**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4104098/2018**

**Held in Glasgow on 4 March 2019**

**Employment Judge: Lucy Wiseman**
**Members: Mr Ashraf**
**Martha McAllister**

**Ms Fiona Ingram** — **Claimant**
**Written Submissions**

**JHP Transport Ltd** — **Respondent**
**Written Submissions**

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided to dismiss the respondent's application for expenses.

## REASONS

1. The claimant presented a claim to the Employment Tribunal on the 18 April 2018 alleging she had been discriminated against because of the protected characteristic of sex, in circumstances where named comparators had also had accidents but had not been dismissed.

2. The claim was heard over three days in October 2018. The tribunal decided to dismiss the claim. The Judgment was dated 7 October, and sent to the parties on the 8 October 2018.

3. The respondent's representative, by email of the 5 December, made an application for an Expenses or Preparation Time Order.

4. The parties proposed the application be dealt with by written submissions. The Employment Judge issued directions for written submissions to be exchanged and submitted, and allowed a period for further comments.

5. The members of the tribunal met on the 4 March to consider the written submissions from the parties, and to reach their decision regarding the application.

**Respondent' submissions**

6. Mr Muirhead invited the tribunal to make an order for expenses (or a preparation time order) under rules 74 – 79 (and rule 84) of the Employment Tribunal Rules of Procedure. The application was made on the grounds that the claimant had acted unreasonably in bringing the proceedings and/or the claim had no reasonable prospect of success.

7. Mr Muirhead noted the discrimination claim had relied upon a comparison which the claimant drew between her treatment and the treatment of 7 actual male comparators. The claimant asserted the male comparators had *"caused much more extensive damage and were not dismissed".*

8. It was very clear from the claimant's dismissal letter and the respondent's ET3, that the claimant was not dismissed because of the extent of the damage she caused to the respondent's vehicles, but for her pattern of repeated incidents of damage without any signs of improvement, this in the respondent's view, representing an unacceptable risk to health and safety.

9. It was submitted that given the terms of the claimant's dismissal letter, it must have been apparent to the claimant that the circumstances of her named comparators were materially different such that her claim of direct discrimination would fail. It should have been apparent that the claim had no reasonable prospect of success.

10. The respondent's position that the claim had no reasonable prospect of success was made clear to the claimant in a letter dated 23 August 2018. The

letter warned the claimant there would be an issue of expenses if she proceeded with her claim.

11. Mr Muirhead referred to the claimant's ET1 where information regarding the damage caused by the comparators was asserted as fact. However, it became apparent during cross examination that those "facts" were based almost entirely on hearsay and gossip of other drivers. The claimant had no evidence other than this to support her position.

12. The claimant was invited to withdraw her claim at the end of the first day of the hearing, and warned an application for expenses would be made if she did not do so. The claimant did not withdraw, but the following morning introduced a hypothetical comparator.

13. Mr Muirhead submitted that in bringing the claim the claimant had acted unreasonably, and that it should have been apparent from the outset that the claim would fail given the comparison she sought to make between her treatment and the treatment of the other male drivers. Furthermore, the claimant had conducted the proceedings unreasonably in relying on hearsay and gossip.

14. The respondent had incurred costs in defending the claim, and schedules of those costs were attached to the application. Mr Muirhead invited the tribunal to make an expenses order for the sum of £4708, or alternatively, a preparation time order for the sum of £2320.

15. Mr Muirhead made further comments on the claimant's submissions. He made clear that the conduct of the claimant relied upon as the basis for making the application was:

- the claimant's decision to proceed with her claim relying on named comparators whose circumstances were materially different than her own, particularly when the differences in circumstances must have been clear;

- the claimant's decision to proceed with her claim despite the costs warning and
- the claimant's decision to proceed with her claim after a further costs warning on day 1 of the hearing.

16. Mr Muirhead submitted the conduct was unreasonable because the claimant ought to have appreciated that the factual circumstances upon which she sought to rely would mean her claim would fail.

17. Mr Muirhead clarified it had never been suggested the claim was vexatious.

18. The claimant's representative made reference to the dismissal being motivated by discrimination. Mr Muirhead invited the tribunal to disregard this comment because it had never been part of the claimant's case. Similarly, the tribunal was not asked to determine reasonable prospects of success, and therefore the fact no comments were made regarding this matter was of no relevance.

**Claimant's submissions**

19. The claimant objected to the application for expenses and asserted her application did have and always had a reasonable prospect of success; the claim was not pursued unreasonably, vexatiously or as otherwise described by the respondent and, in any event, the tribunal should not exercise its discretion to grant a costs award of any sort in favour of the respondent.

20. Ms Flanagan submitted the making of a costs order was the exception rather than the general rule in tribunal hearings. Ms Flanagan referred to the statutory provisions, and to the case of **Barnsley Metropolitan Council v Yerrakalva 2012 IRLR 78** where it was stated: *"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."*

21. Ms Flanagan also referred to the cases of **Marler Ltd v Robertson 1974 ICR** 72 and **A-G v Barker 2000 1 FLR 759** regarding the meaning of the term "vexatious".

22. Ms Flanagan also referred the tribunal to **Anyanwu v South Bank Students Union 2001 ICR 391** where comments were made regarding the striking out of discrimination claims. Ms Flanagan submitted those comments applied equally to applications for expenses.

23. Ms Flanagan referred to the findings of fact made by the tribunal and, in particular, the fact the respondent, in not following any formal procedure, did not exclude the possibility the dismissal might have been motivated consciously or unconsciously by discrimination.

24. Ms Flanagan submitted the standard in judging reasonable prospects of success was the same as that used to determine strike out applications. She submitted the claim, at no time, came near to falling below this standard. The claim was not frivolous or fanciful: the claimant believed she was not treated the same as other male employees.

25. The claim could have amounted to a valid and legitimate claim capable of proof at the tribunal, and the tribunal could have reasonably concluded the claimant was discriminated against on grounds of her sex. Ms Flanagan referred to the submissions made on the claimant's behalf at the end of the hearing.

26. A finding by the tribunal that the claim was dismissed, does not and should not lead to a conclusion that a claim lacked reasonable prospects of success, which is a different standard. The respondent's application referred to the hypothetical comparator being introduced, but the tribunal accepted a hypothetical comparator could be introduced and paragraph 104 of the Judgment makes this clear. Ultimately the tribunal concluded it was not prepared to draw an inference that a hypothetical comparator would have

been treated more favourably than the claimant. However, this did not mean the claim did not have reasonable prospects of success.

27. Ms Flanagan rejected Mr Muirhead's suggestion the tribunal accepted the claimant only had hearsay and gossip to rely upon. The tribunal engaged with the claimant's reasoning regarding the comparators but concluded the actual comparators were not employees and/or there were material differences in the circumstances. It was submitted a tribunal, reasonably directing itself, and on the evidence it heard, could reasonably have determined the claim in favour of the claimant. The claim was one with reasonable prospects of success, which the claimant was entitled to pursue to conclusion.

28. The claimant rejected the respondent's suggestion the claimant acted unreasonably in pursuing her claim. Ms Flanagan referred to the points set out above, and also invited the tribunal to have regard to the fact there was a public interest in tribunals hearing discrimination cases, particularly where, as in this case, the claimant worked in a male dominated industry.

29. Ms Flanagan submitted that if the tribunal finds there are grounds for making a costs order, the tribunal should not do so because it would be unjust and disproportionate.

30. Ms Flanagan invited the tribunal to dismiss the application.

**Discussion and Decision**

31. We firstly had regard to the rules governing costs orders and preparation time orders, as set out in rules 74 – 79 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules).

32. Rule 75 provides that *"a costs order is an order that a party (the paying party) make a payment to another party (the receiving party) in respect of the costs that the receiving party has incurred while legally represented or whilst represented by a lay representative". Further, "a preparation time order is an order that a party (a paying party) make a payment to another party (the*

*receiving party) in respect of the receiving party's preparation time while not legally represented".*

33. Rule 76 sets out when a costs order or a preparation time order may or shall be made. It provides that *"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 the way that the proceedings have been conducted, or (b) any claim or response had no reasonable prospect of success ..".*

34. We also had regard to the ***Yerraclava*** case to which we were referred (above) and to the guidance that in exercising discretion to order costs, the tribunal is required to identify the conduct; what was unreasonable about it and what effects it had.

35. Mr Muirhead invited the tribunal to make either a costs order or a preparation time order, and he submitted the basis for doing so was twofold: (i) the claimant acted unreasonably in bringing the proceedings and (ii) the claim had no reasonable prospects of success. We considered each of those matters.

36. The respondent invited the tribunal to accept the claimant had acted unreasonably in bringing the proceedings because, essentially, she must have known there was a wide disparity between the circumstances of her accidents and those of her comparators.

37. This was a case where the claimant sought to compare her treatment to that of several male drivers who had also had accidents causing damage to the respondent's vehicles, but who had not been dismissed. In terms of background and context there was no dispute the claimant worked in a male dominated industry, and the respondent accepted it was not unusual for drivers to have accidents, although the respondent impressed on drivers the need for care to be taken.

38. The respondent produced a document (page 203) on which it had listed the seven comparators relied upon by the claimant, the incident/s, the cost of repairs and whether the person had been asked to make a contribution to the cost of the repair. The claimant's representative accepted, at the conclusion of the evidence, that in fact only three comparators were to be relied upon because one comparator had been withdrawn and it was accepted the circumstances of three comparators had not been substantiated.

39. The issue for the tribunal to determine was whether there was any material difference between the circumstances relating to the cases of the comparator and the claimant. We, having had the benefit of hearing the evidence, decided (i) the three comparators were employed by Farm Field Fresh Ltd and not the respondent and (ii) there were material differences between the claimant's circumstances and those of her comparators.

40. We stress that we could only make those decisions having had the benefit of hearing evidence. We understand the respondent may feel that our decision in effect proved them right, but we could not accept that a material difference in the circumstances would have been obvious prior to the hearing. In any event, we accepted Ms Flanagan's submission that the claimant, having been able to point to less favourable treatment (on the face of it), and having been able to point to actual comparators, was entitled to ask a tribunal to determine her claim.

41. We had regard to the respondent's position that there were apparent and material differences between the cases, and we had regard to their argument that this would have been apparent to the claimant. However, the dispute between the parties regarding the materiality of those differences was something that could only be tested and determined by hearing all of the evidence.

42. We had regard to the fact the claimant was able to use the facts and circumstances of the actual comparators to assist in constructing the hypothetical comparator and arguing how that hypothetical comparator would

have been treated. We acknowledged Ms Flanagan's submission that another tribunal, reasonably directing itself, could have drawn an adverse inference and found in favour of the claimant.

43. Mr Muirhead focussed on the fact the claimant relied on *"hearsay, gossip and non-qualified opinion of herself and other drivers".* We considered Mr Muirhead was only able to make this submission after having had the benefit of hearing the evidence and being able to cross examine the claimant and her witness. The strength, or otherwise, of the claimant's evidence was not so weak as to render it unreasonable to have brought the claim.

44. We concluded for these reasons that the claimant had not acted unreasonably in bringing the claim.

45. We next considered whether it could be said the claim had no reasonable prospect of success. We, in considering this matter, had regard to the fact the issue upon which we must focus is whether the claim had reasonable prospects of success. The respondent relied upon the same factors as set out above to argue the claim had no reasonable prospect of success, and that this should have been obvious to the claimant upon receipt of the ET3 and subsequently.

46. We could not accept the respondent's submissions regarding this point, and we rely on the same points as set out above. There was a dispute between the parties regarding the differences between the circumstances of the claimant and the comparators and this issue could only be determined by a tribunal after having heard all of the evidence. There were issues of credibility to be determined. The fact the tribunal decided to dismiss the claim does not mean, of itself, that the claim had no reasonable prospects of success.

47. We, in conclusion and for the reasons stated, decided to dismiss the respondent's application for expenses.

Employment Judge: Lucy Wiseman

Date of Judgement: 11 March 2019

Entered in Register,

Copied to Parties: 12 March 2019