EMPLOYMENT TRIBUNALS

Claimant: **Mrs Jaqueline Oliver**

Respondent: **1 RXT Limited**

Heard at: **Newcastle CFCTC (on the papers)** **On:** **27 January 2021**

Before: **Employment Judge Arullendran**

JUDGMENT ON COSTS

The Judgment of the Employment Tribunal is that the Respondent's application for an Order for Costs against the Claimant is not well founded and is dismissed.

REASONS

1. This hearing was conducted on the papers with the consent of the Respondent, there being no representation from the Claimant, and I have taken into account the written representations made on behalf of the Respondent.
2. Following the Judgment of this Tribunal on the substantive claims made by the Claimant against the Respondent, which was promulgated on 30 November 2020, the Respondent made an application, by email dated 21 December 2020, to the Employment Tribunal for an Order for Costs against the Claimant. The application for a Costs Order was made pursuant to Rule 76 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, Schedule 1.
3. The Respondent has made the application for costs on the basis that the Claimant's claims had no reasonable prospect of success, which led to all the claims being dismissed at the preliminary hearing on 30 November 2020, i.e. pursuant to rule 76(i)(b) of the Tribunal Rules.

The Facts

4. The Claimant's employment with the Respondent terminated on 1 March 2020 and she submitted her ET1 to the Tribunal on 21 September 2020, some 12 weeks and 2 days out of time. The preliminary hearing of 30 November 2020 was convened to determine whether it was reasonably practicable for the claims to have been submitted in time or, if not, whether the further period between the expiry of the time limit and the date of presentation was reasonable. The decision of this Tribunal was that it was reasonably practicable to present the claims in time and, as a consequence, all the claims were dismissed. Whilst it was not necessary to determine whether the further period between the expiry of the time limit and the date of submission were reasonable, for completeness, this Tribunal found on the evidence presented that it was not a reasonable period of time in the circumstances.

5. The Claimant was represented by her sister at the preliminary hearing and it was the Claimant's sister who prepared and submitted the ET1 in behalf of the Claimant. The Claimant told the Tribunal that her sister worked in employment law, but the Respondent did not ask any questions about the nature of the sister's work or whether she had any legal qualifications. However, it was very clear at the preliminary hearing that the Claimant's sister was not an advocate and she did not demonstrate any understanding of the applicable legislation or caselaw.

6. The Claimant's evidence at the preliminary hearing, which was not disputed by the Respondent, was that she had been experiencing difficulties with her mental health for quite some time and had experienced a breakdown in March 2020, requiring her to seek medical help. At around this time, the Claimant asked her sister to correspond with the Respondent about her employment dispute and the contents of that letter mirror the details of the ET1. The Claimant said that her sister told her about the time limit for submitting her claim to the Tribunal and it was evident that the Claimant left all matters relating to the Tribunal claim to her sister to complete. The error in calculating the 3-month time limit was on the part of the Claimant's sister, who took it to run from the last day she had contact with ACAS, rather than from the effective date of termination. The Claimant was unable to say in cross examination how this error had occurred and the Claimant's sister was not called to give evidence. Whilst the Claimant had attended a 1-hour appointment with an employment law practitioner through Citizens Advice, no evidence was presented whether any of the advice had been reduced to writing or if any of it had ben passed on to the Claimant's sister.

7. The Claimant gave an account to the Tribunal at the preliminary hearing of relying on her sister to handle the application to the Tribunal on her behalf because she was not well enough to deal with it herself and she was not able to use a computer to contact ACAS or the Tribunal as she is computer-illiterate.

8. The Respondent has produced copies of correspondence with the Claimant as part of its application for costs. The Respondent wrote to the Claimant on 13 November 2020 and that letter is marked "without prejudice save as to costs", which placed the Claimant on notice that the Respondent would be seeking an order for costs under Rule 76 of the Employment Tribunal Rules of Procedure 2013 if the Claimant did not withdraw her claim prior to the preliminary hearing and in which an offer to settle was made in the sum on £350. The Respondent sent a further email to the Claimant on 19 November 2020, which is also marked "without prejudice save as to costs", rejecting an offer to settle from the Claimant in the sum of £10,000 and advanced an offer to settle in the sum of £850. This was rejected by the Claimant and a final offer was made to the Claimant in an email

dated 25 November 2020 in the sum of £1,500 on a "without prejudice save as to costs" basis, which was not accepted.

9. The Respondent seeks costs from the Claimant in the sum of £1,350 plus VAT in respect of solicitor's fees and £850 plus for counsel's fee, although no details have been provided as to how the amounts have been calculated or which period of time the costs relate to.

10. The Respondent copied its application for costs to the Claimant on 21 December 2020 and the Tribunal also sent a copy to the Claimant's representative asking for a response within 14 days. Other than receiving a response that the Claimant's sister was no longer acting for her, no reply was received to the Respondent's application.

The Law

11. I refer myself to Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, which provides "(i) 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 the proceedings (or part) have been conducted; or (b) any claim or response had no reasonable prospect of success…".

12. The Respondent makes no reference to the relevant caselaw in their application, however I refer myself to the guidance given in ***Gee -v- Shell UK Ltd*** **[2002] IRLR 82** in which it was stated that the first principle is that costs in the Employment Tribunal is still the exception rather than the rule. In terms of the procedure to be adopted by this Tribunal, a two-stage process was set out in the case of ***Kriddle -v- Epcott Leisure Limited*** **[2005] EAT/0275/05**: (i) A finding of unreasonable conduct and, separately (ii) the exercise of discretion in making of an Order for Costs. This two-stage procedure also applies to applications made under Rule 76(i)(b) on the grounds of no reasonable prospect of success.

13. In the case of ***Barnsley Metropolitan Borough Council -v- Yerrakalva*** **[2001] EWCA Civ 1255** guidance was given on the question of causation and I refer myself specifically to paragraphs 40 to 42 of that Judgment in which it was decided that the vital point in exercising the discretion to order costs was 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.

14. I refer myself to the case of ***Mahler -v- Robertson*** **[1974] ICR 72** in which it was held that the definition of a hopeless claim is where an employee brings a claim not with the expectation of recovering compensation, but out of spite to harass the employer or over some improper motive. I note that this is a serious finding to make against an applicant, where it would generally involve bad faith on his or her part and one would expect that discretion to be sparingly exercised.

15. I refer myself to the case of ***Eszias -v- North Glamorgan NHS Trust*** **[2007]** in which an example was given of a case which would have no reasonable prospect of success where "the facts ought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation".

16. I refer myself to the case of ***Anderson -v- Cheltenham and Gloucester plc*** **EAT 0221/13** in which the Employment Appeal Tribunal reiterated that the Calderbank principle does not apply in full to Employment Tribunal litigation but that the failure to accept a prior offer may have a bearing on whether the Claimant has conducted that proceedings unreasonably or pursued a claim that has no reasonable prospect of success.

Conclusions

17. I have reviewed my Judgment and oral reasons given at the preliminary hearing of 30 November 2020, along with my copy of the hearing notes, as part of the Respondent's application for costs.

18. The Claimant was not professionally represented throughout the Tribunal process and her sister did not hold herself out as being a professional representative or as having any specialist legal knowledge akin to an advocate or legal professional. The parties were notified by the Tribunal that the preliminary hearing would determine whether it had been reasonably practicable for the Claimant to submit her claim in time and, if not, whether the further period of time was reasonable. It is evident on the face of the issues to be determined that submission of a claim outside the 3-month time limit was not an absolute bar to the Claimant's claims, but that there would be an assessment of the reasons for the delay.

19. It is evident from the correspondence between the parties, such as the email of 23 October 2020, that the Claimant's representative believed that the date of contact with ACAS was relevant in calculating the time limit for submission of the claim form. The Claimant's sister wrote in that email "*I can confirm that negotiations were still ongoing through the ACAS conciliation process up until 19 June …".* She also refers to the deterioration in the Claimant's mental health as contributing to the delay. The Claimant and her sister believed these two matters would be examined by the Tribunal in deciding whether it was reasonably practicable to submit the claim in time and whether the further period of time was reasonable and duly notified the Respondent and the Tribunal of the same prior to the preliminary hearing. Indeed, these were the issues which were examined by this Tribunal and evidence was presented by the Claimant in respect of her reasons for the delay.

20. Whilst this Tribunal decided that it had been reasonably practicable for the Claimant to submit her claims in time, which resulted in her claims being struck out, there was clearly a disagreement between the parties on the preliminary issues and the evidence on these issues was clearly capable of being tested at the preliminary hearing. Therefore, I cannot find that there was no reasonable prospect of success in respect of the arguments of it not being reasonably practicable to present the Claimant's claim in time or for the further delay being reasonable. The fact I did not agree with the Claimant's arguments does

not mean that those arguments were hopeless or were not capable of being tested on the evidence.

21. The rejection by the Claimant of the offers to settle prior to the preliminary hearing does not take matters any further forward. The Claimant valued her claim as being considerably higher than the offers put forward by the Respondent and the issues relating to quantum would have been examined at the full merits/remedy hearing had the claims progressed, where the Claimant would have been entitled to have her evidence on remedies tested in cross examination. Offers of settlement are often made in Employment Tribunal proceedings on a commercial basis and often prior to hearings taking place in an effort to save legal costs. Rejection of such offers does not mean that the claims had no reasonable prospect of success, particularly as the Claimant did not have access to specialist legal advice in respect of those offers and could not be expected to understand the nuances of the legal principles relation to "reasonably practicability" and "reasonableness" or the issues relating to ignorance of the time limits as set out in the case of ***Deadman -v- British Building and Engineering Appliances Limited*** **[1974] ICR 53**, or the relevant evidence she would have to adduce to satisfy the same. Therefore, I find that nothing turns on the fact the Claimant rejected the offers put forward by the Respondent, particularly as the Calderbank principle is not to be applied strictly in the Employment Tribunal as it is in the County Court.

22. In all the circumstances, I find that the Respondents application for an Order for Costs against the Claimant on the grounds that her claims had no reasonable prospect of success is not well founded and is dismissed.

Employment Judge Arullendran

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 27 January 2021