THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms N Staph	**V**	**Notting Hill Genesis**

Heard at: London Central **On**: 30 March 2021

Before: **Employment Judge Glennie**
Ms G Carpenter
Ms C James

Representation:
Claimant: In person, assisted by Mr Staph (her husband)
Respondent: Mr A Allen QC

JUDGMENT ON COSTS

The Judgment of the Tribunal is as follows:

1. **By a majority (EJ Glennie and Ms Carpenter), that an order for costs should be made against the Claimant in favour of the Respondent.**

2. **By a majority (Ms Carpenter and Ms James), that the amount of the costs order should be £150.**

3. **Pursuant to rule 39(5) the deposit of £150 shall be paid to the Respondent, and pursuant to rule 39(6) this payment shall count towards the settlement of the costs order.**

REASONS

1. By its judgment and reasons sent to the parties on 23 March 2021 the Tribunal dismissed the Claimant's claims brought under the Equality Act 2010, following a 5-day hearing. A complaint under the Transfer of Undertakings Regulations had previously been withdrawn in August 2020.

2. The Respondents made a costs application dated 25 March 2021: the purpose of this hearing was to determine that application. There was a

bundle of documents relevant to that application, and page numbers that follow refer to that bundle.

3. The hearing was held by video (CVP). Neither party made any objection to the Tribunal proceeding in that way.

4. Rule 76 of the Rules of Procedure includes the following provisions:

(1) A Tribunal may make a costs order….., and shall consider whether to do so, where it considers that -
(a) A party….has acted unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted.
(b) Any claim or response had no reasonable prospect of success.

5. Rule 39, which relates to deposit orders, contains the following:

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the same reasons given in the deposit order –
(a) the paying party shall be treated as having acted unreasonably in pursuing that particular allegation or argument for the purposes of rule 76, unless the contrary is shown; and
(b) the deposit shall be paid to the other party….

(6) If a deposit has been paid to a party under paragraph 5(b) and a costs order….has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

6. Returning to rule 76, the Tribunal noted that, if one or more of the "threshold" conditions applies, it does not automatically follow that a costs order should be made: the Tribunal then has a discretion to exercise as to whether or not to make an order. That discretion must be exercised judicially.

7. Rule 84 provides that, in deciding whether to make a costs order, and if so in what amount, the Tribunal may have regard to the paying party's ability to pay. Again, there is a judicial discretion to be exercised in this regard.

8. In **Oni v Unison UKEAT/0370/14** Simler J set out the legal principles involved in a Tribunal's consideration of a costs application. This is a two-stage exercise, as set out above. At the second stage, the Tribunal should give the matter detailed and reasoned consideration. It should bear in mind that costs are compensatory and not punitive. The Tribunal should not judge a litigant in person by the same standards as a professional representative, as lay people may lack the objectivity of a professional advisor.

9. So far as means are concerned, in paragraph 18 of her judgment Simler J said that

> "….a paying party's means are not restricted to income, but may include capital: for example, the individual's share of a matrimonial home. But importantly the fact that a party's ability to pay is limited does not oblige a tribunal to limit the amount of a costs order to a sum that can be paid presently or within a specified timescale. If there is a realistic prospect that a claimant might at some point in the future have the ability to pay a costs order, it would be legitimate to make a costs order in that amount so that the respondent could make some recovery if and when that occurred…."

10. In the present case, Mr Allen submitted that the Claimant had acted unreasonably in the bringing and the conduct of the clam, and that no part of the claim had reasonable prospects of success. The Tribunal noted that:

    10.1 As stated above, the claim had originally included a complaint under the TUPE Regulations, but this had been withdrawn. The Tribunal has not therefore considered, or made any findings, about that complaint.

    10.2 On 2 October 2020 Employment Judge Russell made deposit orders (pages 69-77) in respect of each of the heads of claim under the Equality Act (namely, direct discrimination because of race, harassment and victimisation). EJ Russell gave detailed reasons for his orders. It was notable that in relation to direct discrimination, EJ Russell's reasons included that there was little reasonable prospect of the Tribunal finding that the matters complained of occurred because of race; in relation to harassment, that there was little reasonable prospect of the Tribunal finding that the matters complained of were related to race; and in relation to victimisation, that there was little reasonable prospect of the Tribunal finding that the matters complained of occurred because of a belief that the Claimant might do a protected act.

    10.3 It was correct to say, as Mr Allen submitted, that there was considerable similarity between EJ Russell's reasons for making the deposit orders and this Tribunal's reasons for the judgment that it reached.

11. Mr Allen stated that the Respondent's costs of the entire litigation exceeded £100,000, and that the costs incurred since the deposit order was sent to the parties were in excess of £67,000. The Tribunal did not scrutinise the figures, as the Respondent's application was limited to £20,000. The Tribunal had no doubt that the Respondent's costs (whether of the whole litigation, or since October 2020) were well in excess of that figure.

12. With regard to the TUPE element of the claim, the Tribunal was unanimous in deciding that, even assuming that this had never had any reasonable

prospect of success, it would not make a costs order as a matter of discretion. The Claimant had withdrawn this complaint at a fairly early stage, before the Preliminary Hearing, and we concluded that it would not be proportionate to make a costs order in those circumstances.

13. The majority of the Tribunal (EJ Glennie and Ms Carpenter) found that the threshold condition of conducting the proceedings unreasonably was met in relation to the Equality Act complaints. The effect of the deposit orders, and rule 39(5)(a), is that the Claimant should be treated as having acted unreasonably in pursuing those complaints, unless the contrary is shown.

14. The majority considered that, although there were aspects of the case where, in a broad sense, the Claimant had some grounds for complaint or concern, the contrary to acting unreasonably had not been shown. These aspects were that the assessment process for the LCW role was open to some criticism; that there had been an error in the communication about the FHO role; and that there had been some sort of error (although it was not clear by whom) concerning the Claimant's personal telephone number. The central point, however, in the majority's judgment, was that EJ Russell had been taken to all of these matters and had identified that there was little reasonable prospect of the Tribunal finding that these involved breaches of the Equality Act. The Claimant had nonetheless continued with these complaints, and the Tribunal had determined them against her on grounds which included those identified by EJ Russell. The majority concluded that, although the Claimant was a litigant in person, she had had the equivalent of clear, authoritative, legal advice from EJ Russell, but had continued with her complaints nonetheless.

15. With regard to the exercise of discretion that then arises, EJ Glennie and Ms Carpenter concluded that this should be exercised in favour of making a costs order (although as will be explained below, they differed as to the amount of this). The reasons given for finding that the Claimant had acted unreasonably were also reasons why a costs order should be made. The information about the Claimant's ability to pay (set out below) was not such as to justify making no costs order at all, since at the very least the Claimant had paid the total of £150 under the terms of the deposit orders.

16. The minority (Ms James) gave greater weight to the Claimant's position as a litigant in person. Ms James considered that the Claimant had reason to feel that she had been treated unfairly, especially in relation to the assessment for the LCW role, where the successful candidates had had an unfair advantage. Ms James would therefore find that the Claimant had shown that she had not acted unreasonably, and would not make a costs order. Furthermore, if the discretion to make a costs order arose, she would for the same reasons exercise that discretion against making a costs order.

17. Mr Allen also relied on the Claimant's failure to accept the Respondent's offer of settlement made on 7 January 2021, with a costs warning, of £5,000. The Tribunal was unanimous in finding that (one way or the other)

this added little, if anything, to the conclusions that we had reached, principally because this offer did not relate only to the present claim, but also to potential future claims that have been intimated and as to which the Tribunal has no detailed information.

18. All three members of the Tribunal then considered the amount of the costs order to be made under the terms of the majority's decision.

19. On the question of ability to pay, the Tribunal heard evidence from the Claimant. She said that she had been made redundant by the Respondent, but had not yet received the redundancy payment of £6,400 due to her. There were no jobs available to her, and her mental health had been severely affected by the events of her employment with the Respondent, such that she required medication. She had financial obligations to her son and her mother.

20. When cross-examined by Mr Allen the Claimant accepted that she received attendance allowance and care allowance with reference to her mother. She agreed that she was the joint owner of the matrimonial home with her husband, that it was worth in excess of £800,000, and that there was no mortgage. She also owned a car, as did her husband. The Claimant confirmed that she had brought a second claim against the Respondent, in which she made complaints of unfair dismissal, discrimination, harassment and victimisation. In submissions, the Claimant said that if she were to acquire a debt to the Respondent, this would make her more depressed.

21. Here, the majority (Ms Carpenter and Ms James) concluded that the amount of that order should be £150, i.e. the amount of the deposit orders. The majority's reasons for this were as follows:

    21.1 Although the claims had been assessed as having little reasonable prospect of success, they could not, in the majority's judgment, be regarded as completely hopeless, or as having had no reasonable prospect of success. The Claimant had engaged properly with the Tribunal's process, in complying with the case management orders.

    21.2 As explained above in relation to the conclusions about whether a costs order should be made in principle, there were grounds for criticism of the Respondent.

    21.3 The Claimant was not the only person who had complained about the selection process for the LCW role, but the Respondent had not responded to the complaints in a way that gave the Claimant, or the others who complained, any effective remedy.

    21.4 It would not be just to impose a costs order that the Claimant could not immediately meet, and which would therefore be hanging over her for some period of time, with the prospect that the Respondent might take enforcement action such as seeking a charge over her interest in the matrimonial home.

22. The minority, namely EJ Glennie, took a different view. He considered that, although the Tribunal had found that the Respondent was open to criticism in certain relevant respects, it remained inescapable that EJ Russell had identified the essential reason why the claim was likely to fail. He considered that a very small award of costs would not compensate the Respondent for the costs that they had incurred, at least since the making of the deposit orders. EJ Glennie agreed with Mr Allen's submission that there was nothing in the Claimant's evidence about her ability to pay that showed that an order for £20,000 should not be made. As pointed out by Simler J in **Oni**, the Claimant's capital position could be taken into account, as well as her income. With regard to the latter, he saw no reason to believe that the Claimant, an experienced professional person in her 50's, would not be able to return to work at some point in the future. She also has a redundancy payment of £6,400 to come. While sympathetic to the position regarding the Claimant's mental health, EJ Glennie would make a costs order in the amount of £20,000.

23. The effect of all of the above is that the Tribunal makes a costs order in the amount of £150, which will be satisfied by payment to the Respondent of the deposit.

Employment Judge Glennie

Employment Judge Glennie

Dated…..24 June 2021……

Judgment sent to the parties on:

24/06/2021..

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For the Tribunal Office