Case Number: 3200009/2017

RM

EMPLOYMENT TRIBUNALS

Claimant: **Ms S Olukoya**

Respondent: **London Borough of Tower Hamlets**

Heard at: **East London Hearing Centre**

On: **22 January 2019**

Before: **Employment Judge M Warren**

Members: **Ms M Long**
Mrs P Alford

Representation

Claimant: Ms N Mallick (Counsel)

Respondent: Mr C Adjei (Counsel)

JUDGMENT ON COSTS

1 This is the Claimant's application for costs after she succeeded in her complaints of disability discrimination and unfair dismissal before us in August 2017. Reserved Judgment on liability was sent to the parties on 13 October 2017. There was a remedy hearing on 7 and 8 June 2018, oral judgment was given to the parties on that occasion, the written decision sent on 18 July 2018. The costs application was made in writing in time, on 22 June 2018.

2 The Respondent's gave a written response to the application on 11 December 2018, however, a costs hearing has been necessary.

3 For today, the Respondent has prepared a paginated and indexed bundle, running to page number 114.

4 We heard oral submissions from Ms Mallick and Mr Adjei.

The Law

5 Rule 76 provides that an Employment Tribunal may make an order for costs where a party has, (a) in the way it has conducted the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or (b) the response had no reasonable prospects of success.

6 In the case of Gee –v- Shell UK Limited [2003] IRLR82 Sedley LJ said:

> *"It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to ordinary people without the need of lawyers and that in sharp distinction for ordinary litigation in the United Kingdom losing does not ordinarily mean paying the other side's costs".*

7 Similar comments were recently made by Mrs Justice Cox in HCA International v May-Bheemul UKEAT/0477/10:

> *"Although employment tribunals are under a duty to consider making an order for costs in the circumstances specified in rule 14(1) in practice they do not normally make orders for costs against unsuccessful applicants. Their power to make costs orders is not only more restricted than the power of the ordinary courts under the CPR, it has also for long been generally accepted that the costs regime in ordinary litigation does not fit the particular function and special procedures of ETs"*

8 Nevertheless, that said, if the conduct of a party meets the description set out at rule 76, the Tribunal's discretion to make an order for costs arises.

9 There are 3 steps for us to take as identified by Langstaff J in Millan v Capsticks Solicitors LLP & Others UKEAT/0093/14/RN:

9.1 Has the putative paying party behaved in the manner proscribed by the rules?

9.2 If so, it must then exercise its discretion as to whether or not it is appropriate to make a costs order, (it may take into account ability to pay in making that decision).

9.3 If it decides that a costs order should be made, it must decide what amount should be paid or whether the matter should be referred for assessment, (again the Tribunal may take into account the paying party's ability to pay).

10 In the case of Power –v- Panasonic UK Limited UKEAT 0439/04 His Honour Judge Clarke made it clear that the civil jurisdiction principles from the case known as Calderbank & Calderbank have no place in Employment Tribunals, although he acknowledged that pressing-on or conducting negotiations in an unreasonable way might amount to unreasonable conduct.

11 There are two cases often referred to in situations where a Tribunal has found that

a litigant has lied. They are called Nursing Home Limited –v- Matthews UK EAT20519/08 and Dunedin Campbell Housing Association –v- Donaldson UK EAT0014/09. Essentially, the point is that the EAT has held that where the employment tribunal has found that a litigant has lied, that may be taken as unreasonable conduct and indeed, it is suggested that to not find that is unreasonable conduct it might be perverse. On the other hand, in the Employment Appeal Tribunal, Mrs Justice Cox in HCA International, (paragraphs 39 and 40) made the remarks that Ms Mallick herself referred to in her submissions, to the effect that a lie on its own would not be enough to found an award of costs, one must look at the nature, gravity and affect and there is no point of principle of general application arising out the likes of Daleside, (an approach endorsed by the Court of Appeal in Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797 [2012] ICR 159)

12 The Employment Appeal Tribunal reminded us recently that the mere fact that somebody may have given false evidence is not reason of itself automatically to make a cost order it has to look at the case as a whole see Kapoor v Governing Body of Barnhill School UKEAT/0352/13.

13 Ms Mallick has referred us to the case of Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420 that is authority for the proposition that we should:

> *"…look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had*".

Discussion

14 We considered the points made by Ms Mallick in her written application and in her oral submissions this morning.

15 We did not find that Mr Willie lied. We weighed the evidence in the balance and reached our conclusions on the balance of probability. We made no express finding that he had lied.

16 In respect of the, "one down two to go" comment by Mr Willie, which we found he had made though he denied it, to repeat the point, we weighed the evidence in the balance before reaching our conclusion. In any event, this was an allegation of race discrimination in respect of which the Claimant did not succeed.

17 Ms Mallick did not bring a copy of Yerrakalva v Barnsley Metropolitan Borough Council [2012] IRLR 78 with her today, which is surprising because she relied upon that case in support of her proposition that in making a decision as to costs, we should take into account the Respondent's conduct in the employment itself. I printed a copy of that case for my members and I and we could not find in there, any references which support that submission.

18 That the Respondent did not do what it should have done during the Claimant's employment, is why she has won her case and is why she has been awarded compensation not just for her loss of earnings, but also for the injury to her feelings and the personal injury she has suffered.

19 That there was no apology for the discrimination until the remedy hearing is something relevant to the way that Ms Olukoya felt and is reflected in the damages award she has received.

20 In respect of our finding at paragraph 308 of our reserved decision on liability, that it was difficult to see how, given the history of homeworking, such could not have been a reasonable adjustment, is a point Ms Mallick makes with which we have some sympathy. However, homeworking had been under review in the Respondent organisation, as recorded in our reasons. We could not say that their arguments had no reasonable prospects of success. That ultimately the Respondent did not do what it should have done with regard to homeworking is once again, why Ms Olukoya won her case and for which she has been compensated.

21 The reference to the expert psychiatrist report before us in the remedy hearing, telling us how unwell Ms Olukoya was at the time, is evidence that is reflected in the compensation which she has received.

22 That Ms Olukoya says she would have retired when she was 70 and wanted compensation for her loss of earnings until she was 70 and the fact that we made a finding that we considered that she would have retired at the age of 67, is not a reason to order the Respondent to pay Ms Olukoya's costs of these proceedings.

23 On the time point, the reasonable adjustments claim was six months out of time. As a matter of jurisdiction we were bound to take that point and make a decision on it. The Tribunal had to make a decision on whether it was just and equitable to extend time and it is not for the Respondent to concede the point. It is something that requires a decision from the Tribunal. The Respondent is entitled to argue that it was not just and equitable to extend time.

24 In respect of the claim of constructive unfair dismissal, Ms Mallick says that it must have been obvious this claim would succeed. That is not necessary so, because the relevant findings of fact have to be made and in any event, the Respondent is entitled to argue for example that if on our findings Ms Olukoya had decided in March to resign but then did not actually resign until July, that there had therefore been acceptance, or waiver, of the breach of contract. It is not unreasonable conduct on the part of the Respondent to run that argument.

25 The Respondent argues that the Claimant made no application to strike out the response. Whilst Ms Mallick was wrong to say that there is no authority on the point, because I referred to such authority, (AQ Ltd v Holden UKEAT/0021/12/CEA) it is a fair point to say that expecting a litigant in person, funding her own case, to go to the cost of a speculative application at a Preliminary Hearing to strike out a response and/or to seek a deposit order, would be asking rather a lot. We do not think one can read anything into the lack of such an application.

26 For the avoidance of doubt, there was nothing untoward in the cross-examination of the Claimant.

27 At paragraph 13 of the written submissions from Ms Mallick, she criticises the

Respondent's efforts to settle the case. This is not something which was developed orally today. We have been given no detailed information. No without prejudice save as to costs correspondence, (sometimes known as Calderbank letters) were referred to.

28 The points listed at paragraph 15 of the written application seem to us primarily to go to Claimant's injury to feelings, for which she has been compensated, save for the point about home working being a reasonable adjustment, which we have already dealt with.

29 A minor point, but a point nevertheless to be made, is that the Respondent did succeed in resisting the complaint of race discrimination.

Conclusion

30 In conclusion, the Respondent is entitled to defend itself. That is what litigation is about. Orders for costs in the Employment Tribunal are the exception. Nothing about this case takes it outside the scope of the usual cut and thrust of employment law litigation and into the realms of unreasonable conduct prohibited by Rule76. This is a case where we find that the Respondent has not crossed that line and therefore we decide not to make an order for costs.

Employment Judge Warren

25 February 2019