Case No:1303009/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
	AND	
OFFICER S		**THE CHIEF CONSTABLE OF WEST MIDLANDS POLICE**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

ON RESPONDENT'S COSTS APPLICATION

HELD AT: Birmingham (In Chambers) **ON:** 7 April 2020

EMPLOYMENT JUDGE Algazy QC

Written Representations

For the Claimant: Ms K. Annand - Counsel

For the Respondent: Mr J. Arnold – Counsel

JUDGMENT

The respondent's application for costs is dismissed.

REASONS

INTRODUCTION

1. The substantive Hearing of the claimant's case took place before a full Tribunal Panel (the "panel") on 3-7 & 10 December 2018. I sat with 2 lay members, Mr R.W. White and Mr C.J. Ledbury. All the separate allegations of different forms of discrimination on the grounds of disability were dismissed. There was some overlap in respect of the allegations and causes of action. A discrete issue in respect of a period in which the claimant's disability was disputed was resolved in the claimant's favour.

2. An application for costs was timeously made by the respondent by letter dated 14 January 2019. This came to my attention in early March 2019. By letter dated 13 March 2019, the claimant was invited to respond, and the response was sent on 26 March 2019. I made an order dated 16 May 2019 and gave certain directions. The costs application was to be decided by the panel on paper and written submissions and authorities were to be filed and exchanged. These were sent by the parties on 13 June 2019.

3. Arrangements were put in place for the panel to convene to determine the application. There then followed a considerable unfortunate delay due, in substantial measure, to the unavailability of one member of the panel for medical reasons. The hearing was eventually fixed for 7 April 2020, but that date became imperilled by the practical difficulties that emerged from the Covid – 19 pandemic.

4. At my invitation, the parties consented to my sitting alone to consider the respondent's application. In order to ensure that I had all the relevant documents and submissions that the parties wished me to consider, these were requested to be re-sent directly.

5. A plainly undesirable and lengthy period has elapsed since the original judgment was handed down and the costs application was made. The parties can be re-assured that I have extensively re-read the relevant case papers and had careful regard to the detailed findings made by the full panel in respect of the claims advanced by the claimant.

THE APPLICATION

Legal basis

6. The Respondent seeks a costs order against the Claimant capped at £20,000 incurred in resisting the Claimant's tribunal claim.

7. The costs application is made pursuant to Rule 76, Schedule 1 of the **Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013** (the "Rules"). The respondent submits that:

   7.1 The Claimant has behaved unreasonably in bringing (pursuing) such proceedings within the meaning of Rule 76(1)(a); and/or

   7.2 had no reasonable prospect of success within the meaning of Rule 76(1)(b).

The respondent's specific complaints

8. The "thrust" of the application (the respondent's description) is set out in paragraph 5 of the respondent's written submissions. The respondent relies on the following matters as being unreasonable for the claimant to pursue or alternatively as having no reasonable prospect of success:

   8.1 Allegations 1 - 4 under the heading of 'Threat of placing her on a development plan', put as claims of discrimination arising from disability and/or harassment related to disability;

   8.2 Failure to make reasonable adjustments in respect of PCP 1, that officers be fit to carry out the full range of the 24/7 shift pattern;

   8.3 Failure to make reasonable adjustments in respect of PCP 2, that officers must maintain a certain level of attendance;

   8.4 Failure to make reasonable adjustments in respect of PCP 3, that police officers are required to work in the role that they are placed in by management;

   8.5 Allegation 12, pressure to disclose the cause of her disability; and

   8.6 Allegations 13-16, regarding personal information.

9. The claimant takes objection to the respondent seeking to rely on Rule 76(1)(a) in his written submissions in that the original application only referred to it being made under Rule 76(1)(b). I address that objection below.

THE LAW

10. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provide as follows, insofar as is material:

> **"76.— When a costs order or a preparation time order may or shall be made**
>
> **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;**
>
> **(b) any claim or response had no reasonable prospect of success …"**

11. From the submissions of the parties and from consideration of relevant authorities, the following principles and guidance emerge[1]:

    11.1 The correct approach in employment tribunals is that orders for costs in employment tribunals are the exception, not the rule. In respect of Employment Tribunals, the governing structure remained that of a cost-free, user-friendly jurisdiction in which the power to award costs is not so much an exception to as a means of protecting its essential character - **Gee v Shell UK Ltd [2003] IRLR 82 (CA) –** See Sedley L.J. at paragraph 35.

    11.2 Notwithstanding that costs orders remain the exception rather than the rule, the facts of a case need not be exceptional for a costs order to be made. The question is whether the relevant test is satisfied - **Power v Panasonic (UK) Ltd UKEAT/0439/04** and **Vaughan v London Borough of Lewisham and others [2013] IRLR 713.**

    11.3 Where a costs application is made by the respondent, it is for the respondent to satisfy the tribunal that it has jurisdiction to make a costs

[1] I, of course, took into consideration the entirety of the submissions and case law relied on by the parties even if a particular authority is not specifically referred to in these reasons.

award ("Stage 1"). If so established, it is then for the tribunal to satisfy itself that it is right and proper to exercise the discretion to award costs, having regard to all the relevant factors ("Stage 2") –

> **"25. The words of the Rules are clear and require no gloss as the Court of Appeal has emphasised. They make clear (as is common ground) that there is, in effect, a three-stage process to awarding costs. The first stage - stage one - is to ask whether the trigger for making a costs order has been established either because a party or his representative has behaved unreasonably, abusively, disruptively or vexatiously in bringing or conducting the proceedings or part of them, or because the claim had no reasonable prospects of success. The trigger, if it is satisfied, is a necessary but not sufficient condition for an award of costs. Simply because the costs jurisdiction is engaged, does not mean that costs will automatically follow. This is because, at the second stage - stage two - the tribunal must consider whether to exercise its discretion to make an award of costs. The discretion is broad and unfettered. The third stage - stage three - only arises if the tribunal decides to exercise its discretion to make an award of costs, and involves assessing the amount of costs to be ordered in accordance with Rule 78"**

Per Simler J in **Haydar v Pennine Acute NHS Trust UKEAT/0141/17**

11.4 Failure to seek a deposit order is not necessarily a recognition of the arguability of a claim - **Vaughan v London Borough of Lewisham** (Op. cit.).

11.5 The tribunal has a wide and unfettered discretion. The EAT will not use "legal microscopes and forensic toothpicks" to "tinker" with the Tribunal's exercise of discretion **- Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78.**

11.6 Unreasonableness has its ordinary meaning. It is not equivalent to vexatious - **Dyer v Secretary of State for Employment UKEAT/183/83.**

11.7 It is a matter of fact for the tribunal as to whether conduct is to be considered as unreasonable - **Dyer v Secretary of State for Employment UKEAT/183/83**.

11.8 Mummery L.J. gave guidance on the correct approach in respect of unreasonableness and the Tribunal's exercise of discretion in **Yerrakalva** (Op. cit.)

> **"41. The vital point in exercising the discretion to order costs is to look at 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."

11.9 That a misconceived claim was "genuinely brought' is neither a proper nor conclusive answer to a claim for costs. An Employment Tribunal must determine if the claim was thereafter properly pursued **– NPower Yorkshire Ltd v Daly UKEAT/0842/04.**

11.10 A failure to accept an offer not to pursue a party for costs does not, of itself, constitute conduct that is to be considered unreasonable - **Lake v Arco Grating (UK) Ltd UKEAT/0511/04.**

11.11 In the context of costs applications, attention was drawn to the particular difficulties facing claimants in discrimination claims by the EAT in **Saka v Fitzroy Robinson UKEAT/0241/00**

"10. We wish at the outset to make it clear that Tribunals should always have in mind the very real difficulties which face a claimant in a discrimination claim. Very rarely is there overt evidence of discrimination; and thus it may be and often is very difficult for the claimant to know whether or not he has real prospects of success until the explanation of the employers' conduct which is the subject of complaint is heard, seen and tested. Nothing we say should be taken to impinge on that broad and important principle. Secondly, and it follows from that, a costs order against an applicant in a discrimination claim is always likely in the absence of misconduct to be made only in a very rare and even an exceptional case.
…."

11.12 In the exercise of its discretion the Tribunal is entitled to take in to account the means of the Union supporting a claimant in an appropriate case – See **Beynon v Scadden [1999] IRLR 700** in which the Union was alleged to be acting with a collateral purpose.

CONCLUSIONS

General

12 In the determination of the respondent's application, I heeded the warning note given by Mummery L.J. in **Yerrakalva** (Op. cit.) with particular reference to the passages set out below:

"39. I begin with some words of caution, first about the citation and value of authorities on costs questions and, secondly, about the dangers of adopting an over-analytical approach to the exercise of a broad discretion.

> …..
>
> **42. On matters of discretion an earlier case only stands as authority for what are, or what are not, the principles governing the discretion and serving only as a broad steer on the factors covered by the paramount principle of relevance. A costs decision in one case will not in most cases pre-determine the outcome of a costs application in another case: the facts of the cases will be different, as will be the interaction of the relevant factors with one another and the varying weight to be attached to them."**

13 I also found force in the submission advanced by the claimant in respect of the breadth of the additional oral evidence adduced by the respondent at the Hearing. Whilst not criticising the respondent's witness statements, the claimant makes the point that this was not evidence that the claimant was able to assess the merits of in advance.

14 The claimant relied on the passage below in **ET Marler v Robertson [1974] ICR 72, NIRC** to draw a distinction between a claim not being upheld, after all the evidence has been considered, and a claim having had no reasonable prospects of success at the outset:

> "**Ordinary experience of life frequently teaches us that which is plain for all to see once the dust of battle has subsided was far from clear to the combatants once they took up arms".**

15 I reject the claimant's interpretation of the respondent's original application contained in the letter dated 14 January 2010. On a fair reading, it does make reference to unreasonable conduct whilst not explicitly referencing Rule 76(1)(b). If I am wrong about that, and insofar as may be necessary, I am prepared to treat the respondent's written submissions as an application to amend which I grant. I have taken into account the claimant's objections set out in the letter dated 24 June 2019.

Allegations 1- 4

16 Reliance is placed by the respondent on the panel's finding that the characterisation of the discussions surrounding a potential development as a "threat" was inappropriate.

17 That finding was made on the totality of the evidence heard by the panel. Whilst we disagreed with the claimant's subjective perception, I do not regard that attaching the label of "threat" to the discussions as unreasonable conduct so as to trigger the exercise of the Tribunal's discretion. Nor do I accept that those allegations had no reasonable prospect of success.

18 The panel had to make findings about whether the communications in question were in fact made in the manner alleged by the claimant and decide whether they constituted unfavourable treatment.

19 There was medical evidence before the panel that the prospect of being put on a development plan caused the claimant heightened anxiety. It was not in dispute that the claimant's own perceptions did not assist in assessing whether unfavourable treatment had occurred. On consideration of all of the evidence adduced, the panel found that it had not.

20 However, I reject the submission made by the respondent that no reasonable officer would have raised these complaints or framed them as she did.

21 The question of discretion does not arise in respect of these complaints. I would not have exercised my "broad and unfettered" discretion in favour of the respondent if my discretion had been in play. I so find by looking at the facts of the case in the round. The ambit of the additional oral evidence over and above the respondent's witness statements would have been a matter that I would have found persuasive in deciding not to make an award of costs had "Stage 2" been reached.

22 I mention one factor in particular and that is that this was not a case in which the panel found misconduct by the claimant. The tribunal also found that the claimant was doing her best to assist the tribunal and was, at worst, operating under an honest but mistaken belief.

23 I also have regard to the fact that the claimant's case before the Tribunal involved a substantial number of allegations that took place over a lengthy period. The specific complaints (the "thrust") identified and relied on by the respondent in respect of this application[2] are not levelled at all the allegations advanced by the claimant. It is more than likely that those remaining matters would have been the subject of a Tribunal hearing in any event. In addition, the claimant succeeded in her disputed claim that she was disabled in respect of the period between October 2015 to April 2016.

24 The fact that the claimant was supported by her union is a matter that I have taken into consideration in arriving at my conclusion on the exercise of discretion, had it arisen. The submission made by the respondent in respect of that particular matter observed that:

22.1 the respondent understood that the Police Federation would pay any costs award; and

[2] Save for a more general complaint contained in paragraph 32 of the respondent's written submissions which is addressed below.

22.2 there was no suggestion that the Police Federation wasn't able to afford any such award

25 If necessary to do so, I distinguish the present case from that of **Beynon** (Op. cit.). It has not been suggested that the union was pursuing any collateral purpose here.

26 I have taken into consideration the correspondence dated 14 November 2018 and the respondents offer to withdraw her claims without the risk of a costs application. This feature of the background circumstances to the application does not alter my overall conclusion on the question of the exercise of my wide discretion at Stage 2 of considering whether to make an award of costs. I bear in mind that failure to accept such an offer is not, without more, to be considered unreasonable – **Lake** (Op.cit.)

Failure to make reasonable adjustments in respect of PCP 1- Fitness

27 I take a different view on this complaint. I note that in the respondent's 14 January 2019 letter, the submission is made is that this was a claim that was **"highly unlikely to be successful".**

28 I find that Stage 1 of the applicable test is satisfied on the basis that both limbs of Rule 76(1) are here engaged. There was no direct evidence to support the existence of a PCP that required police officers to be fit for the job they were employed to do, namely a police officer carrying out the full range of the 24/7 shift pattern. Indeed, there was evidence to the contrary.

29 However, I decline to make an award of costs in the exercise of my discretion for the reasons above explained.

Failure to make reasonable adjustments in respect of PCP 2 - Attendance

30 In respect of this complaint I am not satisfied that the respondent has successfully negotiated Stage 1. This PCP was accepted by the respondent. The panel found that both the two disadvantages alleged by the claimant were substantial and in play. However, we found that the respondent took a number of steps which were reasonable to avoid the disadvantages.

31 I note that the respondent's 14 January 2019 letter did not put the complaint in the stronger terms subsequently advanced in his written submissions. In respect of this matter the letter reads, so far as material"

"The claimant … should not have pursued this aspect of the claim as it had very limited prospects of success"

32 In any event and in all the circumstances, I do not judge that the pursuit of this aspect of the case by the claimant was either unreasonable or that it had no reasonable prospect of success.

33 Again, and for the reasons expressed above, I would have declined to exercise my discretion to make an award of costs against the claimant if my discretion had been triggered.

Failure to make reasonable adjustments in respect of PCP 3 – Working in allocated role

34 The underlying complaint raised by the claimant here was clarified as being that the claimant was not moved from her department. The panel determined, amongst other findings here, that that was not unreasonable on the part of the respondent taking into account all the prevailing circumstances.

35 We also found that the steps taken by the respondent were reasonable to avoid the alleged substantial disadvantage which was not made out in any event. The panel made specific reference to the findings of fact that we made and the particular context of those findings in reaching our conclusions in respect of the claimant's desire and her proposal to move to another department.

36 I do not find that Stage 1 has been established by the respondent. The conclusions reached by the panel required a judgement on the sincerity of the respondent's explanations as to why such a move was problematic. In addition, we accepted that, with hindsight, it might have been preferable to have sought the advice of occupational health before the meeting of 3 March 2016 to discuss the claimants suggested move.

37 In all the circumstances, I find that the pursuit of this aspect of the case by the claimant was neither unreasonable nor that it had no reasonable prospect of success. I repeat my conclusions above set out on the exercise of my discretion had I found Stage 2 to have been reached.

Allegation 12: Pressure to disclose the cause of her disability

38 In respect of this complaint advanced by the claimant, I arrive at a similar conclusion to the one I reached in respect of PCP 1. Namely that Stage 1 of the applicable test is satisfied and that both limbs of Rule.76(1) are here engaged.

39 Pursuit of this allegation was, in my judgment, both unreasonable and had no reasonable prospects of success in circumstances where no reference was made to this matter in the claimant's witness statement.

40 However, I do not make an award of costs against the claimant in the exercise of my discretion for the reasons previously expressed.

Allegations 13 - 16: Claimant's personal information

41 I do not find that the claims advanced in respect of these allegations fall on the wrong side of either limb of Rule 76(1). The claims were not unreasonable, nor did they have no reasonable prospect of success.

42 With particular respect to allegations 14 to 16, these were of particular concern to the panel. We were troubled by these matters as it was clear that the claimant's confidential information could have been more sensitively handled.

43 We also accepted the claimant's submission that there was clear evidence that the disclosure of this information had the effect of violating the claimant's dignity and creating an intimidating, hostile, degrading, humiliating and offensive environment for her.

44 These claims failed as they related to, what I will describe for the purposes of these reasons as, other non-material problems and not the claimant's relevant disability.

45 Moreover, the claimant makes the point that there was not such a clear delineation between the other non-material problems and the claimant's relevant disability so as to conclude that this aspect of her claim had no reasonable prospect of success. This was so in circumstances where the claimant was maintaining, amongst other matters, that those non-material problems were, in fact, the cause of her disability. I accept that submission which is also applicable to allegation 13.

46 I repeat my conclusions on the exercise of discretion had I found otherwise in respect of Stage 1. As well as those reasons, I add here that the conclusion reached in the previous paragraph of these reasons would have been a matter that I would have also found pertinent in deciding not to make an award of costs had Stage 2 been reached.

Final

47 That disposes of the specific matters raised by the respondent in paragraphs 5.1 to 5.6 of his written submissions.

48 A further point is raised by the respondent at paragraph 32 of those submissions. For completeness, I reject the conclusion contended for in that paragraph as regards the remaining allegations made by the claimant.

49 In particular, reference is made to the precise wording of the panel's judgment in that the discrimination claims were described as being not "well founded" before dismissing them. That form of wording was not intended to convey any additional

or particular disapprobation in respect of the case advanced by the claimant. If that impression is indeed conveyed by those words, it was entirely unintentional.

50 I am grateful to counsel for their careful and considered submissions and repeat the thanks given at the end of the substantive Hearing.

Employment Judge Algazy QC

7 May 2020

The parties are reminded that this judgment and reasons will be posted on the appropriate government website at

https://www.gov.uk/employment-tribunal-decisions