



EMPLOYMENT TRIBUNALS

Claimant: Ms J Harrington

Respondent: Keoghs LLP

Heard at: Liverpool

On: 15 March 2024
(in Chambers)

Before: Employment Judge Ainscough

Representation

Claimant: Not in attendance

Respondent: Not in attendance

JUDGMENT ON COSTS

The judgment of the Tribunal is that the respondent's application for costs is unsuccessful.

REASONS

Introduction

1. Following a case management preliminary hearing on 14 November 2023, the respondent made an application for costs in accordance with rule 77 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. I agreed to deal with the application without a hearing following receipt of the written application from the respondent on 27 November 2023 and a written response from the claimant on 12 January 2024.

Case Management Preliminary Hearing 14 November 2023

2. The case management preliminary hearing was listed to deal with the claimant's application to include "without prejudice" correspondence in the final hearing bundle.

3. I determined that the "without prejudice" correspondence should not be included in the final hearing bundle because the "without prejudice" label had been correctly applied to that correspondence and there was no unambiguous impropriety by the respondent.

4. I provided my decision in an ex tempore Judgment on 14 November 2023 and a record of the preliminary hearing was sent to the parties on 12 December 2023.

Respondent's Application

5. On 27 November 2023 the respondent made an application in writing for costs of the case management preliminary hearing on the basis that:

- (1) the claimant, and/or her representative, had acted vexatiously, abusively, disruptively or otherwise unreasonably in the conduct of that part of the proceedings; and
- (2) the claim had no reasonable prospect of success,

in accordance with rule 76(1)(a) and (b) respectively.

6. The respondent contended that the claimant's application to rely on the "without prejudice" correspondence had no reasonable prospect of success. Further, the respondent contended that the claimant and her representatives had acted unreasonably in the preparation of the List of Issues prior to the case management preliminary hearing such that they had not properly prepared for the case management preliminary hearing and the List of Issues could not be finalised at that hearing.

Claimant's Response

7. The claimant contended that it was not possible for the respondent to assert that the claim had no reasonable prospect of success. The case of **Warburton v The Chief Constable of Northamptonshire Police [2022]** determined that the ground of "no reasonable prospect of success" could not apply to an application made during the course of proceedings.

8. In the alternative, the claimant disputed that she had acted unreasonably in making the application for the inclusion of the "without prejudice" correspondence. It was the claimant's submission that her position was arguable.

9. The claimant contended that there was a disagreement over which version of the List of Issues would be used by the parties prior to the case management preliminary hearing – that prepared by the respondent's representative or that prepared by the claimant's representative.

10. The claimant submitted that it was correct to use the List of Issues prepared by the claimant's representative because it included the issues that had arisen as a result of the claimant's further and better particulars, whereas the respondent's List of Issues did not.

11. The claimant submitted that in any event the respondent agreed to use the claimant's version, and that version was subsequently agreed following the case management preliminary hearing. The claimant denies that either her or her representatives acted unreasonably.

Relevant Legal Principles

12. Rule 76(1) states:

- (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
 - (b) any claim or response had no reasonable prospect of success.
 - (c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

13. Rule 77 states:

“A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.”

14. In **Meadowstone (Derbyshire) Ltd v Kirk and another EAT 0529/05 (2005)** the Employment Appeals Tribunal concluded that the respondent knew the defence was unmeritorious and untrue and therefore had no reasonable prospect of success and upheld the costs award.

15. In **Yerrakalva v Barnsley Metropolitan Borough Council and another 2012 ICR 420, CA** the Court of Appeal reiterated that costs in the Employment Tribunal are the exception rather than the rule.

16. In **Lodwick v Southwark London Borough Council 2004 ICR 884, CA**, the Court of Appeal determined that at both stages of the Tribunal’s discretion to make a costs award, the fundamental principle that costs awards are compensatory not punitive, must be observed.

Discussion and Conclusions

Did ground 76(1)(b) apply in this case?

17. In the case of **Warburton v The Chief Constable of Northamptonshire Police [2022]** the Employment Appeal Tribunal confirmed that this ground only applies to submissions that either the claim itself or the response has no reasonable prospect of success and does not apply to an application within the proceedings. Therefore, I have not considered this ground further.

Ground 76(1)(a) – Did the claimant and/or her representatives conduct themselves unreasonably?

18. I accept the claimant’s submissions that the List of Issues prepared by the claimant and her representative which differed to that prepared by the respondent’s representative was because of the claimant’s preparation of the

further and better particulars. The List of Issues had to include the issues that had arisen as a result of the further and better particulars.

19. Disagreement between the parties as to how the issues should be presented is to be expected during the course of litigation. The claimant's representative did not object to the respondent's representative making amendments to the claimant's list of issues. The position taken by the claimant and her representative cannot be said to be vexatious or to prevent the resolution of the matter.

20. Therefore, I determine that the claimant and/or her representative did not act unreasonably in seeking to rely on the claimant's version.

21. I have not determined that any of the grounds in rule 76 are made out and I have not therefore gone on to consider whether a costs order should be made.

22. The respondent's application for a costs order is refused.

Employment Judge Ainscough

Date: 8 May 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON

17 May 2024

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