EMPLOYMENT TRIBUNALS

Claimant: Mrs K Corrie

Respondent: Pennine Acute Hospitals NHS Trust

Heard at: Manchester (in chambers) **On:** 28 July 2021

Before: Employment Judge Leach

JUDGMENT – RESPONDENT'S APPLICATION FOR COSTS

The respondent's application for costs is refused.

REASONS

Introduction

1. The claimant brought a claim of unfair (constructive) dismissal following her resignation from the respondent on 20 December 2019.

2. The claimant's claims were heard on 20-22 June 2021. All evidence and submissions were heard at that hearing and I gave judgment at the end of the hearing, dismissing the claims. I gave my reasons for the decision orally, at the hearing. There was no request for written reasons under Rule 62(3) Employment Tribunal Rules of Procedure (ET Rules).

3. By email dated 7 July 2022 from Hill Dickinson, the respondent applies for costs. The basis of the costs application is set out below. The claimant resists the application. The respondent indicated that it was content for the application to be dealt with in writing and did not therefore require a hearing. The claimant was provided with an opportunity to elect a hearing but did not.

Respondent's application for costs

4. The respondent applies for costs under rule 76 of the Employment Tribunal Rules of Procedure 2013 ("Rules") on the basis that (1) the claimant's claims had no reasonable prospects of success (Rule 76(1)(b)) and (2) that the claimant acted unreasonably in continuing with her claim after she had received a "costs warning" letter ("Letter") from the respondent's solicitors dated 24 March 2022 (Rule 76(1)(a)).

5. The costs claimed are those legal costs incurred by the respondent, from 25 March 2022 (the day after the Letter was sent) to the conclusion of the proceedings. These amount to £5337.50 net of VAT. The breakdown of costs is in a schedule showing the hours worked and the charging rates applied. The time and rates are both reasonable.

6. I note the following points made by Hill Dickinson in support of the application:-

    a. The Letter was written in terms that were appropriate for a litigant in person.
    b. The Letter urged the claimant to obtain independent legal advice
    c. In her response, the claimant indicated that she had obtained legal advice .
    d. That in her response to the Letter, the claimant denied saying that one of the issues which led to her resignation was a "trivial" matter, which contradicted her own witness statement.
    e. That the claim did not at any stage have any reasonable prospects of success but the claimant should have realised this by late March 2022 and her continuation of the claim form that point was unreasonable conduct.
    f. The respondent is a public body and the time and resources necessarily spent on this case could have been used more appropriately.

The claimant's response to the application

7. The claimant makes various points in response both in an email of 13 May 2022 (which is a detailed response to the Letter, sent to Hill Dickinson) and in her email to the Tribunal dated 6 August 2022 (her response to the costs application).

8. Broadly, the claimant's position is as follows:-
    a. That she honestly believed she had a good claim
    b. That, had she been told by the Judge at case management stage that her case had no prospects of success, she would not have continued, but no such indication was given.
    c. That she received some advice from the Citizens Advice Bureau (CAB) that the Letter was provably an attempt to frighten her in to dropping the case and that she would not have to pay any fees in Employment Tribunal proceedings.
    d. That the claimant was also informed (it is not clear whether this was also from the CAB) that she should not have to pay costs as long as she acted reasonably in her claim and had a reasonable case but there was a chance of costs if the claimant behaved badly or the case had no chance of success.
    e. That at the final hearing there were times when I had been "sympathetic towards" the claimant's reasons for her claim.

9. The claimant was given an opportunity to provide evidence that she wanted the Tribunal to take in to account when considering ability to pay a costs order (see Rule 84 of the ET rules, noted below) but did not do so.

The Law

10. Unlike the general procedure in Civil Courts, costs do not "follow the event" in Employment Tribunals. Traditionally, Employment Tribunals have allowed employees to challenge the fairness of dismissals (or other matters within the jurisdiction of Employment Tribunals) without a threat of costs in the event that a claim is unsuccessful and also for employers to respond to claims, without a threat as to costs in the event that a claimant is successful.

11. The Tribunal Rules provide Tribunals with a power to award costs in the circumstances set out in those Rules.

12. The Rules which are relevant to the respondent's costs application state as follows:

> "*76. When a Costs Order or Preparation Time Order may or shall be made*

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 has no reasonable prospect of success….

……

77. *Procedure*

A party may apply for a Costs Order or a Preparation Time Order at any stage up to 28 days after the date on which the Judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

78. The amount of a Costs Order

(1) *A Costs Order may –*

(a) Order the paying party to pay the receiving party a specified amount not exceeding £20,000 in respect of the costs of the receiving party;

(b) Order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of a detailed assessment carried out either by a County Court in accordance with the Civil Procedure Rules 1998 or by an Employment Judge applying the same principles."

……..

84. Ability to Pay

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."

13. In relation to an application under rule 76(1)(b) (no reasonable prospect of success), this test should be considered on the basis of the information that was known or reasonably available at the start of proceedings (see paragraph 67 of the decision in Radia v Jefferies International Limited [UKEAT/007/18/JOJ] ("Radia"):

> *"Where the Tribunal is considering a costs application at the end of, or after, a trial it has to decide whether the claims 'had' no reasonable prospect of success judged on the basis of the information that was known or reasonably available at the start, and considering how at that earlier point the prospects of success in a trial that was yet to take place would have looked. But the Tribunal is making that decision at a later point in time, when it has much more information and evidence available to it, following the trial having in fact taken place. As long as it maintains its focus on the question of how things would have looked at the time when the claim began, it may and should take account of any information it has gained and evidence it has seen by virtue of having heard the case, that may properly cast light back on that question. But it should not have regard to information or evidence which would not have been available at that earlier time."*

14. Where a party seeking costs makes out one or more of the grounds for costs to be awarded, then the Tribunal must consider whether to award costs. This consideration requires the Tribunal to exercise a discretion. There is no finite list of matters that Tribunals must take into account when exercising this discretion, and the relevant importance of various factors will depend on the particular circumstances of the case. In the case of Barnsley MBC v. Yerrakalva [2011] EWCA Civ 1255 the Court of Appeal provided some guidance to Tribunals when considering costs applications:-.

> *"On matters of discretion an earlier case only stands as authority for what are or what are not the principles governing the discretion and serving only as a broad steer on the factors covered by the paramount principle of relevance. A costs decision in one case will not in most cases predetermine the outcome of a costs application in another case: the facts of the cases will be different as will be the interaction of the relevant factors with one another and the varying weight to be attached to them."*

15. In the 2012 case of AQ Limited v. Mr A J Holden [2012] UKEAT/0021/12 ("AQ Limited") the Employment Appeal Tribunal noted the following in relation to costs applications against litigants in person:-

> *32. The threshold tests in rule 40(3) are the same whether a litigant is or is not professionally represented. The application of those tests may, however, must take into account whether a litigant is professionally represented. A tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals; and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent themselves. Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. As Mr Davies submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. Tribunals must bear this in mind when assessing the threshold tests in rule 40(3). Further, even if the threshold tests for an order for costs are met, the Tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice.*
>
> *33. This is not to say that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity.*

16. That judgment considered an Employment Tribunal's refusal to make a costs order under the previous version of the Tribunal rules (2004) which is why there is a reference to rule 40(3) rather than rule 76. However, the principles noted in the extract above in relation to litigants in person remain relevant.

17. When considering whether a claim had any reasonable prospects of success (for the purposes of Rule 76(1)(b)) it is clear that Tribunals are required to assess this objectively (see for example Hamilton-Jones v. Black EATS/0047/04). Where a claim, assessed objectively, has no reasonable prospects of success, it is irrelevant (for the purposes of rule 76(1)(b)) that the claim has been brought by a litigant in person. However, and as made clear by the AQ Limited case, the fact that the claim was brought by a litigant in person may be relevant when the tribunal goes on to consider whether to make a costs order once the threshold of 76(1)(b) has been met.

18. It is not uncommon for an offer of a financial settlement to include a notification, that an application for costs will be made if the offer is rejected and the case pursued. In this case, there was no offer of a financial payment. Even so it was an offer of settlement as it provided the claimant with an opportunity to withdraw

her claim without adverse financial consequences. These types of letters are sometimes called "Calderbank" letters.

19. In other jurisdictions a Calderbank letter can be an effective tactic, ensuring that a party rejecting a financial settlement has some confidence that he or she will recover more than was offered at a trial. It is clear that "Calderbank" letters do not lead to a successful costs application in Employment Tribunals, in the event that the party rejecting the offer does not succeed at a full Tribunal hearing. It is Rule 76 which sets out the circumstances in which costs orders may be made. However, Tribunals can take these types of letters into account in appropriate circumstances when applying Rule 76 (see for example Anderson v. Cheltenham & Gloucester plc UKEAT/0221/13).

Analysis and Conclusion

Did the claim of constructive dismissal have no reasonable prospects of success?

20. Whilst I found against the claimant, that finding was made on the basis of the evidence before me having heard and considered that evidence. The judgment in Radia (see para 13 above) makes clear that the no reasonable prospects test must be applied as things would have looked at the start of the case, not with the benefit of hindsight when all findings of fact have been made.

21. The findings of fact that I was required to make included:-

    a. The terms on which the claimant was engaged in 2016, following retirement and re engagement. In a flexible retirement application, the claimant had applied for night working only. The respondent's internal communications indicated that was not possible but there is nothing in writing to show that this was then communicated in such clear terms to the claimant. (a letter dated 6 April 2016 uses the term "internal rotation" but the letter also states that the claimant's flexible retirement request had been accepted). Seemingly, the claimant was not provided with any written contract on her re engagement.
    b. Whether a discussion had taken place between the claimant and Angela Senior (AS) in 2016 in which, according to the claimant, she was given assurances she would not be asked to work days going forward
    c. The inconsistency of approach over the years as far as requesting/requiring the claimant to work some day shifts. The claimant was not asked to work any days in 2017 or 2018. That could have been seen as supporting the claimant's version of events in relation to the discussions with AS.

d. Whether to accept the evidence of Mr West in relation to a conversation in which Sherryl Thomas had said that part time staff only need to do one "bad shift" over Christmas.
e. Whether a night shift that straddled Christmas Eve and Christmas day was a "bad" shift.

22. It is also relevant to take some account here of the fact that the respondent did not make an application for a deposit order. It was probably right not to have done so. Prior to the final hearing and the findings of fact made, it was unlikely that a Tribunal would have determined that the claimant had little prospects of success (the lower threshold applicable to a deposit order application).

23. I do not find that the constructive dismissal claim falls in to the "no reasonable prospect of success" category.

24. I do not find that the claimant's conduct was unreasonable in rejecting the offers of settlement and continuing with her claim. The claimant considered that she had reasonable prospects of success and was entitled to pursue her claim. Her claim failed because the findings of fact went against her.

25. As the threshold in Rule 76(1)(a) and/or (b) has not been met, I do not need to go on to consider whether a costs order should be made.

Employment Judge Leach
Date: 20 October 2022

JUDGMENT AND REASONS SENT TO
THE PARTIES ON 21 OCTOBER 2022

FOR THE TRIBUNAL OFFICE