RM

EMPLOYMENT TRIBUNALS

Claimant: **Miss K Hamad-Okunnu**

Respondent: **The London Borough of Waltham Forest**

Heard at: **East London Hearing Centre**

On: **Monday 3 June 2019**

Before: **Employment Judge Prichard**

Members: **Mr D Kendall**
Mrs BK Saund

Representation

Claimant: In person accompanied by Mr S Leftwich

Respondent: Mr S Harding instructed by London LBWF Legal Services also attending Mr M Springer, Solicitor LBWF, Mr A Hall, Head of Service

RESERVED JUDGMENT

1. It is the judgment of the tribunal under Rule 76 of the Employment Tribunal Rules of Procedure 2013 that the claimant shall make a contribution to the costs of the respondent in the sum of £1,000.

2. The amount has been discounted considerably by reference to Rule 84 of the 2013 Rule.

REASONS

1 In this case the tribunal held a final hearing from 14 February ending on 5 March 2018. The tribunal judgment was sent to the parties on 13 June 2018.

2 By a letter dated 20 July 2018 the respondent applied for costs. The application was made under various headings:

2.1 Bundle of documents.

2.2 Further disclosure.

2.3 Exchange of witness statements.

2.4 Corresponding, and

2.5 The unreasonableness of the claim itself.

3 We note that this costs hearing that is, unusually in today's litigation climate, not accompanied by any correspondence headed "Without prejudice save as to costs" from the putative receiving party. We usually welcome such correspondence. This tribunal has a real fear of any party sleepwalking into an adverse costs order without any sort of premonition that it was on the cards. This is usually a no costs jurisdiction. Notwithstanding that, with some misgiving, the tribunal is clearly of the view that there has been some unreasonableness in the bringing of the case or certainly in the pursuing of the case beyond a certain point before this tribunal. Under Rule 76 of the Employment Tribunal Rules of Procedure 2013 there are 3 steps to go through. There are the trigger conditions in Rule 76(1). Rule 76(1)(a) provides:

> "A tribunal may make a costs order … and shall consider whether to do so where it considers that –
>
> (a) A party … has acted … otherwise unreasonably in either the bringing of the proceedings of part or the way that the proceedings (or part) have been conducted or
>
> (b) Any claim or response had no reasonable prospect of success."

That phrase "no reasonable prospect of success" can also be found in Rule 37(1)(a) permitting the striking out of a claim before a hearing if it has no such prospects of success.

4 We have spent some time listening to the claimant over the course of an 8-day hearing before our deliberation started and now today the claimant comes across as an intelligent, sometimes pedantic individual, whose sincerity cannot be doubted. That is not the criterion for the making of a costs order or the striking out of a claim. The word used is "reasonable". That involves objectivity. In other words, people are expected to stand back from their own intended proceedings and ask themselves in a practical way how they will succeed in convincing an impartial tribunal of the merits of their claim. We cannot think that, if the claimant had ever done this with her claim, she would have brought it in the way it was brought, or in fact at all. We felt compelled to say so in the judgment.

5 The tribunal has had a lot of information thrown at it today by the respondent without being provided with the tools for analysing it, for instance, how much of the bundle preparation was due to the claimant's alleged unreasonableness and how much was cost that the respondent was bound to incur. We have heard variously that the hearing

bundles amounted to 4 or 5 lever arch files and always would have done. We ended up with seven and extra disclosure which is referred to in paragraph 171 of the judgment, at the claimant's request. These were the extra documents the claimant asked for mid-hearing and then did not refer to at all.

6 Again, we have not been given the tools to disaggregate the totals for correspondence perusing and research or personal attendance on this point.

7 Coming to the second point in the costs application - the exchange of witness statements. This did not seem to resound in actual costs or expense. The claimant as part of her rather over-legalistic outlook had declined to accept one witness statement because it was not signed. Rather than using email for exchange she actually attended the respondent's offices. Why that was necessary, we have no concept. It was a very weird and bizarre story. Again, we have not got the tools to see if any specific costs arose because of this strange conduct. Realistically if we look at every scrap of information it would take us 2 weeks rather than 3 hours. In the event we have sat for a whole day, exceeding the allotted 3-hour time estimate to do justice to the application. We conclude that it was odd of the claimant not to rely on email, but there is no discernible cost occasioned by this.

8 At paragraph 91 of the judgment the tribunal commented on the tribunal's own experience of receiving a profusion of detailed emails which the tribunal staff and judiciary simply lacked time and resource to deal with. So, it is not on this ground specifically we cannot make a reliable fact-based judgment on that.

9 Nor can we make a reliable fact-based judgment on the volume of correspondence sent to the respondent. They produced a 200-page bundle of this correspondence the tribunal simply did not have the resource to analyse how reasonable or otherwise they were either in aggregate or individually. It was unrealistic to throw this at the tribunal and ask us to make some judgment based upon it in 3 hours. The respondent or the claimant could have asked for a longer time estimate if they felt it was just and proportionate.

10 The parties ultimately accepted the tribunal's indication that the main point which we did have the tools to deal was the reasonableness of bringing or pursuing the claim at all under Rule 76(1)(a) and (b).

11 Mr Harding in a crazy submission at the start of the hearing said this was about preparation time which is of course entirely wrong. It is a costs application. He and Mr Springer are practising lawyers.

12 The other error in the application was that Mr Springer has applied for VAT costs. That is a fundamental and stupid error. The respondent is registered for VAT. This is not an expense. They claim it back penny for penny as Input Tax.

13 Mr Harding also realised that the amount of costs the grand total of which was £63,389.93 exceeded the £2,000 ceiling on unassessed costs and could not be dealt with in the course of a 3-hour hearing.

14 This hearing has therefore been restricted to consideration of whether the tribunal will award costs. Whether the threshold conditions are met. Whether our discretion should be exercised in the respondent's favour to any extent, and mitigation of the amounts following enquiry into the claimant's financial situation, under Rule 84. The respondent did agree later that that is all we can and should do. They limited their claim to £20,000. In the event we have not ordered anything like that amount.

15 Certain passages of the judgment need to be cited to illustrate that the tribunal's findings that the claimant's perspective was not reasonable., Paras 105 – 106 of the judgment dealt with an important point we come across all too depressingly often in this tribunal. People will sometime use a discrimination complaint as an indirect way of attempting a 3rd tier appeal against work place grievance hearing. This is not about fairness. We are looking for discrimination under the Equality Act 2010 on the grounds of a protected characteristic. In the claimant's case, her Chronic Fatigue Syndrome, Para106:

> "The claimant's fairness at work complaint was not a discrimination complaint it was to do with fairness as the policy suggests. For the claimant's tribunal claim to succeed, not only would the tribunal have had to disagree with Mr Howard's conclusion (grievance) but we would also have to find that it was an act of disability discrimination either direct discrimination harassment or victimisation, on those specific grounds. It always an ambitious claim to make to the tribunal."

16 The most important passages are about the central allegation that Emma Fall, the claimant's line-manager wanted to harm the claimant. The allegation under Rule 13 of the Equality Act 2010 was never well founded. The resource of the tribunal cannot extend case management hearings to effectively to giving unrepresented claimants law tutorials even when it feels that they might need it.

17 Section 13(1) Equality Act 2010 provides:

> "A person A discriminates against another person B if because of a protected characteristic A treats B less favourably than A treats or would treat others".

18 The fundamental problem with the claimant's distinct submissions on this is illustrated as follows:

> "I the claimant assert that I was treated less favourably than the respondent did or would treat my colleagues and the reason was because of a protected characteristic… I believe that if another colleague with the same abilities had received the same treatment it would not affect them as much as if they did not have chronic fatigue syndrome."

19 Here the claimant has shifted the argument not to the treatment which is what is forbidden by the Act, but to its effect on her vulnerabilities. This is a conceptual problem with the claim. One has to be careful.

20 Paragraph 149 of the Judgment stated:

> "The claimant's case is far-fetched and also a conceptual strain on the imagination to say that Ms Fall wanted the claimant to fail and wanted to harm her, as the tribunal remarked during this hearing, is impossible to accept. Circumstantial evidence is very much against it. Any failure by the claimant in her work would have reflected badly on Ms Fall as a team leader. To say this was done to the claimant because she had Chronic Fatigue Syndrome and not to the others because

> they did not is utterly implausible even at a subconscious level (which could count as discrimination in paragraph 150). The claimant often tried to resile from her own case theory on this without apparently realising that, at the bottom, it is a crude thesis she is putting to the tribunal despite burying it beneath copious statistical data. There is no nice way of saying what she was inviting the tribunal to find".

We are not convinced that the claimant ever thought through what she needed to prove to this tribunal in order to win. That, in the tribunal's view, is a clear statement of a case that had no reasonable prospect of success.

21 We are not convinced by Mr Harding's submission on harrassment. The harassment he cites is more referring to reasonableness in the workplace and not reasonableness in these proceedings. On this point Section 26(4) as follows:

> "In deciding whether the conduct has the effect referred to in subsection 1(b) each of the following must be taken into account -
>
> (a) The perception of B
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect."

This was a finding that the tribunal had to make. We are not persuaded that it is a good argument to make on a costs application which clearly refers to the tribunal proceedings rather than the primary allegations from which they arise in the workplace. That is what the section refers to. We reject Mr Harding's submission.

22 The claimant should note that there were two separate reasons for rejecting the victimisation claims both of which she had to prove. The tribunal found (a) there was no protected act and (b) even if there had been that there was no adequate evidence that these played any part in the decision on work allocations etc. – the telephones and all the other things of which she complained.

23 The claimant's submission today came too close to being an attempt to revisit our findings of fact. Those stand, stand forever, now they have been challenged before the Employment Appeal Tribunal. The claimant's complaint was rejected by Mrs Justice Simler (P) on the sift i.e. on paper, on the basis that the claimant was trying to go behind findings of fact and could not raise a point of law. Even we are bound by our own findings of fact.

24 A Judgment is reconsidered within the normal time limits on proper grounds like fresh evidence. The claimant made complaints today there was evidence to show that Emma Fall must have known she had Chronic Fatigue Syndrome as the letters CFS appeared in the team diary of 2015 coincidently the only diary which the respondent could not produce she says that they supressed that evidence in order to ensure that her tribunal claim failed.

25 When it comes to the hearing we have to decide on the evidence we have. That is what we have responsibly done. The claimant should have known, as she proceeded

with the hearing, that she just did not have that evidence even if she disbelieved the respondent's account.

26 It was open to her to call, for instance, the other manager in the team – Chi Ta - to give evidence, as she said it was he who had written it in the 2015 team diary. He has left the council but they could have provided her with some contact details or they could have got in touch with him to notify him that she wanted to get in touch and he would therefore have had the choice. He might have been able to fill this evidential hole in her case but it was up to the claimant to make a more objective assessment of the prospects of her claim succeeding. It was her responsibility.

27 I asked the claimant today how she thought she had the ammunition to convince an impartial tribunal that despite the grievance and the grievance before Mr Howard and the grievance appeal before Jane Custance who basically agreed, that they were wrong and they were so wrong and there was disability discrimination in here. How was she going to convince us? She mentioned the grievance was rejected by Mr Howard, the appeal was rejected Ms Custance who largely agreed that the claimant's cherished spreadsheets only provided a snap-shot. Indeed, the claimant's dim realisation of this is recorded at paragraph 124 of the judgment as stated:

> "The claimant suggested during this hearing that Mr Howard should have commissioned a full scale analysis from the technical people employed in the council. Maybe the ICT could have been involved. It would have required enormous time and expense. The respondent could not and would not have done that. We cannot consider that it was unreasonable not to do that.

To quote Ms Custance at paragraph 123:

> "I have no idea whether there is any way of going back now to further test your allegations"

28 Then the tribunal commented:

> "She put her finger on major obstacles to the claimant's grievance succeeding. The tribunal has found that the claimant's Excel spreadsheets described by Mr Howard to the tribunal as a snap-shot were just that. They do not represent the whole picture and might well have been partial."

29 The problem is and always was the claimant could not demonstrate a pattern. Hence her realisation that maybe ICT should have been involved to find the pattern that she could not find, to demonstrate it. This impacted upon the prospects of success. It would be absurd to suggest that any employer should spend thousands of pounds on an ICT audit of work allocation within the parking section in order to help a claimant with her tribunal complaint in litigation against them. This is not a public enquiry. There are limits on disclosure of extant documentation and computer records. The respondent has no duty to generate such evidence to help an unrepresented claimant.

30 Now we turn to the question of the claimant's financial circumstances which are not at all good. The claimant was made redundant on 27 February 2017. In May 2017 she first received Universal Credit which continued until August 2018, some 15 months. On 15 July 2018 to September 2018 she obtained a temporary work contract another local authority in a parking section on a 6-week gap but no credit was received in that period. Then from 12 November 2018 until the following 4 April 2019 she found another local

authority temporary contract in helping to clear a backlog and she was back on Universal Credit at the beginning of April, where she still is.

31 The claimant lives in the White City estate where she lives in a block in a 2-bedroom council house. She is a tenant having succeeded her mother who passed away in 1997. The claimant has no children, and lives alone. She does not live with her partner. She informed the tribunal that she had been let off the under-occupancy charge but also told there would be no succession but it seems that as she has no children of her own there would not be any succession in any event. She receives Universal Credit.

32 Housing Benefit covers her ongoing rental. She has some £1,600 odd of arrears which she is bound under a Notice Seeking Possession. She has entered into an arrangement to pay £501 towards these arrears and current arrears and historic arrears these are not covered by housing benefit. Her universal credit amounts to £600 and she has approximately £1,000 in savings out of which she is paying for essential food, and her mobile subscription. She has to have the internet and has 3/4G her tablet, oyster card, phone. She pays her own gas and electricity and a service charge for the block in which she lives which is approximately £30 a month.

33 The tribunal has no reason whatsoever to doubt the accuracy of any of these numbers. The details were given openly. The claimant is not drowning in debt and she strikes the tribunal as thoroughly responsible about meeting all these obligations and speaking to everybody concerned reassuring them that she is coping with it. We appreciate that an extra burden of £1,000 is extraordinarily unwelcome to her. She will struggle to meet it. However, we have reminded ourselves of what is said in many costs cases that the prerogative of mercy belongs to the receiving party in these cases. It is a matter for the respondent to decide the extent to which they seek to enforce this costs order.

34 It is set extremely low by taking careful account of the claimant's means and it is set at a level where, in the tribunal's view, it will not forever be beyond the power of the claimant to pay. She is still 49 years old.

Employment Judge Prichard

6 August 2019