



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs E Whelan

**Respondent:** Gemini Communications Limited

**Heard at:** Manchester

**On:** 5 June 2020

**Before:** Employment Judge Leach

## REPRESENTATION:

**Claimant:** Not in attendance

**Respondent:** Not in attendance

## DECISION – RESPONDENT’S APPLICATION FOR COSTS

The respondent’s application for costs is refused.

## REASONS

1. The claimant’s claims in these proceedings have all been withdrawn by her. The respondent has applied for a Costs Order under rule 76(1)(a) of the Employment Tribunals Rules of Procedure 2013 (“Rules”) (unreasonable conduct) and rule 76(1)(b) of the Rules (that the claims had no reasonable prospect of success).

### Chronology of Proceedings

2. The chronology of the proceedings is as follows:

- (1) 27 September 2017 – claim form was received by the Tribunal. By this claim, the claimant claimed (1) unfair dismissal, contrary to s98 Employment Rights Act 1996 (“ERA”) ) and (2) direct discrimination

(protected characteristic of marriage) contrary to s13 Equality Act 2010 ("EQA")

- (2) 3 October 2017 – Tribunal noted that it appeared that the claimant had less than two years' service so was not entitled to bring a complaint of unfair dismissal.
- (3) 19 October 2017 – respondent filed response in which it denied that the claimant was dismissed on grounds of her marriage to her husband, gave misconduct reasons for dismissal but in the alternative, as the response put it, "the claimant was dismissed by way of mutual agreement". It appears from the terms of the response that the respondents were pleading here that there was a "mutual agreement" between claimant and respondent by which the claimant's employment came to an end; in which case, that would not to be a dismissal at all.

The claimant's claim (together with related Employment Tribunal proceedings brought by the claimant's husband and the claimant's son) were then stayed and no further steps were taken in the proceedings until a preliminary hearing (case management) on 14 August 2019.

- (4) 14 August 2019 – claimant withdrew her discrimination claim at the preliminary hearing. Judgment noting dismissal on withdrawal was issued.
- (5) 17 November 2019 – claimant withdrew her unfair dismissal claim.
- (6) 21 November 2019 – respondent wrote to the Tribunal applying for a Costs Order against the claimant.
- (7) 14 April 2020 –the costs hearing was listed to be heard but in view of the COVID-19 pandemic, both parties agreed that costs application could be dealt with in writing.

## **Summary of the Claimant's Claims**

### Unfair Dismissal Claim

3. A claimant is required to have at least 2 year's continuous employment with their employer, to be eligible to bring an unfair dismissal claim under s98 Employment Rights Act 1996 ("ERA").

4. In her claim form, the claimant recorded the dates of her employment with the respondent as commencing on 24 May 2015 and ending on 28 April 2017. On the basis that these dates were correct, the claimant had less than two years' service and so was unable to bring a standard unfair dismissal claim.

5. The narrative attached to the claim form however indicated that there were issues in relation to the date of termination of employment. For example, the claimant explained that her employer did not inform her that her employment was terminated, and that it was not until she later emailed the respondent with a number

of queries, that she received a reply from the respondent's solicitor informing her that her employment had terminated on 27 April or shortly after then. The letter from the respondent's solicitors is dated 26 May 2017.

6. The following is stated in this letter:

*“At the meeting on 27 April 2017 at the Border Gate Restaurant your husband, Mr S Whelan, stated you had not attended work the previous night. It was agreed by all parties in attendance at this meeting that your services as a cleaner for our client were no longer required. In short, your employment was terminated.*

*Between 27 April 2017 and 23 May 2017 this has been communicated to you by either Mr S Whelan or Mr M Whelan. You state in your letter ‘It is my understanding that as of your meeting...I no longer have that position’. We would suggest that the communication of the decision to terminate your employment occurred on the evening of 27 April 2017 or shortly afterwards as you have failed to attend work.*

*As in the case of Robinson v Bowskill, a summary dismissal takes effect when the employee either learns about it or has had a reasonable opportunity to learn about it. Clearly this has occurred in this situation on or around 27 April 2017, given your conduct since this date.*

*In relation to the claim ‘I have also neither resigned or been fired’, we note that at no time over the course of three weeks have you attempted to confirm your employment status. You did not attend the premises at all and our client rightly assumed that you were aware of the termination. We note your email to one of our client’s directors, Mrs Thompson, on 14 May 2017. At no stage in this email did you seek to question the status of your employment.”*

7. In her claim form, the claimant accepted that her husband and son informed her that she had lost or would be losing her job. In her claim form she quotes her husband as saying to her *“Oh and you’ve lost your job too.”* It is clear that the claimant accepts that her husband spoke to her in these terms on or shortly after 27 April 2017. The claimant's husband was neither an employee nor an officer of the claimant's employer.

8. At the case management hearing on 14 August 2019 the claimant noted that her termination date may be later than 27 April 2017. She repeats this in her submissions document (see below) and also in that document notes that the date her employment commenced may be earlier than 24 May 2015. I do not know whether the claimant commented on her start date at the case management hearing.

9. I have not been provided with any document which recorded the date that the claimant's employment with the respondent commenced (such as a contract of employment or statement of terms of employment which the respondent was legally obliged to provide to the claimant, by s1 ERA). I have not been provided with formal notice of dismissal or a similar document which confirmed the date of termination of employment. I have considered this application on the basis that no such documents exist. I have not been provided with any evidence of a discussion between claimant and an employee or officer of the respondent when the respondent

gave the claimant notice of her dismissal. I have considered and determined this application on the basis that no such discussion took place.

10. It is also relevant to note how the response was pleaded in the alternative (see paragraph 2(3) above. If that was what the respondent understood to be the position then that may explain why it took no steps to give notice of dismissal to the claimant.

11. Taking in to account the effect of s97(2) ERA and on the assumption that the claimant's employment commenced on 24 May 2015, the claimant's employment would need to have been terminated on 17 May 2017 or later in order for the claimant to have sufficient continuous employment to bring an unfair dismissal claim. If the start date was earlier then of course, the termination date could have been before 17 May 2017.

#### Claim of Discrimination (protected characteristic marriage/civil partnership)

12. In her claim form the claimant claims as follows:

*"It is my belief that the sole reason I lost my job with Gemini Communications is that I am married to Stephen Whelan and as such I was discriminated against on these grounds. Both he and my father-in-law, Michael Whelan, were effectively forced out of Gemini IT just before I was told I no longer had a job. And I feel that if I was not married or related to him in any way I would still have had the position. I had done nothing to warrant losing my job prior to this date."* (my emphasis)

13. The discrimination claim therefore also concerns the claimant's dismissal from her employment with the respondent. As the above extract from the claim form makes clear, the claim is that the only reason the claimant was dismissed was her close relationship with her husband. She claimed that the act of dismissing her was direct discrimination (protected characteristic of marriage/civil partnership).

#### **The Respondent's Application and Submissions**

14. The respondent's application for costs is made in a letter to the Tribunal dated 25 September 2019 (the letter is dated 2018 in error). This letter refers to an earlier letter of 15 August 2019 on the issue of costs.

15. This earlier letter is from respondent's solicitors to the claimant. It threatens the claimant with costs in relation to her application to change the dates she claims to have been employed by the respondent.

16. The respondent's submissions in relation to costs are more recently set out in a document headed "*Further Costs Submissions on behalf of the Respondent*", and sent to the Tribunal on 1 May 2020 (R's Submissions).

17. The following documents are listed in R's submissions as relevant:

- (a) The Employment Tribunal strike out warning of 3 October 2017;
- (b) The respondent's skeleton argument for the CMC on 11 March 2019 (heard on 14 August 2019) at paragraphs 20 to 24;
- (c) The Case Management Order note of Employment Judge Hoey following the preliminary hearing on 14 August 2019;
- (d) The respondent's costs warning letter to the claimant dated 15 August 2019;
- (e) The respondent's letter setting out further written arguments dated 25 September 201[9];
- (f) The respondent's letter applying for a Costs Order dated 21 November 2019.

18. I have considered all of these documents.

19. In R's submissions it is submitted that neither of the two claims had any reasonable prospects of success and in addition that the bringing and continuation of the proceedings (in the face of what the respondent's solicitor describes as repeated warnings by the Tribunal and the respondent) amounted to unreasonable conduct.

20. In relation to the issue of unreasonable conduct, R's submissions list five occasions when the claimant was warned about her claims:

- (a) The Tribunal strike out warning of 3 October 2017;
- (b) An oral warning given by the Employment Judge at the preliminary hearing of 14 August 2019;
- (c) A warning provided by the respondent's solicitor at the same preliminary hearing. This is described in the following terms:

*"The respondent's representative's oral indication to the Tribunal and to the claimant at the above CMH that no costs would be sought by the respondent if the matter proceeded no further, but also with a warning that costs would be sought if the claimant continued to pursue her claim."*

- (d) The terms of the Case Management Order note following the preliminary hearing of 14 August 2019;
- (e) The respondent's costs warning letter of 15 August 2019 (as noted above, I have not had sight of this).

21. In R's submissions the respondent does not make any claim for a particular monetary amount by way of costs. As far as the amount of costs claimed, the respondent states as follows:

*"Our submissions are being made in writing simultaneously. No costs schedule has been submitted on behalf of the respondent because:*

- (i) *This will save costs at this stage;*
- (ii) *There would be no opportunity for the claimant to make submissions in response; and*
- (iii) *If the respondent's arguments are successful, the Tribunal may prefer to refer the matter to an assessment in the Civil Courts."*

### **Claimant's Submissions**

22. The claimant wrote in response to the respondent's application by her letter to the Tribunal sent by email on 30 April 2020 ("C's submissions"). C's submissions focus on the dismissal date and what she claims to be confusion in relation to this. As noted above, she also raises some uncertainty about the date her employment commenced. I am not aware that she did so at the case management hearing. There is nothing in the summary of that hearing which indicates she did.

23. The claimant also provides information in relation to her financial means, and states as follows:

*"I have since found new employment, albeit, in a charity shop on minimum wage (currently 80% of minimum wage). I have not instructed a solicitor to act on my behalf because I am not in a position to be able to afford a solicitor, primarily due to the financial impact of being unemployed for two years and subsequent effect on my self esteem following the callous actions of the respondent. I also currently have two children at home, one of which would have been receiving free school meals which I now have to pay for from a reduced income. Quite how they expect me to pay their costs is beyond me and certainly beyond my means."*

### **The Law**

24. Unlike the general procedure in Civil Courts, costs do not "follow the event" in Employment Tribunals. Traditionally, Employment Tribunals have allowed employees to challenge the fairness of dismissals (or other matters within the jurisdiction of Employment Tribunals) without a threat of costs in the event that a claim is unsuccessful and also for employers to respond to claims, without a threat as to costs in the event that a claimant is successful.

25. The Tribunal Rules provide Tribunals with a power to award costs in the circumstances set out in those Rules.

26. The Rules which are relevant to the respondent's costs application state as follows:

*"76. When a Costs Order or Preparation Time Order may or shall be made*

*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 has no reasonable prospect of success....*

.....

77. Procedure

*A party may apply for a Costs Order or a Preparation Time Order at any stage up to 28 days after the date on which the Judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.*

78. The amount of a Costs Order

(1) A Costs Order may –

(a) *Order the paying party to pay the receiving party a specified amount not exceeding £20,000 in respect of the costs of the receiving party;*

(b) *Order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of a detailed assessment carried out either by a County Court in accordance with the Civil Procedure Rules 1998 or by an Employment Judge applying the same principles.”*

27. R’s submissions made reference to two authorities, being:

(a) Brooks v Nottingham University Hospitals NHS Trust [EAT 0246/18] (“Brooks”);

(b) Radia v Jefferies International Limited [UKEAT/007/18/JOJ] (“Radia”).

28. Both cases concern a respondent making a costs application against an unsuccessful claimant. In both cases the application was made after a final hearing where the Tribunal had considered and decided on all of the issues in the cases and all evidence provided.

29. The following is apparent from these decisions:

(1) In relation to an application under rule 76(1)(b) (no reasonable prospect of success), this test should be considered on the basis of the information that was known or reasonably available at the start of proceedings (see paragraph 67 of the Radia Judgment):

*“Where the Tribunal is considering a costs application at the end of, or after, a trial it has to decide whether the claims ‘had’ no reasonable prospect of success judged on the basis of the information that was known or reasonably available at the start, and considering how at that earlier point the prospects of success in a trial that was yet to take place would have looked. But the Tribunal is making that decision at a later point in time, when it has much more information and evidence available to it, following the trial having in fact taken place. As long as it maintains its focus on the question of how things would have looked at the time when the claim began, it may and should take account of any information it has gained and evidence it has seen by virtue of having heard the case, that may properly cast light back on that question. But it should not have regard to information or evidence which would not have been available at that earlier time.”*

- (2) The fact that there were factual disputes which could only be resolved by hearing evidence does not necessarily mean that a Tribunal cannot properly conclude that a claim had no reasonable prospects from the outset, as that depends on what the party knew or ought to have known were the true facts (paragraph 69 of Radia).

30. Where a party seeking costs makes out one or more of the grounds for costs to be awarded, then the Tribunal must consider whether to award costs. This consideration requires the Tribunal to exercise a discretion. There is no finite list of matters that Tribunals must take into account when exercising this discretion, and the relevant importance of various factors will depend on the particular circumstances of the case. In the case of Barnsley MBC v. Yerrakalva [2011] EWCA Civ 1255 the Court of Appeal provided some guidance to Tribunals when considering costs applications:-

*“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 predetermine 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.”*

In the same case, *“When, as here, the case has been withdrawn before it has run the full course to a final conclusion on the merits, difficulties on costs applications are bound to arise from the absence of findings of credibility, the absence of findings of disputed facts and the absence of findings on issues of liability. The Tribunal or Court has to do the best it can with such material as it has in a case that has never been fully tried.”*

31. R’s submissions made reference to its written submissions prepared for the preliminary hearing on 14 August 2019. In these earlier submissions. The respondent’s solicitors referred to the case of Hawkins v Atex Group Limited & others UKEAT/0302/11 and they claim this supports their submission that the claim



of discrimination had no reasonable prospects of success. The following extract from the judgment in this case is referred to:-

*“There was in reality no prospect of the appellant being able to establish...that the respondents were motivated specifically by the fact that she and Mr Hawkins were married rather than simply by the closeness of their relationship – or, to put it the other way, that she would not have been dismissed if she and Mr Hawkins had been common law spouses. It is impossible to conceive of a ‘marriage specific’ reason for the conduct complained of and none is alleged in the particulars of claim: whether or not the suspicions of conflicts of interests or nepotism which plainly led the respondents to act as they did were justified, they would as a matter of common sense have arisen equally whether she and Mr Hawkins were married or not...That being so the Judge was right to strike the claim out.”*

32. In the Hawkins case, the EAT made clear the narrow basis for a marriage/civil partnership discrimination claim and that in order for a claim to succeed, discrimination must be based on the fact that the claimant is specifically married rather than being an unmarried partner, close friend or other relative of another individual.

### **Analysis and Conclusion**

33. In this section I set out my conclusions in relation to each of the two claims brought in these proceedings

#### The claim of direct discrimination (protected characteristic of marriage and civil partnership)

34. This claim had no reasonable prospects of success. I base this on the following:

- (1) The claim as pleaded and particularly the following sentence: *“I feel that if I was not married or related to [Stephen Whelan] in any way I would still have had the position”.*
- (2) The narrowness of discrimination as far as this protected characteristic is concerned as confirmed by the Hawkins judgment.

35. Having reached this conclusion and applying Rule 76(1) it is necessary therefore that I consider whether a costs order should be made.

36. My decision is that no Costs Order should be made. These are my reasons:

- (1) at the preliminary hearing of 14 August 2019 the respondent’s representative indicated to both the Tribunal and the claimant that no costs would be sought by the respondent if the matter proceeded no

further. The claimant withdrew her claim of discrimination at that hearing. Judgment was issued effecting dismissal on withdrawal by the claimant. For that reason alone, no costs order should be made in relation to this claim.

- (2) Further, whilst these proceedings were some two years old before the discrimination claim was withdrawn, they were in fact at an early stage. All that had happened was that the claim had been issued, the response had been filed and then proceedings had been stayed with no further steps taken prior to the case management hearing of 14 August 2019. It is apparent that that hearing was of assistance to the claimant's understanding of the law as it related to the claims she was bringing and it appears clear from the note of the hearing that the Judge was able to provide the claimant with an appropriate indication in relation to the potential merits of her claim.
- (3) The complexity of matters. Discrimination is a complex area of law and parties have relatively little time from the alleged act of discrimination complained of to issue Employment Tribunal proceedings. The claimant, without the benefit of any legal advice, issued those proceedings, noting her association with her husband with whom the respondent appears to be in a significant dispute and claimed that she was treated the way that she was because she was his wife. The respondent's solicitors have been right to note that this is not in itself the basis of a claim of direct discrimination (protected characteristic marriage/civil partnership) although it may well be a misunderstanding many unrepresented or uninformed individuals may have. As noted above, when matters were explained to the claimant at an early stage of the proceedings she acted reasonably in withdrawing her claim.
- (4) As for unreasonable conduct of the discrimination claim, I do not find that there has been unreasonable conduct. The respondent's submissions in relation to unreasonable conduct refer to warnings as listed in the respondent's submissions. None of those warnings is applicable to the discrimination claim, which was withdrawn on 14 August 2019.

### Unfair Dismissal Claim

37. I do not find that there were no reasonable prospects of this claim. I do not find that the claimant acted unreasonably in the bringing and/or continuing of these proceedings. On that basis I am not required to consider whether to make a Costs Order against the claimant.

38. My reasons are these:

- (1) Whilst it is apparent from the dates provided on the claim form that the claimant has less than two years' service, it is clear from the narrative provided by the claimant in the document attached to her claim form

that there was a lack of clarity in relation to the termination date. She raised this lack of clarity/confusion at the time she issued her claim. It is clear from the claim form that she had written to the respondent in May 2017 asserting her employment was continuing as she had not been dismissed. I have not been provided with a copy of this letter.

- (2) The claimant has referred to the letter of 26 May 2017 written by the respondent's solicitors. This carefully drafted letter also indicates a lack of certainty about the date of termination of the claimant's employment. The following is noted in the letter:

*"We would suggest that the communication of the decision to terminate your employment occurred on the evening of 27 April 2017 or shortly afterwards as you have failed to attend work since."* (my emphasis)

- (3) This letter from respondent's solicitors also refers to a reported case in support of the stated suggestion that termination of employment occurred on or shortly after 27 April 2017.

*"As in the case of Robinson v Bowskill a summary dismissal takes effect when the employee either learns about it or has had a reasonable opportunity to learn about it. Clearly this has occurred in this situation on or around 27 April 2017 given your conduct since this date."*

- (4) The case of Robinson v Bowskill & Others concerned an employee who was communicating with her employer through her solicitor. In accordance with this line of communication the employer was sent written notice of termination of the employee's employment and accordingly then the solicitor informed the client (the claimant) of the decision to terminate the claimant's employment and provided the claimant with a copy of the termination letter.
- (5) As for the matter before me: it is not clear from the information I have what was communicated to the claimant's husband, in what capacity the husband received the information that he did at a business meeting of 27 April 2017 and what (if anything) was agreed with the husband.
- (6) The way that the response is pleaded in the alternative (see para 2(3) above) only adds to the confusion around date of termination although as I have noted earlier, may explain why the respondent did not provide the claimant with any notice of termination of employment.
- (7) It may well be that, having heard and tested all of the evidence in this case and reached findings of fact, a Tribunal would have concluded the claimant had less than two years' service and that the date of termination of the claimant's employment was either 27 April 2017 or a date between 27 April and 17 May 2017, but on the basis of the information that I have I cannot say that there were no reasonable prospects of the claimant demonstrating two years' employment.

39. As for unreasonable conduct:

- (1) Once the claimant issued proceedings, other than the respondent submitting a response, nothing further happened in this case until the preliminary hearing of 14 August 2019.
- (2) The claimant had the benefit of guidance by the Judge at that hearing.
- (3) Not long after the hearing the claimant chose to withdraw her claim. By that stage the claimant had written to explain her reasons for seeking to amend the date of employment on her claim form and the respondent had, in its letter of 25 September 2019, provided a robust response. The claimant was asked to comment on that robust response by 18 November 2019 and at that stage (by email of 17 November 2019) informed the Tribunal that she would not apply to amend her ET1 and (following correspondence between the claimant and the Tribunal clarifying her position) confirmed that she was withdrawing her claim.

40. Given the complications in relation to the dates of employment and the withdrawal of the claim at an early stage of the proceedings and very shortly after the case management hearing, I do not consider the claimant to have been unreasonable in bringing or continuing the proceedings until her withdrawal.

41. For completeness, I note that, even had I concluded that there were no reasonable prospects of success in relation to the unfair dismissal claim, I would have exercised my discretion in the same way as in the discrimination claim. The claim was at an early stage; the claimant had matters explained to her at a case management hearing, she was then provided with a robust letter from the respondent's solicitors and withdrew her claim, the respondents' solicitors having confirmed 3 months beforehand, that no application for costs would be made if she did so. This was not a case where the claimant withdrew her claim at the last minute before a hearing.

Employment Judge Leach  
Date: 12 June 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON  
15 June 2020

FOR THE TRIBUNAL OFFICE

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