Case No: 2301225/2019

EMPLOYMENT TRIBUNALS

Claimant: **J Delacour**

Respondent: **Trinity Medical Centre**

Held at: London South

On: 18 February 2021

Before: **Employment Judge L Burge**

Representation: The application was determined on the basis of written submissions without an oral hearing.

JUDGMENT

The Respondent's application for costs dated 10 February 2021 is dismissed.

REASONS

1. The Claimant brought a claim of constructive unfair dismissal which was dismissed at a final hearing on 3 and 4 February 2021.

2. At the end of the hearing the Respondent made an application for its costs. In view of the time, the Tribunal decided that the Respondent should make a written application within 7 days, the Claimant would then have 7 days to respond and the Tribunal would make a decision on the papers.

3. The Respondent made an application for costs pursuant to rule 76(1)(b) of the Employment Tribunal (Constitution and Rules of Procedure Regulations 2013. It was contended that the Claimant brought a claim with no reasonable prospect of success based on the Tribunal's findings, evidence and supported by the authority of *Kaur v Leeds Teaching Hospitals* and that it was also unreasonable for the Claimant to reject the Respondent's offers of settlement. Correspondence showed that the Respondent had offered £1500 (August 2019), £3000 (September 2019), £5000 (September 2019), £1500 (April 2020), £2000 (April 2020), £3000 (January 2021) to settle the Claimant's claims and that the Claimant had maintained throughout that she

would only accept £12,000. The Respondent had written two costs warning letters.

4. The Claimant, via her representative Mr Short, resisted the application for costs by response dated 12 February 2021. In summary, the Claimant contended that she had a genuine belief that she had been subjected to serious mistreatment over a period of 2 years, she had become unwell as a result, in her view the Respondent had created a deliberately harsh environment for the Claimant with the intention of making her decide to leave. Further that the Tribunal had found that the Claimant was not included in discussions relating to a change in telephone duties and that other behaviour by the Respondent was criticised by the Tribunal. The Claimant had, in her view, reasonably rejected offers of settlement and had maintained throughout that she would accept £12,000 which reflected her lost salary and was only seeking a fair outcome. The Claimant was convinced that the costs warning letters were an attempt to get her to drop her claim and she brought the claim "in good faith to seek justice for herself".

Relevant Law

5. Costs do not "follow the event" in employment tribunal claims. In other words it is not usual practice for the loser to pay the winner's costs. Costs in the employment tribunal are still the exception rather than the rule (*Yerrakalva v Barnsley Metropolitan Borough Council* 2012 ICR 420, CA).

6. 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), 77, 78(1)(a) 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) have been conducted; or
(b) any claim or response had no reasonable prospect of success.
…

77 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.

7. There is no system for Part 36 offers with attendant sanctions as is found in the Civil Procedure Rules applied in the County Court or High Court.

8. Rule 76 imposes a two-stage exercise – first the Tribunal must determine whether the claim had no reasonable prospect of success/if the party has acted unreasonably such as to invoke the jurisdiction to make an order for costs. If that stage is satisfied, the second stage is engaged – the Tribunal is required to consider making a costs order but has a discretion whether or not to do so. (*Oni v Unison* UKEAT/0370/14/LA).

9. Tribunals must take into account all of the relevant matters and circumstances when deciding on costs applications. The fact that a party is unrepresented is a relevant consideration. Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. 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 (*AQ Limited v Holden* [2012] IRLR 648).

10. If the means of a paying party in any costs award 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).

11. In *Kopel v Safeway Stores plc* 2003 IRLR 753 a Tribunal's decision to award costs of £5,000 against the claimant had been influenced by the fact that she had earlier rejected a settlement offer made 'without prejudice save as to costs' (known as a '*Calderbank* offer') during the proceedings. The Employment Appeal Tribunal held that the rule in *Calderbank* has no place in employment tribunal jurisdiction, however, a claimant's refusal of such an offer was a factor that a tribunal could take into account in deciding whether to award costs.

Conclusions

12. The Tribunal is satisfied that the Claimant genuinely believed she was the victim of an injustice and that she issued proceedings in the genuine hope and expectation that she would obtain redress from the Employment Tribunal. The Tribunal did conclude that none of the alleged acts constituted breaches of contract, on the basis that simply acting in an unreasonable manner was not sufficient, the breach had to be calculated/likely to "seriously" damage the relationship of trust and confidence. As none of the Claimant's allegations, in the Tribunal's judgment, amounted to breaches of

contract, the first part of the test for constructive dismissal failed – there was no fundamental breach of the employment contract by the employer.

13. Mr Short, the Claimant's friend/neighbour who was representing her accepted, fairly in the Tribunal's view, that the documents showed that in general the Respondent had done everything reasonable to manage many significant changes in the workplace. He also sought to persuade the Tribunal that there was a lack of "true compassion" or any display of "real care or concern" for the Claimant. However, the Tribunal did not agree that there was a lack of "true" compassion or lack of "real" care or concern, having found the Respondent's witness credible. Occasionally, cases which at the outset seem hopeless, become stronger during the evidence, as perhaps a witness is particularly impressive and credible and vice-versa.

14. The Tribunal concluded that there are almost always things that an employer can do better when managing employees and undertaking mergers, and no doubt there are some things that the Respondent in this case could have done better, for example, knowing that the Claimant had struggled with the change surrounding the first merger, they should have communicated with her directly to ensure her views were canvassed in relation to changes of telephone duties. While this, in the Tribunal's judgment, did not amount to a breach that was calculated/likely to "seriously" damage the relationship of trust and confidence, it could not be said to have no reasonable prospect of success. The first part of the Rule 76(1)(b) accordingly fails - the Claimant's claim did not have no reasonable prospect of success.

15. In relation to Rule 76(1)(a) did the Claimant act unreasonably in the conduct of proceedings, namely that she failed to accept the offers of settlement despite the fact that she subsequently lost the claim? The *Calderbank* principle does not fully apply to employment tribunal proceedings and a failure to beat a settlement offer does not, by itself, lead to an order for costs. Failures to accept a settlement offer are relevant factors in considering whether the discretion to award costs should be exercised, but the Tribunal does not consider that the conduct in this case is such that the grounds for costs under Rule 76(1)(a) are made out by the Claimant's conduct in settlement discussions. The Claimant did not act unreasonably in failing to accept the offers of settlement. She genuinely believed she was a victim of injustice and that the offers were an attempt to persuade her to drop her claim. Her counter offer of £12,000 based on her earnings to the date of her retirement was not unreasonable.

16. While the application fails on the first part of the test in Rule 76, the Tribunal concludes that the application would also fail at the second part of the test. Even if the first part had been met, the Tribunal would not exercise the discretion to make a costs award because this case is not an exceptional case to warrant the discretion being exercised. The Claimant did not have legal representation (her friend/neighbour Mr Short represented her) and the Claimant cannot be expected to be judged against professional standards. In this context, the Claimant's conduct has been reasonable.

17. As the Respondent's application for its costs has failed, the Tribunal does not enquire about the Claimant's ability to pay under Rule 84 and the application is dismissed.

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Employment Judge **L Burge**

Date: **18 February 2021**

JUDGMENT SENT TO THE PARTIES ON
Date: **21 April 2021**

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FOR EMPLOYMENT TRIBUNALS

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