



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms E Page

**Respondent:** Blue Orca Limited

**Heard at:** Nottingham **On:** Wednesday 17 June 2020

**Before:** Employment Judge Hutchinson (sitting alone)

## Representatives

**Claimant:** Written representation

**Respondent:** Written representation

## JUDGMENT

The Employment Tribunal Judge gave judgment as follows: -

The Respondent's application for costs fails and is dismissed.

## REASONS

### Background to this hearing

1. By an originating claim received by the Tribunal on 17 October 2018 the Claimant brought a claim of victimisation contrary to section 27 of the Equality Act 2010. She complained that she had not been offered alternative employment with the Respondent company after the Respondent's owner Lee Hancock had closed 14C Executive Search Limited made the claimant redundant. She said that the reason that she had received this detrimental treatment was that she had brought an earlier claim against 14C Executive Search Limited and Mr Lee Hancock who was the owner and Managing Director of that company.

2. Her claim was that when 14C Executive Search Limited was closed by Mr Hancock he set up a new company which is the Respondent in this case. The Claimant said that as a direct result of her having pursued the claim against Mr Hancock and his previous company under case number 2602218/2017 he had not offered her employment in the new company, i.e. this Respondent.

3. The Claimant withdrew her claim on 30 January 2020 at 10:15 and the dismissal judgment signed by my colleague Employment Judge Heap on 14 February 2020 was sent to the parties on 20 February 2020.

4. On 23 March 2020 Mr Gilbert on behalf of the Respondents made an application for costs. He said that he had only received the judgment by e-mail from the Tribunal on 21 March 2020.

5. He contended that the Claimant had acted unreasonably in bringing the proceedings. He also said that the claim was vexatious and had no reasonable prospect of success. The costs application was made pursuant to Rules 76(a) and (b) of the Employment Tribunal Rules of Procedure 2013.

6. I acknowledged the e-mail and suggested to the parties that the matter should be dealt with by way of written representations and both parties agreed to this, hence the hearing today.

### **The proceedings against I4C Executive Search Limited and Mr Hancock**

7. This claim had been presented to the Tribunal on 22 December 2017 and at that time she was still employed by I4C Executive Search Limited as a Recruitment Consultant. She was dismissed on 16 July 2018. Her claims were of: -

- Pregnancy and maternity discrimination
- Detriment contrary to section 44 Employment Rights Act 1996

8. The hearing in respect of that matter took place at the Lincoln Employment Tribunal Hearing Centre on 10 and 12 June 2019. The case was heard by myself with members and at the end of the hearing we dismissed her claims.

9. Mr Gilbert who represented the Claimant applied at the end of the proceedings for an order for costs saying that the Claimant had acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing the proceedings and in the way the proceedings had been conducted and that the claims had no reasonable prospect of success.

10. The Tribunal disagreed with those contentions and declined to make any order for costs pointing out that all discrimination cases turn on the evidence and although we had found against the Claimant it did not mean that she had behaved in any way unreasonably in bringing the proceedings. It was not an appropriate case to make an order for costs which are only made in exceptional circumstances.

### **The claim against Blue Orca Limited**

11. This claim was received by the Tribunal on 17 October 2018 and was a claim of victimisation. It was therefore made prior to the hearing of the case against I4C Executive Search Limited in June 2019 and after her dismissal. The Claimant alleged that she had been not offered employment by this Respondent because of her claims against Mr Hancock and I4C Executive Search Limited. Blue Orca Limited is Mr Hancock's new company operating a similar business to that of his previous company.

Regional Employment Judge Swann conducted a closed telephone Preliminary Hearing on 18 March 2019 at which he identified the claims and the issues. He noted that this claim was listed for hearing on 3, 5 and 6 February 2020 at Lincoln Magistrates Court and he made case management orders for the preparation of that.

12. On 30 January 2020 at 10:15 am the Claimant wrote to the Tribunal and sent a copy to the Respondent's representative as follows:

"To whom it may concern,

I would like to withdraw the application for the above-named case.

This is due to high stress, related issues and unforeseen circumstances.

I am currently e-mailing this from the hospital where I am here with my one-year daughter so as I am sure you can appreciate I have a lot going on and her health and her needs must come first.

Please forward confirmation of the dismissal of this case.

Kind regards

Emily Page."

13. A dismissal judgment was signed by my colleague Employment Judge Heap on 14 February 2020 and sent to the parties on 20 February 2020.

14. Mr Gilbert said that he had not received this and requested a copy of the dismissal judgment on 18 March 2020.

15. He then made his application for costs on 23 March 2020. He said the following:

"It is clear that the outcome in the I4C case was a significant factor in terms of the Claimant succeeding with her claim against Blue Orca, especially given Regional Employment Judge Swann's comments in the case management order."

16. The Claimant was sent a costs warning in respect of this matter on 14 June 2019. That warning was issued immediately after the hearing at Lincoln where the Claimant had lost her case against 14C recruitment. It was said in the letter that the Respondents were confident that the Claimant would lose her case and referred to the finding of my tribunal that the Claimant was not a credible witness. They also said that it was their view that the claim was pursued vexatiously.

17. On 13 January 2020 the bundle of documents was agreed and sent to the claimant's representative. The parties agreed that they would exchange witness statements on 27 January 2020. On that day the Claimant's representative wrote to the Respondents to say that the Claimant was planning to withdraw her claim before witness statements are exchanged. They explained that the prospect of further proceedings was have an impact on her general well-being meaning she

was no longer looking to proceed with her claim. The Respondent wrote again on 30 January 2020 saying that if the claimant did not withdraw her claim by midday that day they would make an application to strike out the claim with an application for costs in respect of that. The Claimant withdrew her claims against the Respondent in this matter on 30 January 2020 as described above. This was one working day before the final hearing and the Respondent had incurred the costs of preparing and drafting witness statements by this point.

### **The Respondents' contentions**

18. The Respondent contends that the Claimant has acted unreasonably in bringing these proceedings, that her claim was vexatious and that it had no reasonable prospect of success and applies that for a costs order be made on this basis. The Claimant was put on a costs warning immediately after the outcome of the I4C claim which failed. However, she continued to pursue this claim before withdrawing at the very last minute and this resulted in the Respondent incurring costs unnecessarily and unreasonably.

19. They further contend that the Claimant has unreasonably pursued a claim that was both vexatious and had no reasonable prospect of success and this is supported by the abrupt nature of the Claimant's withdrawal. Whilst the Claimant cited health reasons as the reason for the withdrawal the Respondent contends the Claimant could have asked for a postponement but she did not. The Respondent invites the Tribunal to draw an adverse inference from the abrupt nature of the Claimant's withdrawal and namely that the purpose of her claim was to unreasonably incur the Respondent unnecessary costs, which she succeeded with.

### **The law**

20. Rule 76 provides when a costs order or a preparation time order may 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; or

(b) any claim or response had no reasonable prospect of success;”

21. Rule 77 deals with the procedure, it says:

“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.”

## My Conclusions

22. In his submission dated 6 May 2020 Mr Gilbert does not deal with the out of time point. He gives no explanation at all for the late application. The dismissal judgment was sent to the parties on 20 February 2020 and I have seen a copy of the e-mail by which it was sent. It was sent to Fay Astin at Peninsula who was the person who was on record as representing the Respondents. The e-mail was not returned.

23. I have seen the e-mail that Mr Gilbert sent on 18 March 2020 in which he said:

“Further to the below e-mail we have still not received the dismissal judgment from the Tribunal.

Please can you advise when the parties are likely to receive this.

The Claimant has been copied into this e-mail.

Kind regards

James Gilbert.”

24. That was responded to on 21 March 2020 by which time the application for costs was already out of time.

25. An application for costs has to be made “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”. The 28 days in this case expired on 19 March 2020. The application is therefore out of time. There is no provision for an extension of time in the interests of justice and although I have power under rule 5 to extend the time limit I see no reason before me as to why I should extend time the circumstances of this case.

26. Mr Gilbert has provided me with no explanation as to why he says I should extend time. In any event I am satisfied that the judgment was sent properly to the person who was recorded as representing the Respondent i.e. Fay Astin and time ran from the day that the judgment was sent to her.

27. Even if I had been satisfied that I did have jurisdiction this is not a case where I would make an order for costs for the Respondent.

28. I do not agree with Mr Gilbert’s contention that anything could be drawn from the comments of Regional Employment Judge Swann at the case management hearing on 18 March 2019. It is not in dispute in this case that by making her claim against I4C and Mr Hancock that she had undertaken a protected act. This complaint is made against Mr Hancock’s new company Blue Orca Limited. The fact that the Claimant failed in her case against I4C Executive Search Limited does not affect the position regarding that protected act. What the Tribunal would have had to determine was whether the Respondents had declined to employ her and whether they did so because of that protected act.

29. I note that in June 2019, immediately after that hearing the Respondent sent a costs warning letter and I have now seen that letter. The Respondents

are entitled to send such letters. I note that the grounds for that costs warning was the outcome of the proceedings and the fact that the Tribunal had concluded that Ms Page “was not a credible witness”. We found in that case that the Claimant’s evidence was “unreliable” and we preferred the evidence of the Respondent’s witnesses. It does not automatically follow from that that the Claimant could not succeed with this claim.

30. I also note that the Respondent’s representative wrote to the Claimant on the day that she withdrew her claim telling her that she should withdraw her claim by midday otherwise that they would make an application for costs. The Claimant did withdraw the claim not as suggested by the Respondent at 1:50 pm but at 11:15 am i.e. before his deadline.

31. In any event I accept the Claimant’s explanation that the reason that she withdrew her claim was because of the concerns that she had about her daughter’s health. Tribunal proceedings are necessarily stressful events and in this case the Claimant was facing a 3-day hearing whilst her daughter was unwell and she did not want to leave her. In my view that is quite understandable.

32. It is also case that many claimants decide at a late stage that they do not wish to proceed with their claim. The tribunal should not discourage people from making that decision by awarding costs. I bear in mind that I have not heard, or indeed, seen any evidence in this case to decide whether in fact the claimant had been victimised. Looking at the ET1 and the ET3 it is not clear to me that the claim had no reasonable prospect of success. I note in this case that there was no deposit order and I would therefore have to be satisfied based on the pleadings alone that it had no prospects. I am not so satisfied. In any event, even if I had been satisfied I would not have exercise my discretion to award costs in this case considering the reasons the Claimant has given for withdrawing the claim. I am satisfied that it would not be appropriate to make an award of costs in this case and therefore the application for costs would have failed in any event.

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Employment Judge Hutchinson

Date 2 July 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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