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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondents**
Mrs P Panton	**AND**	Birmingham City Council (1) The Governing Body of Holte School (2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON 13 November 2018**

EMPLOYMENT JUDGE Woffenden
MEMBERS: Mr T Liburd
Mrs I Fox

Representation
For the Claimant: Did Not Attend and Was not Represented
For the Respondent: Miss L Hodgetts of Counsel

RESERVED JUDGMENT

1 The claimant failed to attend or to be represented at the hearing. The tribunal considered the information in its possession. The tribunal proceeded with the hearing in her absence.

2 Under Rule 76 (1) (a**)** of the Employment Tribunal Rules of Procedure 2013 the claimant acted unreasonably in the bringing of proceedings.

3 The claimant shall make a payment to the first respondent in respect of the costs that it incurred with the amount to be paid being determined by way of detailed assessment carried out by an Employment Judge applying the same principles as the Civil Procedure Rules 1998.

REASONS

1 By its judgment sent to the parties on 9 November 2017 the claimant's claims of race discrimination and detriment under section 47B (1) Employment Rights Act 1996 were dismissed ('the Judgment').

2 On 29 November 2017 the respondents made an application for costs in the sum of £58514.64 to be paid by the claimant under rule 76 (1) (a) and/or b) of the Employment Tribunal Rules of Procedure 2013 ('The Rules'), having issued a costs warning letter to her on 20 June 2017('the costs warning letter'). We note that having received the costs warning letter, The claimant's former representative Mr Sykes (of Frontline Advice and latterly Legal Advice Services) responded to the first respondent on 21 June 2017 as follows:
'*We warn you that we are preparing an application to strike out the Responses with costs for malfeasance in public office and unreasonable conduct by Birmingham City Council solicitors in together concealing with Council officers the existence of documents available for issue to the Claimant from approximately October 2014 until about 19th May 2017, a period of approximately 2 ½ years*.' He went on to say that '*A formal application to the Solicitors Disciplinary Tribunal and / or SRA will follow*.'

3 Miss Hodgetts confirmed during the hearing that the application was pursued by the first respondent only. The second respondent is indemnified by the first respondent in respect of any costs. She also confirmed that ,despite the costs warning having been given on 20 June 2017 and the schedule of costs setting out costs incurred from that date, the first respondent was choosing '*generously*' to limit the application to costs incurred from that date ;there was no '*magic*' about it and it had been open to the first respondent to apply for all costs incurred.

4 On 26 February 2018 the claimant was ordered to serve on the respondents a schedule of her means and a paginated bundle of the documents on which she intended to rely by 21 March 2018. She has never complied with that order.

5 The claimant unsuccessfully appealed the Judgment to the Employment Appeal tribunal. A notice of hearing of the costs application was sent to the parties on 20 September 2018.

6 On 12 November 2018 the claimant sent an email to the tribunal in which she described the judge as '*biased*' and sought further time to find representation '*or even the support of the British people'*. That letter was treated as an application for a postponement and on 12 November 2018 (timed at 17.26) the tribunal sent the claimant an email saying although she had said the judge was biased, she had not explained why she said this and confirming that the hearing would proceed because there was no basis on which it should be postponed.

7 The claimant did not attend today's hearing and was not represented. Under rule 47 of the Rules if a party fails to attend and is not represented a tribunal may dismiss the claim or proceed with the hearing in that party's absence but before doing so it must consider any information which is available to it after any enquiries that may be practicable about the reasons for the party's absence. The claimant was telephoned three times but on each occasion the call went through to an answering machine. In the light of the claimant's email of 12 November 2018, we were satisfied the claimant had received the notice of hearing and knew (or ought to have known) that the hearing had not been postponed. We therefore decided to proceed in her absence.

8 We also considered whether in the light of the claimant having raised the issue of bias we should recuse ourselves. We must consider whether the circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased (**Porter v Magill 2002AC 357, HL**).In this case the claimant has not set out any grounds whatsoever in her email of 12 November 2018 for her assertion of bias. She had preceded that assertion by saying she was convinced that she will get '*no justice in front of Judge Woffenden as I did report he (sic) to the tribunal for covering up the murder* 'in her case. It is reasonable to assume that she was referring to her unsuccessful appeal to the Employment Appeal Tribunal. In the absence of any grounds, in our judgment there are no circumstances which would lead a fair minded and informed observer to reach the requisite conclusion. Such an observer would conclude that the claimant was understandably disappointed and upset that her claim to the tribunal and appeal to the Employment Appeal Tribunal failed and as a result has unreasonably formed the opinion that this tribunal must have been and will continue to be prejudiced against her. We have decided there is no basis on which we should recuse ourselves

9 Under rule 76 (1) of the Rules 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; or*
(b) any claim or response had no reasonable prospect of success."
Miss Hodgetts confirmed that the application for costs under rule 76 (1) (a) was confined to the claimant having acted unreasonably in the bringing of the proceedings.

10 No costs order may be made unless the paying party has had a reasonable opportunity to make representations in writing or at a hearing in response to the application (rule 77 of the Rules). We are satisfied that in this case the claimant has had such a reasonable opportunity.

11 In deciding whether to make a costs order and if so what amount, the tribunal may have regard to the paying party's ability to pay (rule 84 of the Rules).

12 Under rule 78 (1) (b) of the Rules such an order may order the paying party to pay the whole or a specified part of the costs of the receiving party with the amount to be paid being determined by way of detailed assessment carried out by an Employment Judge applying the same principles as the Civil Procedure Rules 1998.Miss Hodgetts seeks such an order.

13 Costs in the employment tribunal (though made more frequently than was the case in the past) remain the exception rather than the rule (**Yerrakalva v Barnsley Metropolitan Borough Council 2012 ICR 420)** and are compensatory not punitive. Tribunals must look at the whole picture of what happened in the case and ask whether there has been unreasonable conduct by the claimant in bringing the case and in doing so identify the conduct what was unreasonable about it and what effects it had. Costs should be limited to those which have been reasonably and properly incurred. Even if the grounds under rule 76 (1) (a) and (b) are established the tribunal still has a discretion as to whether to make an order.

14 In **Daleside Nursing Home Ltd v Mathew EAT 0519/08** it was held that where there was a clear cut finding that the central allegation of racial abuse was a lie, it is perverse for the tribunal to fail to conclude that the making of such a false allegation at the heart of the claim does not constitute a person acting unreasonably. In **Topic v Hollyland Pitta Bakery EAT 0523/11** it was held that the fact that a claimant has based his or her claim on lies does not lead automatically to a finding either that the proceedings have been conducted unreasonably or that they have been commenced and conducted on the basis they were misconceived and the fact that there have been no lies ,equally ,does not mean that there cannot be a finding that the proceedings have been brought or conducted unreasonably or were misconceived.

15 We remind ourselves that it is appropriate for a litigant in person to be judged less harshly than one who is professionally represented (**AQ Ltd v Holden 2012 IRLR 648).**

16 Miss Hodgetts had prepared for us a bundle of the documents on which she relied and provided copies of relevant authorities in support of her application. She relied on the skeleton argument prepared by Ms R Dickinson, the respondent's counsel at the tribunal hearing.

17 Miss Hodgetts submitted that the costs warning letter to the claimant's then representative in which the claimant was told that having formed the view that the claimant's claims had no reasonable prospect of success the respondents would not pursue a costs order against her if she withdrew her claims was '*fair warning*'

that the respondents regarded the bringing of the claims as unreasonable. If such a letter was ignored that was a wilful refusal to have regard to the prospects of success at the outset. The claimant carried on and that was evidence that the bringing of the proceedings was unreasonable. She referred to the many findings in the Judgment in which the claimant was not found to be truthful. The first ground on which the first respondent relied under rule 76 (1) (a) was the claimant's reliance on untruthful evidence. She referred to paragraph 7 of Ms Dickinson's skeleton argument in which (in reliance on **Daleside**) it was submitted that the claimant's entire case was underpinned by dishonesty the finding of untruthfulness was wide ranging and clear cut, going to the very heart of the claim. In particular she referred us to paragraph 55 of the Judgment:
'55 We turn first to the claimant's credibility. Her first lengthy witness statement contained obvious inaccuracies (for example that the PGCE students were both white when one was Asian; that Charlene Whittingham was white when she is black; that Mrs Hardy had held a disciplinary hearing on 19 July 2016 when no such hearing took place) was selective (for example it omitted any account of the steps she took to obtain a fit note or advice from her GP or any explanation of any failure to do so although she had informed the respondent that she would be getting such information) and made assertions and posed 'questions' which were then left unanswered. Indeed under cross-examination she displayed a marked lack of familiarity with its contents and the contents of the agreed bundle and the factual bases on which her case had been put. For example she denied in evidence that she told Mr Fowler she was suicidal but in her witness statement she stated that she said Ms Walters and her group were driving her to suicide; she denied in evidence that Mr Robinson told her she was medically suspended at their meeting but her statement suggested he said that if she refused ,he would suspend her on medical grounds; she denied in evidence that she had accused Mr Fowler of trying to get her suspended but her statement said that she telephoned him and said he had intended to get her suspended ;under cross-examination she denied that she had ever seen the management referral form to Health Assured but in her statement complained at length about and quoted from it. It was necessary throughout cross-examination for questions to be put to her several times. She purported to be able to remember some details of events and meetings with clarity but was unable to recall other equally significant matters. She embellished her oral evidence under cross –examination (for example the account she gave of her meeting with Mr Robinson on 26 March 2015 that there was shouting and he had put a foot on the settee and leaned forward in her face) which were omitted from her witness statement. The inconsistencies inaccuracies and omissions are so numerous as to be incapable of being wholly explained by exceptionally poor recollection. We are forced to conclude that she is not a truthful witness and her evidence is therefore of little persuasive value. In the event of a conflict between it and the evidence of the respondent's witnesses (which was for the most part entirely consistent with the contemporaneous documents) we have unhesitatingly preferred the latter.'

18 Ms Hodgetts submitted that as far as the second ground on which the first respondent relied was concerned, this was largely covered by the submission under rule 76 (1) (a) (allegations had no basis in reality) in relation to the claimant's untruthful evidence. It followed in part from her untruthful (as opposed to mistaken) evidence that the claims had no reasonable prospect of success (Rule 76 (1) (b))-she must have been aware the allegations were false and unlikely to be successful. There never was a credible argument that some of the claims were in time and she provided no evidence or argument why it would be just and equitable for time to be extended in her favour. There was no reasonable prospect of her 'whistleblowing' claims succeeding from the outset because on her own evidence she did not make any disclosure in the public interest and therefore no protected disclosures could have been found to have been made (see paragraph 56.85 of the Judgment:
'The claimant accepted under cross-examination in clear and unequivocal terms that she was not considering any wider concerns when raising any of her grievances of 16 June 2014 8 December 2014 and 9 May 2016; she was concerned solely about herself.')

19 Further Miss Hodgetts submitted that in relation to Equality Act claims generally the claimant's lack of truthfulness permeated our findings in the Judgment-it was very likely that her complaints would have failed for want of jurisdiction alone but this when combined with her untruthfulness meant they were bound to fail.

20 Ms Hodgetts then went to set out other factors which she submitted were relevant to the exercise of our discretion if the threshold test was met. The claimant had had every opportunity to provide evidence of her means and had not attended today. It was submitted her absence was deliberate. She no longer worked at the second respondent and since her dismissal she had presented a third claim to the tribunal with what was described as a '*string of allegations'* which appeared to relate to her second claim. The first respondent understood she was now singing at paid gigs. The case law acknowledges that an unrepresented person should not be judged by the standards of someone with legal representation. However, the Rules are to ensure that a party cannot hide behind their legal representative or vice versa. The tribunal does not need to decide whose fault it was. If the claimant thought that her representative had acted negligently then she could pursue a claim against Mr Sykes. He was not a legal representative but held himself out as an advocate and the tribunal had a wide discretion and could take that into account. The tribunal should consider Mr Sykes' reply to the costs warning letter which gave the clear impression it was sent on the claimant's instructions.

21 Miss Hodgetts submitted it was reasonable and foreseeable for both Ms Birch and Mr Jerrison of the first claimant's legal department to attend the hearing because it was an '*unusual case'* with a long list of historical allegations and Mr

Sykes was given to making allegations about which instructions needed to be taken. The amount of costs was not unreasonable for this sort of case. It was well established law that a party can claim for the costs incurred by its in house legal representative **(Wiggins v Jenkins 1981 275 EAT; Ladak**).

22 We have considered the contents of the claimant's claim forms. In the first claim (presented on 31 March 2016) she complained of direct race discrimination and '*racia*l' harassment and direct religious discrimination and '*religious*' harassment and detriment *'by section 47B (1) Employment Rights Act 1996'*.The accompanying particulars of claim (as amended) consisted of 28 numbered paragraphs drafted by '*Frontline Advice'* described as her representative in section 11 of the claim form. She later withdrew her claim of religious discrimination. In the second claim (presented on 14 October 2016) she complained of direct race discrimination and '*racia*l' harassment and victimisation and detriment '*by section 47B (1) Employment Rights Act 1996*'. The accompanying particulars of claim consist of 29 numbered paragraphs again drafted by '*Frontline Advice'* described as her representative in section 11 of the claim form. The claims before us at the final hearing concerned three alleged protected acts, three alleged protected disclosures, 56 acts of direct race discrimination and /or harassment related to race,53 of which were also said to be acts of victimisation and 40 of which said to be acts of protected disclosure detriment.

23 We acknowledge that the claimant is now representing herself in these proceedings. However, she was represented by Mr Sykes of Frontline Advice and latterly Legal Advice Services from at least 8 April 2015.He is someone who on his own account has (or purports to have) some 22 years' experience of tribunal advocacy and therefore (presumably) knowledge of Employment Tribunal procedure (including the costs regime) and the requisite factual and legal bases for her claims. She is not to be judged by the same standard as a litigant in person; she had the benefit of representation by a person who had substantial experience in this jurisdiction.

24 In our judgment the claimant's apparent disregard of the costs warning letter (made very late in the day) has no material evidential value as far as the reasonableness or otherwise of her bringing of the proceedings is concerned, nor is there anything about the contents of Mr Sykes 'letter to the first respondent of 21 June 2017 which indicates it was sent on the claimant's instructions or indeed that he had made her aware of its contents or its consequences.

25 Although we found the claimant had not expressed the truth in her evidence before us, we did not make a finding of dishonesty in the Judgment. However, we did say in paragraph 152 of the Judgment that' *Far from there having been any sinister action (or inaction) on the part of the respondents in our judgment it had become ingrained behaviour for the claimant to respond to those management*

decisions or interventions to which she objects by raising baseless complaints that they are tainted by racism.' In our judgment it was this predisposition for which there was no rational basis (rather than any genuine but mistaken belief in the rightness of her cause) which made the claimant decide to commence proceedings against the respondents. She is not wholly incapable of objectivity; she withdrew her complaint of religious discrimination -either of her own volition or acting on advice from Mr Sykes- but in our judgment her predisposition set her on a course of action (the bringing of the proceedings) from which she could not or would not resile. In our judgment in doing so the claimant acted unreasonably.

26 The first respondent was thereby put to the costs of defending complex and numerous claims against it up to and including the final hearing.

27 Having concluded that the grounds under rule 76 (1) (a) are made out we now consider whether we should exercise our discretion in favour of making a costs order against the claimant.

28 The claimant was represented (see paragraph 23 above).

29 Due to the claimant's unexplained failure to comply with the order of 26 February 2018 or to attend to be asked further questions we have little information about her ability to pay. Ms Hodgetts informed us that her employment as a teacher with the second respondent has terminated and it is believed she is currently singing professionally. It does not follow that, because her employment as a teacher has ended, she is unable to pay an award of costs now or that she will not be able to do so sometime in the future. She was an experienced teacher and there is no reason to suppose she will not be able to get similar employment elsewhere. That she was in employment is a factor which inclines us to make an award of costs. She has chosen not to be transparent about her finances. The first respondent is a public body and it is trite to observe in these times of austerity that its financial resources are scarce.

30 As we have already noted the costs warning was made very late in the day and we were not made aware of any strike out /deposit application .However in this case the first respondent is (in our judgement) quite properly limiting the costs it seeks to those which postdate the costs warning so we do not regard the lack of prior warning as being a conclusive factor in not making a costs order.

31 We have therefore decided that we should exercise our discretion in favour of making a costs award against the claimant and have set out below orders to enable a detailed assessment to be carried out.

CASE MANAGEMENT ORDERS

Subject to the following Case Management Orders and any further Case Management Orders which the tribunal may make from time to time, the detailed assessment of the costs shall be governed by the provisions of the Civil Procedure Rules 1998 (CPR) - Part 44; Practice Direction 44; Part 47; and Practice Direction 47.

1By 4pm on **14 January 2019** the first respondent shall file with the tribunal and serve on the claimant the following documents: -

(a)A copy of the Bill of Costs (which shall comply with CPR Rule 47.6 and Paragraph 5 of Practice Direction 47 and using precedents A and F in the Schedule of Costs Precedents annexed to CPR Practice Direction 47).
(b)Copies of the fee notes of counsel and of any expert in respect fees claimed in the bill.
(c)Written evidence as to any other disbursement which is claimed (or an explanation for the unavailability of such evidence).

2By 4pm on **28 January 2019** the claimant shall file with the tribunal and serve on the respondent, Points of Dispute (which shall comply with CPR Rule 47.9 and Paragraph 8 of Practice Direction 47 and using precedent G in the Schedule of Costs Precedents annexed to CPR Practice Direction 47).

3By 4pm on **11 February 2019** the first respondent may, if so advised, file with the tribunal and serve on the claimant replies to the Points of Dispute (which shall comply with CPR Rule 47.13 and Paragraph 12 of Practice Direction 47 and using precedent G in the Schedule of Costs Precedents annexed to CPR Practice Direction 47).

4By 4pm on **25 February 2019** the parties shall file the following with the tribunal:

(a)A joint statement setting out those items in the Bill which are agreed and those which remain in dispute and setting out reasons for the dispute.
(b)A time estimate for the detailed assessment hearing.
(c)Any request for further Case Management Orders – including any application for disclosure of documents.

5**The detailed assessment hearing will be conducted by an Employment Judge sitting alone at the Midlands (West) Employment Tribunal, to be held in Birmingham at 13 Floor, Centre City Tower, 5-7 Hill Street, Birmingham B5 4UU to start at 10am or as soon thereafter as possible on 7 March 2019**
The parties are to attend by 9.30 am. Only items specified in the Points of Dispute may be raised at the hearing unless the tribunal gives permission.

6By 9.30am on the day appointed for the detailed assessment hearing the first respondent shall lodge the following documents with the tribunal:

(a)Copies of the Bill of Costs; the Points of Dispute; any Replies to the Points of Dispute and the Joint Statement filed pursuant to Paragraph 4(a) above.
(b)Instructions and briefs to counsel arranged in chronological order together with all advices, opinions and drafts received and responses to such instructions.
(c)Reports and opinions of medical and other experts.
(d)Any other relevant papers.
(e)A full set of any relevant statements of case.
(f)Correspondence, file notes and attendance notes.

7Once the detailed assessment hearing has ended it is the responsibility of the first respondent to remove the papers filed in support of the Bill of Costs.

8If the first respondent fails to comply with these Case Management Orders or with any relevant provision of the CPR, the claimant may apply to the tribunal for the costs to be disallowed in their entirety. If the claimant fails to comply with these Case Management Orders or with any relevant provision of the CPR, the respondent may apply to the tribunal for the Bill of Costs to be allowed in full.

CONSEQUENCES OF NON-COMPLIANCE

1.Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2.The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3.An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge Woffenden
28/12/2018

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