EMPLOYMENT TRIBUNALS

Claimant: Ms A Catchpole

Respondent: Spicerhaart Ltd

Heard at: **Bury St Edmunds - on the papers**

Before: **Employment Judge Laidler**

JUDGMENT

1. That the response had no reasonable prospects of success and that the tribunal shall therefore consider making a costs order within Rule 76(1) Employment Tribunal Rules 2013.

2. The respondent is ordered to pay £10,000 towards the costs incurred by the claimant.

REASONS

1. The hearing in this matter took place between the 9 – 12 July 2018 and the tribunal found the Claimant to have been constructively and unfairly dismissed. At a remedy hearing on the 19 October 2018 a settlement was reached between the parties of £28,971.74.

2. By letter of the 12 November 2018 the Claimant's representative submitted a costs application against the Respondent. The Respondent's submissions in reply were eventually received on the 21 December 2018. Both parties have agreed to the Judge now determining the application on paper.

The Application

3. The application is brought on the grounds that:

3.1 the respondent has acted unreasonably in the bringing or conducting of these proceedings, or a part of them (Rule 76(1) (a) and

3.2 the response had no reasonable prospects of success

4. The claim was issued by the claimant as a litigant in person in September 2016.

5. The claimant asserts in support of this costs application that she has been attempting to settle matters from the outset without the need for litigation but that the respondent has unreasonably refused to consider reasonable offers to settle. Remedy was subsequently agreed at the remedy hearing on the 19 October 2018 at £28,971.74, which is a figure only £6000 less than the sum the claimant sought in her resignation letter. Offers that had been made by the respondents were £2000 (21 December 2016) and £3500 (January 2018)

6. The written costs application made on behalf of the Claimant states at paragraph 6ii that Mr Ryan Clements of Conference Chambers was instructed by the Claimant when she was a litigant in person. A fee of £2500 plus VAT was incurred and paid by the Claimant. All that is said in that paragraph of the cost application is that 'the matter was listed for hearing but adjourned in January 2018'. It omits to explain the circumstances.

7. By email of the 28 August 2017 dates to avoid had been submitted for Mr Clements of counsel. The case was then listed for the 8 – 11 January 2018, which fell within Mr Clements dates to avoid. Mr Clements then wrote again stating he was booked elsewhere for the 8 to 12 January 2018 (in the Bristol Employment Tribunal). By letter of the 17 October 2017 E J Postle refused the request to postpone stating that the proceedings could not be postponed again.

8. On the 5 January 2018 Mr Clements made another postponement application. This was refused by this Employment Judge as it was in effect a repetition of the earlier application.

9. On 7 January 2018 the claimant submitted a doctor's certificate that she was unfit to attend the hearing. The matter came before this Employment Judge who determined the tribunal had no alternative but to postpone.

10. There are a number of issues therefore relating to Mr Clements fee. The claimant was at that time acting in person and had instructed Mr Clements directly. No application has been made for a preparation time order but Rule 75(3) makes it clear that a costs order under paragraph 1(a) of that Rule and a preparation time order may not be made in favour of the same party in the same proceedings. Even if a preparation time order had been applied for it would be for the hours devoted by the Claimant in preparation

and not to Counsel's fees. Further it cannot be said that the fee was incurred by any unreasonable conduct of the respondent. The tribunal will not therefore be considering that fee as part of this application.

11. The hearing was relisted for 9 – 13 July 2018 when it was eventually heard.

12. Gordon Dean Solicitors were formally instructed on the 17 March 2018.

13. The application continues to stress the failure of the respondent to enter into a negotiated settlement. Reference is also made to a 'without prejudice letter save as to costs' sent on the 27 July 2018, after the decision on liability had been given. This relied on the following as acts of unreasonable conduct in the proceedings:

    13.1 'Failing to alert our client as a litigant in person, of the need to submit mitigation evidence in the bundle or exercising any obligations due to a litigant in person

    13.2 Failure to disclose the folder of evidence that Annie Edwards presented at the grievance interview and appeal interview. Plainly what she had was more than the 30 or so pages that were in the original bundle.

    13.3 Failing to look into how Annie Edwards was able to obtain highly personal emails from our client's email account. On this point, please accept this letter as a formal subject access request, requesting all documents (in particular the folder relied on by Annie Edwards and all documents relating to my client or her partner Jason Green, including searches of deleted items in email folders). Please also note in this regard our client intents to complain to the information Commissioner's Office of the apparent and very serious data breach by which her emails were accessed by Mrs Edwards. If would seem Spicerhaart's IT Department was complicit in the breach and that HR Officers, and the 2 senior directors involved in the grievance all knew (or should have realised) that Mrs Edwards had inappropriately obtained personal data belonging to our client without any proper justification.

    13.4 Rejecting very reasonable offers to settle the case but which were refused out of hand.

14. That letter stated that the claimant had spent £3000 in counsel's fees pre-trial and £4750 plus VAT at trial.

15. Some of the matters relied upon relate to a Subject Access Request and alleged accessing of the claimant's emails which are not matters the subject of these proceedings. Issues relating to the period when the claimant was a litigant in person cannot be relevant to this costs application either which is for the period when the claimant was represented.

16. There is also reliance on the alleged failure to disclose the folder of evidence that Annie Edwards presented at the grievance interview and appeal

17. interview. That may be a matter of concern to the claimant, but it is not something that played a part in the decision of this tribunal.

18. In the costs application the claimant relies upon the respondent applying, unreasonably it is alleged, for specific disclosure by its letter of the 31 August 2018 in relation to remedy 'rather than negotiate a settlement'. This request was referred to E J Warren who directed that the claimant disclose copies of her payslips for the period 19 July 2016 to date and to bring copies of her contracts of employment to the remedy hearing in case they were required by the tribunal. It does not appear from the tribunal file that instruction was ever actioned by the administration, but it cannot be said that the request was entirely unreasonable when the judge had so directed. Even in the costs application at paragraph 6x it is accepted that 'the claimant then obtained all relevant pay slips from her more recent employers and provided those to the respondent. It is accepted by us that the wage slips for Addecco were disclosed in the days before the remedy hearing, however the P60s were already disclosed, soon after the main hearing in July 2018…'

19. The claimant also argues that the response had no reasonable prospects of success. She relies on the inadequacies of the respondent's grievance and appeal procedure. Further the absence of Richard Oliffe to give evidence and the inconsistencies in his witness statement.

Respondent's submissions

20. In a document received on the 21 December 2018 the respondent set out its submissions opposing the costs application.

21. The respondent disputes unreasonable conduct with regard to negotiations. It refers to the claimant's original position being £35,000 which it submits is approximately 20% more than the claim was eventually settled for. It disputes that a firm proposal was made by Ryan Clement of counsel on the claimant's behalf in January 2018 submitting that what he actually said was that his client would 'consider a sum in excess of £20K…' (his email of the 4 January 2018). The respondent states that its then proposal of £3500 reflected its perception at that time of the strengths of the claim.

22. The respondent then refers to another suggestion by the claimant's then counsel that she return to work for the respondent which it was believed was made without the claimant's instructions.

23. With regard to the disclosure application it is submitted it was necessary and that although no order was made further documents were supplied following it.

24. That the tribunal found against the respondent having heard all the evidence does not, it submits, demonstrate that the response did not have reasonable prospects on what was known to the respondent.

25. The respondent also questions the level of costs. It avers that there has been confusion as to the basis of the retainer, Gordon Dean initially advising the respondent that they were instructed on a contingency fee basis. The first they were aware that firm was instructed was the 26 June 2018 and not the 17 March 2018 as stated in the application.

26. The respondent takes issue with the fees of Mr Ryan Clements being the £2500 for the hearing listed for the 8 – 12 January 2018 when it is clear from the correspondence that as early as September 2017 he was unable to attend and did not attend. They question why that brief fee was payable.

RELEVANT RULES

27. Employment Tribunal Rules 2013

Costs orders and preparation time orders

75.—(1) A costs order is an order that a party ("the paying party") make a payment to—

(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;

(b) the receiving party in respect of a Tribunal fee paid by the receiving party; or

(c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.

(2) A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

When a costs order or a preparation time order may or shall be made

76.—(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 that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—

(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and

(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

The amount of a costs order

78.—(1) A costs order may—

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either

by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993(**1**), or by an Employment Judge applying the same principles;

(c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;

(d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or

(e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

Ability to pay

84. In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

CONCLUSIONS

28. The tribunal does not find there was unreasonable behaviour by the respondent in the manner in which it dealt with negotiations. It accepts its submissions that various positions were put on behalf of the claimant some of which appeared to come without instructions. The tribunal is aware that negotiations take place throughout litigation and at various stages of it. That remedy was settled on the day of the remedy hearing is something that often occurs, and it cannot find that the respondent's failure to settle prior to that amounted to unreasonable behaviour such to justify a costs award.

29. What the tribunal has concluded however is that the respondent was misconceived in its response to these proceedings. A respondent is of course entitled to defend a claim but there came a point in the preparation of the defence when it ought to have been apparent to the respondent that

it had no reasonable prospects of successfully defending this claim. In that respect the tribunal relies upon its findings on the behaviour of Richard Oliffe who promised to speak to Annie Edwards and get back to the claimant but did not. He then promised a meeting on the claimant's return to work and that did not happen. When the respondent knew that Richard Oliffe would not be giving evidence to defend his position it ought to have been clear to them the difficulties they would face.

30. The tribunal also relies upon its findings with regard to the Grievance hearings. As set out at paragraph 29 - 30 Mr McGrath had no experience of dealing with a grievance hearing and was the same level of seniority as Richard Oliffe. He did not appreciate the concept of weighing up evidence and looking at inconsistencies. In preparation for this hearing the respondent's representative ought to have taken into consideration how his evidence was likely to be viewed by a tribunal.

31. There comes a point in litigation when a respondent ought reasonably to weigh up the evidence and assess the risks of proceeding to defend the proceedings. That was not done in this case. Even after the remedy hearing the respondent persisted with an application to stay the remedy judgment which as stated in the tribunal's letter of the 23 November 2018 was misconceived.

32. The Rules require a two stage approach as costs do not automatically follow the event. The first stage is passed as the respondent was misconceived in continuing to defend this claim. The tribunal has concluded it should bear the costs of the hearing on liability and the remedy hearing and some of the final preparation leading to it. The award that is made is that the respondent pay the total sum of £10,000 towards the claimant's costs.

33. As the respondent is an operating business and no submissions have been made on its ability to pay it is assumed it has funds to meet this award and no other consideration to means has been given

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Employment Judge Laidler

Date: 29 May 2019

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RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS