



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Allan

Respondent: Oakley Builders and Groundwork Contractors Ltd

Heard at: Exeter (in chambers) **On:** 20 September 2019

Before: Employment Judge Housego

Representation

Claimant: Not advised of the application

Respondent: Written submissions

JUDGMENT

The Respondent's application for costs is dismissed.

REASONS

1. The claimant brought a claim for unfair dismissal age discrimination and for (the balance of) a redundancy payment either as such or by means of a claim under S13 of the Employment Rights Act. She accepted that there was a redundancy situation. She said that she was selected as she was older than the other two, who were in their 20s, she being considerably older than they are. She said that the process was unfair, for reasons set out in the decision.
2. The respondent seeks an order for costs. The reasons given are:

“We enclose for the attention of the Tribunal two costs warning letters sent to the Claimant advising her as to why her claims would not be successful at Tribunal and providing her with the opportunity to withdraw her claims against the Respondent. Within these letters we made it clear to the Claimant should her claims not succeed at Tribunal or she failed to withdraw her claims against the Respondent we would seek recovery of the Respondent's legal costs in defending the claims.

We respectfully request that the Tribunal considers an application for the recovery of the Respondent's legal costs incurred in defending the claimant

claims. The Respondent avers that the Claimant's claims were brought vexatiously and that she acted unreasonably in bringing the proceedings against the Respondent and was made aware that her claims had no reasonable prospect of succeeding from the outset.

We are of the view that the Claimant was given ample opportunity to withdraw her claims given that there was clear evidence that they had no reasonable prospects of succeeding and the Claimant acted vexatiously in pursuing such proceedings against the Respondent. The Respondent avers that the time and preparation in defending the Claimant's claims has caused much stress for staff members involved and had a detrimental impact upon morale of the company."

3. In its costs warning letters of 17 December 2017 and 07 June 2018 the Respondent set out its position as follows:

"Unfair Dismissal

1. Our client can demonstrate that a fair procedure was followed in respect of the decision to make the Claimant redundant in that:
 1. they identified the appropriate pool of at risk employees and applied an objective selection criteria, namely "last in first out", resulting in the Claimant's redundancy;
 2. they gave meaningful consideration to alternatives and carried out meaningful consultation, however, for the reasons explained to the Claimant and repeated in our client's grounds of resistance; these alternatives were not a viable option in the circumstances;
2. Even if the Tribunal finds that there was procedural unfairness in some other element, which our client wholly refutes, our client will say that the selection criteria was last in first out and the Claimant was the last in her pool to commence employment; therefore the Claimant would have been dismissed in any event and therefore her compensation would be reduced to nil.

Age Discrimination

1. We believe that this claim is vexatious and misconceived in that Mrs Hamley was included in the selection pool considered for redundancy and was older than the Claimant.
 2. The selection criteria "last in first out" was objective in that our client wished to retain the most experienced members of staff; therefore this selection criteria was not age discrimination.
 3. The Claimant has produced no evidence to substantiate her claim for age discrimination.
 4. Therefore we do not consider that the Claimant will be able to particularise her claim relating to age discrimination.
4. The letter of 18 June 2019 dealt also with the redundancy payments claim. The letter of 17 December 2018 did not. The later letter said:

"Unlawful Deduction from Wages

1. It is clear, as stated in our grounds of resistance that the Claimant is able to recover the tax/NI deducted from her redundancy payment by contacting HMRC. The Claimant's failure to do so and insistence on pursuing legal proceedings to this effect is unreasonable and vexatious."
5. I have not seen any response from the Claimant, but none is necessary, as I have concluded that a costs order is not appropriate in this case.
6. Rule 76(1)(b) in the Schedule 1 to The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 states:

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.

7. The Respondent asserts that the claim was abusive and vexatious. I do not consider that the Claimant was vexatious or abusive. She had a genuine sense of grievance. The claim was not brought to make things difficult for the Respondent.
8. In considering whether the claim had no reasonable prospect of success, I note that I found against the Claimant, in the age and unfair dismissal cases, but for her in the redundancy payments / S13 unlawful deduction claim. It was the respondent which wrongly ran the redundancy payment claim through payroll so that it was taxed, and then said it was up to the claimant to resolve it, offering her no help to do so. While the sum involved is small, there would have needed to be a hearing to resolve it. The respondent's assertion that this was also a vexatious and abusive claim with no reasonable prospect of success and in respect of which a costs order would be sought was plainly misplaced given the outcome.
9. Last in first out was used to select the claimant, and it was not disputed that it was used. The respondent wrote in costs warning letters that this cannot be age discrimination. It can, for the young have less chance to built up a long work record. However here it was the older claimant who had the lesser service. But the reason offered by the respondent as to why the claim must fail was wrong in law.

10. There were some complexities about exactly how long Ms Wise had been employed given a break in service. It was a fact that the two who were retained were much younger than the claimant. She was entitled to challenge the decision on the basis that only she, the oldest by some margin of the three, was selected, with the other 2 being of a similar, much younger age. She was not satisfied that LIFO was the true reason, and she was entitled to challenge that assertion.
11. That the manager of all 3 (of a similar age to the claimant) was soon removed from risk was also not a relevant consideration for the age or unfair dismissal claim, for there may have been other reasons why the respondent may have wished to keep her, as the claimant asserted.
12. There was also the complexity that the staff dealt also with the business of the partner of the owner of the respondent, so that the respondent itself did not need as many staff for its own business.
13. Just because a respondent is judged to be right for the reasons it gave in advance does not mean that a costs order is appropriate. That is tantamount to costs following the event, which is not the case in Employment Tribunal cases. Costs are not often awarded, unless there is a deposit order, when the losing party will have known that a judge felt that the case put forward had little reasonable prospect of success. No such application was made in this case.
14. Accordingly for these variety of reasons I decide that the provisions of the Rules relating to costs are not met in this case.

Employment Judge Housego

Date: 20 September 2019
.....