Case No: 2403659/2018

EMPLOYMENT TRIBUNALS

Claimant: Miss R Jacklin

Respondent: Phoenix Helicopter Academy Ltd

Decided on the papers, by consent, on: 29 November 2018

Before: Employment Judge Mulvaney

JUDGMENT

The respondent's application for costs does not succeed. No order for costs is made.

REASONS

1. The respondent made an application for costs against the claimant following the withdrawal by the claimant of her claim to the Tribunal on the 7 January 2018.

2. A brief history of the claim is as follows:
   2.1. The claimant submitted a claim for sex discrimination and for notice pay on the 8 August 2017 following the termination of her employment by the respondent on the 2 July 2017. Paul Andrews was named as respondent on the claim form and the first line of his address was given as Phoenix Helicopters. The name of the respondent on the ACAS Early Conciliation Certificate was Phoenix Helicopter Academy Ltd. On receipt, the claim was referred to Employment Judge Holmes who concluded that the name difference was a minor error and that the claim should be accepted by the Tribunal as being brought against Mr Andrews. The incidents of alleged discrimination described in the particulars of claim were ascribed to Paul Andrews and so the claimant was entitled to bring a claim of discrimination against him personally and/or against her employer Phoenix Helicopter Academy Ltd.
   2.2. A response to the claim was submitted on the 24 August 2017. The respondent disputed the claim and queried whether the respondent should be Paul Andrews or Phoenix Helicopter Academy Ltd.

2.3. The case was listed for a Preliminary Hearing by telephone on 23 November 2017. The claimant emailed the Tribunal on the 27 September 2017 asking if her claim could be against both the company and Mr Andrews. Employment Judge Reed when considering the claimant's email, which had the company name as respondent in the header, was unclear as to the basis of the claimant's request as the ACAS Conciliation Certificate was also in the company name. He did not appear to have noticed that the named respondent at that time was Mr Andrews. He asked for further explanation from the claimant as to what she was seeking. The claimant decided not to pursue the claim against tMr Andrews personally (her email dated 30 October 2017) and the name of the respondent was changed by consent at the Preliminary Hearing on the 23 November 2017.

2.4. In her email of the 30 October 2017, the claimant informed the Tribunal (copied to Mr Andrews) that due to a recent change of circumstances she was going to be out of the country from the end of November "for the next few years" and would not be able to attend any Court hearing scheduled later than November. She sought advice from the Tribunal on what she should do. The response from the Tribunal on the 4 November was that *"In order to present her case and to allow the respondent to defend itself she would have to make arrangements to attend the hearing. This would be addressed at the case management hearing on the 23 November 2017."*

2.5. The claimant emailed the Tribunal again on the 20 November 2017. She said that she would be unable to attend the court hearing and would be out of the country from the following week. She said that unless her claim could be electronically based she felt that her only option was to withdraw her claim. She asked if the telephone hearing would go ahead or if her claim was now closed.

2.6. The Tribunal administration understood the claimant's email to be indicating that she could not attend the Preliminary Hearing listed for the 23 November 2017 and, after speaking with an Employment Judge, a Tribunal clerk telephoned the claimant on the 22 November 2017 to inform her that she would not need to attend the Preliminary Hearing in person as it would be conducted by telephone. The note on the court file indicates that there was also a short discussion between the claimant and the clerk about the final hearing in the light of the claimant being resident in Australia 'for the foreseeable future' and that the possibility of attending a final hearing by video link was mentioned. The claimant in her submission refers to a telephone call with the Employment Tribunal although she indicates that she thought she was speaking to a Judge. I concluded that she was in fact speaking to one of the Tribunal clerks whose file note reads:

> *"T/C with C @ 14.10 on 22/11 – She will phone in to TCMPH on 23/11 from Australia. Is there for the foreseeable future so may need to attend final hearing (when listed) by video link"*

2.7. The reference to the claimant phoning in to the Preliminary Hearing from Australia appears to reflect the misunderstanding about the claimant's email to the Tribunal of the 20 November 2017 which had been read as indicating that the claimant could not attend the hearing on the 23 November 2017 due to her relocation.

2.8. The claimant and the Mr Paul Andrews attended the Preliminary Hearing on the 23 November 2017 by telephone. The hearing was

conducted by Employment Judge Matthews. The claimant raised with the Employment Judge the possibility of attending a final hearing by video link and he explained the difficulties and limitations of that arrangement. A direction was given that the claimant notify the Tribunal (copy to the respondent) *'as soon as practicable but in any event no later than the 13 January 2018 whether she intends to attend the hearing or setting out her proposals for video conferencing'*.

2.9. The final hearing was listed for the 21 and 22 February 2018 and directions were given for disclosure to take place on the 8 December 2017 and for the preparation of a bundle by the respondent by the 12 January 2018. Witness statements were to be exchanged by the 26 January 2018. The Order was emailed to the parties on the 4 December 2017.

2.10. On the 7 January 2018, the claimant emailed the Tribunal, with a copy to the respondent, informing it that she was withdrawing her claim. Judgment dismissing the claimant's claim following its withdrawal was sent to the parties on the 25 January 2018.

2.11. On the 25 January 2018 the respondent emailed the Tribunal with its application for costs on the basis that the claimant had *'acted vexatiously, unreasonably without any reasonable expectation of success'*.

2.12. The parties have given their consent to the issue of costs being dealt with on the paperwork and have both provided written submissions in support of their positions.

Conclusions

3. The Tribunal's power to award costs is contained in the Employment Tribunal's Constitution and Rules of Procedure) Regulations 2013. Costs orders can only be made in respect of costs that a party has incurred while legally represented (rule 75(1)). In this case the respondent has not made any reference to having been legally represented. The application is therefore assumed to be for a preparation time order which is an order *'that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time, while not legally represented. "Preparation time" means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.'*(Rule 75(2))

4. Rule 76 provides:
(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 … has acted vexatiously, abusively, disruptively, or otherwise unreasonably in either bringing 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.

5. The respondent contends that the claimant in bringing the case was acting for personal reasons and without expectation of succeeding in her claim. Its reasons for holding this belief are that the claimant did not at the time or during internal discussions prior to her dismissal raise any issues of sex discrimination with the respondent. Furthermore, the issuing of the claim against Mr Andrews initially showed that she intended to make the matter a

personal one between her and Mr Andrews.

6. I found that the fact that the claimant did not raise the sex discrimination issues directly with the respondent at the time of her dismissal does not necessarily indicate that she had no such complaint at the time. Those complaints were raised shortly following her dismissal and within the Tribunal time limits. It is often the case that an individual will not feel able to raise a complaint of discrimination with the person against whom the allegation is made. The claimant was entitled to bring her claim against Mr Andrews personally in addition to the company, since the allegations of discrimination related to his actions. In any event she agreed to add the company as respondent and withdraw her claim against Mr Andrews at the Preliminary Hearing before EJ Matthews.

7. The claimant's subsequent withdrawal of her claim in its entirety does not appear to have been motivated by a concern about the merits of her claim. It was prompted by her move to Australia and her consequent inability to attend a hearing in person.

8. For those reasons I did not conclude that the claimant acted unreasonably in bringing the claim against the respondent, and on the basis of the pleadings alone I cannot conclude that her claim had no reasonable prospect of success.

9. The respondent contends that the claimant acted vexatiously and unreasonably in continuing to pursue her claim once she realised that she was going to be moving to Australia and therefore would be unable to attend a hearing in person. On the evidence of the correspondence between the claimant and the Tribunal, all of which was copied to the respondent, I found that the claimant acted reasonably in writing to the Tribunal on the 30 October 2017 to inform it of her recent change of circumstances (her move from the UK for an extended period) and to ask what she should do. Although she was told that this could be discussed at the forthcoming telephone hearing the claimant was sufficiently concerned to write again on the 20 November 2017 indicating that she would withdraw her claim. It was only after being told by a Tribunal clerk on the 22 November 2017 that she could continue with the telephone hearing on the 23 November 2017 and that there might be an opportunity to give evidence at a final hearing by video link that she then proceeded to attend the telephone hearing.

10. At the telephone hearing on the 23 November 2017 the claimant's imminent move to Australia was discussed and Employment Judge Matthews explained the difficulties of not giving evidence in person at a hearing. He directed that the claimant notify the Tribunal by the 13 January 2018 whether she would attend the hearing or set out her proposals to give evidence by video link. On the 7 January 2018 the claimant notified the Tribunal that as she could not attend a hearing in person she was withdrawing her claim.

11. The respondent contends that the claimant should have withdrawn her claim earlier since she was aware that she would not be able to attend a hearing from at least 30 October 2017. In continuing with her claim until the 7 January 2018 she acted unreasonably or vexatiously in allowing the respondent to spend time and resources in defending the claim and in

complying with the directions for disclosure given at the preliminary hearing.

12. The claimant moved from the UK to Australia a few days after the Preliminary Hearing in late November 2017. She wrote in her submission that she had a stressful time over Christmas and New Year following her relocation and that her final decision to withdraw was made and communicated on the 7 January 2018, within the time allowed by EJ Matthews for her to notify the Tribunal of her intentions regarding attending the hearing.

13. Within that period the respondent had spent time putting together its documents for disclosure which it provided to the claimant by means of an electronic file share on the 7 December 2017. The claimant said that it was received on that date but that the file share had an expiry date of the 14 December and she did not have an opportunity to evaluate it within that time because of her recent move. The respondent states that the claimant did not comply with the disclosure order, as she provided no documentation to the respondent. It appears from the claimant's submission that she understood that her evidence was required to be provided at the time of witness statement exchange on the 26 January 2018. It may be that she had no documents to disclose or that she assumed all relevant documents would be included in the respondent's disclosure.

14. I concluded that the claimant did not behave vexatiously or unreasonably in not deciding to withdraw her case until 7 January 2018. She had been informed by an individual at the Tribunal office that giving evidence by video link was a possibility as an alternative to attendance in person at a hearing. This was correct information. She had then been told by EJ Matthews of the potential difficulties that were inherent in dealing with evidence by video link rather than in person. It was appropriate for the claimant to be made aware by EJ Matthews that whilst video link can be used in court hearings, there are difficulties with it. Having been made aware of both the possibility and of the potential problems, it was reasonable for the claimant to take time to consider whether she should pursue that option.

15. After giving the matter consideration she decided that she would not make use of the video link option and that she could not therefore pursue her claim. I concluded that she informed the respondent in reasonable time of her decision to withdraw her claim. Clearly from the respondent's perspective it would have been preferable if she could have made and communicated that decision soon after the Preliminary Hearing, but it does not follow that the claimant acted unreasonably in taking the time allowed by Employment Judge Matthews to reach her decision.

16. Although costs can be awarded against a claimant where they have withdrawn their claim at a late stage, the case of ***McPherson v BNP Paribas 2004 ICR 1398 CA*** is authority for the principle that the tribunal must consider whether the claimant has conducted the proceedings unreasonably in all the circumstances and not whether the late withdrawal of the claim itself was unreasonable. In this case there was still approximately 6 weeks before the hearing when the claimant withdrew her claim. She had alerted the Tribunal and the respondent to her relocation and the possible impact on the proceedings at an early stage and she had made her decision within the time

frame given at the Preliminary Hearing.

17. For the reasons given, I concluded that in all the circumstances the claimant did not behave vexatiously or unreasonably in bringing her case nor in the manner in which she pursued her case. I therefore have concluded that I should not exercise my discretion to make a preparation time or costs order against her. The respondent's application is refused.

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Employment Judge Mulvaney

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Date 29 November 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE