EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs L Soppelsa	**v**	GMB

Heard at: **Bristol (by video)** **On: 8 October 2021**

Before: **Employment Judge O'Rourke**

Appearances
For the Claimant: Not in attendance, or represented
For the Respondent: Mrs L Mankau - Counsel

COSTS JUDGMENT

1. The Claimant is ordered to pay the Respondent's costs (in either the sum of £9660.85, inclusive of VAT, or, if the Respondent is able to recover VAT, in the sum of £8222.00, exclusive of VAT).

2. The Respondent is to confirm its position in respect of VAT, to the Tribunal and the Claimant, by no later than 22 October 2021.

REASONS

(Being provided, as the Claimant was not in attendance at the Hearing)

Background and Issues

1. By a judgment 18 August 2020, the Claimant's claim for constructive unfair dismissal was dismissed. As a consequence, the Respondent has applied for its costs.

2. The Claimant brought a claim of constructive unfair dismissal, in July 2019, against her ex-employer, the union GMB, where she'd worked as a secretary, which claim the Respondent denied.

3. The matter had originally been listed for hearing on 23 to 26 March 2020, but due to the Covid pandemic, was re-listed for 17 to 19 August 2020, a telephone case management being instead conducted on 23 March.

Deposit Order

4. Employment Judge Livesey, who conducted that Hearing, considered that the Claimant's claim had little reasonable prospect of success and made a Deposit Order, of £50, subject to Rule 39 of the Tribunal's Rules of Procedure, which the Claimant subsequently paid. His reasons for doing so were set out in a comprehensive and detailed manner [45-49]. In summary, his reasons were as follows:

    a. There appeared to be very little factual dispute around the nature (and refusal) of the Claimant's flexible working application, at the end of 2018. He pointed out that it was not enough (even if it was the case) that the application may have been dealt with unreasonably, because the implied term of trust and confidence was not breached merely if an employer behaved unreasonably (and he referred to **Bournemouth University v Buckland [2010] ICR 908 EWCA**).

    b. He explained the correct test, as established in **BCCI v Malik [1997] ICR 606 UKHL**, namely that the implied term was breached if an employer participated in conduct which was calculated or likely to cause serious damage to, or destroy that relationship. Whether it was 'likely' to was an objective test. He also pointed out that there needed to be no reasonable or proper cause for the conduct.

    c. He noted that the Claimant did not assert that the reasons for the refusal of the flexible working application were disingenuous, irrational, or born out of ill will. Indeed, she accepted that in August 2018, on the departure of a full-time typist from her office, that gap needed to be filled. He considered that in those circumstances the Claimant had little reasonable prospect of meeting the Malik test.

    d. He considered it possible, also that the Claimant had affirmed any breach, by remaining in employment for a further five months, resigning on 24 May 2019 and that the true reason for her resignation could have been the receipt by her of an Occupational Health (OH) report, which indicated that she was fit to return to work, but that she did not wish to do so.

Judgment of 18 August 2020.

5. This case was heard before me, on 17 and 18 August 2020 and the claim was dismissed. I did so for very similar reasons as relied upon by EJ Livesey, in his Deposit Order, summarised as follows:

    a. The Claimant got nowhere near meeting the **Malik** test. Essentially, because of her personal circumstances at home (she had, in 2014, adopted two children, one of whom was experiencing difficulties) she experienced problems in satisfying her work commitments and she went on long-term sick leave in January 2018. In August, when she felt ready to return, she discussed that return with the Respondent, who

indicated that she could return on a phased basis, over four weeks, at two days a week, but thereafter would need to return to her contracted hours (2.5 days). However, the Claimant was unwilling to do so and the Respondent considered that due to their manning and staff requirements, they had compromised as much as they were willing to. I note, in this respect that there had been years of such discussions and the taking of sick leave by the Claimant.

b. The Claimant made a flexible working request on 19 December 2018 and a meeting was held on 9 January 2019, to discuss it. The Respondent was, however, unwilling to grant the request, setting out its rationale for doing so (essentially that the Claimant and the other part-time secretary have a common day in the office, when they could hand-over to each other and that the Respondent was struggling to provide secretarial support to its officers, having to arrange cover for the Bristol office, from the Cardiff office).

c. The Claimant subsequently lodged an appeal against that decision, which was rejected, on 19 March 2019. The Claimant had remained on sick leave, throughout. The Respondent arranged an OH report, which concluded that the Claimant was fit to return to work. That was sent to her on 15 May and she resigned on 24 May.

6. The Claimant was essentially attempting to dictate to the Respondent what hours she would, or wouldn't work. She seemed to consider that because of her personal problems at home that the Respondent was somehow obliged to facilitate her, which clearly, of course, they were not. Their only obligation was to deal with the flexible working application in a reasonable manner and only to reject it on certain grounds (s.80G ERA) and it was abundantly clear to me that they had done so, but simply were not prepared, for the rational reasons provided, to grant the request. However, even <u>if</u>, as set out by EJ Livesey, they had not acted reasonably (which I found was not the case) any such behaviour would not meet the test in **<u>Malik</u>**. There was no question that the simple, reasoned refusal of the Claimant's request could, objectively, be 'behaviour calculated or likely to cause serious damage to, or destroy the relationship', between the Claimant and Respondent. The Claimant was simply not getting her own way and was, herself unreasonably, refusing to accept that decision.

7. I considered also that she did tarry in resigning, almost certainly realising that her appeal was very unlikely to be successful, but deciding to remain on sick leave until that could be resolved. The true reason for her resignation was the realisation that the Respondent was not going to accede to her request and that having provided her with an OH report indicating that she could return to work and her not wishing to, she had no option but to resign.

Rule 39(5)(a)

8. I find, therefore that the allegations and arguments against the Claimant's case, as decided by me, are for substantially the same reasons as set out in the Deposit Order.

9. Accordingly, therefore, applying this Rule, the Claimant shall be treated as having acted unreasonably in pursuing her claim, for the purposes of Rule 76, unless the contrary is shown.

10. In that latter respect, as she did not attend this Hearing, I took account of the Claimant's emails of 16 September 2020 [54-55] and her letter of 13 August 2021. Those items of correspondence, however, provide no rebuttal to the assumption of unreasonable behaviour. While the Claimant asserts that she did not take the matter '*lightly*' and '*went in with the belief that there was a breach of contract of trust and confidence … I did my best and I lost.'*, she makes no reference to the detailed Deposit Order, or any consideration she gave to it, clearly assuming or hoping that a costs order would not be enforced against her (as she asks the Respondent to reconsider their stance in her letter of 13 August 2021). This was clearly a deliberate decision on her part, perhaps hoping that the Respondent would not, in the end, pursue its costs.

Rule 76 – When a costs order … may or shall be made

11. The Rules states:

'*(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 the bringing of the proceedings ..
(b) any claim … had no reasonable prospect of success.

Rule 83 – ability to pay

12. The Rule states that '*in deciding whether to make a costs … order and if so, what amount, the Tribunal may have regards to the paying party's … ability to pay.*

The Law

13. I was reminded of the case of **Kovacs v Queen Mary and Westfield College [2002] EWCA Civ 352** which indicated that ability to pay is not a factor which an employment tribunal is required or entitled to take into account when deciding whether or not to make a costs order. **Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420 EWCA** indicates that a tribunal has a broad discretion in such matters and in exercising that discretion should look at the 'whole picture' and ask whether there has been unreasonable conduct by the Claimant in bringing or conducting his claim and in doing so, to identify the conduct, what was unreasonable about it and what effects it had. While ability to pay is a factor that a tribunal may take into

account, it is not determinative as to the amount of costs ordered. **Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797** states that (paragraph 37) '*The fact that her ability to pay was so limited did not, however, require the ET to assess a sum that was confined to an amount that she could pay. Her circumstances may well improve and no doubt she hopes that they will.*'

Reasons for Costs Order

14. While I note that costs orders are the 'exception rather than the rule', I find that it is appropriate to exercise my discretion to make a costs order in this case, as I consider it a particularly egregious one, where a claimant is bringing a relatively straightforward, single claim and has had the benefit of considered 'advice' (effectively), setting out the legal issues in great detail, from an Employment Judge, but chooses, instead, to ignore that warning and to proceed nonetheless, completely failing, at hearing, to make her case, but seemingly willing to accept a risk as to a costs order, either because she doesn't believe (without any foundation) that the Respondent would pursue one, or alternatively that she will be able to evade any such order, due to her personal circumstances. I consider that entirely cynical behaviour on her part, perhaps motivated by a hope that if she maintained her claim, the Respondent might have settled it. I don't consider that the fact that she was unrepresented is a mitigating factor: as stated, she had the issues spelt out for her in great detail and could have easily researched them on the internet; she had worked in an office in the GMB, for officers providing advice to union members, is clearly intelligent and educated and therefore capable, I consider, of considering her position, following the making of the Deposit Order.

Amount of Costs Order

15. The Respondent's costs, as set out in their schedule are, in my experience, entirely reasonable (even modest) for a case such as this, involving a case management hearing, a three-day final hearing listing (although, in fact, concluded in two days) and the hearing of a costs application. I am entirely satisfied, therefore that the costs claimed are those incurred by the Respondent, for which they are entitled to be compensated. Respondent Counsel was unable to take instructions as to whether or not the Respondent can recover VAT on legal fees and therefore I order costs, subject to that clarification by the Respondent, in the sum of either £9660.85, or £8222.00.

Ability to Pay

16. In respect of that sum, I went on to consider the Claimant's ability to pay it. The Claimant said, in her email of 16 September 2020 that she was then currently unemployed, that her husband was self-employed, they had £20,000 of credit card debts and three missed mortgage payments and therefore were at risk of losing their house (which has clearly not subsequently happened). In a further email, provided only at the conclusion of this morning's hearing, she said that she continued to be unemployed and that they continue to have

problems with their mortgage. She provided a screenshot of her husband's business bank account and a credit report (neither of which the Respondent was able to consider in advance of the Hearing, or to make representations in respect of them). While I note from the credit report that the Claimant and her husband have a mortgage and credit card debts, so then do many others. No worthwhile documentary evidence was provided as to her husband's overall earnings from his business, instead just a snapshot of an apparent account for one day and nor were copies of any joint bank account, or credit card bills, or entitlement to benefits provided. Nor was any explanation forthcoming as to why, the Claimant having been aware of the costs application for over a year and of this hearing for at least a month, she chose only to provide this information, past the 'eleventh hour'. I consider, therefore, that I have taken as much account as is possible of the Claimant's ability to pay, but conclude, applying **Arrowsmith** that the Claimant is likely, if not now, but in the future, to have the ability to pay costs in the sum ordered, for the following reasons:

a. She is an educated and skilled individual, is still of working age and can, therefore, if not now, in due course, expect to return to a similar income as before (in the region of plus of £12,000 p.a.);

b. I had no worthwhile corroborative evidence before me that her husband's business would not make reasonable earnings;

c. It is the case that no matter what order is made by this Tribunal, the Respondent will be unable to 'get blood from a stone': if the Claimant genuinely does not have the funds, then she cannot be forced to pay. In that event, it will then be open to the Respondent to consider enforcement through the County Court, in which process the Court can order her to attend, with documents, to satisfy itself as to her means and to then make a repayment order, taking into account her genuine ability to pay.

19. Conclusion. I conclude, therefore, for the reasons set out above that the Claimant is ordered to pay the Respondent's costs, in the sum of either £9660.85, or £8222.00 (dependent on the Respondent's VAT status).

Employment Judge O'Rourke
Dated: 8 October 2021

Judgment and Reasons sent to parties: 27 October 2021

FOR THE TRIBUNAL OFFICE