EMPLOYMENT TRIBUNALS

Claimant: **Mrs. T Marshall**

Respondent: **Bellway Homes Limited**

Heard at: **Nottingham**

On: **29th January 2020 (In Chambers)**

Before: **Employment Judge Heap (Sitting alone)**

Representatives

Claimant: **Written representations**
Respondent: **Written representations**

JUDGMENT ON COSTS

The Claimant's application for costs is refused.

REASONS

BACKGROUND AND THE ISSUES

1. By way of a Reserved Judgment promulgated on 12th October 2019, I determined that the Claimant was at all material times an employee of the Respondent within the meaning of Section 230(1) Employment Rights Act 1996 and that accordingly she had sufficient continuous service under Section 108 of that Act to claim constructive unfair dismissal. That determination followed on from a Preliminary hearing which had taken place on 11th September 2019.

2. A further Preliminary hearing for the purposes of case management took place before Employment Judge Broughton on 16th October 2019. As part of the agenda for that hearing, the Claimant signified her intention to make an application for costs and attached a schedule of the costs sought. The parties agreed when the matter came before Employment Judge Broughton that that was an application that I should determine given that it arose from findings made and conclusions reached following the 11th September Preliminary hearing and both also agreed that it should be determined on the papers. Employment Judge Broughton set out directions for the parties to set out their respective positions before I undertook that determination.

3. I have considered carefully all that both parties have said in that regard but set out here in brief terms the nature of the application and the reply to it as I

have dealt in further detail with each of the grounds advanced by the Claimant in my conclusions below.

THE CLAIMANT'S POSITION

4. The Claimant's position is that the Respondent conducted the proceedings unreasonably or vexatiously and/or that the approach taken in respect of the Preliminary hearing (that the Claimant was not an employee within the meaning of Section 230(1) Employment Rights Act 1996) had no reasonable prospect of success.

5. The schedule of costs focuses on preparation for and representation at the Preliminary hearing and seeks an Order for costs in the Claimant's favour in the sum of £5,841.60.

THE RESPONDENT'S POSITION

6. The Respondent denies that it has acted vexatiously, unreasonably or that the arguments advanced at the Preliminary hearing had no reasonable prospect of success. It is also said that in all events the schedule of costs is "vastly inflated"; that the Claimant's claim is backed via an insurance policy and that accordingly the Claimant herself has no liability for such costs but that in all events no evidence of the retainer has been provided on which to support the hourly rates claimed.

THE LAW

7. Rules 74 to 84 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("The Regulations") deal with the question of whether an Employment Tribunal should make an Order for costs.

8. Rule 76 sets out the relevant circumstances in which an Employment Judge or Tribunal can exercise their discretion to make an Order for costs, which are as follows:

> **"*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."

9. In short, therefore, there is discretion to make an Order for costs where a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing or conducting of the proceedings. Equally, the discretion is engaged where a party pursues either a claim or defence which has no reasonable prospect of succeeding or, to put it as it was termed previously, where a claim or defence (or part of it) is being pursued which is "misconceived".

10. For something to have been pursued in a vexatious manner it must be that it is pursued not with the expectation of success but to harass the other side or out of some improper motive – **ET Marler Ltd v Robertson 1974 ICR 72** or, more widely, as something that is an abuse of process.

11. With regard to unreasonable conduct it is necessary for the Tribunal to consider *"the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the Claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had." (***Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78)**

12. It should be noted that merely because a party has been found to have acted vexatiously, abusively, disruptively or unreasonably or where a claim or response (or part of it) has no reasonable prospect of succeeding, it does not automatically follow that an Order for costs should be made. Once such conduct or issue has been found, a Tribunal must then go on to consider whether an Order should be made and, particularly, whether it is appropriate to make one. Particularly, when deciding whether an Order should be made at all and, if so, in what terms, a Tribunal is required to take all relevant mitigating factors into account.

13. In accordance with Rule 84 of the Regulations, a Tribunal is entitled to have regard to the ability to pay any award of costs both in relation to the making of an Order at all, or the amount of any such Order. However, it is not a mandatory requirement that such consideration must automatically be given.

CONCLUSIONS

14. I turn now to my conclusions in respect of the costs application. I consider each of the grounds upon which the application is advanced and the Respondent's objections in turn.

15. The first of those grounds is that it is said that the arguments advanced at the Preliminary hearing that the Claimant was not an employee had no reasonable prospect of success and that it was both unreasonable and vexatious for the Respondent to have tried to "disown their own description" of the Claimant as an employee within their own documentation. It is said that:

a. All of the written documentation pointed to the Claimant being an employee;
b. That the Respondent acted unreasonably in failing to lead cogent and persuasive oral evidence to show that the documentation did not reflect the actuality of the arrangements and deployed a witness who was unable to produce evidence about how matters worked in practice;
c. That there had been no real evidence deployed which was inconsistent with employee status; and
d. That in view of those matters the Respondent should not have applied for a Preliminary hearing.

16. The position of the Respondent is that the documentation referred to by the Claimant was historic and that it was their position that it was not reflective of later changes in arrangements between the parties. The question as the Respondent saw it was one of mutuality of obligation and, on that question, there needed to be oral evidence.

17. As to the matter of witness evidence, it is the Respondent's position that as the Claimant's Line Manager was no longer in their employment and thus Mrs. Watkinson was called as she was familiar with the reasons that the Company used "Floating Sales Negotiators". It is also relied upon that I did not make any finding that Mrs. Watkinson's evidence was unreasonable or vexatious.

18. I begin firstly with considering if the arguments advanced by the Respondent had no reasonable prospect of success. I do not find that to be the case. There was a clearly triable issue on the matter of mutuality of obligation given references in emails to there being no obligation to offer work and the fact that, on the Claimant's own case, there was some limited degree of flexibility in her being able to refuse work. Mutuality of obligation is a key, if not the key, ingredient in the question of employment status and that was an issue that could only properly be determined on the evidence and, particularly, by way of cross examination of relevant witnesses – not least the Claimant. This is not a case where it can be reasonably said that the preliminary issue had no reasonable prospect of success – that is that it was utterly hopeless - from the get go. Whilst I ultimately found against the Respondent on the point, that does not equate to their arguments being without any reasonable prospect of success.

19. It was clear after the dust had settled that the preliminary point was not a strong one in light of all of the evidence - and particularly the witness evidence - but there were nevertheless clear triable issues.

20. I therefore reject the assertion that the Respondent's position on the preliminary point was misconceived or had no reasonable prospect of success so as for the costs discretion to become engaged.

21. I also reject the arguments that the Respondent acted vexatiously or unreasonably in respect of this matter. It is difficult to see – and the costs application does not particularly assist in that regard – how the Respondent could be said to be acting vexatiously within the meaning in **Marler** given that they were simply advancing a triable issue open to them on the facts. It is not unusual of course for parties to litigation to advance all arguments open to them – even when those are perhaps not the best points to put – but that cannot be said to be vexatious conduct.

22. Nor can I see that the Respondent was unreasonable in their approach either to making an application for a Preliminary hearing or in respect of the evidence deployed thereat. The Respondent was entitled to have the employment status issue ventilated and tested with a view to the Tribunal determining if the Claimant was an employee. Particularly, had I accepted the Respondent's arguments on employment status it would have proved a complete answer to the claim given that the Claimant would then have lacked the standing to bring a complaint of constructive unfair dismissal and the matter would have proceeded no further.

23. The application for a Preliminary hearing therefore would in those circumstances have saved time and costs had the Respondent succeeded on the point and I can well foresee that the Respondent would have faced criticism for leaving that issue to the full merits hearing if the Tribunal had been against the Claimant on the status question and the time and costs of preparation for the substantive issues had then been wasted.

24. It is correct to say that I found the evidence of Mrs. Watkinson to be unsatisfactory, I did not find her to be in any way untruthful as I set out in my Judgment on the employment status issue. I simply found her to have been hampered in giving a helpful account by dint of her lack of familiarity with the Claimant's circumstances, the issues and the relevant documents. However, given the departure of the Claimant's Line Manager the Respondent appears to have had little choice but to seek to deploy the only evidence that they could. The fact that Mrs. Watkinson did not come up to proof is not something that can be classed as unreasonable conduct.

25. Therefore, the Respondent's position on employment status cannot be said to have no reasonable prospect of success nor was it vexatious or unreasonable to advance an application for a Preliminary hearing or deploy the evidence that it did at that hearing. The first strand of the costs application therefore does not meet the threshold for a Costs Order to be made under Rule 76 of the Regulations.

26. The second of the grounds on which the costs application is advanced is interlinked with the first to the extent that it relates to the application of the Respondent for a Preliminary hearing to be listed. The Claimant relies upon a costs warning letter sent by the Respondent dated 1st August 2019 to her solicitors inviting her to withdraw the claim. It is said that this amounted to time and financial pressure and was a *"tactic to drive a wedge and increase costs and risk for the Claimant"* and that it could only be properly characterised as "bullying" and as such unreasonable.

27. The Respondent denies that the letter was unreasonable. They say that it also dealt with the merits (as the Respondent sees it) of the constructive dismissal claim which has not yet been determined and that the issue of costs in that regard from the Respondent's point of view remains live. It is said that the letter invited a withdrawal as opposed to demanded one as the costs application suggests and that as it was addressed not to the Claimant in person but to her solicitors, there can be no suggestion that it can be viewed as bullying or any of the other labels suggested in the application.

28. I have been provided with a copy of the letter in question and I have considered it carefully. The letter is written in somewhat strident terms and, indeed, in terms that transpired to be rather wrong as to the conclusions reached at the Preliminary hearing. It refers to a *"strength of …. evidence"* that was clearly lacking at the Preliminary hearing but there is nothing to reasonably say that it was not written in keeping and in accordance with the view of the Respondent's solicitor and the advice given to the Respondent on the point. It was clear to me at the Preliminary hearing that the Respondent and their representative felt strongly about their position on employment status. Again, it is not unusual for it to be the case that there are strong feelings and strong representations on a point only to find that matters are not resolved in that party's favour. The letter does no more than set out the Respondent's stall and their (albeit misplaced) belief that they would succeed on the preliminary point in particular.

29. Having viewed the content of the letter, I also cannot accept the view that it is in anyway "bullying" or similar.

30. I take Judicial notice of the fact that it is no different to the type of correspondence frequently sent between professional representatives inviting withdrawal of a claim or concession on a point, particularly where there is an issue such as jurisdiction or standing to bring a claim. That was the precise point that arose at the Preliminary hearing. I agree with the Respondent that it is noteworthy that this letter was not one sent to the Claimant directly but to her solicitors and thus it cannot be said that there was any inequality of arms or resources. As I understand it from the Respondent's submissions (and there has been no correction by the Claimant) she has the benefit of funding via an insurance policy and thus her resources to continue with the matter were not materially different to that of the Respondent.

31. The Respondent I also accept did not "demand" that the Claimant withdraw her claim. It merely set out, and again that is not unusual, the Respondent's position and views on the merits of both the preliminary and substantive issues and invited the Claimant to withdraw. The term "invite" was specifically referenced in the letter and it cannot reasonably be read across as a demand. The letter set out what costs would be likely to be incurred at the preliminary and full merits stages and that the Respondent would give "serious consideration" to a costs application if matters proceeded. Again, it is clear that that referred to both the preliminary and substantive issues. In respect of the latter, the Respondent clearly referenced a point on affirmation and the Tribunal will still need to consider that at the full merits hearing.

32. I am therefore not satisfied by a long stretch that the content or sending of this letter could be said to amount to unreasonable or vexatious conduct nor to "bullying". It is a not untypical hallmark of robustly pursued or defended litigation.

33. Therefore, it is clear from what I have said above that the Respondent's conduct of the matter in sending the letter or, sending it in the terms that it did, cannot be said to be vexatious or unreasonable. The second strand of the costs application therefore does not meet the threshold for a Costs Order to be made under Rule 76 of the Regulations.

34. For all those reasons, the application for costs made by the Claimant is refused.

35. Given the determination that I have made above, it is not necessary for me to consider the quantum of the costs claimed or the question of whether the Claimant had liability to pay them and therefore I say no more about those matters.

Employment Judge Heap

Date: 29th January 2020

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE