EMPLOYMENT TRIBUNALS

Claimant: Miss H Dainty

Respondent: Horizon Care and Education Group Limited

Heard at: By video **On:** 13, 14 September 2022
In chambers 10 February 2023

Before: Employment Judge Moore
Mrs J Kiely
Mr P Pendle

Representation
Claimant: Mr Ward, litigation friend
Respondent: Mr L Ashwood, Solicitor

JUDGMENT

The respondent's application for costs is refused.

REASONS

Background and Introduction

1. The ET1 was presented on 14 January 2022. The claimant brought claims of disability discrimination and protected disclosure detriment. The hearing was listed on 13 and 14 September 2022, by video. The evidence was completed on 13 September 2022. On the morning of 14 September 2022 submissions were about to be made when the claimant's representative informed the Tribunal that the claimant wanted to withdraw her claim. The reasons were having heard the evidence the day before, revisiting the work allocations and in light of the claimant's mental health. I explained to Mr Ward the risk of costs in withdrawing and that a judgment on withdrawal would be issued which would be final, Mr Ward confirmed the claimant understood this and still wished to withdraw.

2. A judgment on withdrawal dated 14 September 2022 was issued on 27 September 2022.

3. On 7 October 2022 the respondent made an application for costs under Rule 76 (1) (a) Employment Tribunal Rules of Procedure 2013 ("the Rules") on the basis of vexatious and / or unreasonable conduct. The respondent asked for this to be determined without a hearing.

4. There was a delay in referring this application to a Judge. It was referred on 22 November 2022 and an order was made to seek the claimant's comments. This was not actioned until 19 December 2022. The claimant's comments were sent in an email dated 2 January 2022. The claimant did not ask for a hearing. As such the application has been determined on the papers by me without a hearing.

Grounds for application

5. The respondent sought their costs following exchange of witness statements for the hearing preparation. The amount claimed is £3864.00. The respondent had offered the settle their claim for costs at £2000 on 27 September 2022 but the claimant did not respond or reply to that offer. This led to the costs application on 7 October 2022.

6. The respondent's grounds for making the application were:

7. Having received the respondents witness statements, the claimant had all the information she later relied upon to withdraw her claim. In withdrawing her claim after the evidence had been concluded but before the judgment was handed down, it was evident the claimant had no regard whatsoever for the outcome of her claim. The claimant had put the respondent to the cost of preparing for and attending the hearing. The claimant acted vexatiously in continuing with her claim beyond the exchange of witness statements and/or unreasonably in continuing with her claim following the exchange of witness statements.

8. The respondent had previously asserted that the claimant had been represented by a retired solicitor. For the avoidance of doubt Mr Ward is not a retired solicitor but was described by the claimant as a family friend who had experience of tribunal cases.

The claimant's response

9. The claimant's response set out a summary of her claim that due to her arthritis condition, she could not drive for more than 1.5 hours which put her out of range of any of the respondent's client schools. The claimant was made redundant by the respondent she could not travel due to her disability. The respondent had also stated that there was a reduction in the requirement for the work she was undertaking. The claimant maintained that the basis of her case was that she would have been able to undertake online teaching and administration or that the online teaching others undertook could be passed to her.

10. The claimant asserted that the respondent's witness informed the tribunal that the respondent had no online teaching assignments as they had ceased to undertake this type of work. This meant that the claimant's case that there was a reasonable adjustment fell away and it was clear that to continue would have been fruitless. There was a reference to saving the tribunal any further time. The claimant maintained that her actions were not malicious, vexatious or unreasonable in the circumstances.

11. At the hearing, one of the reasons the claimant gave for withdrawing her claim was her mental health. It had been conceded that the claimant was disabled by reason of anxiety.

The Law

12. The power to award costs is set out in Rule 76 Employment Tribunal Rules of Procedure 2013 ("the Rules"). This provides for a two stage test:

76 When a costs order or a 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;
(b) any claim or response had no reasonable prospect of success;

13. **Radia v Jefferies International Ltd [2020] IRLR 431, EAT** sets out the approach go be taken when considering a costs order. The first question for a tribunal considering a costs application is whether the costs threshold is crossed, in the sense that at least one of r 76(1)(a) or (b) is made out. If so, it does not automatically follow that a costs order will be made. Rather, this means that the tribunal may make a costs order, and shall consider whether to do so. That is the second stage, and it involves the exercise by the tribunal of a judicial discretion.

14. **A Q Ltd v Holden [2012] IRLR 648, EAT** provides that the fact a party is a litigant in person is factor to take into account when assessing the threshold test.

15. Vexatious conduct was defined by Lord Bingham in **Attorney General v Barker 2000 1 FLR 759, QBD (DivCt)** as '*the hallmark of a vexatious proceeding is… that it has little or no basis in law (or at least no discernible basis);* that whatever the intention of the proceedings may be*, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a*

use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process'.

16. In **McPherson v BNP Paribas (London Branch)[2004] EWCA Civ 569** the Court of Appeal considered a case in which there had been a withdrawal of the claim several weeks before the hearing, according to the claimant in that case, on medical grounds. Per LJ Mummery:

"28.. In my view, it would be legally erroneous if, acting on a misconceived analogy with the CPR , tribunals took the line that it was unreasonable conduct for employment tribunal claimants to withdraw claims and that they should accordingly be made liable to pay all the costs of the proceedings. It would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs on withdrawal, which might well not be made against them if they fought on to a full hearing and failed. As Miss McCafferty, appearing for Mr McPherson, pointed out, withdrawal could lead to a saving of costs. Also, as Thorpe LJ observed during argument, notice of withdrawal might in some cases be the dawn of sanity and the tribunal should not adopt a practice on costs, which would deter applicants from making sensible litigation decisions.

29.. On the other side, I agree with Mr Tatton-Brown, appearing for BNP Paribas, that tribunals should not follow a practice on costs, which might encourage speculative claims, by allowing applicants to start cases and to pursue them down to the last week or two before the hearing in the hope of receiving an offer to settle, and then, failing an offer, dropping the case without any risk of a costs sanction.

30.. The solution lies in the proper construction and sensible application of rule 14 . The crucial question is whether, in all the circumstances of the case, the claimant withdrawing the claim has conducted the proceedings unreasonably. It is not whether the withdrawal of the claim is in itself unreasonable…

Discussion

17. The respondent's final witness was Rachel Martin. Ms Martin was the Head Teacher of the respondent. Ms Martin's witness statement had set out why the claimant had been made redundant. The claimant had been undertaking online teaching of 7.5 hours per week. The respondent had 121.5 hours teaching work with 187.5 hours teaching hours available across their employees. The statement explained the only online teaching available was the pupil allocated to the claimant and there was a move away from teaching remotely. Therefore, the claimant's assertion that she learned this when Ms Martin gave evidence at the hearing was in my judgment not sustainable. The claimant must have been aware of this after exchanging witness statements and not at the hearing when Ms Martin was cross examined. Further, the respondent had also explained this to the claimant during the redundancy consultation procedure.

Conclusions

18. The explanation provided at the hearing when the claimant communicated her decision on the beginning of the second day was having heard the evidence the day before, revisiting the work allocations and in light of the claimant's mental health.

19. I do not consider that the conduct of withdrawing the claim at the stage it was in this case amounted to *vexatious* conduct. The effect was not to subject the respondent to inconvenience, harassment and expense out of all proportion nor was it an abuse of process. In my judgment, the claimant realised after hearing the live evidence that her claim was unlikely to succeed and she believed in withdrawing that it would save a further wasted day, as stated in her response to the application.

20. I must consider whether the claimant has conducted the proceedings unreasonably in all the circumstances, and not whether the late withdrawal of the claim was in itself unreasonable (**McPherson v BNP Paribas**).

21. This was not a speculative claim. The claimant complied with all directions for the preparation of the claim including disclosure of medical records, providing an impact statement, schedule of loss, disclosure and preparation of a witness statement. In my judgment the claimant was committed to the claim and did not bring a claim merely to seek a settlement. This did not accord with her overall conduct of the proceedings and further, had this been the case she would have been more likely to have withdrawn before the hearing rather than half way through.

22. The evidence and the work allocations were not new evidence that arose at the hearing but were the subject of evidence in witness statements and also documents in the bundle.

23. Tthe respondent's case was clear from the point the parties had exchanged statements (which is the point from which costs are sought). Nothing new or surprising arose at the hearing in evidence that could have been reasonably relied upon by the claimant as grounds to abandon her claim part way through the hearing.

24. I do however consider that withdrawing the claim halfway through the hearing, when there had been no material change in circumstances amounted to unreasonable conduct by the claimant. The claimant knew the respondent's case. It had been well rehearsed and consistent from the outset of the redundancy consultations, the response and the witness statements exchanged before the hearing.

25. I therefore go on to consider whether to exercise my discretion and order for costs.

26. I have had particular regard to Thorpe LJ's observations recorded in **McPherson v BNP Paribas** that notice of withdrawal might in some cases "be the dawn of sanity and the tribunal should not adopt a practice on costs, which would deter applicants from making sensible litigation

decisions."

27. Withdrawal on the morning of the second day (and final day) of the hearing did not save any costs. These would have been already incurred but it does not follow that the claimant would have understood this to be the case. As a litigant in person, and based on her reference to withdrawing to "save the Tribunal further time", I find that the claimant would have thought otherwise and that she would be saving time and expense of the Tribunal and the respondent by withdrawing when she did. Litigants in person must not be held to the same standard as those professionally represented.

28. The claimant was given a warning about the costs consequences and elected to withdraw when the case was almost concluded. This was not a sensible litigation decision in regard to timing of the withdrawal. However it would be unfortunate if a party was deterred from withdrawing a claim even part way through a hearing for fear of costs electing instead to continue with an unmeritorious claim having heard the evidence believing if they did so, they would be at less at risk of costs. This would be a practice cautioned against in **McPherson v BNP Paribas.**

29. In exercising my discretion, I have also taken into account the claimant's mental health which was cited as one of the reasons for her withdrawing on the day and that she is a litigant in person.

30. Having balanced the above factors I have decided not to exercise my discretion and refuse the application for costs.

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Employment Judge S Moore

Date: 16 February 2023

JUDGMENT SENT TO THE PARTIES ON 20 February 2023

FOR THE TRIBUNAL OFFICE Mr N Roche

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