EMPLOYMENT TRIBUNALS

Claimant: Mrs E Brown

Respondents: 1. The Governing Body of Wennington Hall School
2. Lancashire County Council

HELD AT: Manchester **ON:** 3 April 2019

BEFORE: Employment Judge Slater
Mrs M A Gill
Mrs C A Titherington

REPRESENTATION:

Claimant: Written representations
Respondent: Written representations

JUDGMENT

The unanimous judgment of the Tribunal is that the claimant is ordered to pay costs to the respondents of £1250.

REASONS

Background

1. Judgment was given orally in this case at the hearing on 21 June 2018 and a written judgment sent to the parties on 2 July 2018, followed by written reasons on 23 July 2018. The claimant did not succeed in any of her claims.

2. The respondents made an application for costs by letter dated 27 July 2018. The respondents asked that the application be dealt with on written submissions, without a hearing, to save costs. The claimant sent her written objections to the application to the tribunal on 16 August 2018. She agreed that the application could be dealt with on paper without a further hearing.

3. References to paragraph numbers in our reasons are to the written reasons sent to the parties on 23 July 2018.

The respondents' application

4. The respondents argued that the claim was unreasonably brought and lacked prospects for success on account of it being brought out of time. They also argued that the claimant acted unreasonably in not engaging with negotiations to settle the matter and proceeding with a claim that was out of time, especially after a "without prejudice save as to costs" letter of 13 June 2018. The respondents sought an order for costs of instructing a barrister, in the sum of £4,500.

The claimant's response to the application

5. The claimant, who has been unrepresented throughout the proceedings, opposed the application for reasons set out in her letter of 16 August 2018. These included what the claimant described as unreasonable behaviour by the respondents over a period of 2 years. She referred to the costs sought as being over half her annual salary, which is now £8526.33 per annum. She gave no other information as to her financial means. The claimant denied (at paragraph 10 of her letter) receiving the letter of 13 June 2018 from the respondents. However, she referred, at paragraph 11, to receiving a letter threatening to recover costs from her which she was not allowed to tell the tribunal. The claimant said she had been made an offer on an email from ACAS and enclosed a copy of this email, dated 18 May 2018.

The law

6. Rule 76(1) of the Employment Tribunals (Rules of Procedure) 2013 provides:

> "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 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 have been conducted; or
> any claim or response has no reasonable prospect of success."

7. In accordance with rule 75(1)(a), a costs order is an order to make a payment to a party in respect of costs that the receiving party has incurred while legally represented or while represented by a lay representative.

8. "Costs" are defined in rule 74(1) as "fees, charges, disbursement or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing).

9. Rule 84 provides that, 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.

Decision

10. We do not conclude that the claimant was unreasonable in starting proceedings. Her claim was not entirely misconceived. Although dismissed on jurisdictional grounds, there was some merit in one of the complaints of failure to make reasonable adjustments in respect of a period of one month (see paragraphs 72 and

73 of our reasons) and the complaint about the handling of the claimant's flexible working application (see paragraph 89 of our reasons). The time limit issue and the "disposed of by agreement" jurisdictional issue were identified at the preliminary hearing (although not the further jurisdictional issue about whether the flexible working request was in the form required by the legislation, which was only identified at the final hearing). However, as an unrepresented litigant, albeit with some access to advice from her trade union, we consider it unlikely the claimant would have been fully aware of the difficulties in her complaints succeeding.

11. We conclude, however, that the claimant did act unreasonably in continuing with the proceedings to a final hearing after the "without prejudice save as to costs" offer had been made on 13 June 2018. We find, on a balance of probabilities, that the claimant received this letter. The claimant denied in her submissions having received this letter although doubt is cast on this denial by her statement in another paragraph that she had received a letter threatening to recover costs from her which she was not allowed to tell the tribunal. From the description, this could well be the letter of 13 June 2018 which was headed "without prejudice save as to costs" and concluded "Please note that this correspondence is on a without prejudice basis, which means it should not be disclosed in open court during the final hearing." We find that the letter was sent and, given it indicates it was sent "initially by email" and then by post to the correct postal address, we consider it more likely than not that it was received by email and/or post.

12. The letter of 13 June 2018 put the claimant on notice that they considered her case was unreasonably proceeded with. The respondents raised the time limit issues and that the flexible working request was dealt with by agreement. They put forward an offer of compensation of £3750, a letter of apology and the further reduction in hours which had already taken effect, from 9 April 2018.

13. The claimant sent us a copy of an email from ACAS dated 18 May 2018 conveying an offer from the respondent. They offered compensation of £2103.16 representing 8 weeks' wages before the reduction in hours, explaining that 8 weeks was the maximum the claimant could be entitled to if she succeeded in the flexible working request claim plus £1500 for injury to feelings, a letter of apology and the reduction in hours which had taken effect from 9 April 2018.

14. We would not normally see offers conveyed via ACAS, such offers being "without prejudice". However, the claimant has sent this to us and the respondent has not objected to us seeing it. We understand from this that both parties are waiving privilege in relation to this email.

15. The existence of this earlier offer in very similar terms to those in the letter of 13 June (although the compensation offered in the 13 June letter is slightly increased) lends further support to the likelihood that the letter of 13 June was sent to the claimant.

16. The claimant did not accept the offer and the case proceeded to the final hearing on 20-21 June 2018.

17. The claimant has not explained what more than was offered (in the letter of 13 June or the offer conveyed via ACAS on 18 May) she considered she could obtain

by proceeding with her claim to the tribunal and why. The claimant has not suggested that any compensation she could have been awarded by the tribunal would have been higher than the offer she was made. There has been nothing which has suggested to us that the claimant suffered a financial loss as a result of any of the matters she complained about.

18. If the claimant had succeeded in her claims, she would have had a public recognition of the merits of her complaints and the wrongdoing of the respondents. However, the apology offered by the respondent would be an acknowledgement, at least to some extent, that the respondent was guilty of wrongdoing.

19. We conclude that the claimant acted unreasonably in continuing to pursue a case where, at the least, from the identification of the issues at the preliminary hearing and then the respondent's letter of 13 June, she had been made aware there were obstacles to her succeeding in her complaints and in circumstances where she had been offered possibly as much, if not more, than she would obtain if she succeeded in her claims at a final hearing. The claimant continued to pursue her case to a final hearing in these circumstances, aware that, by doing so, she was putting the publicly funded respondents to additional legal costs.

20. We conclude that, for these reasons, a costs order may be made by us. We have a discretion as to whether to make an award and, if so, how much. In exercising that discretion, one of the matters which we may (but do not have to) take into account is the claimant's ability to pay. The only information we have about the claimant's financial means is that she has an income of £8526.33 per annum from her job with the respondent school. We have no information as to whether she has any substantial assets (such as equity in a house) or savings.

21. In exercising our discretion, we take into account the likely impact of any award on the claimant's finances, given the claimant's relatively modest income. We also take into account the extent to which there was some merit in the claimant's claims and the mistakes which had been made by the respondents in dealing with her application for flexible working (we refer to paragraph 89 of our reasons in particular). In all the circumstances, we consider it fair that the claimant be ordered to pay costs of £1250 to the respondents and we make this order.

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Employment Judge Slater

Date: 4 April 2019

JUDGMENT & REASONS
SENT TO THE PARTIES ON

5 April 2019

FOR THE TRIBUNAL OFFICE

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