EMPLOYMENT TRIBUNALS

Claimant: Mrs E Garwell

Respondents: Hull Culture and Leisure Limited

HELD AT: Hull **ON:** 21 December 2017

BEFORE: Employment Judge T Ryan

REPRESENTATION:

Claimant: No attendance
Respondent: Mr I Miller, Solicitor

JUDGMENT ON APPLICATION FOR COSTS

The judgment of the tribunal is that:

1. The respondent's application for an order for costs is granted.

2. The claimant is ordered to pay a contribution to the respondent's costs in the sum of £3,000.00.

REASONS

1. At a hearing of a claim for constructive unfair dismissal on 3 and 4 April 2017 I gave judgment dismissing the claim. I made detailed findings of fact in relation to the claimant's assertion that a series of acts that occurred over a long period of time, between 2012 and June 2016 when she resigned, did not amount to a fundamental breach of the implied term of trust and confidence.

2. The respondent, on 26 April 2017, made an application for costs on the basis that the claim had no reasonable prospect of success.

3. The respondent referred to two letters: first, a letter sent on 19 January 2017 to solicitor, Ingrams, then acting for the claimant. This referred to a preliminary hearing conducted by Employment Judge Rostant on 4 January 2017 in which he had pointed out the difficulty that the claimant might face in establishing dismissal

in relation to the last act in the series of acts upon which she relied. The second was a further warning letter of 28 February 2017 sent to the claimant.

4. There was then further correspondence between the parties concerning the claimant's financial circumstances. The respondent requested, although the claimant did not, an oral hearing of this application, which was granted. A hearing was arranged. Regrettably it had to be postponed due to a period of ill health and it was reconvened.

5. Mrs Garwell sent to the Tribunal on 21 December 2017, the date of this hearing, an email indicating that she was unwell and could not attend. She stated she did not wish the matter to be prolonged and asked that the hearing proceed in her absence.

6. I have received a bundle of documents helpfully compiled by Mr Miller and the correspondence from the claimant that was sent to the Tribunal in the months leading up to this hearing. This included her representations why an order for costs should not be made. I have taken those representations into account.

7. Mr Miller has reminded me of my powers under the Employment Tribunals Rules of Procedure 2013. They are derived from rules 74 to 84.

8. The relevant rules are rule 76(1) which provides in material part that:

> "A Tribunal may make a costs order … and shall consider whether to do so, where it considers that –
>
> (a) a party … has acted … 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 … has no reasonable prospect of success."

9. Rule 78 provides that the amount of a costs order may be a specified amount not exceeding £20,000. There are also provisions for awarding an agreed sum of the matter to be subject to detailed assessment. Those provisions do not apply here.

10. Rule 84 provides:

> "In deciding whether to make a costs … order, and if so in what amount, the Tribunal may have regard to the paying party's … ability to pay."

11. If then the tribunal is satisfied that one or both of the matters set out in rule 76(1) (a) or (b) is established it is required to consider making an order but has a broad discretion as to whether to make a costs order and the amount of the costs which may be awarded.

12. Two authorities were brought to my attention by Mr Miller. The first is the case of **Peat & others v Birmingham City Council UKEAT/0503/11**. In that case the Tribunal was concerned to consider the way in which the appellants had or had not engaged with warning letters that had been properly sent. This case concerned collective consultation. In paragraph 28 the Court said:

> "Quite simply the Appellants' solicitors appear to have failed to address their mind to the nature and extent of the collective consultation. We think that if they had engaged with that issue the Appellants, even if they considered they had a reasonable prospect of success, would have been likely to have appreciated that it was so thin, that it was not worth going on with the hearing."

13. That is a case relied upon for the proposition that there can be unreasonable conduct even if the Tribunal is not in a position to say that the claim had no reasonable prospects of success.

14. The second authority on which Mr Miller relied was **Vaughan v London Borough of Lewisham No. 2 [2013] IRLR 713**, again a decision of the Employment Appeal Tribunal, concerned the question of whether there was a realistic prospect that the claimant could pay. In paragraph 28 of that judgment, which is worth quoting in full, the judge said this:

> "The starting-point is that even though the Tribunal thought it right to "have regard to" the Appellant's means that did not require it to make a firm finding as to the maximum that it believed she could pay, either forthwith or within some specified timescale, and to limit the award to that amount. That is not what the rule says (and it would be particularly surprising if it were the case, given that there is no absolute obligation to have regard to means at all). If there was a realistic prospect that the Appellant might at some point in the future be able to afford to pay a substantial amount it was legitimate to make a costs order in that amount so that the Respondents would be able to make some recovery when and if that occurred. That seems to us right in principle: there is no reason why the question of affordability has to be decided once and for all by reference to the party's means as at the moment the order falls to be made. And it is in any event the basis on which the Court of Appeal proceeded in **Arrowsmith**, albeit that the relevant reasoning is extremely shortly expressed. It is necessary to remember that whatever order was made would have to be enforced through the County Court, which would itself take into account the Appellant's means from time to time in deciding whether to require payment by instalments, and if so in what amount."

At paragraph 29 the judge continued:

> "On that basis the question for the Tribunal – given, we repeat, that it thought it right to have regard to the Appellant's means – was essentially whether there was indeed a reasonable prospect of her being able in due course to return to well-paid employment and thus to be in a position to make a payment of costs; and, if so, what limit ought nevertheless be placed on her liability to take account of her means in that scenario and, more generally, to take account of proportionality."

15. That was a case in which the appellant had brought claims, there had been no costs warnings, some settlement offers, but she had been in well paid employment of something in the order of £30,000 per annum although she was said to be unfit for work at the time. The Tribunal had made a substantial award of some £87,000, based upon the consideration that she would be able to return to work in the future.

16. The factual position in this case is that the claimant was employed by the respondent at a salary of about £1,800 per month. She stated in her claim form that she was only receiving £900 at the time the claim is presented.

17. The claimant appears, and I think she accepts this, to have gone to work with her husband who has a group of companies. They are identified as Parrot Car Training Limited, Parrot Driver Training Limited and another company called Parrot Trans. The claimant produced some information about them.

18. Mr Miller has put before me, and I have considered, the published accounts accounts and published company information.

19. It is clear that the claimant received some money from these enterprises. She states that her and her husband's income y over the previous 12 months has been somewhere in the region of £1,800-£2000 per calendar month for the two of them.

20. She describes the company Parrot Driver Training Limited as being currently locked in a dispute with HMRC. That dispute appears to be about a debt for £72,000. HMRC issued a winding up warning in July, according to the documentation, but the company is still shown as active with no proposal for liquidation or anything else on the companies house website at the moment.

21. The claimant states that Parrot Trans Limited, is not trading. She states Parrot Car Training Limited is a small company with a turnover of about £75,000 per annum, with two driving instructors employed earning between £25,000 and £30,000 per annum each. The cars, it is said, had been more of a presence as part of the Parrot brand than a source of cashflow.

22. It is clear to me that this business is a husband and wife team. They appear to be doing driver training, a small amount of haulage work (the claimant speaks about about two trucks on transport) and perhaps some LGV driver training.

23. The figures that are produced do not cause me to seriously doubt that the figure that is put in of £1,800-£2,000 per calendar is inaccurate. I know nothing about the claimant's capital position.

24. I have first to be satisfied that my discretion to make an order is triggered. If I find it is, I should then consider whether it is just for me to make a costs order at all having regard to the claimant's means. If I think it is right to make an order I then had to consider the amount of that order, again having regard to the claimant's means.

25. Mr Miller has taken me in some detail through my original judgment and findings. He submits that this is not a case of litigant who had, as it appears, legal assistance for a very brief period, and who has then misinterpreted what are largely uncontested facts in terms of considering her prospects of success. The claimant has been found by me to have misstated the facts in a number of respects. That description is appropriate in respect of both early and late allegations, though not in every case. It is sufficient to summarise the position by

saying that I did not accept the facts that the claimant asserted on a significant number of occasions.

26. The claimant must be taken to know the facts of her own case. She was dealing with workplace matters on a day-to-day basis.

27. In reaching my conclusion I do not attach significance to the fact that I found that some of these facts occurred so long ago that any breach that they might have demonstrated had been waived. I would not expect a litigant in person to appreciate that point. However, I identified in paragraphs 97 to 100 of my reasons the factual matters which were relevant to the last straw principle. That was an issue that was clearly highly material in this case.

28. In paragraph 99 I referred to the case of **Woods v WM Car Services (Peterborough) [1981] ICR 666**, where an employer had been found to have committed a series of acts which effectively squeezed out the employee from their employment by making their life so uncomfortable that they resigned. I said then, and I still consider this to be right, that it occurred to me that that might be the sort of allegation the claimant could have made in this case, but I went on to say that it was not.

29. The claimant had put her case much higher than that. She put the case that she had been subject to constant victimisation, accusations, having her welfare and safety put at risk, regular bullying and systematic removal or work duties. I rejected that case put as it was on that basis.

30. There were a number of unfortunate events. The claimant was accused of prostitution and using the respondent's premises for that purpose. She was accused of putting up a Facebook entry. There were matters such as the placing with her of Miss Carr who was clearly a troubled employee and with whom there was eventually a serious dispute. These occurred over a period of years. Looking back one can understand as a layperson why she may have felt that things were not going properly. But that is not what is required in law.

31. Mr Miller rightly makes this submission. He submits I should bear in mind Employment Judge Rostant's warning, the letters, first to her solicitors at the time and then the warning letter to the claimant personally. He submits that even if the bringing of the proceedings was not unreasonable at the outset, even if at that point in time the claimant might have believed that the claim had reasonable prospect of success, by the time of that second warning the claimant should, as the claimant in **Peat** should have done taken the view that her case was so thin that it was not worth going on with the hearing.

32. In my judgment there is force in that submission and I accept it.

33. Although I consider the claimant's means are relevant as to amount of a costs order, they are not such persuade me that it would not be just and equitable to make some order for costs. I particularly bear in mind the passage I have quoted above of Underhill J in the case of **Vaughan**.

34. In all those circumstances I find that my discretion to make an order for costs is triggered.

35. Costs are sought in this case, on the basis that the respondent had the benefit an in-house legal service, in the sum of £8,219.667. That was calculated up until the middle of the summer of 2017. Mr Miller accepted that a figure of £6,000 would reflect the costs up to the conclusion of the hearing on the merits.

36. I do not think this is a case in which it would be reasonable for the claimant to be expected to pay the costs of the costs application itself.

37. So the starting point in my judgment for considering an order based on that estimate, which Mr Miller accepted was an appropriate way to proceed, would be £6,000.

38. My difficulty in awarding the entirety of that sum, even given the fact that affordability at this point in time is not the total criteria, is that whilst I accept the claimant's has interests in the companies that I have referred to, it appears to be that this is a small family business operating under a number of heads with a relatively modest income at this stage. That is the best analysis I can achieve on the information that is available.

39. However I note that the claimant is relatively young. There is no reason why she should not continue in in her working life working life. There is no reason why the claimant and her husband should not continue in business if that is what they choose to do. Either in that way or by obtaining other employment I accept there is at least a prospect of affordability.

40. For that reason even on the information before me it is appropriate that there should be some order for costs. Doing the best I can, I think that the proper order in this case is that the claimant should pay not the entirety but a significant contribution to the respondent's costs. I consider that the appropriate sum is one of £3,000.00.

Employment Judge Tom Ryan

Date: 2 February 2018