



EMPLOYMENT TRIBUNALS

Claimant: Ms A Agbelie

Respondent: HSBC Global Services (UK) Limited

Heard at: East London Hearing Centre

On: 9 and 10 November 2021

Before: Employment Judge Scott
Members: Ms M Daniels
Ms S Jeary

Representation:

For the Claimant: Mr Rahmin (Counsel)

For the Respondent: Ms Masters (Counsel)

RESERVED COSTS JUDGMENT

The Respondent's application for an Order for Costs against the Claimant is well founded and succeeds. The claimant is ordered to pay the respondent the sum of £17,856.00 in respect of costs.

REASONS

1. The Respondent's counsel applied for costs pursuant to ET Rules 75(1) and 76(1)(a) of the Employment Tribunals (Constitution & Rules of Procedure) Regs 2013 (ET rules).

The Issues

2. The issues which need to be determined are:

- 1.1. Did the claimant's conduct amount to acting unreasonably (within rule 76(1)(a) of the Employment Tribunal Rules of Procedure 2013 ("ET Rules"))? If, so,
- 1.2. Should, in the Tribunal's discretion, a costs order be made?
- 1.3. If so, how much should be awarded?

The Law

3. Costs orders and preparation time orders:

75(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

....

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

76(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; or

....

The amount of a costs order

78(1) A costs order may -

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993(23), or by an Employment Judge applying the same principles;

...

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

Ability to pay

84 - *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.*

4. As made clear by Choudhury P in *Mr V Mihailescu v Better Lives (UK) Limited t/a Bluebird Care* (UKEAT/0184/19), the structure of these provisions dictates a three-stage approach. The Tribunal must first consider the threshold question of whether any of the circumstances identified in rule 76(1) applies and, if so, it must then consider separately, as a matter of discretion, whether to make an award of costs. If it is decided that an award of costs should be made, the final stage is to decide what amount of costs to award.
5. The Tribunal has therefore considered the following issues:
 - 5.1 Has the claimant behaved in the manner proscribed by the rules?
 - 5.2 If so, we must then decide whether or not it is appropriate to make a costs order, (we may take into account ability to pay in making that decision).
 - 5.3 If we decide that a costs order should be made, we must decide what amount should be paid or whether the matter should be referred for assessment, (again the Tribunal may take into account the paying party's ability to pay).

Decision

6. The award of costs is intended to be compensatory and not punitive. 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, in this case, whether there has been unreasonable conduct by the claimant in conducting the case and in doing so, to identify the conduct, what was unreasonable about it and what effects it had (*Barnsley MBC v Yerrakelva* 2012 IRLR 78 CA). In *Gee v Shell UK Limited* [2003] IRLR 82, the Court of Appeal confirmed that it is a fundamental principle that costs are the exception rather than the rule and that costs do not follow the event in Employment Tribunals.
7. We do not repeat here the reasons for granting the claimant's amendment application which were provided in an ex-tempore judgment on 10 November 2021. It was accepted by all parties that the final merits hearing which the respondent had prepared for could not proceed. The Respondent had prepared for a hearing on the basis that the claimant was relying upon a perceived disability. The amendment results in the claimant's case reverting to that of actual disability. The amendment means that whether or not the claimant is disabled is in issue again, the respondent's witness statements will need to be amended and additional witnesses engaged, the Bundles will need to be amended and the matter needs to be listed for longer than the 4 days allocated.
8. The claimant was on notice that the respondent would make a costs application if the claimant's amendment application, made on Day 1 of the Full Merits Hearing, was granted. It was and the respondent has accordingly made a costs application.
9. The application is made on the ground that the Claimant's conduct of the proceedings from and including the readiness hearing on 12 October 2021 has been unreasonable.

10. We do not accept Ms Masters' submission that the claimant's conduct in respect of the Readiness Hearing was unreasonable. The claimant was not represented at that hearing. Justice requires that tribunals do not apply professional standards to lay people. This is not to say that lay people are immune from orders for costs, but proper allowance must be made. The claimant told Judge O'Brien that the impairment of low cognitive function did not have an adverse effect on her day-to-day activities because she understood that if she was relying upon an actual disability and the impact on her day-to-day activities, she would not be able to perform her role/work. On that basis, the claimant says that she agreed at the readiness hearing that she was relying upon discrimination based on perceived disability. Given the claimant's alleged disability and the fact that she was not represented at the readiness hearing, we do not think that her conduct in respect of the readiness hearing was unreasonable.
11. The Readiness Hearing was on 12 October 2021. Judge O'Brien's note of the hearing was sent to the parties on Friday 22 October 2021. The Claimant instructed a solicitor on the Monday 25 October. By now the claimant had Judge O'Brien's note of the Readiness Hearing. By now she knew that her case was proceeding on the basis of discrimination based on perceived disability. The Claimant's solicitor wrote to the Respondent on the Friday 29 October seeking consent to amend (the amendments sought were not particularised). That was resisted by the Respondent who also gave a cost warning. The Claimant's solicitor replied that they understood that the Respondent was not willing to compromise on amendment and would explore other options. The Claimant's solicitor requested a postponement on the 30 October but there was still no application to amend at that stage. The application to postpone was refused by Judge Burgher. At no time before Day 1 of the final merits hearing (FMH) was an application to amend made or particularised. By Day 1, the requested amendments were still not particularised. In respect of issue 5.1 we accept Ms Masters' submissions and conclude that the Claimant has acted contrary to rule 76(1)(a) of the ET Rules for costs to be engaged. It was unreasonable not to make an application to amend to the Tribunal once the claimant was aware that the respondent would not consent to an amendment. We therefore think that costs are appropriate from 1 November 2021 (i.e., the next working day after the respondent told the claimant's solicitor that it resisted amendment). At no stage before Day 1 of the FMH did the claimant make an application to amend. In our view, this is an unreasonable way to conduct litigation. We think that the Claimant acted unreasonably in failing to make a prompt application. The work completed by the respondent's solicitors from 1 November 2021 was carried out in preparation for a 4-day FMH, including amending (and exchanging) witness statements, additional disclosure, reviewing and amending bundles, pre-trial conference with counsel and reviewing the claimant's witness statement. Counsel's Brief fee was also incurred (which included advising in conference on 4 November 2021) and the respondent's solicitor attended the Tribunal.
12. In respect of issue 5.2, when considering whether to exercise our discretion to award costs we have taken into account that the Claimant has not worked since she was dismissed by the respondent and that she is of limited means but we balance this against our conclusions that the Claimant has acted in a manner prescribed by the rules by acting in an unreasonable manner and that she was made aware of the potential cost consequences of the application to amend. We conclude that it is appropriate to exercise our discretion to award costs.

13. When considering the amount of costs (5.3), Ms Masters did not seek detailed assessment. We concluded that it was appropriate to exercise our discretion for summary assessment. The assignment of a further hearing before a Cost Judge was not, we thought, in accordance with the overriding objective of saving further expense, both for the respondent and in term of public funds.
14. We have taken the claimant's means into account when assessing costs. The claimant has not worked since she was dismissed. She has applied for jobs in line with her previous role and earnings (~£80,000). She owns a house worth £450,000, with a mortgage of £380,000, including £20,000 arrears. She has no savings and is £20,000 in arrears on her mortgage. She was receiving Universal Credit benefit of £411 pcm, which should be paid again when she attends a face-to-face meeting. Her outgoings were said to be £360pcm plus £1855 mortgage payments pcm (which the claimant is not paying at present). She received a redundancy payment of just short of £18,000 when she was dismissed. The claimant used that money to pay her mortgage.
15. Ms Masters referred the Tribunal to *Vaughan v London Borough of Lewisham* (UKEAT/0533/12). The Tribunal's task is to assess the costs claimed by the respondent. This is a summary, and not a detailed assessment. As such, the Tribunal takes broad brush approach. As observed in *Mr S Ayoola v St Christopher's Fellowship* UKEAT/0508/13/BA by HHJ Eady QC (para. 51) no particular procedure is laid down by the Tribunal rules for a summary assessment of costs, but the discretion as to the amount must be exercised judicially.
16. The Tribunal has considered the sums claimed in the Schedule provided by the respondent, as it is must, to see if they are reasonable, in terms of the work done and grade of fee earner involved, and proportionate. The respondent's solicitors are based in Scotland. In assessing the reasonableness of the rates claimed, the Tribunal had regard to the Guideline Hourly Rate last updated October 2021 for England & Wales. There are no guideline rates for Scotland. We therefore compared the respondent's rates with the guideline rates for Newcastle, which is National Band 1 in the Guidelines. The current relevant guideline bands for each Grade are Grade A £261, Grade B £218, Grade C £178.00 Grade D £126.00. Mr Leon charges out at £230.00 per hour and that is within the guideline rates for Band 1 in E&W. We think it is reasonable for a fee earner of Mr Leon's seniority to be the main fee earner in this matter, given the nature of the claimant's claim and the importance of the case to the respondent. Mr McKay charges out at £275 per hour, which is above the guideline rate (£261.00). Mr McKay has charged for 1.2 hours, which does not seem unreasonable for the Partner with oversight of the matter. Ms Rankin charges out at £200 per hour. That is higher than the guideline for solicitors with less than 4 years' experience (£178.00). We note, however, in relation to Mr McKay's and Ms Rankin's hourly rates that the respondent is a national company. We do not think that it would have been unreasonable for the respondent to have therefore instructed London solicitors (the claimant worked in London), whose guideline hourly rates would be well in excess of those of the respondent's solicitors. Ms McGowan's & Mr Wiktorsson's hourly rates (£95.00) are below the guideline E&W rate of £126 per hour. In all the circumstances we conclude the respondent's rates are reasonable and we therefore assess the costs on the basis of the rates claimed.

17. As to the work completed and the total number of hours incurred by the respondent's solicitors, we conclude that they are not unreasonable, unnecessary, or disproportionate. We do not accept Mr Rahmin's submission that the solicitors' costs should be discounted because the work carried out by the respondent's solicitors 'in the background is not a total waste'. We conclude that the costs incurred between 1 to 5 November 2021 have been thrown away because that final preparatory work for trial will have to be completed again in 18 months' time in respect of the claimant's revised case. The claimant's case is now different to the case that the respondent was preparing for in the relevant period. The same personnel may not be working at the respondent's solicitors in 18 months' time. Revised witness statements and bundles will need to be prepared and documents will need to be printed again. There will be communications with the client, witnesses and with counsel and counsel's clerk again in the lead up to the FMH in May 2023. The pre-trial conference with counsel will have to take place again. We discount £38.00 on 2.11.21 in respect of Readiness Hearing queries raised by the respondent. Solicitors' costs for the relevant period in the final preparatory stages were £6356.00 (see the summary of costs schedule below). We add Mr Leon's Tribunal attendance fee of £1500, which Mr Rahmin accepted was reasonable. We add counsel's fees of £10,000. The respondent will incur another Brief Fee in 2023. Mr Rahmin submitted that a brief fee of £8,000 is unreasonable. We disagree. We do not consider that a brief fee of £8,000 plus £2000 daily refresher is unreasonable in a case of this nature. That gives a total of £17,856.00.
18. We take into account that the claimant has little income at present and her mortgage arrears are increasing. But we also consider that she currently has ~70k equity in her house, has an outstanding claim to be determined by the Tribunal and she has, in our view, a reasonable prospect of being able to return to well-paid employment. We think that there is a realistic prospect that the claimant will in the future be able to afford to pay this amount from earnings. This costs order will, if relevant, have to be enforced through the County Court, which will also take into account the claimant's means in deciding whether to require payment by instalments, and if so in what amount. We therefore order the claimant to pay £17,856.00 as a contribution to the respondent's costs. Such costs as assessed were reasonably and necessarily incurred in the period leading up to the FMH.

**Employment Judge Scott
Date: 9 December 2021**

Costs Schedule (we do not repeat the items in respect of each cost claimed)

1.11.21 £	40.00	
	300.00	
	40.00	
	207.00	
	9.50	
	38.00	sub-total 625.00
2.11.21 £	114.00	
	138.00	
	47.50	sub-total 299.50
3.11.21 £	220.00	
	165.00	
	400.00	
	80.00	
	920.00	
	38.00	
	66.50	
	57.00	
	40.00	
	60.00	sub-total 2016.50
4.11.21 £	300.00	
	1,610.00	
	19.00	
	400.00	
	140.00	sub-total 2469.00
5.11.21 £	110.00	
	380.00	
	100.00	
	40.00	
	40.00	
	160.00	
	40.00	
	76.00	sub-total 946.00
		TOTAL £6356.00