



EMPLOYMENT TRIBUNALS

Claimant: Ms A Nkemnacho
Respondent: L & Q Living Limited

Heard at: East London Hearing Centre

On: 15 December 2020

Before: Employment Judge Burgher
Members: Mr M Rowe
Mr P Quinn

Appearances

For the Claimant: No attendance or representations
For the Respondent: Written application

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V, hybrid CVP hearing. It was determined that the relevant matters could be properly determined in a hybrid hearing.

COSTS JUDGMENT

1 The Claimant is ordered to pay the Respondent the sum of £250 in respect of its costs.

REASONS

1 The Respondent made its written application on two grounds. First that the Claimant's conduct in the proceedings has been vexatious disruptive and all unreasonable 76(1)(a) of the ET rules. Second, that the Claimant has failed to comply with Tribunal orders causing unnecessary expense. The Claimant was provided with an opportunity to respond to the costs application but did not do so.

2 The application was made on the basis that the Claimant has acted unreasonably in both her conduct of these proceedings and in bringing and pursuing a poorly pleaded claim with no reasonable prospect of success. The Respondent submitted that the Claimant's claims for direct race discrimination and harassment relating to race remained unclear even throughout her oral evidence and that her case repeatedly changed regarding the essential detail. The Tribunal recorded at paragraph 12 of the liability judgment that many of the additional matters that the Claimant raised in her oral evidence were not issues before it. The Tribunal had found that the Claimant's evidence to be confused and unfocussed, unreliable and inconsistent in many respects. It concluded that she generally "avoided questions" and held that it did not "accept [her] evidence" (paragraphs 11 and 24).

3 Allegations of smelly food were at the heart of the Claimant's claims. In its judgment, the tribunal found that the Claimant's repeated allegation that a number of different people made comments that "African food stinks" did not occur. We held that the Claimant's opinions and beliefs regarding her discriminatory treatment had very little objective evidential support and that it was not reasonable to perceive any comment about smelly food to be related to race.

4 In respect of the Claimant's conduct prior to the final hearing, she failed to comply with disclosure; she failed to provide a schedule of loss as directed; and she failed to comply with the exchange of witness statements. The Claimant failed to engage with the Respondent despite them explaining to her the necessity for a witness statement. An unless order was sought by the Respondent on 22 January 2020 and following this application and further correspondence, the Claimant eventually complied.

5 The Respondent sought costs of £16,530.75 comprises the sum of both Counsel's fees (£4,943.75) and costs incurred by the Respondent since the costs warning letter to the Claimant dated 4 February 2020 (£11,587).

6 The Respondent also asserted that the unreasonable conduct has caused additional unnecessary costs to be incurred by the Respondent (£1,042.10 excluding VAT from 23 January to 10 February) by reason of time spent corresponding with both the Claimant and the Tribunal.

7 The Respondent sent the Claimant cost warnings letters on 9 October 2019 and 4 February 2020 which detailed the law and how the Respondent contended that the Claimant's case had no reasonable prospects of success. The Claimant was advised to take legal advice.

Law

8 Rules 76 and 78 of the 2013 Employment Tribunal rules state:

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

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

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—

(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and

(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

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;

(c)order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;

(d)order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or

(e)if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

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

9 The Tribunal also has regard to the structured approach set out in the case of Millan v Capsticks Solicitors LLP & Others UKEAT/0093/14/RN where the then President of the EAT, Langstaff J, described the exercise to be undertaken by the Tribunal as a 3 stage exercise at paragraphs 52:

There are thus three stages to the process of determining upon a costs order in a particular amount. First, the tribunal must be of the opinion that the paying party has behaved in a manner referred to in Rule 40(3); but if of that opinion, does not have to make a costs order. It has still to decide whether, as a second stage, it is “appropriate” to do so. In reaching that decision it may take account of the ability of the paying party to pay. Having decided that there should be a costs order in some amount, the third stage is to determine what that amount should be. Here, covered by Rule 41, the tribunal has the option of ordering the paying party to pay an amount to be determined by way of detailed assessment in a county court.

10 The Tribunal therefore considered the following issues:

1. Has the putative paying party behaved in the manner proscribed by the rules?
2. If so, it must then exercise its discretion as to whether or not it is appropriate to make a costs order, (it may take into account ability to pay in making that decision).

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 take into account the paying party's ability to pay).

11 We concluded that the Claimant had acting unreasonably in the conduct of the proceedings and that her case had no reasonable prospects of success. The triggers to award costs have therefore been met.

12 When considering whether to exercise our discretion to award costs we did not consider it was appropriate to do so in respect of her case having no reasonable prospects of success. The Claimant's case was confused and ill thought out but she was not sophisticated and was entitled to have her contentions resolved.

13 We take a different view in respect to the Claimant's conduct in the litigation. The Respondent was put to greater expense by not following Tribunal orders.

14 The Tribunal therefore concluded that it was appropriate to exercise our discretion to award costs. The Tribunal considered the cost schedule provided by the respondent and determined that £650 pounds was attributable to the Claimant's default. We did not have any representations from the Claimant regarding her means. The Claimant was employed in an agency role before her dismissal earning £13,600 per year and she stated that her net weekly salary was £251.00 per week.

15 Given the limited information that we had we concluded that a cost award of £250 was appropriate. The Claimant is therefore ordered to pay the Respondent £250 in respect of its costs.

Employment Judge Burgher
Date: 4 January 2021