EMPLOYMENT TRIBUNALS

Claimant: **Mrs P Da Silva**

Respondents: **(1) Mrs A Loizou (removed as a Respondent by Tribunal order)**
(2) Little Adventures Play Centre Limited (dissolved 22nd November 2021)

JUDGMENT (COSTS)

1. The First Respondent's application for costs dated 1st December 2021 (supplemented on 10th January 2022) under Rule 76 of the Tribunal Rules 2013 is refused.

2. No order for costs is made against the Claimant.

REASONS

1 The First Respondent made an application for costs at the hearing on 1st December 2021, supplemented by submissions and supporting documents sent to the Tribunal on 10th January 2022 (with extra documents sent on 11th January 2022) and responded to by the Claimant on 17th January 2022.

2 The application was set out in para 1 of the First Respondent's submissions and was made under under Rule 76(1)(a) Tribunal Rules 2013 (vexatious and/or unreasonable conduct) and Rule 76(1)(b) (no reasonable prospects of success, the reference to 'clearly hopeless' in the submission para (viii)). The costs application was made in relation to two matters firstly the Claimant's actions in bringing or continuing her claim against the First Respondent and secondly her actions at the (telephone) hearing on 1st December 2021 in attending without the hearing bundle (in breach of a Tribunal Order, relevant to Rule 76(2)) such that the hearing could not go ahead.

3 The Claimant resisted the application. She does not have legal representation in this claim but is represented by her husband Mr Ribero. A large part of her submissions dwelt on what she considered correspondingly unreasonable/vexatious behaviour by the First Respondent and/or the Second Respondent. Her response to the actual application was that firstly she acted reasonably as regards the inclusion of the First Respondent as a respondent both at the time of bringing the claim and subsequently in the light of her knowledge of Tribunal proceedings and the orders made by the Tribunal on the issue. Secondly she said she had been called in unexpectedly to work the day of the hearing on

1st December 2021 and although she had planned to take the call at home, when the start of the hearing was delayed and she was then called in to work she then had to drive to work and take the call from her car when she got there; she said her understanding had been that due to the nature of the hearing she had not needed to have the bundle with her when she left home.

Relevant law

4 The relevant Tribunal Rules are Rules 74-84 of the Tribunal Rules 2013. Costs in the Employment Tribunal are the exception rather than the rule and there is a high threshold.

5 There is a two stage test, to consider firstly whether the relevant ground under Rule 76 is made out and then if it is, secondly whether the Tribunal should exercise its discretion to award costs.

6 The Tribunal may (but is not required to) take into account the paying party's ability to pay in deciding whether to make a costs order and if so in what amount (Rule 84).

7 *Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420* requires the Tribunal to consider all the circumstances as a whole and *McPherson v BNP Paribas [2004] IRLR 558* establishes the need to consider the nature, gravity and effect of the claimed unreasonable conduct.

8 In *AQ Ltd v Holden 2012 IRLR 648* the EAT stated that the threshold tests governing the award of costs are the same whether a litigant is or is not professionally represented, but that the application of those tests should take this factor into account. However, a litigant in person can be found to have behaved unreasonably even when proper allowance is made for their inexperience and lack of objectivity.

9 There is also Presidential Guidance on costs (Presidential Guidance; General Case management – Guidance Note 7 Costs) which I have taken into account.

10 The Tribunal does not give legal advice to parties.

Findings relevant to the costs application

Presentation of claim against First Respondent and subsequent failure to withdraw claim against First Respondent

11 The Claimant obtained an ACAS certificate issued on 18th November 2020 naming the Second Respondent as her employer. That was her correct employer.

12 The Claimant presented her claim form on 13th December 2020, however now naming the First Respondent as the Respondent (page 3, Q2) but on the same form (page 13) also referring to employment by the Second Respondent and (page 14) saying that the claim was against the First Respondent trading as the Second Respondent and that she was employed by the Second Respondent from 18th November 2020. Her contract of

employment had been clear that her employer was the Second Respondent. Reading her claim as a whole I find that when she presented her claim form the Claimant was in practice potentially claiming against both the First Respondent and the Second Respondent. However given her claim form also included that reference to the Second Respondent being her employer I find that the presentation of the claim against both was at this stage not unreasonable, taking into account she did not have legal advice and she had included a reference to the (correct) Second Respondent; this was not a case where the claim form when read as a whole only claimed against the person identified in the Respondent box on Q2 of the form (ie the First Respondent). It is not uncommon for an unrepresented claimant to name both the person they work for (their 'boss') and the name of the company, particularly when they are aware that a company is in financial difficulties. The Claimant did not understand (evident from what she wrote on the form) that a company is a separate legal entity and that when it comes to an employment contract with a company, a director of that company is not personally liable under that contract, because they are only an officer of the company.

13 I therefore find that the Claimant did not act vexatiously and/or unreasonably in presenting her claim against both the First Respondent and the Second Respondent.

14 The First Respondent did not send in a response to the claim. On 23rd April 2021 the First Respondent's accountant Mr Christodoulou contacted the Tribunal (not copied to the Claimant at this stage) to say he was the First Respondent's representative and to say that she was not the correct respondent and that the correct respondent was the Second Respondent. This was the first time this issue had been raised and by now some 4 months since the Claimant had presented her claim.

15 The hearing on 4th June 2021 was postponed (page 24). The First Respondent had emailed the Tribunal on 4th June 2021 (not copied to the Claimant) saying she was not the correct respondent (page 27). The order was that the Second Respondent be served with the claim (page 25) as an additional respondent. There were no orders about the First Respondent.

16 The Tribunal wrote to the Second Respondent on 10th June 2021 (page 21) enclosing a notice of claim and notifying the hearing date as 1st December 2021. The Tribunal did not do anything as regards the First Respondent. Given that, it was reasonable for the Claimant to assume that both respondents were still in play from the Tribunal's perspective, as potential respondents, with that issue still to be decided and that there was nothing for her to do on that issue at this stage.

17 On 14th May 2021 (page 27) the First Respondent emailed the Tribunal again making the same points and again not copying in the Claimant. The Tribunal asked her to send it to the Claimant (page 33) and for the Claimant to respond on the correct Respondent issue by 12th July (extended to 19th July 2021, page 34).

18 The Second Respondent provided its response on 28th June 2021 and it said (page 16) that the Second Respondent was her employer and asked for the First Respondent to be removed (page 18) as she had been incorrectly served with the claim and was not the Claimant's employer.

19 On 3rd July 2021 the Tribunal asked the Claimant to confirm which was her employer and whether she objected to the First Respondent being struck out. The response to the Tribunal was dated 6th July 2021 (page 36) and said that her employment contract was with the Second Respondent. She also referred to a Mr Georgio now apparently representing the Second Respondent and for this reason the First Respondent as a director should be retained as a Respondent; this did not follow legally from whether or not Mr Georgio had been appointed given her previous acceptance that the Second Respondent was her employer, though again was likely to be linked to concerns that the Second Respondent was in financial difficulties and might 'disappear'. She wanted to keep her options open when she said that she still wanted to leave the First Respondent as a respondent ie not wanting to be left with no respondent at all if she expressly agreed the First Respondent should be removed. She had therefore answered 'yes' to the Tribunal's question as to whether she objected to the removal of the First Respondent. However she then put the ball back into the Tribunal's court by saying if the Tribunal thought continuing with the First Respondent harmed her claim she should be removed. In this the Claimant was being somewhat equivocal. The Claimant clearly did not understand that it is not the Tribunal's role to give advice including as to whether a step harmed her case or not.

20 The parties were then in further correspondence with each other and by email dated 3rd August 2021 the First Respondent again asked that the claim against the First Respondent be withdrawn. However by letter dated 7th August 2021 the Tribunal told the parties that the hearing listed for 1st December 2021 would decide all the issues, including the First Respondent's application to be removed.

21 Taking the above findings into account I therefore find although there was an element of keeping her options open throughout this period (motivated by a concern that the Second Respondent was in financial difficulties and might disappear), the Claimant reasonably then relied on the Tribunal's letter dated 7th August 2021 to the effect that the matter would be decided at the hearing on 1st December 2021 and, flowing from this, it was reasonable of her to 'park' the issue at this stage. In making this finding I have taken into account that the Claimant is not legally represented and if she got a letter from the Tribunal saying an issue would be dealt with at the hearing she would not be aware that even if the Tribunal said this, there might still be a costs risk for her (the costs warning was to come later – see below). She also might reasonably (albeit wrongly) conclude that the decision was to be the Tribunal's and not something she had to decide or do anything about herself. That was the situation as at August 2021.

22 The First Respondent made removal applications to the Tribunal on 7th October 2021 and 1st November 2021.

23 However by letter dated 3rd November 2021 and a month before the hearing was listed, the First Respondent's solicitors sent a without prejudice as to costs letter advising the Claimant that the costs were around £6,000 but that those costs would not be pursued if she withdrew her claim against the First Respondent by 5th November 2021. The Claimant did not reply to that letter.

24 The Claimant's representative Mr Ribero however emailed the Tribunal on 3rd November 2021 about this costs threat . He did not copy in the Respondents to his email to the Tribunal. His email said: 'I have just received this email from the respondent's solicitors threatening to sue me for £6000 of costs if I don't remove the 1st respondent from the

proceeding within the next 48 hours. Can someone please call me urgently on [mobile number] to let me know if this is something I need to take seriously? Many thanks Steven Ribero'.

25 On 4th November 2021 the Tribunal wrote to all parties about the removal applications dated 7th October 2021 and 1st November and referred to the Claimant's email sent the day before (but did not enclose a copy of it). The letter advised the parties that the removal application would be addressed at the 1st December 2021 hearing.

26 Mr Ribero sent a second email on 4th November 2021 (again not copied to the Respondents) which said: ' I have just been threatened once again, it seems that for some reason they cannot wait till the 1st December for this to be addressed. Many thanks for sending that email to them earlier today stating that the issue will be addressed on the 1st. In the meantime, I will reply with you on CC to state that I will not be bullied and that the court will only address this issue on the 1st Dec. Many thanks Steve Ribero.'

27 Given the above findings as to the state of play in August 2021 the issue is whether given receipt of the costs warning letter the Claimant should in November 2021 at this stage have withdrawn her claim against the First Respondent. Given it was only a month now until the hearing, the claim had started in December 2020 and the Claimant had been told twice by the Tribunal (in August 2021 and again now in November 2021) that the issue of the First Respondent's removal would be decided at the hearing on 1st December 2021 I conclude that the Claimant did not act unreasonably in relying on what the Tribunal had told her, even after receipt of the costs letter dated 3rd November 2021 and up until the hearing date. She had told the Tribunal about the costs threat specifically and had been told again to wait for the hearing on 1st December 2021.

28 Had she been legally represented that outcome might have been different because if legally represented she could have been expected to know firstly that the Tribunal saying that the issue would be dealt with at the hearing was not a complete answer (ie it did not preclude a costs award being made because her conduct of her claim might still fall within Rule 76), secondly that the only respondent should be her contractual employer and thirdly that including the wrong respondent incurs costs for that respondent.

29 I therefore find that the Claimant did not act vexatiously and/or unreasonably in failing to withdraw her claim against the First Respondent after she presented it and up to the hearing on 1st December 2021, although accepting it was very irritating for the First Respondent.

Relocating without the bundle at the hearing on 1st December 2021

30 At the beginning of the hearing on 1st December 2021 the relevant issues were identified as the issue of who was the correct respondent and the dissolution of the Second Respondent after the claim had been presented. There was a break around 10.55am for 20 minutes and then the hearing resumed. No decision had yet been taken about removal of the First Respondent before the Claimant says she had to relocate from being at home (because called in to work) to taking the call outside her workplace from her car (now without the bundle). The Claimant's submission (para 38) says that removal of the First Respondent had been decided before the break but it had not, the order to remove the First Respondent

was not made until after the break and it was not right for her to conclude that after the break the rest of the hearing would only be a formality or that she would not be required to say anything; she had not said that she agreed to the removal of the First Respondent at the outset of the hearing so it was still a live issue at the point she relocated.

31 However although the hearing was postponed on 1st December 2021 for two reasons (the Claimant's ability to give evidence without the bundle and the issue of the dissolution of the Second Respondent) the First Respondent was subsequently removed by Tribunal order confirmed on 30th December 2021. This is therefore not a case where the First Respondent wasted costs on 1st December 2021 and will have to come back again for another hearing; the objective for the First Respondent was her removal and the order for her removal was made at the hearing and subsequently confirmed by Tribunal letter dated 30th December 2021. It is only potentially the Second Respondent who may become re-involved in the claim if there is a successful application to restore it to the Register of Companies. The First Respondent was not prejudiced by the postponement because in practice she will not have to re-attend. In that context whilst the Claimant's handling of what she did when called in to work was unhelpful and disorganised, in practice it had little effect on the First Respondent.

Reasons

32 Taking the above findings of fact into account the First Respondent has not met the high threshold required for a costs award looking at all the circumstances. Whilst not having legal representation is not a complete excuse, I have taken it into account in the light of what the Claimant was saying and doing and in the light of what she was being told by the Tribunal (which at times was not assisted by the parties not copying each other into their correspondence with the Tribunal).

33 Taking the above findings of fact into account the First Respondent has not shown the grounds in Rule 76(1)(a) or 76(1)(b) are made out, taking into account the nature, gravity and effect of the claimed unreasonable conduct. Although the Claimant relocated without the bundle (potentially relevant to an order under Rule 76(2), para 8 page 30) I conclude that that behaviour (although unhelpful and disorganised) does not support the making of a costs award in all the circumstances, particularly taking into account the limited practical effect of that on the First Respondent.

34 The First Respondent's costs application is therefore dismissed.

Employment Judge Reid
Dated: 10th February 2022