EMPLOYMENT TRIBUNALS

Claimant: Ms L Hall

Respondent: AstraZeneca UK Limited

Heard at: Newcastle **On:** 24 September 2020 (in Chambers)

Before: Employment Judge Langridge (sitting alone)

REPRESENTATION:

Claimant: Mr D Bunting, Counsel – written representations
Respondent: Mrs S Skeaping, Solicitor – written representations

COSTS JUDGMENT

The judgment of the Tribunal is that:

1. The claimant, in bringing and conducting her claims, did not act unreasonably nor pursue her claims without any reasonable prospect of success.

2. The respondent's application for an order for payment of its costs under rule 76(1) Employment Tribunals Rules of Procedure 2013 is refused.

REASONS

Introduction

1. The hearing of these claims took place in March 2019 and the Tribunal's Judgment was sent to the parties on 20 August 2019 after judgment was reserved and the decision considered in chambers on 8 April 2019. By an application dated 16 September 2019 the respondent sought a hearing to enable it to apply for costs. In response the Tribunal directed the respondent to provide a detailed schedule of the costs it was seeking, and directed the claimant to respond to the application.

These orders were complied with and the costs hearing was listed in person in Manchester on 25 March 2020. At short notice the hearing had to be postponed due to the Tribunal's inability to conduct hearings in person as a result of the pandemic. In subsequent correspondence the parties agreed that the costs application would be dealt with by the Judge sitting alone and with the benefit of written representations from both of them.

2. The written representations were supplied by the parties on 6 April 2020 and considered in full in reaching this decision.

The Respondent's application

3. The respondent relied on rule 76(1) of the 2013 Rules in alleging that the claimant unreasonably brought and conducted the proceedings, and that her claims had no reasonable prospect of success. It referred to a costs warning letter sent by the respondent's solicitors to the claimant's solicitors on 23 August 2018, a year after the claim was submitted to the Tribunal on 25 August 2017. The respondent's offer to allow the claimant to withdraw without seeking an order for costs against her was rejected. The claimant's solicitors indicated that the claimant was being financially supported by her trade union and as such the offer was unattractive because she had no personal costs liability. The claimant made counter offers which were rejected as the respondent was unwilling to entertain payment of any compensation as part of a settlement. The respondent's application for costs asserted that it was unreasonable for the claimant to pursue her claim on the grounds that the union would indemnify her costs, and also relied on this as unreasonable conduct on the part of the claimant's representative.

4. The respondent provided detailed written representations including reference to authorities which were considered by the Tribunal. In these submissions, aspects of the evidence in the case were referred to (for example in paragraph 6), but a number of those extracts reflected the outcome of the case rather than the position as it would have appeared before the issues were aired at a full hearing. The respondent submitted that there was little merit in the unfair dismissal claim, though the same issues of law and fact would inevitably arise in respect of the claims under the Equality Act 2010. A number of the claimant's arguments were identified as having been weak, and the Tribunal agrees that this was the case in some but not all of the examples given. For example, the matters referred to by the respondent in paragraphs 13(d), (e) and (f) could properly be identified as weak arguments relating to the issues of five triggers being necessary for an attendance review, the fairness of the procedure followed, and the fact that adjusting the triggers would lead to the same outcome.

Claimant's representations

5. The claimant's key argument was that the threshold was not met to consider this claim unreasonable. Mr Bunting submitted that the issues are not to be viewed retrospectively and the claims were unsuccessful only after careful scrutiny of the facts and legal principles by the Tribunal. Only if the threshold is met should the Tribunal consider exercising its discretion on costs. As a matter of public policy as well as reasonable conduct, the claimant was entitled to access the support and funding of her trade union, and this fact is irrelevant to the question of her conduct.

Its relevance might arise in the context of the amount of an order for costs when taking into account the means to pay.

6. The claimant submitted that a costs warning is not an unusual step for a respondent to take in Tribunal proceedings, and pointed out that the respondent had made no other applications during the course of the case, such as for a deposit order. In any case, the costs warning letter did not address the issues under section 15 Equality Act or the potential justification defence. In relation to all claims, it was not fanciful for the claimant to argue that her accident might have led to her being given one more chance to establish a good attendance record and avoid dismissal.

Authorities

7. The Court in *Macpherson v BNP Paribas (London Branch)* [2004] IRLR 558 said as follows:

> "Accordingly, it is only if and insofar as the Tribunal is able to conclude that the commencement or pursuit of the claim has been vexatious, abusive, disruptive or otherwise unreasonable that the Tribunal must then proceed to consider whether to make a costs order. The exercise of the Tribunal's discretion is not dependent upon the existence of any causal nexus between the conduct relied upon and the costs incurred."

8. The Court of Appeal authority in the case of *Barnsley Metropolitan Borough Council v Yerrakalva* [2012] IRLR 78 is a key authority which has endorsed the general approach to be taken by the Tribunal in considering whether there is a proper basis to exercise its discretion on costs. It is necessary to take account of the nature, gravity and effect of any unreasonable conduct, but by dissecting those three strands into separate elements but after considering the position as a whole.

9. This was endorsed in *Sud v Ealing London Borough Council* [2013] ICR D39, when the Court of Appeal said that the Tribunal needs to consider whether the conduct was unreasonable and if so, it is then necessary to identify the particular conduct and its effect, adopting a broad-brush approach by reference to all the relevant circumstances.

10. The decision in *Yerrakalva* also endorsed the rule set out in the EAT decision in *Power v Panasonic (UK) Limited* UKEAT/0439/04, which is that costs are an exception and not the rule.

Conclusions

11. The crux of this case revolved around the exercise of the respondent's discretion when considering whether to dismiss the claimant. There was potential for a successful finding in the claimant's favour under section 15 Equality Act 2010, because it was part of the respondent's case that the history of the claimant's absences, including disability-related ones, was factored into its decision. This was apparent from the oral evidence of the managers concerned and the Tribunal found as a fact that that was indeed the case, but that disability absences featured only to a small degree. This was the conclusion reached by the Tribunal after the issues were tested through the evidence and cross-examination of witnesses. There was

also an issue about whether the claimant was correct to say that her past absences formed part of a sequence of events or stepping stones which led inexorably to her dismissal. That is the case that Mr Bunting presented.

12. The respondent's evidence was that disability absences did factor into management's consideration, even if only to a small degree, and the Tribunal found that management looked at the past history of all absences in reaching the conclusion that such absences were likely to recur in the future. The question whether this was a reasonable view to take, either under the Employment Rights Act 1996 or in dealing with the reasonable adjustments claims under the Equality Act, were both matters for the Tribunal to assess after hearing the evidence. If the Tribunal had found there was merit in the section 15 claim, it would have had to address the detail of the justification defence raised by the respondent. This in turn required the Tribunal to consider on the facts whether the decision to dismiss the claimant was a proportionate one.

13. The Tribunal agrees with the respondent that aspects of the claimant's arguments were weak. The unfair dismissal claim could only have succeeded if the Tribunal had found that the decision to dismiss fell outside the band of reasonable responses. Although the claimant tried to pursue arguments about unfair procedure, these were not supported by substance and the claimant correctly made concessions during her cross-examination about the fairness of the procedure. The Tribunal agreed that the steps taken by the respondent were procedurally correct not only for the purposes of the unfair dismissal claim but also when having regard to the reasonable adjustments claims under the Equality Act. However, those procedural criticisms only took the case so far, and the Tribunal had to examine substantive questions about the dismissal decision which formed the central focus of the claims.

14. The Tribunal notes that although the respondent did argue in the alternative that any discrimination arising in consequence of disability was justified under section 15(1)(b) Equality Act, the respondent's witness statements did not address evidence about the legitimate aim or why it was proportionate to dismiss the claimant. Those matters did arise during the oral evidence of witnesses but clearly it was not significantly within the respondent's focus in preparing the claim.

15. It was at the Tribunal's request that the parties provide a detailed analysis of the effect of the reasonable adjustments if the claimant's arguments had been accepted. That step was apparently not taken by the respondent in the period leading up to the hearing. It did set out its concerns about aspects of the claims in the costs warning letter, but the Tribunal agrees with the claimant that this did not identify in any substance the matters for consideration under section 15. The costs warning on its own would not be a reason to make a costs order, as the claimant could not be said to have acted unreasonably in rejecting the offer on the grounds that her union was covering her own costs of the hearing. In choosing to pursue her claim to a hearing she was advised both by solicitors and counsel. The claimant made also made efforts to avoid the cost of a hearing by putting forward a financial proposal but the respondent was unwilling to entertain any such payment (as it was entitled to do).

16. In summary, the Tribunal refuses the respondent's application on the grounds that the threshold of unreasonable conduct is not met under rule 76(1), nor can it be said that the claimant's claims as a whole were entirely without merit or had no reasonable prospect of success. Aspects of the claims were undoubtedly weak but the Tribunal's conclusion is that the section 15 claim in particular, and the general requirements of reasonableness and proportionality arising, could only be determined after a detailed review of the evidence at a hearing. Having asked the parties to provide a detailed analysis of the position the claimant would have been in if reasonable adjustments had been made, the Tribunal's judgment nevertheless required detailed consideration of the nature and number of the absences and the way that they impacted upon the decision to dismiss.

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Employment Judge Langridge

Date 19 October 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

9 December 2020

FOR THE TRIBUNAL OFFICE