EMPLOYMENT TRIBUNALS

Claimant: **Sonia Bryan**

Respondent: **Travelodge Hotels Limited**

Heard at: **London Central**

On: **30 September, 1 and 2 October 2019**

Before: **Employment Judge A James**
Mrs Chavda
Mr Simon

Representation

Claimant: Ms Romage-Hayes, FRU
Respondent: Ms C Urquhart, counsel

RESERVED JUDGMENT ON COSTS

The unanimous judgement of the Employment Tribunal is that the respondent's application for costs should be dismissed.

REASONS

1. At the conclusion of the hearing an application for costs was made on behalf of the respondent. We heard representations from Ms Urquhart for the respondent, and submissions in reply by Ms Romage-Hayes. We also heard evidence from the claimant in relation to her means. We made orders in relation to the provision of further documents by the claimant in relation to her means and provided the opportunity to the respondent to make any further representations once those documents were available.

   Unreasonable conduct etc

2. Rule 76 of the Employment Tribunal Rules of Procedure 2013 says:

> *(1) A Tribunal may make a costs order or a preparation time 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; or*
> >
> > *(b) any claim or response had no reasonable prospect of success.*

3. The tribunal does not consider that the claimant acted vexatiously, abusively or disruptively in either the bringing of the proceedings or the way that it has been conducted. As for whether she has acted unreasonably in bringing or conducting the proceedings, again we conclude she has not. It is our view that her case was arguable. Discrimination claims are usually very fact-sensitive and this case was no exception. A full hearing was necessary in order to determine the issues.
4. We note that the respondent's solicitors in their letter to the claimant of 28 March 2019 argued that the breach of contract claim had no reasonable prospects of success. The claimant succeeded in that claim at the liability hearing. We clearly do not agree with the respondent's assessment of that claim.
5. As for the sexual harassment claim, as we have indicated in the judgment given on 2 October, some of the matters were very finely balanced and gave us pause for thought, before we were able to arrive at our findings of fact and/or our conclusions. It is our view that the claimant did have an arguable case. The fact that we found against her does not mean that she has acted unreasonably in bringing or pursuing her claim.
6. We also take note of our specific finding that whilst in recalling these events, the claimant was in our view mistaken, she was not deliberately lying, or being dishonest. She clearly believed the case she put and still does.
7. At paragraphs 28 and 29 of the judgment in R (on the application of Unison) v Lord Chancellor [2017] UKSC 51, Lord Reed said:

> *28. … [I]t is necessary to bear in mind that it is generally difficult to predict with confidence that a claim will succeed. That is so for a number of reasons. One is that estimating prospects of success is not an exact science, especially before proceedings have been initiated. Depending on the nature of the case, initial estimates can often change during the course of proceedings as new information comes to light. In that regard, it is relevant to note that the pre-claim questionnaire procedure, under which an employer could be required to provide an explanation for a difference in treatment in advance of a claim being issued, was abolished in 2013. Secondly, a reliable estimate depends on legal judgment and experience, which may not be available to an employee contemplating bringing a claim in an ET: employment disputes generally fall outside the scope of legal aid. Thirdly, employment law is characterised by a relatively high level of complexity and technicality. It is also important to bear in mind that, even if an order is made for the reimbursement of fees, there is a significant possibility that the order will not be obeyed. This will be discussed shortly.*
> *29.* ***More fundamentally, the right of access to justice, both under domestic law***

and under EU law, is not restricted to the ability to bring claims which are successful. Many people, even if their claims ultimately fail, nevertheless have arguable claims which they have a right to present for adjudication. *(Our emphasis)*

8. We note that the parties had been in negotiations, and that they had at one stage been very close to settlement. It is clear from the evidence we were presented with that no binding COT3 agreement has ever been arrived at in this case. The claimant ultimately decided to reject the offer made because she was not happy with the wording of the document and because on reflection, she did not want to settle her claim. We do not consider that was such an unreasonable position to adopt that a costs award should follow.

9. For all of the above reasons we do not consider that this is a case where costs should be awarded pursuant to rule 76(1)(a). As to rule 76(1)(b), i.e. that the claimant's claims had no reasonable prospects of success, we do not consider that test is made out either, for the same reasons as set out above. The sexual harassment claims were arguable and the breach of contract claim succeeded.

10. As for the amendment application, the respondent's representative argued that making that application on the first day was unreasonable conduct of the proceedings. It did take the best part of two hours to deal with that application, but we do not believe that the case would have taken less than three days in any event. The costs application would have meant this would have gone into a third day, regardless. It is certainly the case that the application was made late in the day but as the claimant explained, she had only recently been able to obtain legal representation. Whilst we rejected the application to amend, we do not consider that the claimant acted unreasonably in instructing her representative to make that application.

The claimant's means

11. Where a tribunal considers that a costs award could be made, Rule 84 permits a tribunal to take into account the parties means, in deciding whether to make a costs order; and if so in what amount. Whilst, because of our view in relation to the merits of the application under Rule 76, it is not strictly necessary to decide this matter, we did go on to consider it in any event.

12. Having heard the claimant's evidence in relation to her means and carefully considered the documentation subsequently provided and the representations upon those documents, we concluded that the claimant is of very limited means. She has had little paid work since she was dismissed by the respondent in May 2018. She may be eligible for benefits but she says that she is not currently claiming them, because she does not want to become dependent on them. She has been relying on her son to support her and we have heard evidence, which we accept, that he is no longer in a position to do so. As at 25 September 2019 she appears to be in rent arrears in the sum of over £1,162.03. The claimant also has council tax arrears of £340. She is facing potential possession proceedings as a result of the arrears of rent, unless she comes to and sticks to an agreement with the council to start paying off the arrears. The balance in her bank account on 30 September

2019 was £76.86. The claimant is clearly therefore a person of very limited means.

13. We note from the respondent's solicitors' response to the claimant's documents on means dated 25 October 2019 that a bank giro credit is shown from Compass for July and August 2019. The claimant's representative has clarified that this was wages for four weeks' work carried out during the Wimbledon championships.

14. The respondent also argues that London is an area of high employment opportunities. The claimant maintains in response, through her representative, that the prospects of the claimant obtaining work on a regular basis is poor, due to her continuing poor health.

15. Having taken all the above into account, we are of the unanimous view that even if we had decided that this was a case where it was appropriate to make a costs order, we would have decided not to make a costs order at all because of the claimant's very limited means.

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Employment Judge A James

Date 03 Dec 2019

JUDGMENT SENT TO THE PARTIES ON

05/12/2019

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FOR THE TRIBUNAL OFFICE