EMPLOYMENT TRIBUNALS

Claimant : Miss I. Faisal
Respondent : London Borough of Camden

Employment Judge Goodman
14 February 2017

COSTS JUDGMENT

On reading representations from the parties:

The Respondent's application for the Claimant to pay the costs of the proceeding does not succeed.

REASONS

1. On 13 May 2016 the claimant brought complaints of disability discrimination. At a preliminary hearing on 15 July 2016, the claimant was ordered to provide further particulars to clarify whether the claim was for direct discrimination, discrimination arising from the disability, a failure to make reasonable adjustments for disability, harassment related to disability, indirect discrimination, and victimization, and give details of the discriminatory acts. Subsequently she did so, in 63 pages with 536 additional documents.

2. It was disputed by the respondent that the claimant was disabled within the meaning of the Equality Act 2010, so at the case management hearing it was directed that the disability issue should be decided at an open preliminary hearing. That took place on 5 October 2016.

3. In a reserved judgement sent to the parties on 7 November 2016, the disability discrimination claim was dismissed because the claimant was not disabled. In effect that was the end of the proceedings.

Application and Reply

4. The respondent applied by letter of 2 December 2016 for an order for costs in the sum of £9,684. It was argued that the claimant should have realised that she had no reasonable prospect of success in establishing she was a disabled person. Nor, it was argued, did it have a reasonable prospect of success as it was out of time, even though that contention had not yet been decided.

5. It was further argued that her conduct had been unreasonable, in that the further information was excessive, the medical records produced piecemeal and late, the claimant had had access to trade union advice, and had been urged at the preliminary hearing to seek legal advice, but had not done so, and the respondent is a public authority with a limited budget.

6. The claimant replied on 13 January 2017. She said that she had grounds to believe from the occupational health reports and her own doctor that she had a repetitive strain injury that was a disability. She alluded to her evidence, and disputed some of the findings of fact. She said she had been tired when she answered questions about alternative treatments. She blamed the medical practice for delays, and pointed out that the Tribunal had later had to issue an order for disclosure of the records by the practice. The further particulars had been prepared as ordered. It was difficult to get legal advice, she had untrained help from her local union representative. The conduct of the proceedings had not been unreasonable. She also had limited ability to pay, and produced a list of her outgoings, asserting she had no savings. She also said that in discussion with her employer about the way forward after the hearing it had been asserted that if she did not appeal the decision, the respondent would not pursue the order for costs.

7. The claimant provided a further representation, pointing out that the disability issue was decided on the balance of probability, and the fact that she lost did not mean that the claim that she was disabled had no reasonable prospect of success. On the time point, she said that had been reserved to a final hearing, so plainly was not hopeless. On ability to pay, she added that the cost of living was set to rise as Britain exited the European Union.

8. Both parties have confirmed that they wish the application to be decided in their absence, on the basis of the written representations. The respondent has not answered the Claimant's representations.

Relevant Law

9. Rule 76(1) of the Employment Tribunal Rules of Procedure 2013 provides that a Tribunal:

> "may make a costs order, and shall consider whether to do so where it considers that - (a) a party has acted vexatiously, abusively, disruptively otherwise unreasonably in …the way the proceedings have been conducted; or (b) the claim or response had no reasonable prospect of success".

10. Rule 84 provides that when 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.

Discussion

11. I consider first whether the claim had no reasonable prospect of success. The findings of fact following the hearing on 5 October 2016 show that the claimant had a considerable history of visits to her doctor complaining of pain. The diagnosis of right-sided arm pain, with pain in other parts of the of body, is last mentioned in October 2013. From then on the notes record considerable signs of stress related to conflict at work. There were late many consultations about other physical symptoms, but not an upper limb disorder.

12. Plainly she had a history of poor health. It is conceivable that the claimant genuinely believed that she had a substantial and long-term repetitive strain disorder of the upper limb. This was belied, as found, by close examination of her general practice and hospital records, but without advice she may not have appreciated the difficulties of the history, and in any case it took some time for all the records to reach her.

13. Further, it was held that any impairment was not substantial. This too may not have been apparent to an inexperienced person.

14. The disability issue was decided against her, but it was not without foundation in fact, and cannot be said to have been clearly hopeless. She did not, it seems, have legal advice, but low cost or free advice is now very hard to obtain. The claimant's means – an income of £1,873 per month, of which a third is spent on housing costs– means she will have had difficulty obtaining advice. I conclude that on the facts known to the claimant she had some prospect of success in establishing she was a disabled person. It cannot be said she had no reasonable prospect.

15. The respondent, when it saw the further particulars, raised the issue that even the last act identified as discriminatory was out of time. The Tribunal would therefore have had to exercise discretion on whether to extend time. This exercise has not been carried out because the claim failed on the preliminary issue. Without knowing why the claim was late or by how long it is hard to assess how likely the claimant is to have succeeded, and so it is not clear that this ground adds much to the question of prospects of success.

16. There is no presumption that time will be extended, and it will have been for the claimant to show that it should. In her letters about costs she says the judge at the case management hearing said a fact sensitive matter should be left to a full Tribunal hearing evidence. The fact that her subsequently filed schedule revealed that all acts alleged were out of time meant that it could in fact be decided at a preliminary hearing, and that would have been done, had her claim not been unsuccessful on disability. Nevertheless, there is too little material to say that this adds or detracts much to or from the claimant's reasonable prospects of success. A Tribunal may have decided, that with so much evidence collected in writing during internal processes, it was just to extend time.

17. I turn to consider whether the proceedings were conducted unreasonably.

17.1 The further particulars are very long, more in the nature of a witness statement, but that is not untypical of a litigant in person (and even some solicitors). An experienced solicitor will have been able to pick out matters relevant to the disability issue. The prolixity will have added to the time spent on the case, but cannot be said to be unreasonable conduct.

17.2 The claimant seems to have been reasonably prompt in seeking her records and in chasing them up. The documents disclosed to her initially were incomplete but there appear to be no grounds for thinking this was her fault. Some medical practices are not very clear on their obligations under the Data Protection Act. The detail provided to the Tribunal at the time resulted in a letter being sent by the

Tribunal indicating that an order for their production by a non-party would be made when details were given of who should be named on the order. This letter seems to have resulted in further disclosure by the practice. Of course this was frustrating for the respondent and made more work, but there is no ground for thinking that this was because of lack of cooperation or otherwise unreasonable conduct by the claimant.

17.3 The claimant had some assistance from a lay union representative. In view of her financial circumstances it cannot be unreasonable conduct not to have full legal representation. The advice at the case management hearing to seek advice was probably directed to getting advice on which sections of the Equality Act she pursued, which was done.

18. I conclude that the proceedings were not pursued by the claimant unreasonably.

19. The costs rules in Tribunals are clear that an order cannot be made just because the claimant lost – there must be additional grounds. I conclude that the respondent has not established that this threshold was reached, though not without some sympathy for their exasperation at the additional work required by the further particulars and the struggle to see the medical records. With the benefit of hindsight the claimant's difficulties on the facts are made clear, but prospectively she did not pursue a hopeless claim, at least, not so hopeless as to justify an order for costs, and I have concluded that she took reasonable steps to prepare and disclose material.

20. I have not taken into account the claimant's assertion of a contractual bargain precluding this application. Privilege and the respondent's account aside, it is not necessary to do so given the decision on other grounds.

21. As for the Respondent being a public body, that may have been relevant in deciding whether to make an order if the threshold grounds were made out, but they were not, and there is no rule 84 for the receiving party.

22. In conclusion, there is no order on the Respondent's application.

Employment Judge Goodman
14 February 2017