THE EMPLOYMENT TRIBUNALS

Claimant: Mr J Taylor

First Respondent: The Governing Body of Boston Spa Academy.

Second Respondent : The Gorse Academies Trust

Heard at: Leeds

This was a remote hearing by CVP video link which was agreed in advance by the parties.

On: 29 March 2021

Before: Employment Judge Shepherd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: Leeds **On: 29th of March 2021**

Before: Employment Judge Shepherd

Appearances:

For the respondents: Mr S Forshaw, counsel
For the claimant: Ms S King, counsel

RESERVED JUDGMENT ON APPLICATION FOR COSTS

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

REASONS

1. I had sight of a bundle of documents consisting of 281 pages.

2. Counsel for the respondent and claimant provided lengthy submissions and witness statements were provided from the claimant and Diane Ellis, his Trade Union Regional Official. Ms King, on behalf of the claimant, agreed that I should not consider those witness statements apart from with regard to means if necessary.

3. It was unfortunate that the length of time allocated to this hearing was inadequate and that has led to this being a reserved judgment.

4. The claimant presented a claim to the Employment Tribunal on 17 July 2020. The Early Conciliation certificates indicated that ACAS had received the early conciliation notification from the claimant in respect of both respondents on 30 June 2020 and the Early Conciliation Certificate was issued on 15 July 2020. The claim brought by the claimant was dismissed following withdrawal on 3 December 2020.

5. The respondents have made an application for costs pursuant to rule 76 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. It is contended that the claimant brought a claim with no reasonable prospects of success and that it was unreasonably brought and unreasonably pursued up to the point that it was withdrawn at 6:54 am on 3 December 2020, the very day on which the Preliminary Hearing was listed to be heard at 11:30 am.

6. It was submitted by Mr Forshaw on behalf of the respondent that the claims were hopeless on the following grounds:

> (a) There was an obvious jurisdictional bar. The claimant had never been employed by either of the respondents.
>
> (b) In any event, the claims were bound to fail on the merits – as must have been apparent to the claimant.

7. The claim was presented to the Tribunal on 17 July 2020. The claimant brought claims of post-employment victimisation.

8. The claimant worked for Boston Spa School from January 1996 until May 2012. Following an Employment Tribunal claim a settlement had been achieved whereby the claimant's employment with Boston Spa School came to an end by mutual agreement on 31 May 2012. This settlement was encapsulated within a COT3 agreement through ACAS. The respondent in that case being The Governing Body of Boston Spa School.

9. The legal entity transferred to the Governors of Boston Spa Academy on 7 June 2018.

10. This claim was brought against the first and second respondents. It was indicated in the particulars of claim that the claimant was employed at the first respondent, Boston Spa School and his claim was with regard to the actions of CW, referred to as

the Head Teacher of the first respondent and GW, Senior Vice Principal at the Boston Spa School.

11. A notice of preliminary hearing for Case Management purposes by telephone was sent to the parties on 1 October 2020. The private preliminary hearing was listed on 3 December 2020 for 90 minutes.

12. Following an extension of time, the respondents submitted a response on 1 October 2020. Within the grounds of resistance it was stated that neither of the respondents had ever employed the claimant and the claimant could only bring the claim to the Employment Tribunal against an employer or former employer pursuant to section 39 of the Equality Act 2010.

13. The claimant and his Trade Union advisers had sought advice from counsel regarding the potential post-employment victimisation claim. The significance of the school's change of name from Boston Spa School to Boston Spa Academy had not been appreciated by the claimant or his advisers.

14. On 12 November 2020 the respondents' solicitors wrote to the claimant's Trade Union adviser indicating that they were considering making a strike out application on the basis that neither of the respondents ever employed the claimant and none of the liabilities associated with the claimant's employment transferred to either of the respondents pursuant to the Transfer of Undertaking Regulations.

15. On 13 November 2020 the claimant's Trade Union representative, Diane Ellis wrote to the Respondents' solicitors asking for a copy of the Academy Order made by the Secretary of State upon the conversion of the school to an Academy in order to confirm the position in respect of liabilities transferred upon conversion.

16. On 17 November 2020 the Academy Transfer Document and associated Transfer Agreement were provided to the claimant's Trade Union by the respondents' solicitors. An out of office reply was provided by the Trade Union Regional Official's email on 17 November 2020.

17. On 23 November 2020 the respondents' solicitors wrote to the claimant's Trade Union representative indicating that they understood that she had been out of the office but had now returned to work and they looked forward to receiving her substantive response to their letter of 12 November 2020 as soon as possible.

18. On 25 November 2020 the respondents' solicitors wrote to the claimant's Trade Union representative enclosing a draft agenda and list of issues for the upcoming preliminary hearing for case management purposes. It was stated that they would be applying for the claim to be struck out at the forthcoming hearing or, alternatively, at a separate preliminary hearing.

19. On 27 November 2020 the claimant's Trade Union representative wrote to the Respondents' solicitors indicating that they had been required to seek advice from counsel, they said they were also required to share the advice with the claimant which it was indicated would take time and that he be provided with an opportunity to raise any

questions he had about this. It was indicated that, as soon as the claimant's position had been clarified, she would inform the respondents' solicitors of the outcome.

20. On 27 November 2020 the respondents' representatives wrote to the Tribunal making an application for the Preliminary Hearing to be converted to a Public Preliminary Hearing and for the claim to be struck out as having no reasonable prospect of success or for a deposit order to be made on the basis that the claim had little reasonable prospect of success.

21. The Preliminary Hearing remained as a Private Preliminary Hearing for case management purposes. The respondents' application was not considered by an Employment Judge prior to the Preliminary Hearing. In any event, the hearing would not have been converted to consider a strike out application at such short notice. The application having been sent on the Friday before the Preliminary Hearing was to take place on the following Thursday.

22. The claimant's Trade Union representative discussed counsel's advice with the claimant and he agreed to withdraw the claim against the respondents. The claimant's Trade Union representative emailed the Employment Tribunal and the respondents' representatives on the day of the Preliminary Hearing, 3 December 2020 (6:54 am), to indicate that the claim of post-employment victimisation was withdrawn.

23. The respondents' representative has provided a schedule of costs which shows a total of £82,543.22 costs made up of £40,645.00 Partner costs, £26,357.50 Associate Solicitor costs, Trainee Solicitors costs £2280.00 and counsel's fees of £13,165.00.

24. It was submitted on behalf of the respondent that it was self-evident that the claimant's claim had no reasonable prospect of success. It was hopeless for two reasons, firstly the jurisdictional bar that neither of the respondents employed the claimant. Secondly that it was hopeless on the merits in view of the minutes of the meeting in which the Head Teacher had made remarks against the claimant that were so minor as to hardly merit a raised eyebrow, let alone a claim for victimisation.

25. It was submitted on behalf of the claimant that the claim of post-termination victimisation in respect of the conduct of the Head Teacher and Vice Principal were not hopeless on the merits. Minutes had recorded full statements and it must have been known that these were false and their statements could cost the claimant his career.

26. It was submitted that the claim against the respondents was not hopeless. The Respondents' status did make the case riskier and the claimant and his advisers were entitled to take stock of whether to pursue a claim on a novel point of law where there were significant disputes of fact. The cause of action involved in an already complex area of law which had yet to be subject to detailed judicial determination. The claimant's decision and recognition that the risks involved had altered was not an admission that the claims were hopeless from the start. Rather they mounted to a reasonable concession. It did not follow that the claimant must have concluded or let alone should have always known that his claim was hopeless, but the increasing risks led to a

reluctant but pragmatic decision to focus on the strongest claims. It should be noted that the claimant's claim against his employer, Wellspring Academy Trust is ongoing.

27. It was stated, on behalf of the claimant that the respondents' costs bore no relation to the work required and could only be the result of duplication of effort, professional incompetence or a cynical inflation designed to make the demand for the full statutory capped sum and summary assessment look reasonable – none of which are issues which lie at the claimant's door, let alone costs which the Tribunal should reward the respondents for incurring.

28. This is a case in which the claim was withdrawn before the first Preliminary Hearing for case management purposes. The claimant and his advisers were of the opinion that there was a reasonable case of post termination victimisation. They did not appreciate the significance of the school's change of name from Boston Spa School to Boston Spa Academy. Once further information was provided with regard to this change, further advice was sought from counsel and it was determined that the case carried more substantial risks than had been appreciated earlier and the claim was withdrawn.

Relevant law

29. 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 –
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> > (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.
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> 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.
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> 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.

30. 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.

31. Ms King, on behalf of the claimant, referred to the case of **Haydar v Pennine Acute NHS Trust UKEAT/0141/17** in which a three-stage test is applied to awarding costs. The first stage is to ask whether the trigger for making a costs order has been established either because a party or his representative has behaved unreasonably, abusively, disruptively or vexatiously in bringing or conducting the proceedings or part of them, or because the claim had no reasonable prospects of success. The trigger, if it is satisfied is a necessary but not sufficient condition for an award of costs.

32. At the second stage, the Tribunal must consider whether to exercise its discretion to make an award of costs. The third stage only arises if the Tribunal decides to exercise its discretion to make an award of costs and involves assessing the amount of costs to be ordered.

33. In the case of **Omar v Worldwide News Inc T/A United Press [1998] IRLR 291** it was stated that, if a trade union were to conduct a claim on behalf of its member then, any shortcomings in the way such a case is conducted by the union representative cannot amount to a reason for taking the union's means into account when assessing the amount of costs against the party concerned. I was also referred to the case of **Benyon v Scadden [1999] IRLR 700** in which the EAT held that it would be an unjustifiable fetter on the Tribunal's discretion to follow the conclusion in **Omar.**

34. 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**).

35. 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**).

36. It 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.

37. It was submitted, on behalf of the claimant, that, in light of the respondent's demands for over £82,000 in respect of a case that never reached a directions hearing, in **Yerraklava**, it was stated that relevant factors include the conduct of the party applying for costs. LJ Mummery viewed relevant factors as including where the respondent's Counsel seeking costs "made more of a meal out of it than reasonably or necessarily was the case" and following the tribunal's findings that the respondents sought a highly exorbitant figure for a case which was never heard", directed that costs were limited to "those which are reasonably necessarily incurred".

38. Ms King referred to an extract from the judgment of Sir Hugh Griffiths in **Marler v Robertson [1974] ICR 72** :

> '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'.

39. The Tribunal finds this was the case with the claimant. The claimant and his Trade Union were of the view that he had a reasonable claim of post termination victimisation. Once the response had been received and information had been provided with regard to the legal significance of the change of status of the school, it was concluded that the case

carried risks and a decision was made not to continue with the claim in the circumstances. It was said that the claim was on a novel point of law which had yet to be subject to detailed judicial determination. It was submitted by Mr Forshaw that the case should never have been brought. The claimant had never been employed by either of the respondents and the case was hopeless from the start.

40. Ms King submitted that, once the status of the school was raised the respondents were invited to provide evidence of the transfer. The documents were provided on 18 November 2020. Counsel's opinion was sought. The claimant's Trade Union adviser had indicated that there was an argument that post termination victimisation against the successor organisation.

41. I heard a substantial amount of submissions with regard to the liability of a successor organisations and with regard to liability for claims of victimisation pursuant to section 108 of the Equality Act 2010. That is, where the act of discrimination arises out of, and is closely connected to, a relationship which used to exist between them. It was submitted that the claimant and his advisers had reasonably assumed that the identity of the claimant's ex-employers and the School were the same as the respondents.

42. There were submissions with regard to the case of **Butterworth v Greater Manchester Police and Crime Commissioners Office [2016] ICR 456** with regard to whether the successor of an employer falls within the relevant provisions in section 108. I accept there are substantial hurdles for the claimant to overcome in the circumstances. It was submitted by Ms King that it was a matter of statutory construction of section108 and she was of the view that these provisions had never been subject to judicial determination in the context of section108 claims.

43. I accept that the claimant was of the view that the minutes of the LADO meetings which had come to light following a Subject Access Request in June 2020 provided grounds for concluding that CW and GW had made allegations that could be found to be post-termination victimisation. These were set out in Ms King's submissions with regard to the minutes as follows:

> (1) On 19 December 2019, CW falsely claimed to the multidisciplinary meeting that he had been so worried about the claimant's behaviour on European trips that he had put an immediate stop to them. This was wholly untrue;
> (2) CW also made insinuations about the claimant's involvement in a children's football club, when he was aware the claimant's only involvement was with his son's membership;
> (3) CW claimed that the claimant had resigned just before a scheduled disciplinary hearing, when he was fully aware that his conduct leading to the disciplinary hearing was a subject of a Tribunal claim, the hearing had been cancelled as part of a compromise agreement which avoided CW having to answer questions about his behaviour;
> (4) on 15 January 2020, GW attended a meeting in which the respondent's new Head Teacher, AR., falsely claimed that the claimant did not leave the school under a compromise agreement. Not only did she not correct AR's mistake but she represented that the claimant had left the day before a disciplinary hearing had been scheduled;

(5) on 4 February 2020, the respondents' reported to LADO that CW confirmed there had not been a compromise agreement;
(6) neither CW nor GW referred to the TRA referral or its outcome.

44. It was submitted by Mr Forshaw that what CW told the 19 December 2019 LADO meeting was true, or, at least to the extent that if there were inaccuracies in the minutes, they were so minor when set against the claimant's conduct during his employment, as to hardly merit a raised eyebrow, let alone a claim for victimisation.

45. It was clear to me that evidence would have been required to be heard in order to determine whether the claimant's allegations were well-founded.

46. I am not satisfied that this was a case that was entirely hopeless or that it was a claim without reasonable prospects of success.

47. Once the claimant had received the grounds of response and the further information in respect of the Academy Order and the associated Transfer Agreement on 17 November 2020 it was not unreasonable for the claimant and his adviser to seek counsel's opinion. The continuation of the claim until the withdrawal on the morning of the first Case Management hearing on 3 December 2020 was not an unreasonable pursuit of the litigation. The case was listed for the first preliminary hearing for case management purposes at that stage. I do not consider that the threat of a strike out application should have meant an earlier withdrawal in these circumstances. The withdrawal was just over two weeks from the provision of the Academy Transfer documentation and associated Transfer Agreement and, taking into account the obtaining of counsel's advice and the consideration of that advice and provision of instructions, that was not an unreasonable period of time.

48. It was submitted by Ms King that there were three options available to the claimant and his Trade Union having considered the position with the assistance of counsel's advice. These were for the claimant to continue with his claim with the union's support, to continue with the claim without the union's support or to withdraw his claim and focus on his claim against his employer. The decision had been a reluctant but pragmatic decision on the part of the claimant and his advisers.

49. The case was withdrawn before the first case management hearing once the position had been clarified in the grounds of response and the further information provided. The claim was not without difficulty, but I do not accept that it was unreasonable to bring the claim. It became substantially more risky for the claimant once he received the further information from the grounds of resistance and the further information provided and, no doubt, Counsel's opinion.

50. The amount of costs sought by the respondents' advisers was wholly out of proportion to the limited progress of the case. If I had been of the opinion that the costs threshold had been reached any costs awarded would be a very small fraction of those claimed.

51. I do not accept that the claimant had acted unreasonably in bringing the proceedings or in the way in which they were conducted.

52. 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".

53. That remains the case today. Costs are still the exception rather than the rule. I am not satisfied that this case was exceptional. I am also not satisfied that the claim had no reasonable prospect of success and in those circumstances the respondent's application for costs is refused.

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

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

Employment Judge Shepherd

31 March 2021