EMPLOYMENT TRIBUNALS

Claimant: **Mrs K Edmond**

Respondent: **Chief Constable of Nottinghamshire Police**

Heard at: **Nottingham** **On:** **Friday 8 December 2017**

Before: **Employment Judge Britton**

Members: **Mr G Austin**
Mr C Goldson

Representatives

Claimant: **Mr A Mellis of Counsel**
Respondent: **Mr N Smith of Counsel**

JUDGMENT

The Respondent's application for costs succeeds to the extent that the Claimant will pay the Respondent's costs in the sum of £17,500.

REASONS

Introduction

1. This is an application by the Respondent that the Claimant do pay its costs consequent upon the Claimant having lost her claim before the Tribunal in the 6 day hearing, if we include the reading in day, which took place as a live hearing between Monday 24 and Friday 28 April 2017. In relation to that judgment in due course at the request of the parties the written reasons (the Reasons) were promulgated on 15 July 2017. Prior thereto the Respondent had already made its application for costs on 15 May 2017, albeit it would need to wait on the Reasons in order to fully particularise the same. At that stage the Claimant put in her objections to a costs order being made on 25 May 2017; and of course we have had regard to those. Then on 25 July the Respondent re-affirmed its application: "…*We apply for an order for costs on the grounds that the Claimant acted unreasonably and disruptively in her preparation for the hearing and during the hearing itself…"* Given the issues and the amount claimed, accordingly the application was listed for a costs hearing today.

2. Before us Mr Smith, Counsel for the Respondent, has produced a written submission in support of the cost application which we gather was prepared by the then instructing solicitor. It is clear that the solicitor had intended that this be sent in attached to the schedule of costs. The latter had been ordered to be prepared by this presiding judge on 23 August 2017 and was duly provided on the 7th September and copied to the Claimant who then represented herself[1]. However the grounds were not attached due it seems to a change in fee earner. In any event they are now before us. Also learned counsel makes the additional submission that an additional ground to be relied upon is that the claim was misconceived in that it never had any reasonable prospect of success or certainly at the latest once the bundle prepared by the Respondents, and which was very comprehensive indeed, and its witness statements had been provided to the Claimant. As to this latter ground for reasons we shall come to it is very much wrapped up in the original grounds of the cost application. Thus the Claimant is not disadvantaged. Mr Mellish has been able to ably address the issues and put the Claimant's objections to the application for costs.

The law

3. Engaged is Rule 76 of the 2013 Tribunal Rules of Procedure:-

> "Rule 76(1):-
>
> A Tribunal may make a costs 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;
>
> (b) any claim …had no reasonable prospect of success.[2]

4. This of course is a two stage test. First in this particular case are any of the following established? Has she acted "vexatiously…disruptively or otherwise unreasonably" in the bringing of or the continued prosecution of this case (limb1) ? And if we need to go there, has she additionally or in the alternative pursued this case when if not initially then certainly as matters proceeded it had no reasonable prospect of success (limb 2)?

5. In approaching the matter we remind ourselves of the crucial dicta, of Mummery LJ in **Yerrakalva v Barnsley Metropolitan Borough Council** [2011] EWCA civ 1255 and as reaffirmed in **Sud v London Borough of Ealing** [2013] EWCA civ 949 and as per paragraph 70 per Fulford LJ in referring to **Yerrakalva:**[3] :

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[1] Mr Mellis has recently been appointed by the Claimant we gather under the direct access scheme. He did not appear at the main hearing.

[2] If we decide that the costs threshold under the two stage test has been met, finally we have a discretion pursuant to rule 84: "…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."

[3] This was under the precursor 2014 rules, but the wording is essentially the same.

"It was emphasised that the tribunal has a broad discretion and it should avoid adopting an over-analytical approach, for instance, by dissecting the case in detail or attempting to compartmentalise the relevant conduct under headings such as "nature", "gravity", and "effect". The words of the rule should be followed and the tribunal needs " to look a the whole picture of what happened in the case and ask itself whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what is unreasonable about it and what effects it had" (39-41)."

6. So what it means is this. First we have to make a decision on whether or not the threshold has been reached. If it has then, we shall consider whether to exercise our discretion to make an order for costs and in so doing may, and in this case have, considered means.

Submissions; observations and core findings

7. Counsel for the Claimant has urged upon us a medical report from the Claimant's GP dated 23 November 2017. Now of course he wasn't present during the main hearing and in respect of which there are aspects of that report to which we shall come. But we will accept that throughout the period that the Claimant was litigating this matter she was under a raft of medication for her various conditions both physical and mental and in respect of which of course the Respondent had conceded by the time of the mainstream hearing that she was a disabled person for the purposes of the Equality Act 2010. Where Counsel starts from is to urge us to focus on "1.impression; 2. recollection; and 3. litigation." What he is saying to us in a nutshell is you have to take this Claimant as she was. Summarised, she was incapable of being objective. She had blinkered herself so to speak from her impression of the material events into a convinced recollection of the same even though that recollection may have been wrong. And then with the stress of the litigation, she only became more convinced so to speak of the righteousness of her cause and was incapable of rationally standing back. Thus what is at the heart of what he urges upon us is that even if the threshold is objectively met, we should because of these impediments exercise our discretion by not awarding costs.

8. Conversely the Respondent's argument is that this argument simply doesn't hold water. The GP's opinion in this medical report written nearly 7 months after the hearing is not the position as it was before the Tribunal. Two of the two core points relied on in it are incorrect: Thus at the first main paragraph on the second page of the report and having referred to the medication that the Claimant would have been on a the material time: *"it is my personal opinion that this would have affected Karen's ability to concentrate, and her presentation during the hearing, due to the well-known side effect of these medications".* Then as to the penultimate paragraph*:"…Karen was unfortunate enough to be let down by her union representatives from Unison. who did not attend the hearing as they advised they would. This caused her significant extra stress, confusion with regard to the legal processes. and of course, had a significant impact on the hearing, as she was effectively unrepresented."*

9. As to the latter assertion, we have taken the parties through the correspondence trail on the file and which was in effect summarised in the Respondent's written representations to which we have referred. Although there might from time to time have been some shortcomings in the discovery process by the Respondent, they are far outweighed by the disproportionate demands of

the Claimant further aggravated in terms of structuring her case and defining the issues by delaying on agreeing to complete a Scott Schedule; and that which eventually emerged couldn't be agreed. The Claimant never in either of the two case management discussions held by Employment Judge Milgate, and then Employment Judge Hutchinson said she was unfit to participate or acquit herself in the case. Second there is no evidence that the Claimant was ever going to be represented by Unison and it was never said by her at any stage that she was. And she did not start her case before us by saying that she had been let down at the eleventh hour so to speak by Unison. Indeed she came with Ms Robinson on the first day for the purposes of her case and who did her best to assist the Claimant by way of representation. She came for day 2 and 3 with Mr Wingsworth and then on the last 2 days she had the excellent assistance of Ms Tolson to whom the Tribunal paid tribute as indeed did Mr Smith for the Respondent. And the next point to make is that the Claimant was cross examined over two and a half days. The conduct of the same was not oppressive and the Claimant was able to hold her own very well throughout and had an ability to recall in detail what she wanted to argue and demonstrated no signs of mental confusion at all. Insofar as she needed breaks there were no requests for extra breaks because of for instance mental stress and of course we otherwise did factor in breaks. None of her three lay representatives sought to submit that the Claimant was suffering during the hearing because she was mentally unable to cope or concentrate. And we have to state that we observed that throughout the Claimant was giving extensive instructions to whichever of the three was representing her at the time. So it follows that although we accept that the Claimant does have a disability and was under the medication as reported by the doctor, the evidence before us flies in the face of the opinion that he gives which would doubtless be to some extent based upon what the Claimant herself told him as is invariably the case: and a good example here is that he was told something that simply is not true and that relates to being let down at the last minute by Unison or being unable to cope with the proceedings.

10. The bottom line in this case despite the valiant efforts, and he is to be commended, of Counsel for the Claimant is that she chose to embark upon a case which from the first was based on the most serious of allegations to the effect that the Respondent's personnel, in particular Sergeant Walker and Inspector Wilson, had embarked upon fabricating the evidence to justify her dismissal by reason of redundancy and because in particular Sergeant Walker was about managing her out of post because of her disability. As our Reasons painstakingly find this was wholly without foundation. Yet she chose to pursue it. And she could not have been clearer in the various statements that she made in the run up to trial, or in what she told EJ Milgate her case was about, or in the clarification of what her case was about on the last day of the proceeding as summarised by Ms Tolson:

11. Thus paragraph 4 of our Judgment:

> *"The core issue in this case was encapsulated by Ms Tolson in her concluding remarks and it mirrors observations made from time to time by the Tribunal seeking clarification from the Claimant as to her case. Thus her case is that from the moment temporary Sergeant Helen Walker came on the Claimant's scene starting in September 2014 and in particular once she started to line manage her in January 2015 the Claimant alleges she was a marked woman."*

And then in terms of summarisation thus:

> *"The conspiracy to undermine the integrity of the scoring process for the purposes of redundancy selection and with the intention from the off of getting the Claimant selected and dismissed."*

And we observed:

> *"That is of course a very serious accusation."*

12. And it went further as this case proceeded before us. We do not need to spend much time on it at all. For instance, and it required Respondent witnesses to be called who could otherwise have been dispensed with, the Claimant when giving her sworn evidence[4] made a wholly new accusation that during the briefing on the redundancy consultation process at the Riverside Police Station on 23 April 2015 she had raised inter alia relating to Sergeant Walker the bullying issue. She gave us two versions but the core point is that she had therefore raised to Superintendent Fretwell with some twenty persons present in essence that she was being bullied by her Line Manager ie Sergeant Walker and as to how that would therefore impact on the consultation process." This last minute allegation meant that Superintendent Fretwell had to give evidence before us. As our findings made clear this was a false accusation by the Claimant. It simply did not happen.

13.A second late allegation and which again if true had very serious implications as to the integrity of key Respondent witnesses, relates to the handling of her grievance. This is taken up at paragraph 7 of our Judgement. The Claimant for the first time asserted that she gave to Chief Inspector Goodall a list (Bp851) of names of those who would corroborate her complaints and that he must have deliberately not interviewed them. It meant that we had to hear from Chief Inspector Goodall. We found that it did not happen. She did not put in a list of extra names which he then deliberately sought to exclude from interviewing.

14. Those are just but two of the core findings that we made in this case. And going back to other core issues we also found as is clear from our judgment that there was not a shred of evidence that supported the Claimant's contention that Sergeant Walker had been out to get her: In fact the reverse.

15. Suffice to say that anybody who wishes to therefore read our judgment in full would realise that we have made a whole series of adverse findings against the Claimant which completely undermined her case. She chose to bring this case laced with career threatening allegations against the police officers in her sights and add to them in the way we have now referred to and when the allegations lacked substance. We don't think the Claimant ever gave the slightest thought to the impact and distress this would have caused. Indeed the members of this tribunal in particular have asked the Judge to make plain that even today there is not the slightest sign that the Claimant regretted what she did. There is no apology before this Tribunal. There is no hint of one in the Claimant's written submissions.

16. So in terms of the submissions of Mr Mellis and despite the GP report, the Claimant cannot hide behind her disability and say "oh I didn't know what I was doing or I got myself in an obsessional hole whereby I couldn't think through rationally". The way in which the case was originally presented and thence particularised; thence how it was conducted including the copious instructions

[4] See Judgement and Reasons commencing paragraph 8.

she was giving; her own evidence; the cross examination on her clear instructions of the Respondent witnesses; it all flies in the face of such an impediment on her ability to be responsible for her own actions. It is encapsulated within that on the last day of the proceeding when the Claimant was recalled in order that she could have an opportunity to deal with issues that had just emerged in the cross examining of Chief Inspector Goodall. The Claimant could not have been clearer when she was asked to clarify her position over Bp 851 and what Chief Inspector Goodall was saying about not having been given these extra names:

> "He is lying. I don't agree the only person lying is me."

So the Claimant made plain in this case that key players in it were lying.

Conclusions

17. What it means is looking at matters in the round ie the **Yerrakalva** approach and having identified the fundamentals so to speak as per the dicta, we have concluded that the threshold is reached. Put simply this case was pursued in circumstances where we agree with learned Counsel for the Respondent that it was (a) vexatious and (b) unreasonable. It follows that we don't need to get into misconceived because it would only be stating the obvious.

18. It is true that the Claimant was not on notice that she was embarking at her peril as the litigation proceeded. But of course if the Respondent had made application for a de strike out or a deposit order, it is unlikely that it would have been granted given the case was so fact sensitive. There was no Calderbank letter, but given the Claimant's mindset we doubt that it would have made any difference whatsoever. The fact is the Claimant chose to pursue this litigation which we have now found was unreasonable conduct.

19. We now come to stage 2 of the process. We have to now decide whether or not to exercise our discretion to make a costs order. Well we have discounted the mental health defence so to speak. Yes the Claimant is a disabled person and there is no doubt that she is **now**[5] in a poorly state. But why should that prevent a costs order being made? The Respondent has incurred costs in a situation where the Tribunal has found that a Claimant put it to needless expense by behaving unreasonably. The point then becomes that this is a public body. As was put to us by Mr Smith the costs of this litigation at circa £45,000 is in fact the cost of 2 PCSO's or perhaps a Police Constable with on costs. Thus we exercise our discretion so as to award costs.

20. As to what to award in terms of the amount of the costs, we have exercised our discretion so as to take into account the Claimant's means. We are not going to award the whole amount sought. We consider that in this particular case this would be pointless as there aren't the assets. Her husband, who is with her today by way of support, took no part in the litigation. He is the now the sole bread winner. By the same token we are not of course going to take any account of the Child Benefit for the 3 young children of this family

21. On the evidence we have today at present the Claimant is unlikely to work in the foreseeable future. But she is only 39 and say in another 10 years or even earlier when this litigation has finally removed itself from her mind, she might be able to undertake a sedentary occupation. Today she says well I couldn't inter

[5] Our emphasis.

alia because of my hip and leg problems and because I suffer from chronic fatigue syndrome. But there are many sedentary jobs in this region and in short travelling distance of Long Eaton where the Claimant lives, and the Claimant was able to sit throughout the proceedings before us and today and she didn't need a special seat. It is of course only an observation.

22. Otherwise the family's lifestyle is very modest, the motorcar is elderly with 254,000 miles on the clock and there is also a credit card debt. But as to the family home, albeit there is a second loan charged on it, the net equity is about £40,000. As the property is in joint names the Claimant's share would be £20,000. We are going to reduce that a little to take account of such things as sales costs.

23. Therefore what we have decided to do is to not award the whole of the costs sought, which incidentally are in terms of the schedule reasonable against the Claimant. What we are going to do is to order that she must pay £17,500 of the Respondent's costs. At present there is of course no prospect of it being repaid. Thus in probability the Respondent will seek a charging order, but this is not a matter for us. What is important is that via Counsel the Respondent has made clear that the Respondent will not seek to re-possess the family home[6]. Thus they can rest safe in their beds.

Employment Judge P Britton
Date: 26 February 2018

JUDGMENT SENT TO THE PARTIES ON

10 March 2018

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FOR THE TRIBUNAL OFFICE

[6] Unless of course fortunes change for the better and the Claimant fails to cooperate.