EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
Miss J Rodriquez		London Borough of Hammersmith & Fulham

Heard at: London Central Employment Tribunal (by video CVP)

On: 24 February 2021

Before: Employment Judge Adkin
Ms H Craik
Mr D Shaw

Representations

For the Claimant: Claimant
For the Respondent: Mr R O'Dair, Counsel
For Brown & Co solicitors: Mr W Brown, Solicitor

JUDGMENT

(1) The Respondent's application for costs and/or wasted costs from Brown & Co is refused.

REASONS

1. By a claim form presented on 2 October 2019, the Claimant brought claims of race discrimination, automatic unfair dismissal because of protected disclosures (section 103A ERA 1996), unlawful deductions from wages and notice pay, arising from her employment which commenced on 5 March 2018, with Mitie Property Management Limited, which became MPS Housing Limited on 30 November 2018 and which then transferred to the Respondent

on 17 April 2019 as a result of a service provision change in which the Respondent took Quality, Health, Safety and Environment (QHSE) matters back "in house".

2. The Tribunal dealt with liability in a judgment with written reasons dated 5 October 2020 and with remedy by a judgment with written reasons sent to the parties on 16 December 2020.

3. At today's hearing we dealt with an application for costs and/or wasted costs made by the Respondent by an email dated 2 November 2020 and the Claimant's application for an order under rule 31 dated 9 December 2020 which is granted and dealt with in a separate case management order.

The Law

4. Rule 76 provides:

> **When a costs order or a preparation time order may or shall be made**
>
> 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) have been conducted; or
>
> (b) any claim or response had no reasonable prospect of success.

5. The following propositions relevant to costs may be derived from the case law:

5.1. There is a two-stage exercise to making a costs order. The first question is whether a paying party has acted unreasonably or has in some other way invoked the jurisdiction to make a costs order. The second question is whether the discretion should be exercised to make order (*Oni v Unison* ICR D17).

5.2. Costs orders in the Employment Tribunal are the exception rather than the rule (*Gee v Shell* [2003] IRLR 82, *Lodwick v Southwark* [2004] ICR 844).

5.3. While the threshold tests for making a costs order are the same whether or not a party is represented, in the application of the tests it is appropriate to take account of whether a litigant is professionally represented or not. Litigants in person should not be judged by the

standards of a professional representative (*AQ Ltd v Holden* [2012] IRLR 648).

5.4. The fact that a claimant has withdrawn a claim does not mean that there has been unreasonable conduct. Claimant should not be deterred from appropriately withdrawing claims. Withdrawal can sometimes save costs and in some cases might be the "dawn of sanity" (*per Mummery LJ paragraph 29 in McPherson v BNP Paribas* [2004] EWCA Civ 569; [2004] ICR 1404). On the other hand, as Mummery LJ also recognised that tribunals should not follow a practice on costs which might encourage speculative claims, by allowing applicants to start cases and pursue them down to the last week or two before the hearing in the hope of receiving an offer to settle, and then, failing and not receiving an offer, dropping the case without any risk of a costs sanction (*para 29*). A sudden withdrawal without good reason can amount to unreasonable conduct. In that case *M* withdrew his claim 18 days before the hearing on the basis that the stress of the litigation was having an effect on his health. While the tribunal was entitled to make a costs order, the order that *M* pay the whole of the respondent's costs of the litigation was wrong.

Costs Application

Unreasonable conduct

6. Having considered the costs application and heard submissions in support the Tribunal assessed whether accepted the Respondent's starting premise that the conduct of the Claimant was unreasonable, leaving aside the question of whether it would be her responsibility and/or that of her advisor.

7. We have considered the Respondent's costs warning letter of 17 September 2020.

8. Ultimately we do not accept that there was no reasonable prospect of the Claimant's claims succeeding, nor that it was unreasonable of her to pursue the claim.

9. This was originally a whistleblowing or protected disclosure claim as well as a race discrimination claim. We consider that there were a number of unanswered questions in this matter, any one of which might have founded an inference of detrimental or less favourable treatment, and at the very least required an answer from the Respondent. The fact that we have ultimately accepted the Respondent's evidence does not detract from the fact that these points required scrutiny and, viewed from the Claimant's point of view, and before oral evidence had been challenged, might have been the basis for one of her two principal claims to succeed.

U-turn

10. The first point is addressed at paragraph 40 of the liability judgment. This is our finding that Mr Anil Goriah told the Claimant that Mr Buckley had and done a U-turn on wanting her to TUPE transfer over to the Respondent's employment. We found that that was said and that this change of position, it seems to us did require an explanation. The Claimant had been operating reasonably on the basis initially that she would be transferred from her then employer to the Respondent and then she found out that she was not.

11. It was a possible inference to be drawn that protected disclosures or possibly the Claimant's race were factors that have made that could have been the reason for that U-turn. The Claimant raised health and safety concerns and this caused friction. The scene was potentially set to draw an inference that this U-turn was because of matters raised by the Claimant that amounted to protected disclosures.

CMOISH qualification

12. Secondly, at paragraphs 59 and 60 and of our written reasons, is the question of the CMOISH qualification, which was referred to in a costs warning letter. The Respondent's position was that this was an absolute requirement for the H&S management role that the Claimant contends she should have naturally transferred into. She did not have this qualification. The Respondent says that this is a complete answer to the Claimant's claims that a protected disclosure and/or race were the reasons that she did not transfer into.

13. Our finding was that the CMOISH requirement was not quite as cut and dried as the Respondent has suggested. We note particularly at paragraph 60 the Claimant said that Ms Cometson, the consultant running the TUPE process told her that she might transfer into the role if she could achieve this qualification within a reasonable time period.

14. There was a dispute about whether the Claimant would or would not achieve that qualification within a year. Not having the CMOISH qualification at the point of transfer was not necessarily, based on the evidence, a bar to the Claimant transferring into the Health and Safety Manager (Compliance) role.

Three H&S officer roles

15. The third point which required an explanation is contained in paragraph 114 of our written reasons on liability.

16. The Claimant reasonably believed, based on the documentation provided to her that there were three health and safety officer roles. She queried why she was not given the opportunity to be transferred under TUPE into those junior roles, if she was not qualified for the H&S manager role.

17. Ultimately, we accepted the Respondent's case which was that the documents suggesting that there were three H&S officer roles did not reflect reality in that three roles at that level did not exist. It was only having heard oral evidence on this point that we accepted Mr Buckley's account. In our view, it did call for an explanation, particularly given how close those roles were to the Claimant's existing role. It was reasonable for her to challenge the Respondent's position and the Respondent's evidence on this.

Conclusion

18. Taking account of the three points discussed above and given that there plainly had been concerns raised by the Claimant about health and safety relating to the management of asbestos, there was at least an arguable case of protected disclosure detriment or dismissal. We cannot say now whether that would have succeeded or not. There was at least an arguable case.

19. Turning to the race discrimination case. In our view it was a secondary claim, it was initially essentially argued in the alternative. We acknowledge it was a less strong claim. By the time that the protected disclosure had been withdrawn and the race claim was the only remaining principal claim (leaving aside the more minor unlawful deduction claims) the Claimant was acting as a litigation in person.

20. We also have taken account of the particular pressure of presenting a case which she was expecting someone else to present on her behalf. On the afternoon of the first day of the hearing the Claimant was now suddenly having to act as a litigant in person. We do not find it was unreasonable of her to continue with what we acknowledge was a weaker case at that stage, given the stress that she was under and the difficulty of a litigant in person taking an objective view of her own case.

21. We acknowledge Mr O'Dair's submission that there was a degree of repetition in the way the Claimant pursued her claims, including seeking to resurrect matters that had been withdrawn. Again we take account of the fact that the Claimant was a litigant in person. She was expecting someone else to present this claim. There was plainly some confusion on a couple of points due to the abrupt departure of Mr Brown the Claimant's solicitor. We do not find that that the way that the Claimant pursued her claim was unreasonable.

22. There is the point that Mr O'Dair has raised about the claim expanding or 'evolving'. We acknowledge that the Tribunal made findings on that. We do not however find that this was a case where that there was deliberate untruths were being told. This is a situation where a Claimant was pursuing the matter as a litigant in person. We do not accept the characterisation of the Claimant as a 'dog with the bone', which is an unfortunate phrase to be used. We do however accept the point there was degree of persistence. We find that that is a part of litigation, sometimes persistence is required.

23. We do not criticise the Claimant for to failing to accept an offer in the region of £250, which is what she ultimately received. We take account of the fact again at the Claimant was a litigant in person and that there was a lack of trust in the Claimant's mind at that stage not least because of the slow production of documents by the Respondent. Crucial documentation about her unlawful deduction claims and pension claims continued to appear from the Respondent during the course of the hearing.

24. We did not find that the circumstances of the withdrawal of the protected disclosure claim, which is described in some detail in our written reasons on liability, amounted to an unreasonable late withdrawal suggesting that the claim had been pursued on a speculative basis as mentioned in *McPherson*.

25. Ultimately we concluded that neither in the bringing nor in the conducting of the claim did the Claimant act unreasonably. It could not be said that there was no reasonable prospect of success.

26. It followed that we did not consider we needed to push the Claimant (who had somewhat equivocated on this point in her recent two witness statements) to make a clear decision as to whether she would waive legal professional privilege, in order that the Tribunal should make a determination of whether any fault was Mr Brown's.

Section 12 financial penalty

27. At today's hearing the Claimant made an application that a financial penalty should be made further to the order of Employment Judge E Burns dated 21 August 2020:

> "If the Tribunal at the final hearing determines that the respondent has breached any of the claimant's rights to which the claim relates, it may decide whether there were any aggravating features to the breach and, if so, whether to impose a financial penalty (payable to the Secretary of State) and in what sum, in accordance with section 12A Employment Tribunals Act 1996."

28. It should be said that this application was something of a surprise to the Tribunal and also to the Respondent. Nevertheless we dealt with it.

29. The basis for this application made by Ms Rodriquez is that there were matters that could easily have been resolved, but were not resolved and that this was a factor aggravating the breach. It seems that this was an allusion to a number of matters which were evidenced by documents which only came to light quite late on in a hearing.

30. Mr O'Dair reminded us in response that this matter came on for hearing in something of a rush, following the hearing before Judge Burns. The matter had somewhat gone to sleep during Summer 2020, which he attributed to the Covid-19 pandemic. For example witness statements were

only been exchange the day before the hearing, and it is right to say that a number of documents came to light and during the course of the hearing and at the request of the tribunal in some cases.

31. Unfortunately, it is the case that in Tribunal cases which are document heavy and quite complex that documents do often come to light at a relatively late stage. It is a lesson of experience in Tribunal litigation that unfortunately in the context of discrimination or protected disclosure claims, the detail of unpaid wages is sometimes not given as much attention as it should be. We do accept that this case came together in something of a hurry, caused by a catch up following delays which have been caused by the Covid-19 pandemic. Stepping back from that, while we were critical about late production of some documents by the Respondent, we do not find that that this crosses the threshold to amount to an aggravated breach and in those circumstances we do not consider that there should be a financial penalty.

Rule 31 application: third party disclosure & reconsideration applications

32. The Claimant made an application under rule 31, which was originally made on the 9 December 2020, the date of the last remedy hearing. The application was made by email on the evening following that hearing, although it was not copied to the Respondent as it ought to have been under rule 92 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 ("the Rules").

33. Unfortunately, that application was not dealt with at that time. It is worth recording that the London Central Employment Tribunal building closed in December 2020 due to Covid-19 related concerns and had still not reopened by the end of February 2021. This has caused delays. The Claimant had made an application for a rule 31 order before the remedy hearing that was seen by the panel for the first time at that hearing. For reasons given at that hearing that application was not granted, principally because the Respondent had written to Mitie Limited on its own account and received a letter dated 20 November 2018. It is a doubt over the accuracy of the content of that letter which gives rise to the current application.

34. A further application in similar terms was dated 24 January 2021, sent on 25 January, with additional information, which again has not been dealt with until this stage.

35. (The Claimant also made applications for reconsideration, dated 3 January 2021, initially sent to the Tribunal on 4 January. These were dismissed by Employment Judge Adkin sitting alone in paperwork on 23 January 2021 on the basis that these were out of time.)

36. As a result of the rule 31 application being considered in today's hearing, we have seen new correspondence that was not before the Tribunal at the last hearing. In particular we have seen a letter from Mitie Limited (“Mitie”) dated 22 December 2020 which apparently shows that the last payment made by Mitie into the Claimant’s Scottish Widows pension was

made on 27 November 2018. This contrasts with a letter sent by Mitie on 20 November 2020 by Ms Jasmine Hudson Group HR Director, which showed the last payment being made in April 2019. That earlier letter was the reason why the Tribunal revoked a decision in the Claimant's favour in which judgement was given for unpaid pension contributions in the period December 2018 – 17 April 2019.

37. There is also a letter from Scottish Widows dated 3 December 2020 which shows the premium history of Ms Rodriquez's pension account with Scottish Widows. That shows the last date in which a sum was credited to her account as being 19 December 2018, i.e. consistent with the second Mitie letter and contrasting with the first Mitie letter. The letter from Ms Hudson of Mitie dated 20 November 2020 was the basis that we revoked our earlier decision on unpaid pension contributions.

38. There was a loose end in respect of pension matters, in the tail end of the remedy judgement where the Claimant was given the opportunity to make a rule 31 order application. She made that application the day of the hearing before she had written to an the external parties, but thereafter she renewed that application with the further information from Mitie Limited and Scottish Widows.

39. We have also been provided at today with response from Mears Group Limited, the parent company of MPS Housing Limited which says:

> "Thank you for your letter regarding information about your pension and annual leave record. Unfortunate Mears Group plc do not hold any information for yourself as the central records and payroll were kept by Mitie and did not come across to Mears until after your termination date. Therefore, we advise contacting Mitie to obtain these records as unfortunately were unable to find this information you require.

Sick pay

40. We have also had highlighted to us a document that was in the original bundle which is an annual leave authorisation document and which is a pro forma document containing the Claimant's handwriting and leave dates between 30 July 2018 and the last day of leave at 16 August 2018. It shows authorisation for at least a request for 14 days taken.

41. The Claimant by highlighting the annual leave request, has by implication, invited us to reconsider our decision on contractual sick pay, in respect of which the annual leave she had already taken and her outstanding entitlement as at April 2019 was relevant.

42. We have decided that we should not disturb the decision that we have taken on sick pay for two reasons.

43. First, we have absolutely in mind the point made by Mr O'Dair about the desirability of finality in litigation. Sick pay was not a matter that was left

as a loose end in the same way that the pension has been with regard to a potential rule 31 application, which was referred to in our written reasons on remedy dated 16 December 2020.

44. Second, we have made a decision based on the evidence drawing an inference in annual leave from the content of the claimant's payslips (see reasons for remedy judgement paragraphs 12 – 23). The document that has been provided to us is an annual leave authorisation document which relates to one specific absence. It does not provide a complete annual leave record. Even if we were minded to reopen the question of sick pay/annual leave, we do not consider that that document would lead us to change our decision on it.

Unpaid pension contributions

45. The situation regarding pensions is somewhat more complicated. We have considered the submissions from the Respondent that there should be finality to litigation. We have considered the question of proportionality, and recognised that the final amount in dispute is not especially large. We do recognise however that pension entitlements are an important part of remuneration and planning for retirement. The sum missing in the Claimant's Scottish Widows pension will have a lasting effect on her pension. On any view it seems that there is a discrepancy in the Claimant's pension account with Scottish Widow is less than her contractual entitlement, which might be a four figure sum.

46. The Tribunal is concerned about the contradictory documents that have been received from Mitie.

47. We are concerned that there is that the risk of an injustice to the parties and also that the payment of pension entitlements and potentially missing pension payments is not a trivial matter. For these reasons, we propose an to give directions and such that Mitie, Mears and Scottish Widow each be directed to give an account of what is understood by then to occurred with regard to pension payments. There will be a further hearing should it be necessary if the matter cannot be resolved on the on the papers.

Employment Judge Adkin

Date 2.3.21

WRITTEN REASONS SENT TO THE PARTIES ON

04/03/21

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant (s) and respondent(s) in a case.