



EMPLOYMENT TRIBUNALS

Claimant: Ms U Carrigan

Respondent: (1) Generator Hostels Limited
(2) Kennedy Pearce Consulting Limited

Heard at: Central London Employment Tribunal (By CVP)

On: 12, 13 and 14 July 2022

Before: Employment Judge Keogh, Ms Z Darmas, Dr V Weerasinghe

Representation

Claimant: Mr O'Callaghan (Counsel)

First Respondent: Mr Green (Counsel)

Second Respondent: Mr Kumar (Counsel)

JUDGMENT

1. The claimant's claim against the second respondent is struck out as having no reasonable prospects of success.
2. The claimant's claim of breach of contract against the first respondent is successful. The first respondent shall pay to the claimant the agreed net sum of £836.33.
3. The claimant's claim of sex discrimination against the first respondent is unsuccessful and is dismissed.
4. The second respondent's costs application against the claimant is refused.

REASONS

1. We have been asked to provide written reasons in respect of the second respondent's costs application only.
2. On the first day of the hearing after the claim against the second respondent was struck out, it was indicated the second respondent would make an application for costs. A written application has been received and we had

the benefit of oral submissions from both the second respondent and the claimant. The claimant has provided documentation as to her income, savings and outgoings.

3. Rule 76 of the Employment Tribunals Rules provides:
 - (1) A Tribunal may make a costs 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;
 - (b) any claim or response had no reasonable prospect of success...
4. We remind ourselves that costs do not follow the event in Tribunal proceedings and cost awards should be the exception not the rule.
5. The second respondent contends that the claimant has acted unreasonably in both bringing the proceedings and in the way in which she has conducted the proceedings, alternatively that the claim had no reasonable prospect of success.
6. In respect of conduct, the second respondent argues that the claimant has been unable properly to articulate a legally recognisable claim for discrimination against it. The claimant was given an opportunity to release the second respondent from the proceedings at the first preliminary hearing on 8 December 2021. The claimant has sought to introduce new allegations against the second respondent at the final hearing without any supporting evidence when seeking to introduce a newly formulated discrimination claim, meaning that the second respondent has had to incur costs and prepare for the final hearing without knowing exactly what was alleged against it. It is noted that the claimant also delayed providing a witness statement, which required the second respondent to apply for an unless order, which was granted.
7. The second respondent also refers to without prejudice correspondence exchanged between the parties which shows that it made financial offers to settle the claim in the sums of £500 on 10 June 2022, £2,500 on 17 June 2022 and £1,650 on 20 June 2022 (which was reduced as a result of the second respondent incurring a further instalment of Counsel's fees). These offers were rejected, the claimant describing them as 'a bribe and a threat'.
8. The second respondent notes that the claimant was legally represented at least since the second preliminary hearing on 23 February 2022. It was noted in oral submissions that the focus at the preliminary hearing was more on the first respondent than the second respondent, who was equally unrepresented at that point in time. The way in which the case was put at that stage was later abandoned.
9. It is further argued that the claim at no time had any reasonable prospect of success. This is borne out by the way in which the claimant abandoned its claim against the second respondent as articulated by Counsel at the

second preliminary hearing, and the timing and nature of the final articulation of the claim which relied on factually incorrect assertions.

10. The claimant opposes the application. Mr O'Callaghan noted that the second respondent had already made a strike out application which was unsuccessful. The claimant was not represented at the first preliminary hearing and Employment Judge Brown considered there may be an agency argument. Employment Judge Henderson declined to strike the case out. The fact that this Tribunal struck out the claim should not mean that costs should follow. We are asked to take into account the conduct of the second respondent, which led to the contract being revoked and to proceedings being brought. Mr O'Callaghan confirmed he was instructed on 4 July 2022. The claimant confirmed that she had no legal advice between the second preliminary hearing and the instruction of Mr O'Callaghan. She relied on ACAS to mediate between her and the second respondent in negotiations.
11. We have first considered whether the claimant was unreasonable in bringing proceedings against the second respondent. She was a litigant in person when proceedings were commenced. Her pleadings show her view that the actions of the second respondent and first respondent were inextricably linked. We do not consider it was unreasonable to issue the claim. At the time of the first preliminary hearing consideration was given to whether the claim against the second respondent should be withdrawn. It could not be struck out as it was a closed hearing. It was Employment Judge Brown who identified that there may be an agency claim. The claimant would have considered at that point that she had a reasonable claim to proceed with.
12. The claimant was represented at the second preliminary hearing. At that point Employment Judge Henderson considered the claims and declined to strike them out. While the focus was more on the first respondent, Employment Judge Henderson must have been of the view at that stage that the claim against the second respondent had some prospects of success. It is noted that the claim was formulated in a different way at this time, namely that the allegations of less favourable treatment as against both respondents was that they had repeatedly misinformed the claimant that the role was work from home (as recorded at paragraph 23 of Employment Judge Henderson's judgment). The claimant at this stage would again have considered that her claim had reasonable prospects. In her view the claim was still inextricably linked to the claim against the first respondent. It is also clear that the claimant felt very aggrieved by the second respondent's actions.
13. We come to the period after the second preliminary hearing when offers were made. The sequence of events is important. On 10 June 2022 the claimant was offered £500 to settle the claim. The first tranche of Counsel's fee were incurred on 13 June 2022 in the sum of £875. A second offer was made on 17 June 2022 of £2,500. On 20 June 2022 a second tranche of Counsel's fee were incurred and the offer was reduced to £1,650. During this period the claimant was abroad and had little time to consider time constrained offers. She also had no legal advice, relying solely on ACAS. We do not consider she acted unreasonably during this period.

14. A third tranche was incurred on 27 June 2022. Mr O'Callaghan was instructed on 4 July 2022, and the final tranche of £875 fell due to the second respondent on 8 July 2022.
15. We have considered carefully whether there was sufficient time for Mr O'Callaghan to become apprised of the full papers by 8 July 2022 and to advise the claimant that her claim against the second respondent ought to be reformulated or withdrawn. We note that it was only on the first day of the hearing that Mr O'Callaghan was in a position to take instructions as to how precisely the claim should have been formulated. While we consider this ought to have been done before the hearing commenced, we cannot say that it could reasonably have been done before 8 July 2022.
16. In the circumstances we find that the claimant did not act unreasonably in the way in which she conducted her claim. In so far as the reformulation of the claim on the first day of the hearing was unsuccessful, full costs had already been incurred by the second respondent by that point. There would have been no difference had the claimant voluntarily withdrawn the claim at that time (or any time after 8 July 2022).
17. In relation to the prospects of success, we note that the claim has changed over time. It was Employment Judge Brown who first raised the possibility of an agency argument and Employment Judge Henderson considered there were some prospects of success for the claim as formulated then. We have not decided the case on that basis and cannot say what the prospects of success might have been had that been the way in which the claim was presented at trial. We accept the second respondent's position that there would have been no prospect of success in the claim in the way it was reformulated on the first day, not least because it was an allegation of what the second respondent did in relation to negotiations with the claimant, and not what they did as an agent of the first respondent. However, as we have already found, by the time that claim was formulated full costs for the hearing had already been incurred.
18. In the circumstances we do not exercise our discretion to award costs in this case.

Employment Judge Keogh

___15 July 2022_____

Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

15/07/2022.

FOR THE TRIBUNAL OFFICE