EMPLOYMENT TRIBUNALS

Claimant: Miss A Griffiths

Respondent: Bluestones Medical Recruitment Limited

HELD AT: Liverpool **ON:** 26 April 2019 & 23 May 2019 (in chambers)

BEFORE: Employment Judge Shotter

Members: Mr M Gelling
Mr J Murdie

REPRESENTATION:

Claimant: Mr T Kenward, counsel
Respondent: Mr M Budworth, counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that;

The respondent's application for costs against the claimant is successful and the claimant is ordered to pay to the respondent a contribution towards costs in the sum of £2000.

REASONS

1. The respondent made a costs application on day 4 of a 5-day liability hearing held in the week ending 6 July 2018 that was not attended by the claimant, who had given evidence on the previous days and was represented by her partner Mark Swinnerton throughout. Mark Swinnerton also chose not to attend on the fourth day of the hearing. The respondent had conceded earlier in the litigation process that the claimant was disabled with a mental impairment at the relevant time.

2. The claimant withdrew her claims vie an email sent to the Employment Tribunal at 09.41 on 5 July 2018 when the hearing was due to start at 10am without any reference to her health. She was subsequently ordered by the Tribunal to provide medical evidence, which she did by way of a letter dated 18 July 2018 from Dr Giullies who confirmed the claimant had a "long history of OCD and panic attacks…due to the stress of the recent employment Tribunal her severe anxiety and OCD symptoms have become very much worse and she has been unable to attend the Court from 3 July 2018…I would certainly confirm that these symptoms are severe and present today (17 July 2018). I understand why she was unable to attend the Court." It is not disputed the claimant did not see her GP on or immediately following the day she was due to attend the liability hearing on 5 and 6 July 2018. Contrary to the medical evidence the claimant was well enough to attend the hearing on the 3 July and 4 July 2018 and the written notes taken at the liability hearing by the Tribunal reflect that she fully took part in the process, as did Mark Swinnerton.

Means

3. The claimant gave evidence under oath at this costs hearing, and she provided a Statement of Means that confirmed she had no income apart from Child Benefit and repayable loans paid to her by Mark Swinnerton through Blackrock Medical Recruitment Limited, a company incorporated on 19 July 2017. The claimant gave verbal evidence that she worked for Blackrock Medical Recruitment Limited 2-days per week unpaid, lives in the house owned by Mark Swinnerton (her partner), has a child who starts school in September 2019, has been unemployed since 2017 and household expenses are met by Mark Swinnerton who contributes £1350 per month. There exist regular payments and outgoings of £750 per month, the claimant has credit card debts totalling £16,000 approximately with no savings or assets.

4. Mark Swinnerton was and remains the sole director registered at Companies House. The claimant has been described in various documents, including emails, as managing director of Blackrock Medical Recruitment Limited, the most recent being an email sent in relation to a client on 8 January 2019. It is indisputed the email included the claimant's contact number within the company, and the Tribunal did not find her explanation that the description of her as managing director was inadvertent and arose as a consequence of the email formatting. It is notable that correspondence sent by Mark Swinnerton has a different telephone number which strongly suggests information can be changed at will, and the claimant was putting herself out to the world at large, clients and the public as the managing director of Blackrock Medical Recruitment Limited, and so the Tribunal finds.

5. On cross-examination at the liability hearing the claimant gave evidence that she was not employed by Blackrock Medical Recruitment Limited and did not know how it worked. When it was put to the claimant that in the Company Handbook version 1 she was described as managing director and had put her name to the "Welcome" page, the claimant's response was "I've helped, not employed. I did all the setup, Handbook, marketing, I'm not employed and not able to work full-time now…**I need to look professional when**

communicating. [the Tribunal's emphasis]" In cross-examination the claimant was taken to a printout in the bundle at page 147 where Mark Swinnerton described himself as Mark Griffiths and at page 148 he described the claimant as his wife when raising in PCAW notes the existence of an alleged "cover up" by the respondent and breach of data protection. In short, the Tribunal found the way the claimant and Mark Swinnerton described themselves was a matter for concern and raises real issues of credibility.

6. It is notable from the written record of the liability hearing the claimant gave evidence without difficulties over a period of some 2-days and there were no difficulties with her attending on the third-day when Mark Swinnerton cross-examined witnesses. As indicated earlier, the days the claimant attended the hearing straddled those her GP confirmed she was not well-enough to attend, which also raises issues over the claimant's credibility and the information she had provided her GR with once faced with the cots application. During the hearing the respondent's witnesses were cross-examined by Mark Swinnerton, who often confused his own previous Employment Tribunal case that had been heard and dismissed, and an ongoing civil case. On a number of occasions Mark Swinnerton had to be brought back to the claimant's case, which he had some difficulty in presenting. It would have been possible for Mark Swinnerton to have completed the case without the claimant being present, and at very least appear before the Tribunal on the fourth day of the hearing, explain the position concerning the claimant and request an adjournment with medical evidence to be provided. Instead, an email was sent late, 20 minutes before the hearing was to commence, withdrawing the claims and the respondent, who was represented by counsel, was the only party who appeared on the fourth day of the hearing.

7. The withdrawal email written by Mark Swinnerton and was sent on 5 July 2018 at 09.41 and read "…**Despite my best attempts** the claimant wishes to withdraw her claims [the Tribunal's emphasis]." It is notable there was no mention of the claimant being too unwell to proceed with the litigation or attend the hearing on day 4. The Tribunal took the view that the email reflected Mark Swinnerton's difficulties in dealing with a case weakened by the expert cross-examination of the claimant by Mr Budworth and the inexpert cross-examination by Mark Swinnerton of the respondent's witnesses. In the claimant's written submissions as to costs at paragraph 13 observations were made about "an uneven playing field" when the respondent is represented by specialist counsel. The Tribunal's written hearing notes reflect the claimant was provided with breaks when necessary, reasonable adjustments were discussed including re-arranging the room and having a limited number of people present during the hearing which was particularly relevant when the claimant gave evidence. Mark Swinnerton was, despite his previous experience in the Tribunal, not a strong advocate; he and the claimant chose to proceed with the litigation in this way and it may be the case they both felt disadvantaged by this decision which they put right at the costs hearing when very experienced counsel was instructed to appear. It is the manner in which the claimant and Mark Swinnerton conducted the litigation by withdrawing the case at very short notice, not being in attendance on the fourth day with no good reason bearing in mind the doctor's report (which covered a day when the claimant was well and did attend) came later and was not an explanation

put forward initially, that has led to the Tribunal concluding on balance, the claimant acted unreasonably and her reliance on the medical condition which Mark Swinnerton had failed to mention in the withdrawal email, was but one matter to be taken into account given the claimant's lack of credibility when giving evidence as to how she had come to describe herself as Blackrock Medical Recruitment Limited's managing director.

8. The claimant's explanation as to why she was described as the managing director (despite her evidence to the effect that she was not employed by Blackrock Medical Recruitment Limited) was not credible. As indicated above, at the liability hearing on the first day the claimant was questioned about this, her title was clearly an issue, yet by the 8 January 2019 email she was still putting herself out to clients and the public as the managing director. Blackrock Medical Recruitment Limited made many loans to the value of £20,000 to the claimant, which the claimant stated was not salary but repayable by her. The payments to the claimant were regular and it was not credible that the claimant was not in some way working for Blackrock Medical Recruitment Limited, and in her own words as stated at the liability hearing, she needed to look professional. In relation to the 8 January 2019 email in which the claimant requested information concerning a client, there was attached highly confidential information, including a bank statement, relating to that client and it is not credible the claimant was not the managing director and/or authorised by the company to deal with confidential information under the Data Protection Act. In arriving at its decision that the claimant was managing director, the Tribunal has considered the letter from John Moorhouse, accountant, who confirmed the claimant was "not an officer or employee" from 19 July 2017 to 31 December 2018, and the claimant "has not become an employee since 31 December 2018." The Tribunal accepts as indicated by John Moorhouse the monies paid to the claimant were treated as loans, however, it does not accept that she was not an office holder and suspects that the loans were a vehicle by which the claimant was paid for her services to Blackrock Medical Recruitment Limited when she acted as its managing director. The Tribunal found as fact that the claimant held herself out to be the managing director of Blackrock Medical Recruitment Limited, and it appears she received the loans having carried out certain duties, working for the company in some form or other. On the claimant's oral evidence before the Tribunal as to her means, she has no way of paying back any loans or contributing towards the respondent's costs, and yet loans continued to be made. It was not disputed Blackrock Medical Recruitment Limited was performing well, and it could lend money to the claimant in the future, with the result that she had the means to satisfy a costs order despite her poor financial situation on paper.

<u>The cost application grounds</u>

<u>Ground 1</u>

9. Turning to the Written Grounds for making the costs application submitted on behalf of the respondent, the Tribunal accepted Mr Bedworth's submission that the Tribunal should be "slow to accept the stated reason for the withdrawal" as the claimant's evidence was complete and half the

respondent's witnesses had been dealt with. In Mr Kenward's submissions on costs put forward on behalf of the claimant, he submitted that there was no medical basis for rejecting the claimant's explanation supported by the GP letter dated 18 July 2018, given the respondent had conceded the claimant was disabled with depression, severe anxiety and stress" under section 6 of the Equality Act 2010. As suggested by Mr Kenward, the Tribunal accepts legal proceedings can be stressful, however, Mr Kenward was not present at the liability hearing and there was no evidence or indication given before the Tribunal on the third day of the liability hearing that the claimant was having difficulties with her health and was unable to continue with the case. The hearing adjourned at 4.30pm and arrangements were agreed whereby the respondent's remaining witnesses would be cross-examined, the length of time it would take and closing submissions. There was no suggestion the claimant could not take part in this, and no reference to the claimant suffering from "severe anxiety…becoming much worse" in the email sent to the Tribunal withdrawing the claims. It is notable that this prognosis came 12-days after the withdrawal, as did the explanation. The Tribunal appreciates that litigants can become demoralised as the defence to the claim is explored and the likelihood of failure becomes a stronger possibility, than it was at the start of a case, and given Mark Swinnerton's difficulties with cross-examining witnesses the Tribunal took the view that this was the more likely reason for the claimant's withdrawal of her claims.

Ground 2

10. "This claim for £90,000 was always…tactical and not brought for its own sake on the merits."

11. In oral submissions, which the Tribunal does not intend to repeat, Mr Budworth took the Tribunal thorough some of the evidence given at the liability hearing, including the claimant's witness evidence, to support this ground. Mr Kenward submitted in response that the Employment Tribunal Rules of Procedure 2013 are not directly concerned with motivation. The Tribunal's view that had the claimant's claims been spurious as Mr Budworth now argues, an application could have been made for a strike pout/deposit order and there was none. Given the complexity of the case and conflicts in the evidence relating to the claimant's alleged detriment claims, it is more likely than not any strike out application would not have succeeded. The Tribunal agrees with Mr Kenward that employees have employment rights and the Employment Tribunal exists to protect those rights; the mindset of the employee is not directly relevant when bringing such proceedings and in any event, there can be many different motivating factors.

Ground 3 & 4

12. The Tribunal was not able to determine part way through a liability hearing if the claimant's "claim was a creation." It is arguable that a protected disclosure had indeed been made, and whether the Tribunal would have found in the claimant's favour or not would depend on the evidence, submissions, the law and applying it to the Tribunal's findings of facts. The Tribunal did not get to this position, and had made no findings of fact.

13. It is notable that the respondent in these proceedings disputed the claimant was disabled before making the concession later on in the process, and it also raised the disclosure as an issue arguing it was not a protected disclosure. This was one of the agreed issues for the Tribunal to decide. However, after the claimant had raised the alleged whistleblowing allegation Tamsin Witey, head of human resources, confirmed it was being "treated seriously" in a letter dated 7 April 2017, in an email sent 10 April 2017 that "this is a very serious matter" and on 9 May 2017 "We take whistleblowing very seriously and I have now conducted a thorough investigation. I feel that you raised your whistleblowing concerns in good faith and I thank you for following the correct process in reporting your concerns and for your cooperation during the investigation." On the face of the documentary evidence the claimant's case may well have had merit, and it would unlikely to have resulted in a interlocutory strike out or deposit order at interlocutory stage given disability had been conceded and Tamsin Witey's contemporaneous observations on the claimant's protected disclosures. In the light of this contemporaneous evidence it is difficult to see how the claimant's claims could legitimately be described as a "creation." In short, this was a matter for oral submissions and evidence, and did not determine the merits of the claimant's central case. The Tribunal is unable to come up with any conclusion that the claimant had "created" her claims, given it was yet to hear the remaining evidence from the respondent's and oral submissions.

Grounds 5, 6, 7 & 8

14. The Tribunal repeats the observations it has made above. With reference to ground 8 and Mr Kenward's submissions, the Tribunal was in no position to determine the claimant's motives for resigning and whether her resignation gave rise to a constructive unfair dismissal. In short, the Tribunal is being invited to make findings of fact having heard only part of the case, which it is not prepared to do.

Ground 9 to 17

15. In relation to the submissions made by both counsel, the Tribunal was of the view that it could not determine part way through a liability hearing whether there was a reasonable prospect of success or not. On the face of the evidence before it, there were real issues to be decided on the evidence that was incomplete with evidential conflicts to be resolved. Only after hearing all of the evidence would the Tribunal be in a position to consider submissions to the effect that the claimant had not articulated a clear case and there was no merit in her claims. With reference to ground 17, that there was no reasonable belief in public interest, this flies in the face of the contemporaneous documentary evidence before the Tribunal as set out above, where the head of HR acknowledged the claimant had raised an issue in good faith after a "thorough investigation." There was no suggestion by the head of HR that the claimant did not have public interest in mind when she made the protected disclosures that were so thoroughly investigated.

Grounds 18 & 19

16. The Tribunal has taken the claimant's means into account when deciding (a) whether to make the costs order even though it need not have done so, and (b) the amount as set out below, taking note the respective parties views on the law.

Grounds 20 and 21

17. "The claimant was warned as to costs and offered the chance to withdraw for free…" is by the way, as the claimant had decided to progress with her claims until the fourth day of the hearing. Mr Kenward is correct that it is a common tactic for respondents to threaten costs in order to pressurise claimants into settling or withdrawing in what is essentially a no cost forum. The claimant's claims could not have been said to have had no reasonable prospect of success and up until the date she withdrew and the manner in that withdrawal took place, she could not have been described as acting unreasonably in the bringing and conducting of the proceedings. A deposit order/strike out was not applied for under the Tribunal Rules which suggests the respondent did not believe it was a weak case, and the cost warning is irrelevant to this application given the circumstances of the claimant's withdrawal.

Ground 22

18. The Tribunal was referred to the EAT judgment in Mr JA Ladack v DCR Locums Ltd UKEAT/0488/13/LA which it noted, and found not to be strictly relevant to this case given its decision to award the respondent a contribution towards counsel's fees for the last 2-days of the final hearing. The Tribunal did not need to consider the excessive £300 per hour rate for the solicitor. The solicitor's costs total £21,075 and total costs including counsel approximately £35,885.00 not including VAT which would be payable by the claimant. Taking into account the claimant's lack of means and justice to the parties, the Tribunal concluded on balance a contribution of £2000 was just and equitable in the circumstances.

Law

19. The relevant Employment Tribunal Regulation is 74-76. Rule 76(1)(a) provides that: "A Tribunal must consider whether to make a costs order against a party where he or she has acted unreasonably in the bringing or conducting of proceedings". Rule 76 of the Tribunal Rules 2013 imposes a two-stage exercise for a Tribunal in determining whether to award costs. First, the Tribunal must decide whether the paying party (and not the party who is seeking a costs order) has acted unreasonably, such that it has jurisdiction to make a costs order. If satisfied that there has been unreasonable conduct, the Tribunal is required to consider making a costs order and has discretion whether or not to do so. Fees for this purpose means fees, charges, disbursements or expenses incurred – rule 74(1) Tribunal Rules 2013. In Employment Tribunal proceedings costs do not ordinarily follow the event, unlike County Court and High Court actions.

Conclusion

20. The Tribunal is aware that it is "rare" for costs orders to be appropriate in Employment Tribunal proceedings; they do not follow the event as in the ordinary course of litigation. The Tribunal took the view that the claimant's unreasonable conduct lay with the manner in which the claims were withdrawn and for no other reason. Given the complexity of the claimant's claims, the Tribunal was not in a position to satisfy itself (taking into account the fact that the liability hearing was adjourned part-heard after three days of hearing out of five) that the claimant had no prospect of ever succeeding or of the claims being misconceived. Having regard to the nature, gravity and effect of the claimant's unreasonable conduct as identified by the Tribunal, factors relevant to the exercise of the discretion, it is just and equitable to make a cost award taking into account the claimant's means.

21. The Tribunal considered the claimant's statement of means confirmed to be true under oath. Employment Tribunals are a cost-free jurisdiction; however, the wording of the statute is clear, and it took the view the claimant acted unreasonably and taking into account the claimant's means it is just and equitable for the Tribunal to use its discretion in favour of the respondent, who has incurred substantial costs in defending a claim at the liability hearing, appearing on the fourth day having incurred a refresher to cover the fifth day when neither the claimant nor her representative appeared. This had an effect of increasing the respondent's costs by a broad-brush figure in excess of £2000. In assessing this figure, the Tribunal considered respondent's costs schedule and the amounts set out therein.

22. It cannot be said the claimant had acted unreasonably in the bringing or conducting of proceedings up to the date she withdrew her claims. Despite Mr Bedworth's submissions concerning the view taken by the respondent that the claim was "insincere" and for a collateral purpose, clearly there existed a number of important key issues as set put by the parties at case management and confirmed at the outset of the liability hearing that required the Tribunal to consider a complex factual matrix and a number of documents. A considerable proportion of the time and expense was uncured by the respondent defending this complaint, and the Tribunal without hearing all of the evidence and applying its findings of facts to the law, was not able to satisfy itself on the balance of probabilities that all of the claimant's claims were "extremely weak" and had no reasonable prospects pf success.

23. With reference to the schedule of costs, the Tribunal notes counsel's brief fee was £6000 plus Vat and refreshers of £1250 plus VAT per day for the final liability hearing. With reference to the other costs claimed, these are at an excessive hourly rate. It is notable the solicitor's costs for one case management was £3810 including VAT, which reflects the complexity in the case as such costs are unusual for case management preparation and discussion. It is in accordance with the overriding objective to take a broad brush to the costs, as opposed to a more scientific approach, the Tribunal concluding it was just and equitable to award the respondent a contribution towards its costs in the sum of £2,000. This is an amount the claimant can

clearly afford taking account the fact that she has received loans which appear repayable on the face of them but have never been replayed. For the avoidance of doubt the Tribunal has also taken into account the whole picture of what happened in this case, including the claimant's disability, medical evidence, and the fact that a costs award against a party is not a punishment. In exercising its discretion in favour of the respondent the Tribunal also took into account the claimant was effectively a litigant in person represented by her partner, and justice requires that Tribunals do not apply professional standards to lay people, like the claimant and Mark Swinnerton who has some experience in the Employment Tribunal but lacked the objectivity and knowledge of law and practice expected of a professional legal adviser. The respondent has met the threshold tests for a costs order having regard to all the circumstances, including the fact the claimant was not legally represented until the costs hearing, and the fact that she has behaved unreasonably, even making an allowance for inexperience and lack of objectivity.

24. In concussion, the claimant is ordered to pay to the respondent a contribution towards the respondent's legal costs in the sum of £2,000.

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24.5.19

Employment Judge Shotter

Date_____

JUDGMENT SENT TO THE PARTIES ON

07 June 2019

FOR THE TRIBUNAL OFFICE