



EMPLOYMENT TRIBUNALS

Claimant: Shafia Saeed

Respondent: Reed Specialist Recruitment Limited

JUDGMENT

1. The name of the respondent is amended to 'Reed Specialist Recruitment Limited'
2. The respondent's application for costs succeeds in the sum of £500.

REASONS

The application

1. In emails dated 19 July 2022 and 5 August 2022, the respondent set out its application for costs pursuant to rules 76(1)(a) and (b) of the ET Rules of Procedure 2013. In summary, the respondent contends that the claimant's claims had no reasonable prospect of success when commenced, that she acted unreasonably in bringing and conducting the proceedings including because she failed to actively pursue her claims. The respondent sought £500 plus VAT in respect of counsel's fees for attending a hearing on 11 July 2022.
2. The respondent confirmed it was agreeable to the matter being dealt with without a hearing. The claimant did not respond to the respondent's application, nor did she respond to correspondence sent to her by the Tribunal dated 17 August 2022 seeking her comments on the respondent's application.

Facts

3. The claimant was engaged by the respondent as a PPI case handler between 1 October 2018 and 16 October 2018. She commenced early conciliation on 25 February 2022 and concluded on 28 February 2022.

4. On 9 March 2022 she presented her claim to the Tribunal.
5. The claimant complained of race and religion or belief discrimination as well as claiming arrears of pay. She stated that when engaged with the respondent, she earned £110 per day gross. The claim form and appendices contained lengthy and detailed narrative and attached screenshots of email exchanges about the apparent dispute as to pay between the claimant and the respondent that took place in 2018, 2019 and, it appears, continuing in January 2020. On the face of those documents, it appears that the claimant was in possession of all the facts that formed the basis of her complaints at the relevant times. The claimant recognised that her claim should have been submitted 'well before', adding that she was reluctant to bring proceedings sooner.
6. On 23 March 2022, the Tribunal sent to the parties a Notice of Hearing for a telephone case management hearing that was to take place on 24 May 2022.
7. The respondent submitted a 'holding response' on 20 April 2022 and sought permission to present further information by 13 May 2022; permission was granted by EJ Sweeney on 21 April 2022. The claimant emailed the respondent, copying in the Tribunal, on 5 May 2022 seeking a copy of the response and the respondent's agenda in advance of the preliminary hearing. On 9 May 2022, she wrote again to the respondent, again copying in the Tribunal, requesting sight of the response and agenda by 13 May 2022.
8. On 10 May 2022, the respondent completed its amended response and agenda and sent both to the claimant and the Tribunal. The amended response, given the length of time that had elapsed, was impressive in detail and it contended that the claims had been presented significantly out of time. An application to strike out the claimant's claims accompanied the response, again, in part at least on the basis that the claimant's claims had been presented significantly out of time. In both the response and its agenda, the respondent indicated that its name should be amended to that which appears above.
9. The next day, 11 May 2022, the claimant in a short email to the Tribunal (only) informed it that she was unable to attend the preliminary hearing on 24 May 2022, adding that her father had passed away that she would be flying to her 'home country' and 'I will update you once I am back'. She said nothing of her ability or otherwise to receive or make telephone calls or emails, or how long she was likely to be away. That was the last correspondence received by the Tribunal from the claimant.

10. EJ Newburn accepted that email as an application to postpone the hearing and granted it. On 12 May 2022, the parties were sent a further Notice of Preliminary Hearing to take place on 11 July 2022.
11. On 11 July 2022, the claimant failed to attend the Preliminary Hearing before EJ Arullendran. The respondent was represented by counsel who in turn was accompanied by a solicitor. EJ Arullendran issued an unless order, that required the claimant, amongst other matters, to write to the Tribunal and the respondent by 22 July 2022 and provide a reason for her non-attendance at the hearing, and confirm whether she was actively pursuing her claims.
12. The claimant did not comply with the unless order and confirmation of the claims having been dismissed was sent to the parties on 28 July 2022.
13. On 17 August 2022, EJ Sweeney ordered the claimant to provide her comments on the respondent's costs application by 24 August 2022. No response was received.

The Law

14. Rule 76 of the Employment Tribunal Rules of Procedure 2013 ("the ET Rules") govern the awarding of costs by the Tribunal. So far as relevant, it provides:

"76. Where a costs order or preparation time order may or shall be made

(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..."

15. Rule 84 provides that, in deciding both whether to make a costs order, and if so, in what amount, the Tribunal may have regard to ability to pay.
16. In the exercise of my powers under the relevant provisions of the Rules, I have a duty to give effect to the overriding objective.
17. Awards of costs are intended to be compensatory not punitive.

18. It is not necessary for there to be a precise causal link between any relevant conduct in any specific costs claimed. The tribunal is required to look at the whole picture and to ask itself whether there has been unreasonable conduct in bringing the case and to identify the conduct, what was unreasonable about it and what effects it had: Barnsley Metropolitan Borough Council v Yerrakalva.
19. The tribunal is not confined to ordering a sum that a party is able to pay, or able to pay the moment an order falls to be made: Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797 and Vaughan v London Borough of Newham [2021] IRLR 713.

Discussion and Conclusions

Stage 1 – The Threshold Test

20. I am satisfied that the claims had no reasonable prospect of success. The claimant was aware, on the face of her pleadings of the alleged acts of discrimination at the time they were said to have occurred and the dispute over payment. She was aware that she had delayed in the presentation of her claims. The delay was in the order of 3.5 years. She had no *reasonable* prospect of persuading the Tribunal to extend time for the presentation of her claims on the basis that it was just and equitable to do so, or that it was not reasonably practicable to present the claims sooner, on the basis that she did not wish to present a claim unnecessarily.
21. Turning to the respondent's alternative contention, i.e. that the claimant had behaved unreasonably. I am satisfied that in engaging in the litigation only until such time as the respondent submitted a detailed response, before failing to engage with the proceedings at all thereafter amounts to unreasonable conduct. It was her claim to pursue and having presented it, it was for her to engage in the litigation she chose to commence. It was open to the claimant to provide an update in respect of her personal circumstances in advance of the reconvened hearing, but she did not. She did not update the Tribunal of her own volition as she indicated she would, and neither did she respond to the unless order. She did not respond to either of the respondent's emails applying for costs, or the Tribunal's correspondence seeking her views. The claimant's inaction is tantamount to abandoning her claim yet failing to notify either the Tribunal or the respondent of her intention.

Stage 2 – Discretion

22. The threshold test having been met, it does not automatically follow that a costs order will be made. I turn to consider whether to make an order at all, and if so, in what amount.
23. The claimant is capable and demonstrated through her actions that she was able to, with confidence, contact the respondent and the Tribunal and receive correspondence from both via email. I have no information before me to suggest that that ever changed. The claimant has failed to engage with the Tribunal despite a second hearing convened to consider the claim that she decided to present or contact the Tribunal in the face of an unless order and a costs application. I have no information to explain such behaviour over an extended time. It was open to the claimant to update the Tribunal at any stage of the proceedings but she did not do so. In particular it was open to her to contact the Tribunal to inform it of her inability, if that were the case, to attend the second hearing as she did in relation to the first hearing. In failing to do so, she caused the respondent to incur unnecessary legal costs and that consequence would have been plain to her.
24. In the circumstances I am satisfied that it is appropriate to exercise my discretion to make a costs order in favour of the respondent.
25. Turning to the amount of the costs order. I bear in mind that the respondent seeks only the costs of counsel who attended on the date of the second hearing before EJ Arullendran; it does not seek the costs of its solicitor's attendance or indeed any other costs incurred in relation to this claim. Counsel's fees are unremarkable in amount and likely to be no more than, if not less than, the costs of the respondent's solicitor preparing for and attending the hearing itself.
26. I am not required to take the claimant's ability to pay into account, but I may do so. The claimant was given a reasonable opportunity to respond to the respondent's application made across two emails on both 19 July 2022 and 5 August 2022. She further failed to reply to the order of EJ Sweeney requiring comments on the respondent's application. The only information I have before me is in relation to the claimant's ability to earn and, whilst I take into account that that information was in relation to an engagement that took place briefly 4 years ago, I have nothing before me to suggest that that earning capacity has changed significantly and for the worse.
27. It is not necessary for me to conclude that the claimant's means are such that she can satisfy the order the moment it is made. I am satisfied on the evidence before me that

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the net amount of £500 sought is within the claimant's grasp to discharge within a reasonable period of time. As for the VAT element, I make no award to represent that element of the application, since I am not satisfied that the respondent as a limited company cannot recover that element of its costs against its VAT liability as a whole.

Employment Judge Jeram

Date: 23 September 2022