Madu v Loughborough College - making costs harder to claim in discrimination cases

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Mr A E Madu v Loughborough College [2025] EAT 52

This case, in inimitable HHJ Tayler style, provides useful guidance on costs applications in discrimination cases and underlines that litigants in person on the other end of a costs application may need special consideration.

Factual Background

The Claimant was originally representing himself and brought a claim for race discrimination. He subsequently obtained legal representation. The claim failed with costs awarded against the Claimant of £20,000. The Tribunal essentially found that he should have realised, even before he had legal representation, that his claim had no reasonable prospect of success. Moreover, it found that he must have received such advice once his lawyers had looked at the claim but still did not withdraw.

This was an application case. The Claimant had come second of three candidates for the role of a part-time University lecturer. He made three claims said to be due to his race – first that his interview time was not changed on his request, secondly that he was not appointed and thirdly that he was treated less favourably regarding his request for feedback and his complaints. The Claimant sought to rely on a lack of diversity at the Respondent, where only 2.9% of staff were non-white.

The Claimant appealed the costs award.

The EAT's summary of the law

HHJ Tayler reminds us of Rule 74 Employment Tribunal Rules 2024 which sets out the threshold criteria for a costs application

> **When a costs order or a preparation time order may or shall be made**
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> 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. …\

It is a two-stage test – first whether 76(a) or 9b) applies and second, the Tribunal must consider whether to exercise the discretion to award costs. The award of costs is by no means automatic even if a party has acted unreasonably.

HHJ Tayler noted that, as per *AQ Ltd v Holden* [2012] IRLR 648, EAT [32], the fact that a party is a litigant in person can often be relevant to a costs application. They should not be held to the same standards of a professional representative. They are likely to lack the objectivity and knowledge of a lawyer. It is relevant that a lay person may have brought proceedings with little or no access to professional advice.

Key to HHJ Tayler's judgment is that whilst the question of whether a claim had no reasonable prospects of success is entirely objective, the next stage (ie whether to use the discretion to award costs) should generally take into account whether the party has acted in person. He also noted that it is often difficult for a litigant in person to form a clear view of the likely prospects of success, especially if the prospects hinge on performance in the witness box. The Court quoted *Saka v Fitzroy Robinson Ltd* EAT/0241/00 in which the EAT also held that it is often difficult to know whether he has real prospects of success before being tested at Tribunal.

The EAT emphasised how difficult discrimination cases can be to prove, including a lack of overt evidence. It noted that these difficulties and the difficulty in assessing prospects is often relevant to the question of costs.

What did the Tribunal do wrong?

1) The ET erred in assuming that the Claimant had had advice that his claim had no reasonable prospects of success (and therefore used the fact that he pursued the claim in spite of such advice);

2) The ET failed to take account of the difficulties facing a claimant in determining prospects of a discrimination claim

3) The ET failed to analyse the nature, gravity and effect of some of the conduct it found to be unreasonable.

HHJ Tayler found that there were facts in the case that fairly could have led the Claimant to believe that there was some support for his claims. For example, the '*fact that the claimant asked for his interview to be moved and it was not, but another person of a different race asked for an interview to be moved and it was, albeit to another day, was a factor that the claimant could reasonably have thought provided some limited support for his claim*'. He also said that the claimant was entitled to consider the statistics about ethnic minority employment and the delay in dealing with his feedback and grievance might support his claim of race discrimination [32].

The Court also warned [31] of the danger of being influenced by the hindsight of what actually happened at trial when looking at whether a litigant should have appreciated that the claim had no reasonable prospects of success (as per *Iyieke v Bearing Point Ltd* [2025] EAT 25).

It noted surprise [30] that the Tribunal had concluded that it was irrelevant that the Respondent did not apply for strike out because such an application had weak prospects of success when at the same time concluding that the Claimant should have realised the claim had weak prospects of success.

HHJ Tayler noted finally that the Tribunal was entitled to hold that the Claimant's belief that there is widespread racism in society including Judges (which the Tribunal characterised as '*a conspiracy of which there is no single piece of evidence*') was irrelevant to the claim. However, it was not a reason to award costs. The Tribunal therefore erred by failing to analyse the nature, gravity and effect of the additional reasonable conduct [35].

The matter was remitted to a different Tribunal given the 'trenchant' terms in which the judgment was written.

Comment

This claim is good news for those defending costs applications, bad news for those who wish to pursue them. The consequence of this guidance is that it may be more difficult to pursue costs in a discrimination case, especially against a litigant in person.

It is clear that Tribunals should not make assumptions about what legal advice may or may not have been given. They also need to tread carefully if considering finding that a litigant in person should have known all along that a case had weak or no prospects.

Indeed, in circumstances where there is a difference in treatment and a difference in protected characteristic, it might be prudent for parties not to pursue the argument that a litigant in person acted unreasonably because he should have known it was a hopeless case. Rather, an argument that the claim was objectively misconceived may have better prospects of costs as it will involve less examination of the paying party's thought process.

Of course, the EAT was not suggesting that such a claim for costs could never succeed. If there is no additional evidence linking the matter to race and if the Respondent has specifically pointed out the lack of prospects, then it still may lead to a finding of unreasonable conduct and a consequent award of costs. There would be no harm however in also arguing that the claim was misconceived.

Where there are multiple threshold reasons for costs (eg vexatious, misconceived and unreasonable conduct) Tribunals should perhaps also be encouraged to make separate findings on each of those grounds and whether each one alone would have led to a costs award. This would avoid a conclusion as at para 26 of the Judgment where it was not possible to unravel the two findings or apportion whether the costs award stemmed from one ground or the other.

Tribunals should also be reminded to consider the nature, gravity and effect of conduct it considers to be unreasonable. If that conduct is pursuing a particularly bad point that took days of Tribunal time to consider, the answer may be obvious. However, if it is comments during the hearing or an unreasonable threat to pursue costs, then HHJ Tayler appears to remind us that it is incumbent on the Tribunal to analyse what the nature, gravity and effect of that conduct was (remembering that there does not need to be a strict causal link between the conduct and exact costs incurred – para 24).

Over recent years, anecdotal evidence is that Tribunals have been more open to make costs awards than previously. It may be that this Judgment makes Tribunals less minded to do so

in discrimination cases, particularly those against unrepresented parties. Lawyers pursuing costs will need to be more focussed and considered when drafting costs applications and having this case to hand may well be helpful when doing so.

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