlement were predicated on him leaving his employment, which he did not want to do.
    15.3 That disputed facts depended on oral evidence and cross-examination.
    15.4 It was not unreasonable for the Claimant to continue proceedings whilst his application to amend, which was not determined until 20 August 2024, was outstanding.
    15.5 It would not be constructive to the continuing relationship to make an award of costs.
    15.6 The Claimant genuinely believed he had been discriminated against.

15.7 That the quantum of costs claimed is excessive, and only costs after August 2024 should be considered, at most. In any event, costs should reflect the equity of the situation.

Law

16. Rule 74 provides:

> **74.— When a costs order or a preparation time order may or must be made**
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> …
>
> (2) The Tribunal must consider making a costs order or a preparation time order 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 of it, or the way that the proceedings, or part of it, have been conducted,
> (b) any claim, response or reply had no reasonable prospect of success, or

17. This creates a three-part test:

i) Consideration of whether the primary test is met,
ii) If it is, considering whether to exercise the discretion to make a costs order.
iii) If so, deciding on the amount of costs.

18. On the first stage:

18.1 The key question in "having no reasonable prospect of success" is not whether a party thought he or she was in the right, but whether he or she had reasonable grounds for doing so *Scott v Inland Revenue Commissioners* 2004 ICR 1410, CA

18.2 Costs are only awardable from the point at which the claim has no reasonable prospect of success, e.g. *Keighley v Age UK Leeds* EAT 0229/19

18.3 In *Radia v Jefferies International Ltd* UKEAT/0007/18, the court observed (in relation to the equivalent Rules at that time):

> At the first stage, accordingly, it is sufficient if either Rule 76(1)(a) (through at least one sub-route) or Rule 76(1)(b) is found to be fulfilled. 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.

19. On the second part:

19.1 Costs in the Employment Tribunal are still the exception and not the rule. In *Yerrakalva v Barnsley Metropolitan Borough Council and anor* 2012 ICR 420, CA*:*

> The ET's power to order costs is more sparingly exercised and is more circumscribed by the ET's rules than that of the ordinary courts. There the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the ET costs orders are the exception rather than the rule. In most cases the ET does not make any order for costs. If it does, it must act within rules that expressly confine the ET's power to specified circumstances, notably unreasonableness in the bringing or conduct of the proceedings. The ET manages, hears and decides the case and is normally the best judge of how to exercise its discretion.

19.2 Costs are compensatory and so it is necessary to examine what loss has been caused to the receiving party. Costs should be limited to those 'reasonably and necessarily incurred' (*Yerrakalva)*

19.3 Under Rule 82, the Tribunal may have regard to the paying party's ability to pay when deciding whether to make a costs order (and the amount).

19.4 In *Howman v Queen Elizabeth Hospital Kings Lynn* EAT 0509/12, it was noted that any tribunal when having regard to a party's ability to pay needs to balance that factor against the need to compensate the other party who has unreasonably been put to expense. The former does not necessarily trump the latter, but it may do so.

20. On the third part:

    20.1 Costs are compensatory not punitive.
    20.2 It is necessary to assess what loss has been caused by the receiving party and whether those costs have been reasonably and necessarily incurred.
    20.3 The paying party's ability to pay can be considered.

Conclusions

21. We have concluded that the Claimant's claim had no reasonable prospect of success by 20 August 2024, because:

    a) The claims were self-evidently brought out of time.
    b) The Claimant's explanation for the delay, expressed in his witness statement, was that he did not initially see he was being discriminate against "as it was only as a pattern emerged that I could see what was happening." We found that this explanation was not credible, and that he was not being candid because:
        i. He told his doctor he was being discriminated against at work in March 2020 (BP262, 267 and 271), and
        ii. He discussed discrimination, we concluded, with his Union Representative in April 2020.

    c) In any event, the Claimant accepted in evidence that he had researched his legal rights in 2022 and recalled mentioned of time limits at that time.
    d) There was no series of acts. In relation to the acts of PG, the last two acts were more than 2 years apart. The same applied to the acts of BHB.
    e) The Claimant withdrew the reasonable adjustments claim after giving evidence. We infer that it was withdrawn on the basis of facts that were or should have been known to the Claimant by, at the latest, January 2024, when he received a costs warning letter from the Respondent.

f) Although the Claimant made an application to amend to add an additional reasonable adjustments claim, that application was refused on 20 August 2024.
g) The Direct Disability Discrimination claim was conceptually flawed because the comparison (whether real or hypothetical) could never, realistically, have resulted in a successful claim.
h) On the harassment claims, we concluded that the treatment complained of did not have the actual effect required under the Equality Act 2010. The Claimant must have known this to be the case. Further, we concluded it would not have been reasonable to have that effect.

22. We have concluded that it was unreasonable for the Claimant to have maintained his claims after the dismissal of his amendment application on 20 August 2024, but not before, because:

a) Although the majority of his substantive claims were had no reasonable prospect of success, determination of whether the acts of alleged harassment had the **purpose** of violating the Claimant's dignity (etc.) was a matter that, arguably, would require evidence to be tested under cross-examination.
b) It was not unreasonable for the Claimant to entertain a scintilla of hope that the proposed reasonable adjustments claim in his amendment application of May 2024 might support a "conduct extending over a period argument", even though it was finely balanced at that stage.
c) Once the amendment application had been dismissed, all claims had no reasonable prospect of success and that should have been obvious to the Claimant.
d) The Respondent had set out the flaws in the Claimant's case in their detailed letter of 22 January 2024.
e) We accept that our findings largely mirror the points made in that letter.

23. We have concluded that we should exercise our discretion in making a costs order because:

a) For the reasons already outlined, the Claimant acted unreasonably in maintaining a claim with no reasonable prospect of success after 20 August 2024.
b) The consequent Final Hearing was unnecessary and took up valuable Tribunal time, in breach of the Claimant's obligation to assist the Tribunal in furthering the overriding objective in Rule 3.
c) The Final Hearing resulted in the Respondent incurring legal costs, as well as the time and inconvenience in requiring their witnesses to attend and give evience.
d) The Claimant had the benefit of legal advice.
e) The Respondent had sent the Claimant three costs warning letters.
f) The Claimant withdrew his Reasonable Adjustment claim during the Final Hearing.
g) Any damage to the ongoing relationship between the parties is caused, in our judgment, by the Claimant maintaining his claim. If, as the Claimant alleges, the Respondent's application for costs is not conducive to a healthy relationship, then that damage has already been done. It is not a factor, in our judgment, that mitigates against making an order.

24. We have concluded that the appropriate quantum of costs is £5000. To that end we have considered:

a) That we are considering costs incurred only after 20 August 2024.
b) That the Respondent's schedule does not provide a breakdown that would allow for a detailed analysis of costs from that date.
c) Nevertheless, those costs certainly include Counsel's fee for the final hearing, being £6,800. The true cost would exceed that sum.
d) The Claimant has had ample opportunity to provide evidence about his ability to pay, but has not done so. We know that he earned £3,000 per month from his employment with the Respondent. That is the only information available to us.

e) £5,000 is less than the actual cost to the Respondent but balances the information we have about the Claimant's means.

EJ N. Clarke
28 February 2025