



EMPLOYMENT TRIBUNALS

Claimant: Mr K Khan

Respondent: Louis Vuitton UK Limited

JUDGMENT

The Judgment of the Tribunal is that:

1. No order for costs is made on the Respondent's written application for costs dated 2 February 2024.

REASONS

Relevant Background

1. On 29 January 2024 this matter was listed before me to determine the Claimant's application to amend. After carefully weighing up the balance of injustice and hardship, I refused the application. Ultimately, I reached the conclusion that the Respondent would be significantly more prejudiced, if the amendment was allowed.

2. Following my decision, the Respondent indicated that it wished to make an application for costs. Due to the limited time remaining for me to hear this application as well as to allow the Claimant a proper opportunity to respond, I advised the Respondent to submit their application in writing.
3. The Respondent duly submitted a costs application on 2 February 2024 on the basis that the Claimant acted unreasonably in bringing his application to amend, and that costs should be ordered against the Claimant under rule 76(1)(a) of the ET Rules on grounds of the Claimant's unreasonable conduct of this part of the proceedings.
4. The Claimant provided his response to the Respondent's application on 13 February 2024, detailing the reasons for making the amendment applications and setting out further detail in respect of his personal circumstances, which he submitted contributed to the delay.

Relevant Law

1. Rule 76 Employment Tribunal Rules of Procedure 2013 provides in relevant parts:

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; or

(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.
2. Under rule 76(1) therefore, the Tribunal **shall consider** making an order for costs where it is of the opinion that any of the grounds for making a costs order has been made out.

3. Rule 84 Employment Tribunal Rules of Procedure 2013 provides:

84. In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

4. Costs orders are the exception rather than the rule in employment tribunal proceedings, but that does not mean that the facts of the case must be exceptional (***Power v Panasonic (UK) Ltd UKEAT/0439/04***).
5. In terms of abusive, disruptive or unreasonable conduct, "unreasonableness" bears its ordinary meaning and should not be taken to be equivalent of "vexatious" (***National Oilwell Varco UK Ltd v Van de Ruit UKEAT/0006/14***).
6. Guidance has been given by the Court of Appeal in ***Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78*** on the approach to assessing unreasonable conduct:
"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 whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had".
7. The tribunal does not need to identify a direct causal link between the unreasonable conduct and the costs claimed (***MacPherson v BNP Paribas (London Branch) (No 1) [2004] ICR 1398***).

Application & Submissions

8. In summary, the Respondent submits its costs application, for the following reasons:

- a. The Claimant's amendment application sought to add in a hopeless claim and he was misconceived in making the application.
 - b. The Claimants 's application to amend was also self-evidently meritless as a result of the balance of injustice and hardship which the Tribunal was required to weigh up in deciding whether or not to allow the claim.
 - c. The amendment was a substantive one rather than a mere relabelling as the Claimant claimed. The Claimant's assertion in the application that it was a mere relabelling was made without thought and without consideration of the law. It was unreasonable for the Claimant to make this legally wrong assertion.
 - d. The amendment was considerably outside the statutory time limits, and the Claimant did not seek to produce any evidence as to why it was just and equitable to extend time, nor to raise any argument, save the assertion that there was a delay whilst trying to get funds together for the amendment, and that his baby was due in the delayed period.
 - e. There was an inexplicable delay of more than 6 months between Claimant's counsel saying at the Preliminary hearing on 5 June 2023 that an amendment might be required and the application being made.
 - f. The Claimant's application itself was carelessly drafted in only the briefest of terms. It did not set out in a pleaded form the wording of the intended amendment, but merely the nature of the amendment.
9. The Respondent submitted it was taking a restrained approach by applying solely for the costs of counsel for attending the preliminary hearing and for the drafting of the written application.
 10. In response the Claimant provided further details as to why he had pursued an amendment application, which included him becoming aware (presumably in disclosure) of an email from May 2020, which referenced dismissal and related

to his absence history rather than the matter for which he was ultimately dismissed in October 2022.

11. The Claimant advised that he was without legal representation until June 2023, he obtained legal representation from that point onwards and was represented at the Preliminary Hearing before me. He submitted that it was not until the Preliminary hearing in June 2023 that the amendment was discussed with counsel. It was following this discussion and on the counsel's recommendation that he was advised there was merit to the claim and the amendment application could be made in order to better plead his case.
12. In terms of the delay in presenting his application to amend since June 2023, when it was first raised, the Claimant submitted that as a result of his deteriorating mental health, between June and 2023 he has been taking more intense therapy sessions which can have a lasting effect on his ability to carry out even menial day to day tasks. Further, as a result of these issues he has had to take time off work and is presently off sick. In addition, he describes his wife as having had a very difficult pregnancy, throughout which he supported her as well as looking after his eldest child. His father has also been suffering with ill-health.

Decision

13. I reminded myself that Rule 76(1)(a) states that the Tribunal 'may make' and 'shall consider' a costs order in certain circumstances. Ultimately, the Tribunal are left with a wide discretion.
14. In general, costs awards are fact specific. The discretion should be exercised in accordance with the overriding objective to achieve the outcome which is fair and just in the circumstances.
15. The Claimant has set out detailed reasons as to why he made the amendment application. Irrespective of what the Respondent thought about the merits of the Claimants proposed amendment, I do not accept that the application had been made unreasonably, without proper thought. Further, the Claimant had sought

legal advice and his advisors had seen fit to put forward the amendment application and the Claimant was legally represented at the hearing before me.

- 16. I do not make any comment on the merits of the claim that the Claimant had sought to add and for the sake of clarity, I did not weigh this in the balance against the Claimant when I refused the amendment application. The reason I decided not to do so was that I did not have the full evidence before me that a Tribunal would have at a full hearing and I was conscious of the need to avoid becoming drawn into conducting a mini trial.
- 17. Whilst I accept there was a clear delay in presenting the application, I do not see this as any deliberate action by the Claimant. Ultimately, there were a multitude of personal circumstances in existence which contributed to the delay.
- 18. In light of my conclusions above, I do not find that the respondent has established that the claimant’s conduct reached the threshold of unreasonable conduct which would then have allowed me to consider whether to exercise my discretion to award costs, and if so, in what amount.
- 19. In the circumstances I make no order for costs against the claimant.

Employment Judge Akhtar

22 March 2024

Sent to the parties on:

10 April 2024

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For the Tribunal Office:

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Note

Public access to employment tribunal decisions

Judgments (apart from judgments under rule 52) and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.