EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Ms B Mkhize	**v**	Minster Care Group Limited

Heard at: Reading (by CVP) **On:** 8 June 2021

Before: Employment Judge Anstis
Mrs R A Watts-Davies
Mrs A Gibson

Appearances
For the Claimant: No attendance or representation
For the Respondent: Mr B Gray (counsel)

JUDGMENT (COSTS)

The respondent's application for a costs order is dismissed.

REASONS

INTRODUCTION

1. These written reasons were requested by the respondent at the conclusion of the hearing.

2. By a judgment dated 5 August 2020 we found that the claimant had been unfairly dismissed (but made no award of compensation) and dismissed her claims of race discrimination. This was promulgated on 9 September 2020 and on 5 October 2020 the respondent made an application for a costs award. In the meantime, the claimant had applied for written reasons for that judgment. There were lengthy delays in this correspondence being referred to the employment judge, but written reasons were produced and the costs application listed for a hearing today.

3. The week before this hearing the parties were notified that the tribunal intended to conduct the hearing by CVP. The claimant immediately objected, on the basis that she was not in a position to participate by video and wished to give evidence as to her means in person. Further correspondence followed, and on 7 June 2021 instructions were given that the hearing would proceed in hybrid form, with the claimant and anyone else who wished to attend in person able to attend in person.

THE CLAIMANT'S ATTENDANCE

4. Throughout these claims the claimant has been represented by Mr O Onibokun. At the outset of the hearing he gave us an outline of his recent contact with the claimant, following which he considered himself unable to continue to act on her behalf. While evidently he had been expecting the claimant to attend the hearing today (hence the application for it to be heard in person) he had not heard whether she was in fact going to attend. He told us that he was withdrawing from representing her, and left the hearing taking no further part in it.

5. Before Mr Onibokun's withdrawal, Mr Gray properly reminded us of our obligations under rule 47 that before deciding to proceed in the claimant's absence we should "*consider any information … available … after any enquiries as may be practicable, about the reason for the party's absence*". There was no phone number for the claimant given on her claim forms or apparent from the tribunal file. While Mr Onibokun did have the claimant's mobile number he said that he could not pass that on without the claimant's permission. We accept he took the correct approach to this. He suggested that we could telephone the claimant's current employer as a way of trying to get in touch with her. We declined to do so, considering that it would not be appropriate to alert her current employer that an employment tribunal was trying to get in touch with her, and also noting that it had previously been said that she was taking a day off work to attend the tribunal hearing, so she would not be expected to be at work.

6. On Mr Onibokun's withdrawal we considered whether we could proceed in the claimant's absence. We decided that we could. It was clear that the claimant was aware of the hearing. She had previously set out her intention to attend but had not attended and had not given either the tribunal or Mr Onibokun a reason for her non-attendance. Without a telephone number for her there were no practical steps we could take to make further enquiries of her on the day of the hearing.

OUR DECISION ON THE COSTS APPLICATION

7. The costs application is made on two bases. First, that the claimant acted unreasonably in refusing an offer of £5,000 (made without prejudice subject to costs on 17 March 2020), and second that her claim (except in respect of procedural unfairness for unfair dismissal) had no reasonable prospect of success from the start. It is said that this meant that the bringing of the proceedings had been unreasonable.

8. The tribunal is used to such applications being made, but an unusual feature of this case is that the application is made despite the claimant having succeeded in part of her claim, and despite the criticisms of the respondent's behaviour that appear in our judgment.

9. In his oral submission in support of the application, Mr Gray broadened the criticism of the claimant's behaviour referred to in the written application, focussing his challenge in the dramatic accusations the claimant made during the course of her claim that materials had been "fabricated", and other such allegations .

10. Costs awards must be the exception rather than the rule. There is nothing in tribunal practice or procedure to suggest that a costs application can be made simply because a claimant has failed to beat an offer that was made. Our view is that the first part of the application – based on the claimant turning down an offer of £5,000 – is nothing more than an assertion that it was unreasonable to turn down an offer that was more than she eventually received. We note from cases such as Telephone Information Services Limited v Wilkinson [1991] IRLR 148 that a claimant is entitled to pursue a claim for more than simply financial compensation. While the respondent has throughout this process been highly critical of points made by the claimant there seems to have been no acknowledgement that its own defence to the unfair dismissal claim was fundamentally flawed and, just as they have argued that the claimant's race discrimination claim was doomed to fail, it is clear to us that the respondent's defence to the unfair dismissal was doomed to fail – at least on procedural grounds.

11. The second point – that it was unreasonable to have brought aspects of the claim in the first place, such as the race discrimination claim or the substantive element of the unfair dismissal claim – has given us more pause for thought, although we remain surprised that the respondent thought it appropriate to make a costs application in these circumstances.

12. The claimant has made a number of damaging allegations against the respondent which ultimately have not succeeded. We found in our decision that she admitted to wrongdoing during the disciplinary hearing, and that she accepted that this could result in her dismissal. We found that her dismissal was inevitable, and that "*the claimant was undoubtedly in the wrong*". However, this is as far as we went in our judgment. There is nothing beyond that where we say that the claimant has lied about things, or that her claims were fundamentally flawed from the start. Mr Gray's criticisms of the scope of the claimant's claim do not find substantial support in our judgment except that, of course, those elements of the claim failed. Criticisms can be made of both side's conduct of the claim and response. We note that in our decision despite not having heard oral evidence from the claimant we found against the respondent's witnesses' version of events on a number of occasions. These points do not show that it was unreasonable for the claimant to have brought aspects of her claim or for the respondent to have defended aspects of it. We do not consider that the respondent has shown that it was unreasonable for the claimant to have brought parts of her claim, and we refuse to make an award of costs.

Employment Judge Anstis

Date: 8 June 2021

Judgment and Reasons

Sent to the parties on: 17 June 21

For the Tribunal Office

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