



EMPLOYMENT TRIBUNALS

Claimant: Ms E Church

Respondent: Cabinet Office

JUDGMENT

The Judgment of the Tribunal is that:

1. No order for costs is made on the Respondent's written application for costs dated 24 August 2023.

REASONS

Relevant Background/ Application & submissions

1. This case was listed for a five-day final hearing between 18 and 23 July 2023. Approximately 20 minutes before the hearing was due to commence the claimant contacted the employment tribunal by email advising that she wished to withdraw her claim, no reasons were provided for her decision.
2. The Respondent duly submitted a costs application on 24 August 2023 on the basis that the Claimant acted unreasonably in withdrawing her claim at the

precise moment the parties were due to logon to the remote hearing. The Respondent asserts 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 the proceedings.

3. The Claimant provided her response to the Respondent's application on 27 November 2023. The Claimant states that her intention was to obtain free legal counsel representation for the final hearing, however the advocacy service replied late in the process advising that they could not represent her at the final hearing. The Claimant states that she proceeded in good faith throughout the process, she attended the preliminary hearing and complied with every deadline, however, ultimately, she could not face the stress of representing herself at the Final hearing against a represented party.

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***).

Decision

8. 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.

9. 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.
10. The Claimant has now set out her reasons as to why she withdrew her claim at the last moment. It is unfortunate that she did not provide these reasons at the time that she withdrew her claim as this may potentially have had an impact on the Respondent's decision to pursue costs. That said, I accept the Claimant had every intention to attend and represent herself at the final hearing, however, her feelings of stress and anxiety ultimately prevented her from doing so. Even in the latter stages, the Claimant continued to pursue free legal representation to allow her to continue her claim but she was unsuccessful in securing this. Whatever the merits of her claim may have been, I accept that the decision to withdraw was not based on any concerns around merits but rather the reasons the Claimant has set out.
11. Many cases do settle or are withdrawn at the last moment; however, this alone cannot be a justification on its own to award costs against a party. I considered the conduct of the claimant as a whole throughout the proceedings and accept that she acted in good faith. Whilst I conclude the Claimant's last minute withdrawal claim was unfortunate, I do not see this as a deliberate action on her part
12. 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.
13. In the circumstances I make no order for costs against the Claimant.

Employment Judge Akhtar

14 April 2024

Sent to the parties on:

19 April 2024

.....
For the Tribunal Office:

.....

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.