EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs S Solomon	**v**	**1. University of Hertfordshire** **2. Paul Hammond**

Heard at: Watford **On**: 19 October 2018

Before: Employment Judge Smail
Ms PA Breslin
Mr D Bean

Appearances
For the Claimant: Mr C Ameadah, Husband
For the Respondents: Ms C Richmond, Counsel

REMEDY & COSTS JUDGMENT

1. The Respondent must pay the Claimant compensation in the sum of £1,900 within 28 days.

2. The Claimant must pay the Respondent £20,000 costs within 28 days.

REASONS

1. By application dated 27 April 2018 the respondents apply for costs. They are both represented by one firm of solicitors and one Counsel. In its judgment sent to the parties on 15 February 2018 the tribunal dismissed the claimant's claims under the Equality Act 2010 but upheld a claim of unfair dismissal on the basis that the dismissal was procedurally unfair because Sue Grant, the Secretary and Registrar of the first respondent, sat on the panel that decided to dismiss the claimant when she had been involved in authorising HR to make the claimant a prior without prejudice offer of settlement in April 2015 before the decision to dismiss. That constituted a conflict of interest and Sue Grant should have recused herself.

2. We also are to deal with compensation today. We made it clear at paragraph 206 of our judgment that in the absence of any genuine

possibility of redeployment, bearing in mind the university had followed a procedure for redeployment during the claimant's notice period, the compensation would be limited to the basic award. In keeping with that position, we ordered on 7 April 2018 that if the claimant claims anything other than a basic award she must file and serve a schedule of loss and witness statement in support demonstrating how the claim is made in the light of the judgment sent to the parties on 15 February 2018. She had to do that by 20 April 2018. If she did not, a basic award only would be ordered. What was envisaged there, bearing in mind paragraph 206 of the judgment, was that the claimant would need to demonstrate some other redeployment route if she was going to open up loss of earnings as a head of loss. The claimant did not comply with that Order. Mr Ameadah has brought along today some information of examples of employed staff working in areas other than their original area within the university, but there is no focused evidence indicating a probable or possible redeployment opportunity for the claimant during her notice period or indeed within a few months afterwards. There is therefore no credible evidence upon which we could track a realistic loss of opportunity generating an argument that the dismissal caused a loss of earnings. The claimant herself accepted that she could not work in her original role because of the collapse of the relationship with Mr Hammond. Accordingly, no loss of earnings are demonstrated and therefore, as ordered on 7 April 2018, the award is one of the basic award only and the correct sum is £1,900.00.

3. Because the respondent had indicated it would seek costs, the Order of 7 April 2018 also directed that the respondent must file and serve a costs application if they were pursuing that by 27 April 2018. This was done. The claimant has sought to appeal our judgment in the EAT. That Appeal was rejected in the EAT's sift on 1 June 2018. Notwithstanding the claimant's desire to take that to a Rule 3(10) hearing before the EAT, this tribunal on 24 September 2018 rejected the claimant's application to postpone the hearing today. It also ordered that if means were to be taken into account in terms of any costs order considered today, the claimant had to disclose all relevant details to the respondent by 31 September 2018. The claimant did not comply with that Order. She has not attended today but Mr Ameadah, her husband, is here to represent her as he did during the full merits hearing. We accept from him that the family is under financial strain in terms of earnings and accruing debts. This is so because the claimant is not earning at the moment. He did tell us in his submissions that the claimant has a 40% ownership interest in the home at 15 Aviation Avenue in Hatfield, Hertfordshire, the other 60% being owned by Paradigm Housing Association. We are told that the claimant's share is mortgaged. We have given Mr Ameadah opportunity today to produce the mortgage statement by the end of the lunch adjournment. He has not managed to do this but we infer, and believe we do so on a safe basis, that the claimant will have at least £20,000 equity in the property, it having been bought in March 2012. There is evidence that the property is worth a sum in excess of £400,000. The respondent limits its application to £20,000 costs, being an amount the tribunal can award without a detailed assessment of costs being required.

4. The power to award costs is contained in Rule 76(1) of the Employment Tribunals Constitution and Rules of Procedures Regulation 2013. Rule 76(1) provides:

> "When a costs order or a preparation time order may or shall be made
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> (1) A tribunal may make a Costs Order or a Preparation Time Order and shall consider whether to do so where it considers that:
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> (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
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> (b) Any claim or response had no reasonable prospect of success, or
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> (c) A hearing has been postponed or adjourned on the application of a party made less than seven days before the date on which the relevant hearing begins."

5. The respondents bring their application on a variety of bases. The costs they say they had incurred by 20 February 2018 amounted to £122,000 approximately and we are told today that there have been incurred since then an additional £17,000 totalling £139,000. Applying the common wisdom that on an assessment of costs the costs would be reduced by one third, that makes a total of £92,574. The £20,000 being sought today amounts to slightly over one fifth of the probable level of assessed costs incurred by the first respondent.

6. We focus on three aspects of the respondent's application. That does not mean to say we reject the other points made. We select these three points because they are perhaps the most stark. First, the respondent submits that the claimant withdrew from a judicial mediation on 4pm before its due date unreasonably. We agree. The reason put forward by the claimant was that there was an inaccuracy in the respondent's counter-schedule of loss and that this showed a lack of good faith on the part of the respondents in coming to the mediation. There are two points about this. First, the inaccuracy would have been pointed out by the claimant in the mediation. Secondly, the respondent acknowledged the potential for inaccuracy about the relevant matter in an email sent before the claimant's withdrawal from the mediation. The issue had been acknoweedged.

7. At 10.22 on 19 April the claimant asked the respondent's solicitor by email to confirm whether he had sent the requested information as soon as possible without which she said the mediation could go no further. He replied at 12:41,

> "Please find attached an opening statement from the respondents in connection with the judicial mediation. This will be placed in the judicial mediation bundle tomorrow. The statement provides the context around the respondent's legal position that you could have continued to work for the first respondent beyond expiry of your notice period and sets out the positive spirit within which the respondents are approaching the judicial

> mediation tomorrow. To clarify the respondent's position, it is not being suggested that you were actually offered a role to commence on 2 September 2015 but rather this could have been a possibility had you been able willing to carry out more work in the supernumerary role during your notice period."

8. The counter-schedule of loss, or position statement, had suggested that the claimant was offered a particular role at a particular point. That was indeed an inaccuracy. The claimant then emailed at 15:59 "I regret to inform you that I am unable to go ahead with the mediation scheduled for tomorrow as the basis for the negotiation is not in good faith. The counter schedule provided by the respondent which I received yesterday was prepared on the basis that I was made a job offer by the respondent which I rejected. However, the respondent has today confirmed that there was no job offer, neither was there a rejection." Accordingly, she did not believe that they intended to settle the matter in good faith.

9. In our judgment that was not a material reason for failing to attend a mediation. The accuracy or otherwise of the position during the notice period, and we will come back to that in a moment, is something that could have been thrashed out in the mediation. A mediation was only taking place because the respondent was prepared to make some offer, otherwise the mediation would not have been consented to by the respondent. The failure to attend the judicial mediation meant that there was a significant missed opportunity to resolve the matter. The claimant lost the possibility of such a settlement opportunity facilitated by a professional judge whose duty on such an occasion is to seek to secure a settlement. The mediation had been ordered on 16 March 2016, just over a month before the claimant's withdrawal. Understandably the respondent had incurred costs in preparing for the mediation. It had prepared a position statement, it had prepared a bundle, the solicitor had spent time in doing that work and counsel was instructed to attend. The respondents suggest a figure of £6,220.15; reducing it to the conventional two thirds, that makes £4,142.62. We find that sum was wasted by reason of the claimant's unreasonable withdrawal from the mediation.

10. Secondly, and significantly, the claimant turned down two offers of settlement of £50,000 coupled with an offer to pay £500 plus VAT to a solicitor to advise on the merits of the settlement. It would be a matter for the claimant to find a solicitor, the first respondent would pay the bill. The full merits hearing had been listed for 24 April 2017. This offer was first made on 4 April 2017 without prejudice save as to costs. The judge became ill for 24 April 2017 hearing and a hearing was rescheduled for 22 May 2017. The offer was repeated on 8 May 2017 so the period between the offer first being made and the eventual starting of the hearing was between 6 and 7 weeks. The claimant did not consult a solicitor. Mr Ameadah today has said that some enquiries were made and £500 was not enough. That message was not sent to the respondent. There was no request to the respondent to pay more for a solicitor to enable advice to be given. If the claimant wanted advice on the offer in earnest, that message would have been conveyed. In reality, the claimant was not interested in settling for that amount. She had put in a wholly unjustifiable schedule of

loss in a figure over £1,000,000 based on a career loss of earnings. There was and remains in our judgment no basis for a suggestion that the claimant would never work again. There was no reality to that suggestion. The schedule of loss had been inflated from £250,000 to over £1,000,000 in preparation of the judicial mediation as we understand it. The respondent had made clear its accurate position that the £1,000,000 schedule of loss was entirely misconceived.

11. There were significant difficulties, on any view, with the claimant's case; ones that she if she were acting reasonably would have been alive to. First, she accepted herself that her relationship with Mr Hammond had deteriorated such that she would have to leave her old job. Secondly, she had not raised an internal equalities grievance which would have afforded an opportunity internally to raise matters of alleged discrimination and for those to be considered by the respondent. This was so despite there having been a meeting with the Equalities Department to discuss whether or not to make an equalities complaint. The claimant had made a positive decision not to raise an equalities complaint. This led to the next point that because an equalities challenge had not been made, and this was a point noted in particular on appeal in this case, there was no basis for removing Mr Hammond from the role. She therefore had to leave the role. It was her who could not work with him, not the other way round. Next, it being her who had to leave, the issue then became whether there any credible redeployment opportunity. The first respondent had made efforts in this regard. First it had extended the notice period by one month to facilitate more time for the claimant to find an alternative job. Secondly, it had identified a supernumerary role that she could work in during the notice period. It was this point that Mr Childe was alluding to in his email of 19 April 2016. In the event, the claimant worked only seven days in that supernumerary role. Some of the time was spent preparing her position for present purposes, some of that time we acknowledge was spent absent ill, but fundamentally, notwithstanding being given this extended opportunity to find redeployment, none was found and there has been no evidence put forward for example today indicating another credible path to redeployment. Lastly, and fundamentally in terms of the case, notwithstanding being given ample trial opportunities, the claimant had failed to make the flexible working period work. She had failed to hit reasonable targets that were set for her in terms of output during the periods that flexible working had been granted by the respondent.

12. All of those factors meant that an offer of £50,000 to settle the case was a generous and fair offer of settlement. If the claimant had acted reasonably she would have been alive to the difficulties in her case and acknowledged that this was a good offer. She acted unreasonably in our judgment first by failing to take legal advice on the offer and secondly by turning it down. It was a good offer then. This is not just a hindsight point: it is the fact that her position today is that she turned down an offer of £50,000 and she is on the receiving end of an application for costs of £20,000, the difference therefore being some £70,000. The offer dated 4 April 2017 listed in detail and fairly in our judgment weaknesses in the claimant's case. This was not an

unreasoned offer. The detail of the offer happened to predict with some accuracy the ultimate judgment of the tribunal with the exception of the procedural unfairness that we found. In our judgment, the £50,000 plainly should have been taken. The claimant acted unreasonably in turning it down which meant that the respondents incurred the costs of the full merits hearing. Two thirds of those costs are £23,548.

13. Thirdly, in our judgment unreasonably the claimant did not accept an offer of settlement even after the merits Judgment was promulgated. On 20 February 2018 the respondent offered the claimant £1,900 (i.e. the basic award) and not to pursue its costs so as to avoid this remedy and costs hearing. Of course, a settlement would also have the effect of preventing the claimant pursuing an appeal. We consider her failure to settle at this point was unreasonable. She could have prevented exposing herself to a Costs Order and avoiding the respondent incurring further costs. Two thirds of the costs since February 2018 are £11,343.84.

14. We repeat that we have not addressed all the matters that the respondent raises in its costs application. Just by isolating the three matters we have selected, the costs of those run up to £39,034.46 almost double the £20,000 that the respondent seeks. We are satisfied then that the power to make a Costs Order is engaged under Rule 76 in that there has been unreasonable conduct by the claimant and we do choose to exercise our discretion to make a Costs Order. We have taken into account the claimant's means set out above, in particular the equity that exists in her property and we order a figure of costs in the sum of £20,000 to be paid by the claimant within 28 days. The claimant's unreasonable conduct did cause the first respondent, to expend substantial sums of money in relation to a claim which only had procedural strength in terms of an unfair dismissal analysis. It was never aired as a discrimination matter internally in an internal equalities grievance and unreasonably the claimant made the decision not to pursue it internally with equalities before going to the tribunal. Further, following the hearing of evidence we found that there was no merit in any of the discrimination claims put forward for the reasons given in the judgment and this was so notwithstanding the numerous allegations made by the claimant of discrimination, all of which were rejected by the tribunal.

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Employment Judge Smail

Date: …07/11/2018……..

Sent to the parties on: .....

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For the Tribunal Office