



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs M J Smith

**Respondents:** The Governing Body of West Gate School (R1)  
Leicester City Council (R2)

**Heard at:** Nottingham (In Chambers)

**On:** Wednesday 9 October 2019

**Before:** Employment Judge Hutchinson (sitting alone)

**Representation**

**Claimant:** No appearance – representations in writing

**Respondents:** No appearance – representations in writing

## JUDGMENT

The Employment Judge gave Judgment as follows: -

1. The application for costs made by the Respondent fails and is dismissed.
2. The counterclaim for costs made by the Claimant also fails and is dismissed.

## REASONS

### **Background**

1. At a hearing heard by me sitting alone on 1, 2 and 3 July 2019, I dismissed the following claims;
  - 1.1 that the Claimant had been employed by R1;
  - 1.2 the claim of unfair dismissal;
  - 1.3 the claim for notice pay.
2. I gave my reasons and decision at the end of the hearing and the Respondents' Counsel (Mr Heard) applied for costs. This application was made late in the day and it was agreed between myself and advocates that it would be dealt with by way of written representations that the parties would submit once they had received my written reasons.

3. My written reasons and Judgment were sent to the parties on 17 August 2017.

### **Application for costs**

4. The Respondents' solicitors submitted their application for costs by way of letter dated 12 September 2019. The application was made under rule 76(1)(b) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules"). It was said by the Respondents that the claims of unfair dismissal and wrongful dismissal had no reasonable prospect of success. That they were without merit. They limited their claim to the disbursements which had incurred since the commencement of the proceedings. These totalled £6,183.83 plus VAT.
5. The application then sets out the grounds upon which the Claimant pursued her claim for unfair dismissal and relies on the conclusions that I made at the end of the hearing and my finding that;
  - 5.1 the Respondents had conducted a reasonable investigation (Judgment paragraph 70.4);
  - 5.2 that all the circumstances of the case were considered, including the remarks of the Crown Court Judge (Judgment paragraph 74);
  - 5.3 the Claimant was not a scapegoat. ... She was responsible for her own actions (Judgment paragraph 72);
  - 5.4 no one else was responsible for the one to one care of the student. Only the Claimant was responsible for him (Judgment paragraph 73);
  - 5.5 the Respondents had considered the mitigating circumstances and whether there was any alternative to the outcome of dismissal but they reasonably decided there was none (Judgment paragraph 74);
  - 5.6 that bearing in mind the Claimant's admitted behaviour and its consequences for student A, dismissal was well within the band of reasonable responses (Judgment paragraph 71).
6. The Respondents pointed out that I had found in their favour in respect of each allegation and say that in those circumstances "*it is clear that the claims had no reasonable prospect of success*".
7. They also point out that the Claimant had been professionally represented throughout these proceedings and she should have withdrawn her claims as there was no sensible basis for her allegations.

### **The response to the application**

8. Mr Anastasiades wrote to me on 13 September 2019. He totally disagreed that this case had no reasonable prospect of success. He dealt with the various points referred to above.
9. He also points out that at no stage was any application made for a strike out because there was no reasonable prospect of success at the outset.
10. During proceedings, I did not give any indication that the claim had no reasonable prospect of success and I gave no indication at the conclusion of the evidence.

11. Mr Anastasiades suggests that the Respondents were seeking to further punish the Claimant by making the application and that at no point did the Claimant act unreasonably in pursuing her claim. He says that she had the right to have the case heard and just because the claim was not successful, it does not negate the right to be heard.
12. He then goes on to make a cross-application for his own costs in having to defend what he describes as an unmeritorious application for costs and invites me to dismiss the application by the Respondents and grant his cross-application in the sum of £675 plus VAT.
13. I take it from this that he is seeking to argue that the Respondents were acting unreasonably in their conduct of the proceedings.

### The law

14. Rule 76 of the rules provides: -
  - “(1) A Tribunal may make a costs 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 in which the proceedings (or part) have been conducted; or
    - (b) any claim or response had no reasonable prospect of success.”
15. Mr Anastasiades has referred me to several cases namely: -
  - **McPherson v BNP Perry Barr** [2004] IRLR 558
  - **Gee v Shell UK Limited** [2003] IRLR 82
  - **Lodwick v Southwark London Borough Council** [2004] IRLR 554
  - **Power v Panasonic (UK) Ltd** EAT 0439/04
16. When dealing with an application for costs I must apply a two-stage test. In this case I must decide: -
  - 16.1 In respect of the Respondents’ application whether the claim had no reasonable prospect of success.
  - 16.2 In the Claimant’s application for costs whether the Respondents had acted unreasonably in pursuing that application for costs.
  - 16.3 In respect of both applications whether I should exercise my discretion to make an award.

17. The above case law emphasises that in deciding whether or not to make a costs order at Tribunal proceedings I have to remember that the regime differs from that in the ordinary civil courts and in particular: -
- 17.1 Costs orders in the Employment Tribunal remain the exception not the rule. In most Employment Tribunal cases the unsuccessful party will not be ordered to pay the successful party's costs.
- 17.2 I must ensure that I impose a two-stage test.
- 17.3 In applying my discretion I must look at all the circumstances of the case and what happened at the hearing.
18. I make the general point myself that whilst I may have made robust findings in respect of the claims made in this case and found against the Claimant in respect of each of the matters she complained of it does not mean that the claims themselves had no reasonable prospect of success.

### **Conclusions**

19. I am satisfied in this case that I should not make an award of costs against the Claimant. I am not satisfied that the claims had no reasonable prospect of success as described by the Respondent.
20. Whilst I made clear findings after hearing the evidence that the claims failed, that is different from saying they had no prospects of success.
21. In a claim of unfair dismissal, the burden is on the Respondent to establish the reason for the dismissal. If they establish the reason and it is a potentially fair reason I must decide whether dismissal fell within the band of reasonable responses. There is no burden of proof at that stage. It is perhaps for this reason that claims for costs in unfair dismissal claims are rarely made and even more rarely ordered. Both parties vigorously presented their cases to me and ultimately, I decided that the dismissal was within the band of reasonable responses and that the Claimant had breached her contract of employment entitling the Respondents to dismiss her without notice.
22. As has already been rehearsed orders for costs in the Employment Tribunal are the exception rather than the rule. This is a sad case. The Claimant had been employed at the school for 13 years previously without a blemish on her character. Because of this incident involving student A she has lost her job which she loved and been prosecuted at the Crown Court. This case has been a blight on her life for almost 4 years.
23. In the light of this, if I had agreed that the claim had no reasonable prospect of success I would not have exercised my discretion in making an award of costs against this Claimant.
24. Having said that, I do not agree with Mr Anastasiades's contention that the claim for costs is anything other than properly made. The Respondents were entitled to make their application for costs. I do not agree with his

contention that the Respondent “*is seeking to further punish the Claimant by making this application*”.

- 25. I do agree with him that the Claimant had the right to have her case heard and just because she was unsuccessful it did not change that right. As he says costs do not follow the event in these types of cases unless the circumstances are exceptional and this is not the case with Mrs Smith.
- 26. The claim for costs by the Respondent therefore fails and so does the counter claim by the Claimant. They are both dismissed.

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Employment Judge Hutchinson

Date: 19 November 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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