EMPLOYMENT TRIBUNALS

Claimant: **Ms L Cabena**

Respondents: **(1) The Schools of King Edward VI in Birmingham ("R1")**

(2) EBN Academy Trust ("R2")

DECISION ON R1's COSTS APPLICATION

Heard at: Birmingham **On: 17 January 2020 & 18 March 2020 (in chambers)**

Before: Employment Judge Flood

Appearance:

For the Claimant: **Mr L Shaw – Trade union representative**

For the R1: **Mr E Beever - Counsel**

The respondent's application for costs is dismissed

REASONS

Background

1. The claimant's claim, presented on 3 February 2018, was made against two respondents. Her claim against R1 was one of being subject to a detriment on the grounds of having made a protected disclosure (section 47B Employment Rights Act 1996 ("ERA"). She alleged that she was not able to obtain permanent employment with R2 because she had made a protected disclosure to R1 and R2. She also claimed direct sex and age discrimination against R2 on the grounds that she was not employed to carry out a role she had previously fulfilled on a temporary basis on the grounds of sex and/or age. Both respondents defended the claims and lodged responses on 19 June 2019.
2. At a closed preliminary hearing ("CPH") held by telephone on 19 September 2019, EJ Self listed an open preliminary hearing ("OPH") to consider:
   2.1. The identity of the correct respondent
   2.2. Whether the claims should be struck out and/or a deposit order made

2.3. Any application by the claimant to amend her claim

2.4. Case management including a list of final issues and timetabling this matter to a final hearing.

EJ Self also ordered that any application to amend the claim should be filed on or before 4 October 2019 and gave directions for the preliminary hearing.

3. The Tribunal was notified on 16 January 2020 at 17.19 that the claimant was withdrawing her claims against R1. R1 confirmed that it still wished to pursue its application for costs and requested to do this at the OPH the next day. The claimant notified the Tribunal at 17.34 on 16 January 2020 that she was also withdrawing her claims against R2.

4. The matter came before me on 17 January 2020, listed as the OPH to determine the issues at paragraph 2 above. These issues had now been superseded and both claims were dismissed by me upon withdrawal. Mr Beever made an application for costs at the hearing against the claimant and NASUWT under rules 76 and 80 of the Employment Tribunals (Rules of Procedure) 2013 ("ET Rules"). I heard the respondent's application for costs at the hearing (R1 seeks Orders for Costs in the amount of £7,680 plus VAT and disbursements and Counsel's Fees of £2,250 plus VAT). I also heard Mr Shaw's submissions in response to that application. In the absence of any evidence from the claimant, I ordered her to provide information on means (and the respondent to provide a further breakdown of the costs claimed) within 14 days. The parties were given a further opportunity to make submissions on the information provided within 14 days.

5. The claimant provided a Statement of Means on 31 January 2020. She also submitted a document headed "C's Submissions" prepared by Ms King of Counsel. R1's solicitors objected to the provision of this document by the claimant as this was not something that was anticipated or permitted by the Orders I made on 17 January 2020, and confirmed in the case management order sent to the parties on 21 January 2020. The relevant Order provided at paragraph 3.1 that the parties were permitted to "*provide further submissions in writing in response to the information supplied at paragraph 2 above*". R1 makes the point that the document headed C's Submissions did not relate to any information supplied by either party pursuant to the Order but instead made additional submissions on the merits of R1's application to expand on the oral submissions made by Mr Shaw on 17 January 2020. I acknowledge the point made by R1 but have considered the document headed C's Submissions as part of my deliberations as I have determined that it is in the interests of justice and the overriding objective. I take note of the fact that all such documents submitted by both parties were disclosed to each other and R1 had the opportunity to respond (and indeed did so by e mail).

6. The matter was listed before me on 18 March 2020 for a reserved decision to be made based on the application and oral submissions heard on 17 January 2020 and on the following documents:

6.1. Written submissions prepared by Mr Beever on behalf of R1;
6.2. Bundle of Documents for Preliminary Hearing;
6.3. Additional documents produced by Mr Shaw at the Preliminary Hearing; and

6.4. Document headed C's Submissions prepared by Ms King of Counsel.

The Issues

7. The issues which needed to be determined were:

   7.1. Did the claimant's conduct in failing to engage with the respondent on merits since at least 22 August 2019 culminating in a sudden and unexplained withdrawal at 5pm on the day before the hearing amount to acting "*unreasonably*" (within rule 76 (1) (a) of the Employment Tribunal Rules of Procedure 2013 ("ET Rules"))?;

   7.2. Did the action against R1 have no reasonable prospects of success?; and if either 7.1 or 7.2 applied

   7.3. Should, in the Tribunal's discretion, a costs order be made?

   7.4. Is it appropriate to make a wasted costs order against the claimant's trade union representatives, NASUWT (under rule 80 of the ET Rules)

   7.5. In either case if so, how much should be awarded?

The relevant law

8. **Regulation 76, Schedule 1 of the ET Rules** states:

> *(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.*

9. This is a two-stage test initially: a Tribunal must ask whether a party's conduct falls within rule 76(1)(a) or (b) as applicable. If so, the Tribunal must then go onto ask whether it is appropriate to exercise the discretion in favour of awarding costs against that party. It is only when these two stages have been completed that the tribunal may proceed to the third stage, which is to consider the amount of any award payable

10. **Gee v Shell UK Limited [2003] IRLR 82.** The Court of Appeal confirmed that it is a fundamental principle that costs are the exception rather than the rule and that costs do not follow the event in Employment Tribunals.

11. **McPherson v BNP Paribas [2004] ICR 1398**. In determining whether to make an order under the ground of unreasonable conduct, a Tribunal should take into account the "nature, gravity and effect" of a party's unreasonable conduct. In deciding whether to award costs against a claimant who had withdrawn a complaint, the crucial question was whether the claimant had conducted the

proceedings unreasonably and not whether the withdrawal of the case was unreasonable.

12. **Barnsley Metropolitan Borough Council v Yerrakalva [2012] ICR 420**. The vital point in exercising the discretion to order costs is to look at the whole picture. The Tribunal has to ask whether there has been unreasonable conduct by the paying party in bringing, defending or conducting the case, and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had.

13. **Oliver Salinas v Bear Stearns International Holdings UKEAT/0596/04/ DM.** The question of whether a costs order was exceptional or unusual was not significant, so long as the proper statutory tests were applied.

14. **Regulation 80 Schedule 1 of the ET Rules** states

(1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs—

(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or
(b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.

Costs so incurred are described as "wasted costs".

(2) "Representative" means a party's legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit.

(3) A wasted costs order may be made in favour of a party whether or not that party is legally represented and may also be made in favour of a representative's own client. A wasted costs order may not be made against a representative where that representative is representing a party in his or her capacity as an employee of that party.

15. The Court of Appeal in **Ridehalgh v Horsefield [1994] 3 All ER 848** (approved by the House of Lords in **Medcalf v Mardell [2002] 3 All ER 721**), sets out the guiding principles to be followed when applying the provisions regarding wasted costs.

16. I was referred to additional authorities by the parties, including the cases of **Ezsias v North Glamorgan NHS Trust [2007] ICR** 1126 and **Royal Mail v Jhuti [2019] UKSC 55**

The relevant facts

17. The facts relevant to this costs application, largely as put by the parties are briefly as follows:

17.1. The claimant is a teacher and was always employed by R1 (since 2000). R1 is a multi academy trust which consists of 8 academy schools. One of these schools is King Edward VI Sheldon Heath Academy ("Sheldon"). The principal of Sheldon is Mr J Allen. The claimant was Assistant Headteacher (later Assistant Vice Principal) of Sheldon and by September 2013 was appointed as temporary Senior Vice Principal.

17.2. R2 is a separate multi academy trust. One of the schools in R2 is the East Birmingham Network Academy ("EBNA") in Castle Vale. Mr J Allen is also a director of EBNA. From 24 April 2017the claimant was working at EBNA under a temporary secondment under an agreement between Sheldon and R2. She reported to the then Chief Executive Officer of R2, Ms M Rooney. During this secondment, the claimant raised concerns with Mr Allen about Ms Rooney and on 12 March 2018 raised a grievance with R2 about Ms Rooney, which was later withdrawn.

17.3. The claimant applied for two permanent Head of School positions at R2 in December 2018 and was unsuccessful in these applications. Her secondment with R2 came to an end on 22 February 2019 and her employment reverted to R1 and she remains employed by R1.

17.4. The claimant's claims related to not being appointed to the roles at R2 and she contended that she had been subject to age and sex discrimination by R2 when her application was unsuccessful. He claim against R1 was solely that she was detrimentally treated by R1 as she was not appointed to the roles within R2 as a result of making a protected disclosure (so was a claim made under section 47B of the Employment Rights Act 1996).

17.5. During the litigation, the following communications took place which I was referred to for the purposes of the costs application and which I consider to be of relevance:

17.5.1. R1 sent an e mail to the claimant on 22 August 2019 (page 46 of the Bundle) where R1 contended that the matters she complained of related to R2, and not R1, and C was put on notice that an application to strike out and costs application would be made.

17.5.2. C sent a letter to the Tribunal on 29 August 2019 (copied to R1) resisting any application to dismiss R1 from the proceedings. It referred to an internal grievance being pursued by the claimant.

17.5.3. R1 made an application to strike out the claimant's claim against it on 16 September 2019 (page 49 of the Bundle), the main point being that R1 had no control or involvement in the recruitment process conducted by R2. R1 contended that any claims regarding this process were a matter for R2 and were not the liability of R1.

17.5.4. C sent a letter to the Tribunal on 8 October 2019 (copying R1) applying to add further and better to her claim (page 48).

17.5.5. C sent an e mail to R1 and R2 on 17 October 2019 disputing that R1 had any grounds to make an application for costs (page 58);.

17.5.6. R1 made a request on 23 October 2019 asking for a copy of the NASUWT advice file (suggesting that this would support the case made by R1 that the claim is misconceived).

17.5.7. C's representative replied on 29 October 2019 refusing this request and also dealing with other matters relating to ongoing contact.

17.5.8. R1 sent an e mail to the claimant on 4 December 2019 asking C to identify the evidence of any causal link between the whistleblowing disclosure and the failure to appoint the claimant to the 2 roles (page 62).

17.5.9. C sent an e mail to R1 on 12 December 2019 referring to the dual role of Mr Allen and also made reference to minutes of R2 Board meetings (page 61).

17.5.10. There was an exchange of e mails between C's representative and Ms Smith, R1's Head of Employee Relations on 12 December 2019 referencing the possibility of without prejudice discussions and how these should take place. the claimant's representative contends that the claimant received the outcome to her ongoing grievance (submitted on 2 April 2019 (page 218-220) with outcome being provided by a letter dated 12 November 2019 with attached report (page 221-259) on this same date.

17.5.11. On 13 December 2019, the claimant referred in a further e mail (page 68) to witness evidence of Mr Allen regarding conversations he may have had.

17.5.12. R1 sent a further e mail on 20 December 2019, reminding the claimant that a costs application was being pursued and suggesting advice should be sought.

17.5.13. There was an e mail from the claimant's representative to Ms Smith of R1 on 10 January 2020 primarily regarding the claimant's possible return to work and grievance. The whistleblowing claim was not referred to in this e mail. There was further without prejudice correspondence on this day, but I will not consider this further.

17.5.14. Ms Smith responded to the claimant's letter of 10 January in detail on 16 January 2020 at 14:19. Again the ongoing whistleblowing claim was not mentioned expressly, albeit there was a statement in this email about the claimant having "*not engaged with the Trust and from the outset sought compensation*" and that "*there remain questions regarding her commitment to her role and the school*". Other than this, the e mail primarily dealt with matters around the claimant's ongoing employment with R1, her recent grievance and possible return to work.

17.5.15. The claimant's representative wrote to the Tribunal and R1's representative withdrawing her complaint at 16:56 on 16 January 2020. He then wrote to Ms Smith of R1 at 17:15 on 16 January 2020 confirming that her Tribunal claim had been withdrawn. It stated "*Our member has taken this step following receipt of your email today within which you appeared to suggest that her employment relationship with the Trust is now in question and your stated view that she has raised these complaints simply to, as you put it, win "compensation"*". It went on to say that "*our member has*

a genuine belief that she was subjected to a detriment following raising genuine and serious concerns" and that "*our member is content instead to pursue the grievance appeal from which grounds will be submitted in due course and in the honest hoe that these issues will be resolved by the Trust in a non-adversarial and sensible way*"

17.6. I made enquiries regarding the claimant's financial position. the claimant does not dispute that she has sufficient means to meet the costs that have been set out in the costs schedule provided by R1.

Conclusion

18. Mr Beever submitted that the claim against R1 (which is only that which is set out at paragraph 11 of the claim form) never had any reasonable prospects of success. He says that that taken at its highest it was based on a disclosure made to R1 in February 2018 but where the action complained of was taken by R2, an entirely unrelated trust in December 2018. He disputes any contention that Mr Allen who was employed by R1 but was a director of R2 had any sort of dual role with regards to the decision not to appoint the claimant. R1 contends that Mr Allen played no part whatsoever in the panel or interview process and the claimant could not point to any evidence at all which suggested that he played any part at all. Moreover, Mr Beever says, even if he had been involved, his actions would have been in his capacity as a director of R2 and not R1. He contended that R1 has become embroiled in a dispute essentially between the claimant and R2 about a failure to give her a job. He submits that the claimant has had ample opportunity to set out why in the light of what is said above, R1 should continue to play a part in the proceedings. He referred to the minutes of R2 (at pages 191 and 192) which he says the claimant originally based her claim on. He then contends that the claimant shifted her approach to what Mr Allen might say in his witness evidence at the hearing. He submits that had the claim not been withdrawn, it was likely to have been struck out as having no reasonable prospect of success, following the Eszias line of authority

19. He also submits that the claimant has failed to engage with R1 on the merits of her claim against R1 since at least 22 August 2019 and that to then suddenly and unexpectedly withdraw on the day before the hearing, her conduct of the proceedings prior to this was unreasonable. He makes reference to the timeline set out above and states that the claimant has been on notice since 22 August that R1 was of the view that her claim against it was misconceived and this point had been made several times in open correspondence. He says that despite this she waited until 5pm on the day before the hearing to withdraw her claim. At this point, all the preparation costs for the hearing had already been incurred including instructing counsel. Mr Beever submits that these could and should have been avoided had the claimant engaged with R1 at an earlier point. He also points out that any contact between the parties relating to the ongoing grievance and return to work do not relate to the prospects of success of the claim made to the tribunal and is an entirely unrelated matter.

20. He finally submits that a wasted costs order should be made against NASUWT under Rule 80. He recognised that such an award can only be made as against a representative who is "*acting in pursuit of profit with regard to the proceedings".* However he suggests that there is no evidence to suggest that Mr Shaw and the NASUWT are not receiving any fees or payment or income for representing the

claimant in these proceedings. To that end he asked me to consider that they were and that an award of costs should be made.

21. Mr Shaw (and Ms King in writing) submit that firstly no wasted costs order can be made against a trade union as a matter of law. It is submitted that it is wholly unarguable that a lay trade union representative giving services to a union member is not acting in pursuit of profit with regard to the proceedings. Mr Shaw points out that the NASUWT receives no financial benefit for representing the claimant (or indeed any other member in litigation) and as there is no profit motive, this claim for a costs order under rule 80 must fail.

22. It is further submitted that the claim made against R1 was not unarguable. It is said that the claimant believed that the person to whom she made her disclosures, Mr Allen, was involved in the decision not to recruit her. the claimant points out that Mr Allen was involved in both R1 and R2. Reference is made to the Jhuti decision and the requirement for a Tribunal to look for the real reason for an action by someone in an organisation which may be hidden under an invented reason. It is submitted that if Mr Allen was acting on behalf of R1 and involved in the decision making of R2 (overtly of covertly) then R1 would be liable. It is submitted that it was therefore reasonable for the claimant and her lay representative to have issued a claim, described as "defensively" against R1 as well as R2. It is therefore submitted that the claimant's claim against R1 does not come close to crossing the high threshold that the claim had no reasonable prospects of success.

23. It is also submitted that the claimant did not behave in an unreasonable manner and it points out that disclosure was still being discussed between the parties up until December 2019 and the bundle for the January 2020 hearing was not finalised until the beginning of that month. It is said that following disclosure the claimant made attempts to negotiate a settlement and was able to do so with R2 but R1 was unwilling to discuss this. the claimant contends that R1 was aware from 12 December 2019 that the claimant wished to bring proceedings to an end amicably but did not engage with this process. the claimant contends that rather than unreasonable conduct, the claimant's decision to withdraw her claim was pragmatic, reasonable and proportionate. It is pointed out that the claimant was also involved in a grievance process with R1 about her ongoing role and the outcome to this was produced in November 2019 but was not received by the claimant until 12 December 2019. It is said that the claimant's decision was sensible in that she decided to focus on her ongoing job with R1, rather than pursue the litigation further. Her decision to withdraw it is submitted was prompted by the e mail received by the claimant from R1 on 16 January 2020 (paragraph 17.5.12 above) and having received that email, the claimant decided that she was concerned that the ongoing claim did not cloud the ongoing employment relationship and so she decided to withdraw.

24. The first question I have identified above is whether the claimant acted unreasonably by "*failing to engage with the respondent on merits since at least 22 August 2019 culminating in a sudden and unexplained withdrawal at 5pm on the day before the hearing*". I have carefully considered the submissions of the parties and my conclusion that the claimant's conduct cannot be considered as being "unreasonable". Firstly I do not accept that there was as a matter of fact a failure to engage with the respondent on merits since 22 August 2019. I refer to the extensive correspondence set out at paragraph 17.5 above. There are at least 8 pieces of correspondence from the claimant's representative to either Ms

Smith or R1 or R's representative after 22 August 2019 dealing with various matters including the ongoing litigation. I see no basis for suggesting that the claimant was failing to engage with R1. It is clear from the correspondence that matters between the two representatives had become strained. However nothing suggests to me that the claimant had behaved in an unreasonable manner in the conduct of the litigation.

25. In terms of the withdrawal of the claim, I accept that this may have been sudden from R1's perspective and it is certainly not ideal that the withdrawal was notified to R1 (and R2) on the evening before a hearing when all costs had already been incurred and counsel instructed. I fully understand the frustrations of R1 that these costs could have been avoided had the claim been withdrawn earlier. However I have accepted that the claimant made a decision primarily following the receipt of the e mail from R1 on 16 January 2020 (see paragraph 17.5.14 above). The claimant states this in the email sent to R1 that afternoon (see 17.5.15 above) and I accept that this was the trigger for her decision to withdraw. I do not conclude that this decision, and the delay in making it, can be described as unreasonable in the context of the correspondence up to this point. There had been much discussion between the parties on various points and the claimant was in discussion with two separate respondents and their representatives. She made what could be said to be a sensible decision to discontinue proceedings and focus on the ongoing situation. The fact that a settlement may have been part of that (with one of the respondents at least) is not something this Tribunal should consider. The OPH listed for the day following had been listed in part to determine the issue of prospects of success and the parties were preparing a bundle in order to partly determine that very point at the time the claimant was considering her options. All of this leads me to conclude that whatever the concerns R1 may have with a withdrawal being made late in the day, I cannot conclude that the timing of the withdrawal amounts to unreasonable conduct.

26. The next question to consider is whether the action against R1 had no reasonable prospects of success. I have considered the submissions of the parties, but I am not able to conclude that the claim had no reasonable prospects of success. The submissions of Mr Beever on the weaknesses inherent in the claim against R1 were persuasive. I accept that it may have been difficult for the claimant to show at final hearing that R1 was firstly involved in the decision to not to appoint her to the roles in R2 (and was acting on behalf of R1 in doing so) and secondly that if he and R1 were so involved, this decision was related to any earlier protected disclosure. However, there is clearly a dispute of fact here as to the precise status of Mr Allen and what part if any he played and on behalf of what entity in the decisions taken in December 2018. It may be that this could have only been clarified absolutely by the witness evidence to be given by Mr Allen at the final hearing and any relevant cross examination. In the absence of any such clear evidence being forthcoming, it may have been that the Tribunal would have been invited to make inferences, as is often the case in claims involved discrimination or whistleblowing claims. That could only be realistically considered having heard all the evidence.

27. Were I considering the issue of prospects of success for the purpose of a strike out application, then the case of **Anyanwu v South Bank Students' Union [2001] ICR 391**, and the Eszias case referred to above I would consider that a strike out on the basis of no reasonable prospect of success should only arise in an exceptional case when central facts are not in dispute and that the tribunal

should assess this from a careful consideration of all the available material, taking the claimant's pleaded case at its reasonable highest. On this basis and looking at the provisions of rule 76 (1) (b), I find that this is not a case where there is no underlying factual dispute and irrespective of the difficulties the claimant may have had in establishing her case, it was not a case which had no reasonable prospects of success.

28. As I have not found any conduct which amounts to unreasonable conduct within the meaning of rule 76 (1) (a), nor have I concluded that the claim had "no reasonable prospects of success" within the meaning of rule 76 (1) (b) then I do not need to go on to consider whether a costs award is appropriate and if so at what level it should be made.

29. The next issue is whether it is appropriate to make a wasted costs order against the claimant's trade union representatives, NASUWT (under rule 80 of the ET Rules). On that point and with reference to rule 80(2) of the ET Rules above, I do not find that the NASUWT amounts to a representative as it is not acting in pursuit of profit with regard to the proceedings. There is nothing that has been pointed out to me by R1 or otherwise that suggests that the NASUWT were at any times operating in pursuit of profit in representing its member. I accept the submissions of the claimant on this point. Therefore there is no need to consider whether an award should be made as it is not possible for such an award to be made in these proceedings.

30. R1's applications for costs are accordingly dismissed.

Employment Judge Flood

20 April 2020

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