Case Number: 2500900/2016

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mrs M Porter	**AND**	**Wren Living Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **Teesside** **On: 24 February 2017**

Before: **Employment Judge Johnson (sitting alone)**

Appearances

For the Claimant: **Ms J Callan of Counsel**
For the Respondent: **Mr B Williams of Counsel**

JUDGMENT ON APPLICATION FOR COSTS

The respondent's application for costs against the claimant is not well-founded and is dismissed.

REASONS

1 This matter came before me this morning for consideration of the respondent's application for costs against the claimant. The claimant was again represented by Ms Callan of Counsel who had appeared at the original liability hearing. The respondent was today represented by Mr Williams of Counsel, who had not attended at the first hearing.

2 Ms Callan's submissions were marked C1 and Mr Williams' submissions were marked R1. The documents considered by the Tribunal were:-

2.1 The original judgment for the hearing on 27 and 28 October 2016, which was promulgated on 15 November 2016.

2.2 The respondent's "costs warning letter" dated 22 September 2016.

2.3 The respondent's application for costs by letter dated 29 November 2016.

2.4 The respondent's schedule of costs attached to that application.

2.5 A brief statement from the claimant relating to her financial means.

3 In its judgment promulgated on 15 November 2016, the Tribunal dismissed the claimant's complaint of unfair dismissal. That complaint arose from the claimant's dismissal for reasons of redundancy on 31 March 2016. The claimant had challenged the fairness of that dismissal on the following grounds:-

(a) that there was not a genuine redundancy situation;

(b) the claimant had not been fairly or reasonably consulted about the pending redundancy;

(c) that the respondent had failed to reasonably consider the possibility of alternative employment for the claimant.

4 At the commencement of the liability hearing, Ms Callan on behalf of the claimant formally conceded that the real reason for the claimant's dismissal was that she was redundant. The Darlington store where the claimant had worked closed on 31 March 2016 when the lease for those premises came to an end. The respondent had been unable to secure alternative premises in the area and as a result ____ wished to transfer to any of the respondent's other stores, were dismissed for reasons of redundancy.

5 Case management orders were made by the Employment Tribunal on 8 July 2016, which orders included a timetable for the preparation of an agreed bundle of documents and exchange of witness statements. The statements were to be exchanged by 16 September 2016.

6 By letter dated 22 September 2016, the respondent wrote in detail to the claimant's solicitors with a three page letter headed "Without Prejudice Save as to Costs". This is what is hereafter referred to as the "costs warning letter". The first page of the letter states:-

> "As previously discussed with you, both we and our client are confident that our client will be successful in its defence to your client's claims in relation to the above named employment tribunal. Nonetheless our client is mindful of the obligations of all parties to try and resolve their disputes and the potential benefits to both clients in terms of potential costs to draw this matter to a conclusion as soon as possible.
>
> Our client therefore invites your client to withdraw her claim before any further costs are incurred by either party.

1 This invitation remains until 4:00pm on 29 September 2016.

2 Should your client withdraw her claim from the tribunal, our client undertakes not to pursue costs in this matter.

3 If however should your client proceed with her claim and be unsuccessful at tribunal, we will be instructed to seek an order requiring your client to pay our client's costs. Such application for costs shall be made under rule 76 of the Employment Tribunal Rules of Procedure 2013.

4 Rule 87(1) provides that a tribunal may make a costs order or a preparation time order and shall consider whether to do so, when 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 has had no prospect of success.

5 We are of the opinion that your client's claim has no reasonable prospect of success and that she has acted unreasonably in bringing the claim for the reasons set out below".

7 The respondent then sets out in six lengthy paragraphs, the basis of the claimant's case, the respondent's reply to that and its reasons why it considers that its evidence would prevail over that of the claimant at the Employment Tribunal. A concise summary of the relevant points is as follows:-

(a) that the closure of the Darlington store where the claimant worked did amount to a genuine redundancy situation;

(b) that the respondent had followed a fair procedure throughout the redundancy process, which included warnings and meetings;

(c) that suitable alternative roles were sought but not identified;

(d) that the recruitment of new managers in 2015 had taken place before the respondent became aware that its lease of the Darlington store would not be renewed;

(e) that the role of the store manager at York was one which the respondent was prepared to consider offering to the claimant, but that the claimant had made it clear in meetings that she did not wish to be considered for that role;

(f) that the claimant had not appealed the decision to dismiss her;

(g) that the decision to dismiss the claimant for reasons of redundancy was therefore reasonable in all the circumstances.

The respondent's solicitors concluded by stating that they considered the claimant's prospect of success as being "substantially below 50%".

8 In its judgment on liability, the Tribunal found in favour of the respondent on each of those points. The claimant conceded at the beginning of the hearing that the closure of the Darlington store created a genuine redundancy situation. There was no need for a selection criteria as all of the employees engaged at the Darlington store would be dismissed unless they could be found alternative roles at other stores within the respondent's organisation. The Tribunal found that the respondent's duty to consult with its employees began once the landlord had confirmed that the lease would terminate on 31 March 2016. The respondent became aware of that on 22 January 2016 and that was the date upon which the Tribunal found that consultation should have commenced. However, consultation did not in fact commence until 18 February 2016. The Tribunal nevertheless found that all and any of the matters which the claimant may have wished to raise during the consultation process were in fact properly and reasonably raised and discussed with her once consultation did begin. The consultation meetings were full and informative and the claimant was in each case given a fair and reasonable opportunity to ask questions of management and to put forward any proposals which she wished to make. The Tribunal found that the process was fair and reasonable. At paragraph 18 of its judgment, the Tribunal found that the claimant had made it clear to the respondent that the only alternative employment she would consider was one which involved a management role. The claimant was not prepared to work as a designer or surveyor at the Gateshead store. The claimant also made it clear that she was not prepared to consider any kind of permanent role at the respondent's headquarters in Hull. The Tribunal found that it was reasonable for the respondent to conclude that the claimant was not interested in a bench manager role. That left only the manager's role at the York store. At paragraph 18 of its judgment the Tribunal recorded that the respondent had fairly and reasonably considered the York position as one which could provide suitable alternative employment for the claimant, that the respondent had fairly and reasonably discussed that possibility with the claimant and that it was reasonable for the respondent to conclude that, from her replies, the claimant was not interested in that position and did not wish to be considered for it.

9 By letter dated 29 November 2016 the respondent made a formal application for costs against the claimant, stating:-

> "The respondent would respectfully submit that a costs order is appropriate as the claim had no prospect of success and the claimant acted unreasonably in continuing with the proceedings after receiving the costs warning letter dated 22 September 2016. That costs warning letter set out clearly the reasons why the respondent believed that there was no reasonable prospect of success and that the claimant was acting unreasonably in pursuing the claim".

The letter of 29 November 2016 then went through the same points as had been listed in the costs warning letter itself and made specific reference to the findings of the Employment Tribunal in its judgment, with regard to those original points.

10 Mr Williams for the respondent submitted that there were two main parts to his application. The first is that the entire claim had no reasonable prospect of success and the second was that the claimant had acted unreasonably in continuing after the costs warning letter. Mr Williams acknowledged that he had not represented the respondent at the liability hearing and therefore had to be guided by the judgment itself, the costs warning letter and the application for costs. Mr Williams very fairly acknowledged that he would be unable to comment upon how closely fought the case had been, particularly with regard to those specific matters which formed the subject matter of the costs warning letter. Ms Callan for the claimant respectfully reminded the Tribunal as to the evidence which had been given by the claimant and the respondent's witnesses, and how that evidence had been delivered. Ms Callan had referred to the documents in the original trial bundle and reminded the Tribunal of some of the difficulties which had been encountered by the respondent's witnesses in dealing with some of the points raised on behalf of the claimant. Ms Callan's recollection of those matters reflected that of the Tribunal. This was certainly not one of those cases where a claimant presents a complaint and thereafter attempts to adduce evidence to support an unjustified and baseless sense of grievance. There were certainly difficulties with the respondent's case. There was considerable uncertainty at the relevant time about firstly whether the Darlington store would close and if so, when it would close. The staff at the Darlington store, including the claimant, were never officially informed as to what was happening. Information which found its way to them was based upon gossip and rumour, which frequently came from the occupants of adjoining premises with whom the respondent shared the same landlord. The respondent deliberately withheld information about the closure of the store until after it had completed it annual New Year sale. When the claimant raised with the respondent's management and HR, the fact that outside employees had been brought into the region to manage other stores, which created some confusion with those who attended the meetings. The note taking by management and HR was less than satisfactory, which led the claimant to challenge the accuracy of some of what had been recorded. The claimant was entitled to feel concerned and aggrieved at the way the redundancy process was being conducted.

11 The Tribunal found that the claimant's case was not one of those which had no more than a fanciful prospect of success. The Tribunal must consider whether on a careful consideration of all the available material, it could conclude that this was a claim that had no reasonable prospect of success. To challenge whether a claim has no reasonable prospect of success is a high test. There were facts which were in dispute, evidence which the claimant was entitled to challenge. The Tribunal found that this was not a claim which had no reasonable prospect of success or which was entirely misconceived. The first thrust of Mr Williams' argument is thus not well-founded.

12 That then leaves Mr Williams' second line of attack, namely that it was unreasonable for the claimant to continue with these proceedings once she had

received the detailed costs warning letter. Mr Williams respectfully pointed out that the costs warning letter itself was couched in detailed, clear and appropriate terms and under no circumstances could be described as either intimidatory or bullying tactics. Ms Callan fairly conceded that the letter could not properly be described in those terms but was nevertheless one which she considered to be very "close to the bone". The Tribunal found that there was nothing unreasonable or inappropriate either in the terms of the letter or its purpose. Mr Williams' submission was that there was an obligation on the claimant to fairly consider the contents of the letter, address her mind to those points which were clearly set out and then make a reasonable decision as to whether and if so why, she wished to proceed. Neither Mr Williams nor Ms Callan could draw the Tribunal's attention to any letter by way of response from the claimant's solicitor. The Tribunal specifically noted that the invitation in that costs warning letter remained open only until 4:00pm on 29 September, effectively only five working days from when the letter was despatched. In the absence of any formal response in the bundle, the Tribunal was satisfied that no reply had been sent on behalf of the claimant. The offer contained in the cost warning letter should therefore be deemed to have been rejected by the claimant. Mr Williams pressed the point further, suggesting that it was a matter for the claimant to deal with in evidence at this costs hearing as to whether the contents of the cost warning letter had been discussed with her and the reason why no response had been given. The Tribunal expressed its reluctance to allow the claimant to be cross-examined about the nature of any discussions she may have had with her legal advisor. Those matters clearly attract legal professional privilege. Simply because there was no formal response to the costs warning letter, the Tribunal was not prepared to infer that this meant it had not been fairly and properly considered by the claimant.

13 Mr Williams continued to argue that the claimant's failure to consider the contents of the costs warning letter amounted to "unreasonable conduct". He argued that there was a joint responsibility upon the claimant and her solicitors to reflect on all of lthose points before deciding to pursue the claim. The claimant's failure to do so, argued Mr Williams, meant that the relatively high threshold of establishing unreasonable conduct had been overcome in this case by the respondent. The claimant had failed to take proper heed of a fair and clear warning and even now she had failed to provide any meaningful explanation as to why she had decided to continue. Mr Williams submitted that it was unreasonable for the claimant to simply ignore and disregard that warning. The claimant's failure to provide any reason of rebuttal of the ____ set out in the cost warning letter, was of itself unreasonable conduct said Mr Williams.

14 Neither Ms Callan nor Mr Williams could refer the Tribunal to any specific authority to support the contention that failure to respondent to the costs warning letter is of itself unreasonable conduct to justify an award of costs. The Tribunal found that there is no obligation on the claimant to mitigate her case in correspondent with the respondent. By the time the costs warning letter was issued, pleadings had effectively closed, documents had been exchanged and witness statements had been exchanged. Each side by then knew the nature and extent of the other side's case. The Tribunal found that the claimant's failure

to respond to the costs warning letter was not of itself causative of any additional costs being incurred.

15 The Tribunal took regard of the guidance given by the Court of Appeal in **McPherson v BNP Paribas [2004] ICR 1398**, namely that the Tribunal should at all stages take into account the nature, gravity and effect of a party's allegedly unreasonable conduct. That however should not be misunderstood to mean that the circumstances of any case have to be separated into sections such as nature, gravity and effect, with each section being analysed separately. The Court of Appeal said in **Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420**, that it is important not to lose sight of the totality of the circumstances. The vital point in exercising the discretion to award costs is to look at the whole picture. The Tribunal must ask itself whether there has been unreasonable conduct by the paying party in bringing, defending or conducting a case and in so doing, must identify that conduct, what was unreasonable about it and what effect it had. In **Khan v Haywood & Middleton Primary Care Trust [2006] ICR 453**, the Court of Appeal stated that where the conduct could be characterised as "unreasonable" it required an exercise of judgment about which there could be reasonable scope for disagreement among Tribunals, properly directing themselves.

16 The Employment Appeal Tribunal held in **Lake v Arco Grating (UK) Limited EAT0511/04** that a claimant's failure to accept an offer made by the respondent could not of itself constitute unreasonable conduct in bringing or conducting proceedings. The fact that a costs warning has been given is a factor that may be taken into account by the Tribunal when considering whether to exercise its discretion to make a costs order. The making of a costs warning is not a precondition to the making of a costs order. It takes into account the fact that at no stage did the respondent make an application to the court for strike out order or a deposit order on the basis that the claim either had no reasonable prospect of success or little reasonable prospect of success.

17 In adopting the principle of looking at the whole picture (**Yerrakalva**) the Tribunal in this case found that points raised by the respondent in its costs warning letter were far more keenly fought than Mr Williams would now believe. As Ms Callan put it, a different Tribunal on another day may well have come to a different conclusion. This was a case which the claimant was entitled to present and was entitled to pursue. The fact that the claimant was unsuccessful does not mean that by so doing, she acted unreasonably. Furthermore, the fact that she continued after the costs warning letter is not conduct which can fairly or reasonably be described as "unreasonable". The respondent has failed to overcome the relatively high threshold of establishing the claimant has behaved unreasonably in her conduct of the proceedings by continuing after the costs warning letter. The respondent's application for costs is therefore dismissed.

EMPLOYMENT JUDGE JOHNSON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
20 March 2017
JUDGMENT SENT TO THE PARTIES ON

20 March 2017

AND ENTERED IN THE REGISTER

M M Richardson

FOR THE TRIBUNAL