EMPLOYMENT TRIBUNALS

PRELIMINARY HEARING

Claimant: **Miss Z E Zaremba**

Respondent: **Cawingredients Limited**

Heard at: **North Shields Hearing Centre** **On:** **12 June 2018**

Before: **Employment Judge P Arullendran**

Members:

Representation:

Claimant:
Respondent:

ORDER ON APPLICATION FOR COSTS

1) The respondent's application for a costs order against the claimant is not well founded and is dismissed.

2) The respondent's application for a wasted costs order against Jacksons Law Firm is not well founded and is dismissed.

REASONS

1) This hearing was conducted on paper with the consent of the parties, the respondent having made an application for costs and wasted costs in a letter dated 5 March 2018.

2) I have considered the e-mail correspondence from the respondent's representative dated 5 March 2018 with its enclosures and the e-mail correspondence from the claimant's representative dated 6 April 2018 with its

enclosures. I have also considered the documents and correspondence available on the Employment Tribunal file as referred to in the respondent's application and the claimant's reply.

3) The claimant's application to have her substantive claim reinstated to the Employment Tribunal list for a full merits hearing was struck out on the grounds of having no reasonable prospect of success, in a reserved Judgment dated 21 February 2018, on the grounds that her claims had been compromised in a settlement agreement dated 6 February 2017. The respondent seeks to make three applications for costs, all argued in the alternative-

    i) The respondent's costs incurred from 1 February 2017 to the conclusion of the preliminary hearing on 5 February 2018 in the sum of £17,895.10.
    ii) The respondent's costs from 17 February 2017 onwards in the sum of £15,170.58.
    iii) Wasted costs for an unspecified period and for an unspecified sum.

4) The background to the proceedings and the events leading to the preliminary hearing of 5 February 2018 are set out very clearly in the letter from the claimant's representative in reply to the application for costs, dated 6 April 2018, at pages 1 to 4. I note that the background as set out by the claimant's representative is both accurate and presented in an objective manner which is in keeping with the overriding objective, whereas the background as set out in the respondent's application dated 5 March 2018 provides a subjective view, with the writer seeking to promote solely the respondent's position, rather that setting out a balanced or objective assessment of the proceedings.

5) The facts in this case are that the claimant submitted an application for unfair dismissal and disability discrimination on 24 August 2016 against the respondent company. It is common ground that the claimant has Asperger's Syndrome and a psychiatric illness which, on occasion, has manifested itself in self harm. The substantive hearing was compromised by the parties on 6 February 2017 and it was agreed between the parties that there would be a discussion between the claimant and Mr Harrison of the respondent company on 9 February 2017, which would then be followed by a verbal apology and the payment of £30,000.00. It was also agreed that the respondent company would provide a reference in the terms set out in the settlement agreement. In light of the settlement agreement between the parties, Employment Judge Wade issued a consent Judgment on 6 February 2017 which stated "these proceedings will stand dismissed without further order on 20 February 2017 unless either party makes prior application."

6) It is common ground that the discussion between the claimant and Mr Harrison, and the apology which was supposed to have been given after the discussion, did not take place on 9 February 2017 because Mr Harrison initially objected to being in a room with the claimant, without a third party

being present, in order to carry out the terms of the agreement relating to the discussion. A copy of the settlement agreement was shown to Mr Harrison and it was pointed out to him that the agreement stated that the discussion was to take place between the claimant and Mr Harrison only and that the claimant's solicitor would be present at the time the apology would be given by Mr Harrison to the claimant. Mr Harrison spoke to the respondent's solicitors about the terms of the settlement and he eventually agreed that he would carry out the discussion with the claimant, however, by this point the claimant was extremely distressed and was unable to continue with the discussion and apology that afternoon and it was agreed between the parties that further arrangements would be made for the terms of the settlement to be carried out at a later date.

7) It is common ground that the parties were unable to agree a new date for the terms of the settlement to be carried out and it is the claimant's position that her representatives were informed by the respondent's representative that Mr Harrison was extremely reluctant to meet with the claimant alone because he was concerned that the claimant may take steps to harm herself. It is clear from the Tribunal file that an extension was granted for the date by which proceedings would be dismissed in order for the parties to conclude the terms of the settlement agreement and attempts were made by Employment Judge Wade to facilitate a settlement, however it was not possible to arrange mediation between the parties because the claimant did not feel well enough to take part in such a process.

8) The claimant's representative obtained a risk assessment and a copy of this was sent to the respondent's representative on 1 March 2017, along with proposed dates and times for the terms of the settlement agreement to be concluded. However, the response from the respondent's representative stated that Mr Harrison did not wish to be in a room alone with the claimant and that he has concerns for the claimant, as well as his own safety. I note that the claimant's representative also sought advice from the claimant's GP in relation to this specific issue.

9) As no arrangements had been made between the parties for the terms of the settlement agreement to be carried out by the end of March 2017, the claimant made an application to the Employment Tribunal on 29 March 2017 requesting for the proceedings to be reinstated to the Tribunal list. This resulted in preliminary hearings to take place on 19 May 2017, 22 May 2017 and 17 July 2017. It is common ground between the parties that the respondent offered an alternative settlement agreement on 7 December 2017 which was an attempt to re-negotiate the original settlement agreement, however, this was not acceptable to the claimant because the written apologies referred to in the later agreement were insubstantial and did not compare with the terms of the verbal apology which had originally been agreed in February 2016. It is the claimant's position that she continues in her willingness to meet with Mr Harrison in order to carry out the terms of the settlement agreement. It appears to be the respondent's position that Mr Harrison will not meet with the claimant alone in order to carry out the terms of the discussion and has sought to change the terms of the agreed settlement by suggesting that either a third

party is present or the door to the meeting room is left open with a third party having sight of the parties whilst they are taking part in their discussion.

10) The respondent submits that the claimant's conduct in continuing with her claim, having had her £30,000.00 offer of settlement met by the respondent on 26 January 2017, was unreasonable. The respondent further submits that the claimant's conduct in challenging the validity and effect of the settlement agreement, the terms and effects of which were clear and in particular in light of the advice on the effect of the warranty given by her, was unreasonable. The respondent also submits that the claimant's claim from 6 February 2017 onwards, having entered into a settlement agreement, had no reasonable prospects of success and that costs should be awarded on this basis. In the alternative, the respondent submits that, if the claimant seeks to blame her solicitor for some or all of her claim, then it seeks a wasted costs order against the claimant's solicitors on the ground that their conduct has been unreasonable and/or negligent.

11) The claimant submits that the term "unreasonable" should be given its ordinary meaning as set out in the case of **Dyer -v- Secretary of State for Employment UKEAT/183/83**; the question to be asked by the Tribunal is whether, in all the circumstances of the case, the claimant conducted the proceedings unreasonably, as set out in the case of **McPherson -v- BNP Paribas (London branch) 2004 IRLR 558.**

12) The claimant submits that the effect of the claimant's disability is such that she finds it very difficult to understand how the respondent can breach the terms of the settlement agreement and escape liability. The claimant further submits that the Consent Judgment should be considered in the context of the claimant's disability and that the wording of the Judgment is not final on any reasonable view and the claimant could not reasonably be expected to know that she would be unable to continue with her claim if the respondent failed to fulfil the settlement terms. The claimant submits that it cannot, on any reasonable view, be said to have conducted her claim unreasonably, taking into account her disability and the respondent's breach of the settlement agreement, along with the uncertainty created by the Consent Judgment. The claimant submits that, although the Tribunal held that from 6 February 2017 onwards the claimant's claims had no reasonable prospect of success, this was far from certain prior to the preliminary hearing of 5 February 2018 and it is notable that the respondent did not issue any warning that it would seek costs on the basis that the claims had no reasonable prospect of success from 6 February 2017 onwards and, therefore, the claimant's belief that her claims had a reasonable prospect of success is understandable.

13) The claimant submits that the costs sought by the respondent before 6 February 2017 are in appropriate as they pre-date the settlement agreement and it is illogical that a party would enter into settlement agreement with the view that the agreed terms would not be legally binding. The claimant submits that the costs the respondent seeks between 6 February and 24 April 2017

can also be distinguished as they cover a period during which the parties were attempting to fulfil the settlement terms.

14) The claimant asks that the Tribunal considers the nature, gravity and effect of the claimant's conduct in the context of her personal circumstances and the developments in her claim and argues that there is no suggestion that the claimant has acted vexatiously in continuing with her claim. Further, or in the alternative, in the absence of a costs warning letter in respect of the claimant's claims having no reasonable prospect of success, the respondent's culpability in failing to carry out the terms of the settlement agreement and the claimant's inability to pay any costs claimed are other factors for the Tribunal to consider and the claimant submits that the Tribunal should exercise its discretion to withhold from making a costs order against her in this regard.

15) The claimant submits that she has not sought to blame her solicitors and there is no basis for the respondent suggesting that the claimant's solicitor's conduct in representing the claimant has been unreasonable and or negligent. The claimant relies on the three-stage test as set out in the case of **Ridehalgh -v- Horsefield 1994 EWCA Civ 40** and submits that this application must fall at the first hurdle as the representative has not acted improperly, unreasonably or negligently.

The Law

16) Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, schedule 1 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 (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 the proceedings (or part) have been conducted; or
(b) any claim or response had no reasonable prospect of success…."

17) I refer myself to the guidance of **Gee -v- Shell UK Limited 2002 IRLR** 82 in which it was stated that the first principle is that costs in the Employment Tribunal is still the exception rather than the rule. In terms of the procedure to be adopted by this Tribunal, the two-stage process was set out in the case of **Kriddle -v- Epcot Leisure Limited 2005 EAT/0275/05**:
(i) a finding of unreasonable conduct and, separately
(ii) the exercise of discretion in making of an order for costs.

18) In the case of **Barnsley Metropolitan Borough Council -v- Yerrakalva 2011 EWCA Civ 1255** guidance was given on the question of causation and I refer myself specifically to paragraphs 40 to 42 of that Judgment in which it was decided that the vital point in exercising the discretion to orders costs was to 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.

19) I refer to the case of **Marler -v- Robertson 1974 ICR 72** in which it was held that the definition of a hopeless claim is where and employee brings a claim not with the expectation of recovering compensation but out of spite to harass the employer or over some improper motive. I note that this is a serious finding to make against an applicant, for it would generally involve bad faith on his or her part and one would expect that discretion to be sparingly exercised.

20) With regard to the application for wasted costs, I refer to Rule 80 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, schedule 1, which provides

"(1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs

(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative or

(b) which, in light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.

Costs so incurred are described as "wasted costs"."

21) I refer to the case of **Isteed -v- London Brough of Redbridge UK EAT/0442/14** and in particular to paragraph 5 which highlights a three-stage test to be applied when determining whether wasted costs should be contemplated. The test is to ask the following questions

(i) has the legal representative of whom the complaint is made acted improperly, unreasonably or negligently?

(ii) If so, did such conduct cause the applicant to incur unnecessary costs?

(iii) If so, in the circumstances is it just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

22) I refer myself to the case of **Ridehalgh -v- Horsefield and another (1994) SH205** which sets out the definitions for "improper" and "unreasonable". In short, improper covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty and unreasonable is described as conduct that is vexatious, designed to harass the other side while other than advance the resolution of the case.

Conclusions

23) The starting point in this application is whether the claimant acted unreasonably in making an application the Employment Tribunal for her substantive claim to be reinstated to the Tribunal list after the parties had failed to carry into effect the terms of the settlement agreement. The situation that the claimant found herself in was that she had compromised her substantive claims by entering into a settlement agreement with the respondent on 6 February 2017 with the expectation that the terms of the settlement would be carried into effect on 9 February 2017. However, it was Mr Harrison from the respondent company who initially refused to conduct the

discussion in accordance with the terms set out in the settlement agreement and by the time he agreed to meet with the claimant she was unable to take part in the discussion to due to her medical condition. Subsequently, it is clear from the correspondence I have seen between the parties representatives that the claimant has made several attempts to rearrange the discussion meeting, but it is the respondent who has taken the stance that the discussion meeting cannot take place in accordance with the terms set out in the settlement agreement without further conditions being imposed, such as the presence of a third party or the door to the meeting room being left open. I note that the claimant and her representatives have made considerable efforts to facilitate the holding of the discussion meeting by obtaining medical advice and a risk assessment, however the respondent has refused to accept the contents of the risk assessment, preferring to rely on its own subjective opinions without obtaining any medical evidence or carry out a risk assessment of its own. In all the circumstances, the respondent's position appears to be quite intransigent and offensive as there appears to be no objective basis for Mr Harrison's view that the claimant or he would be at any risk of harm during the discussion.

24) Having received a copy of the Consent Judgment dated 6 February 2017 from the Employment Tribunal, I find that it was reasonable for the claimant to conclude that she could make an application to the Employment Tribunal before 20 February 2017 if she did not want the proceedings to be dismissed for any reasons. As the terms of the settlement agreement had not been carried into effect and as further discussions between the parties between February and the end of the March 2017 had not resulted in a resolution, I find that it was reasonable for the claimant to make an application for her claim to be reinstated to the Employment Tribunal list for a full merits hearing to take place.

25) The respondent has made much about the availability of the £30,000.00 settlement payment and the fact that it contends that three apologies have been offered to the claimant in writing. However, I understand from what was said at the hearing on 5 February 2018 that the financial settlement was not the most important aspect for the claimant and that the discussion and verbal apology from Mr Harrison were of particular significance, if not more important, to the claimant. Therefore, I find that the respondent's suggestion that three apologies had been offered to the claimant in writing have no bearing on the breach of the terms of the settlement agreement, particularly as the three alleged written apologies predate the settlement agreement. In the circumstances, I find it was not unreasonable conduct on the part of the claimant to make an application for her claim to be reinstated to the Employment Tribunal list, given that the respondent was trying to renegotiate the terms of the settlement and was referring to matters that predated the settlement agreement in an effort to argue that it had complied with its obligations. Looking at the whole picture of what happened in this case, I find that there has not been unreasonable conduct by the claimant in the brining or the conducting of the case.

26) I note that there is very little case law which deals with the enforcement of settlement agreements, however there is case law which makes it clear that a claim can be reinstated to the Employment Tribunal list for the substantive matter to be heard in full where there has been misrepresentation, economic duress, lack of legal capacity or mistake, or any other ground which might render a settlement agreement voidable at common law. In this case, it was arguable that there might have been a misrepresentation by the respondent which induced the claimant to enter into a settlement agreement if the respondent never had the intention of facilitating a discussion between Mr Harrison and the claimant in the specific terms as set out in the settlement agreement. I note that the arguments raised by the claimant at the hearing on 5 February 2018 were that terms of the settlement agreement were not certain because the respondent had sought to change the way in which the discussion was to be facilitated, i.e. whether a third party should be present and or whether the door to the meeting room had to be left open. It is common ground that such matters cannot be enforced by the civil courts by way of specific performance and, therefore, I find that it is not unreasonable for the claimant to try and argue that the terms of the settlement agreement were not valid, in the circumstances, and request that it be restored to the list for a full merits hearing.

27) Whether an application has a reasonable prospect of success or not must be taken at its highest as first revealed by the application and response. The parties clearly knew that the civil courts could not award specific performance in terms of the discussion between the claimant and Mr Harrison and the apology, plus the respondent was seeking to impose new conditions for the agreed discussion to take place. Under the circumstances, there was uncertainty between the parties from 9 February 2017 onwards in terms of the performance of the terms of the settlement agreement and, therefore, it could not be said that the was no reasonable prospect of success at the time the claimant made the application for her claim to be reinstated to the Employment Tribunal list. For the sake of clarity, I note that the respondent had set out the wrong test by claiming that the claim had no prospect of success, as opposed to no reasonable prospect of success, and this is not what was decided by the Tribunal on 5 February 2018, contrary to what is written on page 3 of the respondent's application dated 5 March 2018.

28) In all the circumstances, I find that the respondent's application for costs, pursuant to Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, schedule 1, is not well founded and it is dismissed.

29) With regard to the respondent's application for wasted costs, I note that the respondent makes this application in the alternative and only if the claimant seeks to blame her solicitor for some or all of the conduct of her claim, which she has not. I also note that the respondent has failed to provide any details of how the claimant's solicitor is said to have behave unreasonably and/or negligently in the proceedings.

30) I note that that "negligent" needs to be understood in an untechnical way to denote a failure to act with the competence reasonably to be expected of ordinary members of the profession and that this includes advice, acts or omissions in the course of professional work which no member of the profession who was reasonably well informed and competent would have given or done or omitted to do.

31) The questions to be answered by this Tribunal are has the legal representative acted improperly, unreasonably or negligently and, if so, did such conduct cause the applicant to incur unnecessary costs? It is then necessary to consider whether, in the circumstances, it is just to order the legal representative to compensate the applicant for whole or any part of the relevant costs.

32) I note that the claimant has not waived her right to legal privilege, which she is entitled to maintain. However, I am conscience of the force of the argument that even if the claimant's case was lost on every point, this does not indicate that the case was hopeless or dishonest or that it was brought in any way to harass the respondent or to run up costs. A party is entitled to representation and a representative is entitled to, and is obliged to, represent where proper instructions are provided and I can see nothing in the respondent's application dated 5 March 2018, or in the Employment Tribunal file in front of me, which would suggest that the claimant's representative has behaved improperly, unreasonably or negligently. Therefore, I find that the respondent's application for a wasted costs order, pursuant to Rule 80 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, schedule 1, is not well founded and it is dismissed.

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.

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Employment Judge Arullendran
Date …24 July 2018……