# THE EMPLOYMENT TRIBUNALS

**Claimant: Ms B Stankova**

**First Respondent: Atalian Servest Ltd.**

**Second Respondent : Ben Hartley**

**Heard at: Leeds**

**On: 3 September 2020**

**Before: Employment Judge Shepherd**

**Members: Mr M Taj**
**Ms L Anderson-Coe**

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**Held at: Leeds On: 3 September 2020**

**Before: Employment Judge Shepherd**

**Members: Ms L Anderson-Coe**
**Mr M Taj**

## JUDGMENT ON APPLICATION FOR COSTS

The respondent's application for costs against the claimant is not well-founded and is dismissed.

# REASONS

1. The judgment of the Tribunal in respect of the claims brought by the claimant was sent to the parties on 9 January 2020 and followed a 12 day substantive hearing. The unanimous judgment of the Tribunal was that the claims of race and disability discrimination against the first and second respondents were not well-founded and were dismissed.

2. The respondents have made an application for costs pursuant to rule 76(1) (a) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. It is contended that the claimant brought a claim with no reasonable prospect of success. The claimant had failed to properly particularise her claims and her conduct of the proceedings was unreasonable and had led to the respondent incurring additional costs.

3. A hearing was listed to take place in the Leads Employment Tribunal on 28 May 2020. In view of the Covid–19 pandemic that hearing was postponed. Both parties agreed that the costs hearing should take place on the basis of documents and without the need for an attended hearing.

4. The Tribunal has considered the written representations by the claimant and the respondent.

5. The respondents apply for an order for costs pursuant to rule 76(1)(a), as a result of the claimant pursuing a claim that had no reasonable prospect of success, the costs of the whole proceedings. In the alternative, the additional costs of a number of preliminary hearings due to the claimant's failure to cogently set out the basis of the complaints and the additional hearing days required to finish the evidence in the case due to the manner in which the claimant elected to conduct her case and evidence at the final hearing in relation to the production of documents, giving evidence and questioning of the respondent's witnesses.

6. The claimant resists the application for costs. She refers to the respondents' failure to provide documents and to comply with orders of the Tribunal. She contends that she had not acted unreasonably in bringing or pursuing her claim and it could not be argued that her claim had no reasonable prospect of success. She referred to the judgment and that the Tribunal had indicated that there had been serious management failures. She said that she thought that if she showed the Tribunal that she was badly treated in circumstances where it could be discrimination the Tribunal could find that it was discrimination in the absence of an adequate explanation.

7. In the document resisting the application for costs the claimant gave a considerable amount of detail with regard to the case and continued to argue about matters and evidence which were considered by the Tribunal in reaching its judgment.

8. The claimant gave details of her means. She has now lost her job, she receives benefits which do not even cover her rent. She is in an 'at- risk' group and, in view of the Covid –19 pandemic has been unable to obtain alternative employment.

**Relevant law**

9. The Employment Tribunal is a completely different jurisdiction to the County Court or High Court, where the normal principle is that "costs follow the event", or in other words the loser pays the winner's costs. The Employment Tribunal is a creature of statute, whose procedure is governed by the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. Any application for costs must be made pursuant to those rules. The relevant rules in respect of the respondent's application are rules 74(1), 76(1) and (2), 77, 78(1)(a), 82 and 84. They state:-

> 74(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purposes of or in connection with attendance at a tribunal hearing).
>
> 76(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) had 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.
>
> 77 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(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.
>
> 84 In deciding whether to make a costs, preparation time or wasted costs order and if so in what amount, the tribunal may have regard to the paying party's ability to pay.

10. The discretion afforded to an Employment Tribunal to make an award of costs must be exercised judicially. (**Doyle v North West London Hospitals NHS Trust UKEAT/0271/11/RN**. The Employment Tribunal must take into account all of the relevant matters and circumstances. The Employment Tribunal must not treat costs orders as merely ancillary and not requiring the same detailed reasons as more substantive issues. Costs orders may be substantial and can thus create a significant liability for the paying party. Accordingly they warrant appropriately detailed and reasoned consideration and conclusions. Costs are intended to be compensatory and not punitive.

11. The fact that a party is unrepresented is a relevant consideration. The threshold tests may be the same whether a party is represented or not, but the application of those tests should take account of whether a litigant has been professionally represented or not. (**Omi v Unison UKEAT/0370/14/LA**). A litigant in person should not be judged by the same standards as a professional representative as lay people may lack the objectivity of law and practice brought to bear by a professional adviser and this is a relevant factor that should be considered by the Tribunal. (**AQ Limited v Holden [2012] IRLR 648**). The means of a paying party in any costs award may be considered twice – first in considering whether to make an award of costs and secondly if an award is to be made, in deciding how much should be awarded. If means are to be taken into account, the Tribunal should set out its findings about ability to pay and say what impact this has had on the decision whether to award costs or an amount of costs. (**Jilley v Birmingham & Solihull Mental Health NHS Trust UKEAT/0584/06**).

12. There is no requirement that the costs awarded must be found to have been caused by or attributable to any unreasonable conduct found, although causation is not irrelevant. What is required is for the Tribunal to look at the whole picture of what happened in the case and to identify the conduct; what was unreasonable about the conduct and its gravity and what effects that unreasonable conduct had on the proceedings. (**Yerraklava v Barnsley MBC [2012] IRLR 78**). As was said by Mummery LJ in **McPherson v BNB Paribas (London Branch) [2004] ICR 1398**, that there is a balance to be struck between people taking a cold, hard look at a case very close to the time when it is to be litigated and withdrawing, on the one side of the scale, and others, on the other side of the scale, who do what may be described as raising a "speculative action", keeping it going and hoping that they will get an offer.

13.The Tribunal is satisfied that the claimant genuinely believed she was the victim of an injustice on the part of her employer and that the proceedings were issued in the genuine hope and expectation that she would obtain redress from the Employment Tribunal. The Tribunal did find that there was unreasonable treatment and a severe rift within the hygiene department and personal animosity. There had been serious management failure but the Tribunal was not satisfied that this was an act of discrimination.

14. An apposite extract from the judgment of Sir Hugh Griffiths in **Marler v Robertson [1974] ICR 72 is**:

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

15. The Tribunal finds this was the case with the claimant. She was of the view that she had a reasonable claim of race and disability discrimination. This was not a case that was entirely hopeless or that there was no case to answer. The Tribunal deliberated over two days and these were serious allegations of discrimination and the Tribunal was of the view that there was unreasonable treatment but, on balance, it was not established that there were facts from which the Tribunal could conclude that the respondent had discriminated against the claimant. This was not a straightforward case and it required a considerable amount of deliberation. The Tribunal is not satisfied that was a claim without reasonable prospects of success.

16. With regard to the conduct of the claim, the respondent specifically referred to additional costs of preliminary hearings due to the claimant's failure to cogently set out the basis of complaints and, at the very least, the two additional hearing days required to finish the evidence in the case due to the manner in which the claimant elected to conduct her case and evidence at the final hearing in relation to the protection of documents, giving evidence and questioning the respondents witnesses.

17. The claimant was a litigant in person. English was not her first language and she had difficulty with the documents. The respondents had the benefit of legal representation throughout and the Tribunal is satisfied that the respondents also contributed to the delays. A number of applications were made to adduce further documents and witness evidence. The Tribunal has given careful consideration to this point and is not satisfied, on balance, that the respondents have established that the conduct of the claimant, in the circumstances, was unreasonable.

18. The Tribunal does not accept that the claimant had acted unreasonably in bringing the proceedings or in the way in which they were conducted.

19. If the Tribunal had been so satisfied, the Tribunal would have considered the evidence with regard to the claimant's means. The Tribunal is satisfied that the claimant was of limited means and it would have ordered a relatively low contribution towards the respondent's costs.

20. Lord Justice Sedley in the case of **Gee v Shell UK Limited (2002) IRLR 82** stated that it is:

> "A very important feature of the employment jurisdiction that it is designed to be accessible to people without the need of lawyers, and that – in sharp distinction from ordinary litigation in the United Kingdom – losing does not ordinarily mean paying the other side's costs".

21. That remains the case today. Costs are still the exception rather than the rule. The Tribunal is not satisfied that this case was exceptional. It was a claim for discrimination and required a lengthy hearing to determine the facts. The Tribunal had to devote a considerable amount of time to deliberations. This was not a clear-cut case. The Tribunal is not satisfied that the claimant acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings or the way in which the proceedings were conducted. The Tribunal is also not satisfied that the claim had no reasonable prospect of success and in those circumstances the respondent's application for costs is refused.

22. The respondent has not overcome the hurdle of establishing that the claimant has acted unreasonably in the bringing or conduct of these proceedings.

23. For those reasons, the respondent's application for costs is dismissed.

**Employment Judge Shepherd**

**on 3 September 2020**