THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms D Daoud	**v**	**(1) The Governing Body of the Holy Family Catholic Primary School** **(2) London Borough of Ealing** **(3) Thomas Doherty**

Before: Employment Judge Glennie

JUDGMENT ON COSTS APPLICATION

The judgment of the Tribunal is that the Claimant shall pay to the Second Respondent costs assessed at £3,000.

REASONS

1. By a reserved judgment and reasons sent to the parties on 13 October 2022, following a preliminary hearing on 27 September 2022, I determined among other matters that the claim against the Second Respondent should be struck out on the grounds that it had no reasonable prospect of success. On 9 November 2022 the Second Respondent ("Ealing") applied for a costs order against the Claimant. The parties have agreed that I should consider and determine the application on paper.

2. In determining this application I have had regard to the following submissions:

   2.1 Ealing's application dated 9 November 2022.

   2.2 An email from the Claimant's solicitors dated 18 November 2022.

2.3 Written submissions on behalf of the Claimant dated 30 November 2022.

2.4 An email from Ealing dated 7 December 2022 containing further submissions in response to those on behalf of the Claimant.

3. Rule 76 of the Rules of Procedure includes the following provisions about costs:

(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……unreasonably in either the bringing of the proceedings (or part) or the way in which the proceedings (or part) have been conducted; or
(b) Any claim……had no reasonable prospect of success.

4. Rule 84 provides as follows:

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.

5. Costs do not generally follow the event in Tribunal proceedings, and costs orders are the exception rather than the rule. A costs order can only be made if one or more of the conditions in rule 76 is met. If that is the case, there is in addition a discretion to be exercised: the making of a costs order does not follow automatically.

6. Ealing contends that the claim against it (which was limited to unfair dismissal) had no reasonable prospect of success, and that the Claimant acted unreasonably in bringing and pursuing the claim. (In using the term "the Claimant" I do not draw any distinction between the Claimant herself and her solicitors, as no one seeks to rely on any such distinction).

7. So far as the prospects of success are concerned, I have already determined that, as at the date of the preliminary hearing, the claim had no reasonable prospect of success. This was because I held that the effect of section 36(2) of the Education Act 2002, in the circumstances of the present case, was that:

"……in practical terms, the only possible outcome of the decision as to who was the Claimant's employer was that it was the First, and not the Second Respondent. Section 36(2) does not allow for any other outcome".

8. It is relevant to summarise how the contention to this effect was advanced by Ealing in the course of the proceedings. In its Response to the claim, Ealing relied on section 36 and pleaded that only the First Respondent could be the Claimant's employer. The First Respondent in its Response agreed that it was the employer and that Ealing could be removed from the proceedings. The point was discussed at a preliminary hearing on 24

March 2022, and Employment Judge Grewal made an order requiring the Claimant to provide further information, including in support of her request to retain Ealing as a Respondent.

9. In her further and better particulars provided on 20 April 2022 the Claimant said the following on the point in question:

> "3. The Claimant maintains that the Second Respondent was her employer and should remain party to this claim.
>
> "4. The Second Respondent has issued a number of documents to the Claimant, including contract renewal documents, payslip and pension documents. Furthermore, the Second Respondent was named as the Claimant's employer on her P45."

10. As I observed in my reasons for striking out the claim against Ealing, it was the case that Ealing was identified as the Claimant's employer in the P45 issued to her and in other documents. The other documents included a P60 and the Claimant's payslips. Additionally, in 2018 and 2020 letters were sent to the Claimant on Ealing headed paper stating that agreement had been given to extending her fixed term contract (the first being signed on behalf of the School Office and the second by the Head Teacher, the Third Respondent). The contracts themselves, however, identified the First Respondent as the Claimant's employer.

11. On 11 May 2022 Ealing sent amended particulars of its Response in which it said that it had carried out an HR and payroll function for the First Respondent, hence the appearance of Ealing's name on the documents, but repeating that it was not the Claimant's employer. Ealing again cited section 36, and made a further application for removal as a respondent, saying that it would regard continuing with the claim as unreasonable conduct. Ealing sent further correspondence along the same lines on 28 July and 11 August 2022, including warning of a costs application.

12. As I have already stated, at the preliminary hearing I accepted the submission that the effect of section 36 was that Ealing could not have been the Claimant's employer, and that the claim therefore had no reasonable prospect of success. For the purposes of the present application, I find that at all times the claim against Ealing had no reasonable prospect of success, because of the effect of section 36. That condition for the making of a costs order has therefore been established.

13. I have also considered whether the Claimant's conduct of the proceedings was unreasonable. On this point, I observed in my earlier reasons that I had no difficulty seeing why a claimant would join Ealing as a respondent when they had received a P45 showing the employer's name and address as the London Borough of Ealing, etc. I remain of the same view, which is strengthened by the other documents referred to above and which are consistent with Ealing putting itself forward as the employer. I find that it

was not unreasonable conduct of the proceedings to join Ealing as a respondent in the first instance.

14. I have then asked myself whether the position was any different once the section 36 point had been taken in the response, or after Ealing had provided amended particulars of its response in May 2022 (the costs application in fact being limited to the latter period).

15. The submissions on behalf of the Claimant assert that she was not acting unreasonably in persisting in her belief that Ealing was her employer until the Tribunal determined that she was wrong. I reminded myself that at the preliminary hearing counsel for the Claimant submitted, and I accepted, that Ealing had not provided any evidence in support of the stated HR and payroll function. I could not, and cannot, see any reason to doubt what Ealing said about this, but I consider that it is not in itself unreasonable for a claimant not to accept an explanation given by a respondent which is not supported by evidence. This is particularly so when the claimant concerned has documents showing the relevant respondent as her employer.

16. There remains the (ultimately successful) argument under section 36. As I have stated, this was relied upon in Ealing's response, and was referred to in the later correspondence. Ealing maintains that the Claimant's solicitors never addressed the point in correspondence, and I have not been referred to anything that suggests the contrary. At the preliminary hearing, counsel for the Claimant addressed me on the reasons why the Claimant believed that Ealing was her employer, and referred to the lack of evidence about the HR and payroll function, but raised no argument against the section 36 point.

17. I find that it was unreasonable conduct of the litigation to persist with the contention that Ealing was the Claimant's employer in the face of the section 36 point, and without relying on any argument directed to that point. The situation might be different if some reasonable argument against what Ealing was saying about the effect of section 36 had been raised, but none was. I do not, however, consider that the conduct of the proceedings became unreasonable in this respect as soon as section 36 was raised. Section 36 is not, so far as I am aware, a well-known provision, and the Claimant and her advisers would have needed to research it and consider it before conceding the point (as it seems to me inevitable that they should have done on full consideration of it).

18. I find that the conduct of the proceedings in this respect was unreasonable as from around late May 2022, being a reasonable period after Ealing had reiterated their position on 11 May.

19. I have therefore found that, in both respects, the threshold conditions for making a costs order have been met. I then have to consider whether, as a matter of discretion, I should make a costs order. As a matter of general discretion, I have considered whether the fact that I have found that it was

not unreasonable to have joined Ealing in the first instance should be put into the balance against making a costs order. Given that the application is restricted to the period during which I have found that it was unreasonable to persist with the argument that Ealing was the employer, I find that it should not. This has already effectively been allowed for by restricting the application in that way.

20. Although I have found that section 36 is not a well-known provision, the Claimant has been legally represented throughout. This is not a situation where it might be said, for example, that a litigant in person could not be expected to research and concede a legal argument, and so could reasonably leave it to the Tribunal to determine.

21. A further, particular, matter that may be taken into account in relation to the exercise of the discretion is ability to pay, as provided for in rule 84.

22. On 28 November 2022 the Tribunal sent a letter to the Claimant's solicitors which stated that Employment Judge Baty had ordered her to provide her comments on the costs application, and which continued:

"She should also include information about whether she has the financial means to pay the costs sought and, if she maintains she does not, set out what her income, assets and liabilities are, including providing the evidence to substantiate this."

23. The written submissions on behalf of the Claimant addressed the particular question of insurance, which Ealing had raised in the costs application, saying that the Claimant "is not insured against an award of costs". Although it is suggested by Ealing that this does not exclude the possibility that the Claimant <u>was</u> insured at some relevant stage, I take it as meaning that the Claimant does not now have available to her any insurance cover in respect of the costs application.

24. Beyond that, the totality of what is said on the Claimant's behalf under the heading "Ability to pay / means" is as follows:

"15. If the Tribunal is minded to order the Claimant to pay costs, it is obliged to consider her ability to pay. [This is incorrect: the effect of rule 84 is that the Tribunal may consider this, not that it must].

"16. It should be noted from her schedule of loss submitted to the Tribunal for the final hearing…that the Claimant has not worked since her dismissal from the school in the summer of 2021 and is being supported financially by her family.

"17. Subsequently the Claimant has been ill and has sought medical treatment for the stress and anxiety which has affected her greatly and has affected her ability to work and also makes clear decision making difficult. Presently the Claimant is still signed unfit to work by her GP."

25. This does not comply with EJ Baty's order. What is said is clearly intended to imply that the Claimant is unable to pay any costs, or has a restricted ability to do so; but stating that the Claimant has not worked since her dismissal, is unfit to work and is being supported by her family does not tell the Tribunal what her income, assets and liabilities are. Furthermore, no supporting evidence has been provided.

26. I am conscious that, when deciding to make deposit orders totalling £375 in respect of the claims against the First and Third Respondents, I observed that the Claimant had not then provided any evidence about her ability to pay. Counsel stated, on instructions, that the Claimant had no income but received money from her family, and could afford around £200 - £300. I expressed the view that it was unlikely that the Claimant was over-stating her ability to pay, but had it in mind that I should take care not to effectively strike out the claim by imposing an order that the Claimant could not pay.

27. I have to say that it is surprising that, given what I had already observed in relation to ability to pay as regards the deposit orders, the Claimant has not complied with EJ Baty's order, while still trying to rely on inability to pay with regard to the costs application.

28. The risk of striking out a claim "by the back door" by ordering payment of a deposit that the Claimant cannot pay does not arise in relation to a costs order. Enforcement of such an order lies with the County Court, where the Claimant can put forward evidence of her means. She has effectively chosen not to do so at the present stage, and I have concluded that I should not have regard to her ability to pay, either when deciding on whether to make a costs order, or in deciding the amount of such an order. In fact, the approach that the Claimant has taken means that I am not able to reach a conclusion as to what her ability to pay may be.

29. Rule 78(1)(a) provides that a costs order may order the paying party to pay a specific amount, not exceeding £20,000.

30. Ealing have produced a schedule seeking the sum of £8,612.50, set out with reference to 25 items. While it is not strictly necessary for the exercise of the Tribunal's costs jurisdiction to find that the costs were caused by the unreasonable conduct, I accept Ealing's argument that all costs incurred after the Claimant was put on notice of their status were so caused, in the sense that the claim against Ealing should have been withdrawn.

31. It is submitted on behalf of the Claimant that the sum claimed in the schedule is excessive; Ealing dispute this. I have to consider this by reference to what it would be reasonable to require the paying party to pay, which may not necessarily be the same as what would be reasonable as between solicitor and client. It would not be proportionate, nor practical in the absence of detailed submissions, to go through the schedule item by item. I make, however, the following general observations:

31.1 There are 4 items (numbers 7, 10, 13 and 14) which include reviews of the file or documents being prepared within Ealing, rather than reviews of documents received from the Claimant or the Tribunal. I find that it is not reasonable to charge this work to the paying party. The total claimed for these items is £1,193.80. Making some allowance for work other than reviewing, I find that there should be a reduction of £900.

31.2 Items 11, 12 and 14 relate to preparation for the preliminary hearing and total 6 hours 50 minutes at the higher rate of £282. Given the previous correspondence setting out Ealing's position on the section 36 point and its HR function, I find that a further 2 hours would have been reasonable, and that there should be a reduction of £1,363 (4 hours 50 minutes x 282 per hour).

31.3 Items 19 and 20 claim 2 hours 30 minutes in relation to the costs application, again at the higher rate. Items 21 to 23 claim 2 hours 58 minutes at the lower rate in relation to the costs application and schedule. Items 24 and 25 claim a further 5 hours 30 minutes at the higher rate in relation to reviewing the schedule and application, amending the schedule and further drafting the application, and emailing the Tribunal. I find that in addition to items 21 to 23, a total of a further 2 hours 30 minutes at the higher rate would have been reasonable to allow for liaising with the client and reviewing the draft schedule and application, and that there should be a reduction of £1,551.

32. The total of the above reductions is £3,814, which would leave a total of £4,798.40 when deducted from the figure on the schedule. I have then asked myself whether, looked at overall, this would be a proportionate amount to order given the nature of the issue. Noting that I have not so far made any finding about the use of the higher and lower rates, and again taking a broad approach, I find that the sum of £3,000 is proportionate.

33. I therefore make a costs order in the sum of £3,000, to be paid by the Claimant to the Second Respondent.

Employment Judge Glennie

Employment Judge Glennie

Dated: ……13 March 2023……..

Judgment sent to the parties on:

13/03/2023

For the Tribunal Office

Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.