Case No: 2410195/2018

EMPLOYMENT TRIBUNALS

Claimant: Miss J Chohan

Respondent: Amey Services Limited

Heard at: Liverpool **On:** 18 July 2019

Before: Employment Judge Wardle (sitting alone)

Representation
Claimant: In person
Respondent: Ms L Banerjee – Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that the respondent's application for costs against the claimant pursuant to Rule 76(1)(b) of the Employment Tribunals Rules of Procedure 2013 on the ground that her claim had no reasonable prospect of success is refused.

REASONS

1. This matter was listed to consider an application under Rule 76(1)(b) of the Employment Tribunals Rules of Procedure 2013 (the Rules) for a costs order to be made against the claimant for costs incurred by the respondent in these proceedings.

2. Rule 76(1) provides that 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 has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings or the way that the proceedings have been conducted or (b) any claim or response had no reasonable prospect of success or (c) a hearing has been postponed or adjourned on the application of a party made less than seven days before the date on which the relevant hearing begins.

3. The background to this matter is as follows. The claimant was employed by the respondent, which is a large company providing infrastructure and environment-related services to public authorities as a HR Adviser. Her employment began on 25 July 2014 and ended on 27 February 2018 by dismissal on conduct grounds.

4. By a claim deemed to have been received on 17 April 2018 she did not tick any of the boxes to be found in section 8 of the ET1 setting out the type of claim that she was making but she did tick the box to say that she was making another type of claim which the Employment Tribunal can deal with referring to a grievance that she had against the company for breaching policy, which appeared to relate to the respondent requiring her to undergo a drugs test on 13 November 2017 outside of the normal working day and with no female present. At section 9 in response to the question what she wanted if her claim was successful she answered that she wanted compensation for all the damage that the respondent had caused her stating that she was very ill and could not apply for other jobs before adding that they had dismissed her on 27 February 2018 for gross misconduct with no pay, which was set up and that she did appeal this decision but they were not willing to understand her side of the story. She continued by saying that she had raised a grievance on 16 March 2018, which had been ignored and her being told that she was no longer an employee so nothing could be done, which led her to seek advice from ACAS, who informed her to fill in a tribunal form.

5. The respondent interpreted the claim as one of victimisation and bullying because it did not follow its drug policy and filed a response resisting it.

6. There then followed a Preliminary Hearing held on 26 June 2018 conducted by Employment Judge Horne for case management purposes. The claimant attended unrepresented and the respondent appeared by Counsel (Mr Humphreys). The Order produced of the discussion records that the claimant was upset and tearful during much of the hearing but that she was able to explain clearly and in some detail what had happened to her on various occasions during her employment but what she found much more difficult to explain was how the respondent's treatment of her affected her employment rights, or gave rise to any kind of claim which the tribunal had power to consider, which saw Judge Horne asking a number of open questions in order to clarify her claim and that from her answers it was reasonably clear to him that she wished to bring a complaint of unfair dismissal contrary to sections 94 and 98 of the Employment Rights Act 1996 and a claim for damages for failure to pay overtime in relation to the out of hours drug test in breach of contract.

7. The claim was set down for hearing over four days on 18, 19, 20 and 21 February 2019.

8. In the light of this clarification of the claimant's claim the respondent submitted an amended response on 18 July 2018.

9. On the morning of 13 February 2019 the respondent's solicitors wrote in a 'without prejudice, subject to contract and save as to costs' communication sent by email to the claimant, copy to the ACAS Conciliator rejecting a settlement offer of

£5,000 made on her behalf. In this they stated that it remained their client's position that she was dismissed fairly and in accordance with their disciplinary procedure for gross misconduct and that having reviewed her witness statements they had seen nothing to cause them to change their view of the case. They also informed her that their client was prepared not to pursue her for costs, if, as they anticipated her claim failed, on the condition that she withdrew her claim ahead of the final hearing, namely by close of business on Thursday 14 February 2019. At 11.53 on 14 February 2019 the ACAS Conciliator emailed the respondent's solicitors to advise that the claimant rejected their client's offer to withdraw her claim in order to escape costs and that the only offer she would consider was monetary but she was not prepared to bid against herself and come back with a lower offer than the one originally made.

10. On the Friday 15 February 2019 at 15.57 the claimant emailed the Tribunal, copy to the respondent's solicitors and ACAS, asking for a postponement of the final hearing scheduled to start on Monday 18 February 2019 due to ill-health stating that the lead up to it had been very stressful and had made her very ill and that she was not in any fit state to defend herself before adding that she would be visiting her doctor and asking if any supporting documents were required. The postponement request was refused, notification of which was given by letter dated 15 February 2019 sent by email to the parties noting that the application for postponement had been made at the last moment and was not supported by medical evidence and on Saturday 16 February 2019 at 16.24 the claimant emailed the Tribunal, copy to the respondent's solicitors and Counsel and ACAS advising that having made a request to postpone the hearing which was rejected she was left with no choice but to withdraw her case as she knew going ahead would harm her health even more. She also stated that she had informed the ACAS Conciliation Officer the previous day before she had received a response from the courts and that he had informed the respondent's solicitors, which it should be said was disputed by the respondent.

11. On 18 February 2019 in the absence of the parties judgment was given that on the basis of the claimant withdrawing all her claims over the weekend of 16 and 17 February 2019 they were to be treated as dismissed upon withdrawal. Such judgment was issued to the parties on 22 February 2019.

12. On 4 March 2019 the respondent's solicitors wrote an open letter to the claimant informing her that they had been instructed to make an application for costs against her pursuant to Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 on the basis that the manner in which the proceedings were brought and pursued were (sic) vexatious and unreasonable and asking as a preliminary step for her to provide evidence of her means. On the same day they also sent her a second 'without prejudice save as to costs' letter advising her that their client had incurred £18,000 plus VAT in fees plus £6674.74 plus VAT in Counsel fees but it was prepared not to pursue its cost application provided she agreed to pay it 10% of the total costs incurred, namely £2,466.47 plus VAT, payable by instalments. She was further advised that the offer remained open for 7 days until 5 p.m. on Monday 11 March 2019, after which time it would lapse without further reference to her.

13. The claimant did not respond to the offer and on 21 March 2019 the

respondent's solicitors wrote to the tribunal, copy to the claimant, making a costs application pursuant to Rule 76(1)(b) stating that the respondent had sent a 'without prejudice' costs warning letter to the claimant on 13 February 2019 stating that her claims were completely without merit and had no reasonable prospect of success, to which end they had made the following points regarding the claimant's unfair dismissal claim: (i) she was dismissed fairly and in accordance with the respondent's disciplinary procedure (ii) she was given ample opportunity to present her version of events during both her disciplinary and appeal hearings (iii) she had already been warned by the respondent during a previous disciplinary that any data protection breach was a serious offence which could result in her dismissal for gross misconduct (iv) she had attended training offered by the respondent on data protection and so should have been aware of the severity of the breaches committed. They also advised that the claimant's unlawful deductions from wages claim had been paid by the respondent in July 2018.

14. On 3 April 2019 the Tribunal informed the parties in writing that a hearing to determine whether a preparation time order should be made against the claimant in favour of the respondent would take place on 18 July 2019. Such notification of hearing, it is to be noted, makes reference incorrectly to a preparation time order, as the respondent was legally represented throughout these proceedings and ought to have referred to a costs order.

15. On 12 July 2019 the respondent's solicitors emailed the claimant attaching their client's schedule of costs in advance of the costs application hearing. This was divided into three sections. The first related to the costs incurred up to and including the final hearing in the sum of £24,664.74. The second related to the costs incurred from the date of the costs letter on 13 February 2019 until the final hearing in the sum of £9898.00. The third related to the costs incurred in respect of the costs application in the sum of £4360.00 plus VAT.

16. On 17 July 2019 the claimant emailed the respondent's solicitors attaching the email sent to her by them dated 13 February 2019 (the costs warning letter) and stating that this was the reason why she had withdrawn her case.

17. In considering this application for costs made pursuant to Rule 76(1)(b) namely the ground that the claim had no reasonable prospect of success the Tribunal reminded itself that Rule 76 (1) imposes a two-stage test requiring it, first, to ask itself whether or not the 'prospects of success' ground is made out and, if so, to go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against the bringer of the claim. In addressing the first question the Tribunal also reminded itself that its focus has be on the claim itself. In this regard it noted that the claim had mutated from one of victimisation and bullying at the Preliminary Hearing stage to one of unfair dismissal and breach of contract involving a failure to pay overtime largely as a result of Judge Horne's recognition that the treatment alleged by her from her employer did not give rise to any kind of claim which the tribunal had power to consider and his attempt by open questioning to clarify what she was claiming. As an unrepresented litigant it seemed to the Tribunal that the claimant may well have construed Judge Horne's intervention and the consequences of it as giving her claims a degree of legitimacy, which was not undermined by the respondent's amended grounds of resistance filed afterwards on

18 July 2019 in that it was no part of the respondent's case that the claim as amended had no reasonable prospect of success and should be struck out on that basis. The Tribunal therefore concluded for these reasons that the claimant would have reasonably believed that she had a case which was by no means bound to fail certainly up until 13 February 2019 as demonstrated by her continuing to seek a settlement offer from the respondent, which prompted the costs warning letter and the first indication by the respondent of its view as to the weakness of her claim and the consequences for her in costs of it failing.

18. Thus having found that the 'prospects of success' ground had not been made out in this case it was not necessary for the Tribunal to go on to consider the second stage of the test as to whether it is appropriate to exercise its discretion in favour of awarding costs against the claimant. Accordingly the respondent's costs application pursuant to Rule 76(1)(b) is refused.

Employment Judge J S Wardle

06/08/2019

JUDGMENT, REASONS & BOOKLET SENT TO THE PARTIES ON

9 August 2019

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS