EMPLOYMENT TRIBUNALS

Claimant: Mrs R Sweet

Respondent: Fairford Opticians Limited

Before: Employment Judge Leith

JUDGMENT

The Respondent's application for a Preparation Time Order is dismissed.

REASONS

Background

1. The Respondent is an optician's practice. The Claimant was employed by the Respondent as an optical assistant from 11 May 2011 until her dismissal on 9 June 2021. She was dismissed primarily for a telephone call she made on 26 May 2021 from the Respondent's business telephone, during working hours. The telephone call was made to a Ms Satchwell, the partner of her ex-husband. Ms Satchwell complained to the Respondent about the telephone call.

2. On 15 July 2021, the Claimant brought a claim of unfair dismissal against the Respondent. Upon filing their response to the claim, the Respondent applied to have the claim struck out. EJ Lang heard that application on 17 March 2022. He declined to strike out the claim, or to make a deposit order.

3. The Claimant failed to attend the second part of the hearing before EJ Lang. He made an order that unless she provided a statement confirming whether she was continuing with her claim, and setting out what compensatory loss she claimed, her claim would be struck out. The Claimant emailed the Tribunal after the hearing to apologise for her absence. She explained that she had been suffering from a migraine and had fallen asleep. EJ Lang apparently accepted that explanation; he reflected it within his Case Management Order.

4. A further open Preliminary Hearing took place before EJ Hogarth, to consider whether the Claimant had complied with EJ Lang's unless order.

EJ Hogarth concluded that the Claimant had complied with that order, and therefore declined to strike out the claim.

5. The case was then listed for a final hearing on 12 and 13 September 2022. On 26 August 2022, EJ Cadney directed that the proceedings be stayed pending the outcome of parallel criminal proceedings. Those proceedings related to alleged harassment of Ms Satchwell by the Claimant. One of the acts relied upon was the telephone call on 26 May 2021. The parties subsequently notified the Tribunal that those proceedings had concluded with a guilty plea from the Claimant on the day of trial. The Respondent made a further application that the claim be struck out. EJ Livesey lifted the stay and directed that the case be listed for a Preliminary Hearing to consider the Respondent's application.

6. I conducted that Preliminary Hearing on 12 January 2023. I struck the claim out on the basis that it had no reasonable prospect of success, for the reasons I gave orally at the time. Written reasons were subsequently requested, and those were produced on 21 February 2023 and sent to the parties on 7 March 2023. References in [square brackets] are to paragraph numbers in those written reasons.

7. On 30 January 2023, the Respondent made an application for a Preparation Time Order. The Claimant responded to the Respondent's application by an email dated 13 February 2023. The Respondent responded to the Claimant's email on 20 February 2023. On 21 February 2023, the Claimant sent two further emails responding to the Respondent's email. The Respondent responded again on 22 February 2023.

8. Unfortunately, the emails following the Respondent's application did not initially come to my attention. I therefore directed that the Claimant be written to requesting her comments on the Respondent's application. The Claimant responded on 13 March 2023 providing further comments. The Respondent then sent a further response to that email on 15 March 2023.

9. I have considered all of those various emails as setting out the parties' respective cases regarding the Respondent's application.

10. The Respondent requested that their application be dealt with on paper, without a hearing. The Claimant did not express any view on whether the application could be dealt with on paper, although she offered to provide further evidence regarding her means should it be required. I consider that the question of whether the test for making a preparation time order is made out can be justly determined on paper, and that it would be proportionate to do so (not least given that both sides have already had to attend three preliminary hearings).

<u>The issues</u>

11. The Respondent's application is, in essence, put on two bases:
    a. The claim was misconceived and had no reasonable prospect of success, for the following reasons:
        i. The claim was misconceived because the Claimant used the

practice telephone line to commit a criminal offence.

ii. The Claimant told the Respondent's other receptionist, Mrs Piggott, that she had taken legal advice regarding her claim and had been told "she did not have a leg to stand on".

iii. The claim form consisted of one line only, and the Claimant did not disclose any documentary evidence or call any witnesses in support of her claim.

iv. The Claimant's case on whether there were any procedural flaws evolved during the course of the proceedings.

v. The Claimant made an unsubstantiated allegation that she had been in a relationship with one of the Respondent's Directors.

b. The Claimant acted unreasonably in her conduct of the proceedings, in that:

i. She repeatedly failed to copy the Respondent into correspondence with the Tribunal.

ii. She failed to attend the second part of the Preliminary Hearing before Employment Judge Lang on 17 March 2022.

iii. She engaged in harassing, antagonistic and abusive behaviour towards the Respondent,

iv. She falsely told the Tribunal that she was unemployed when she was, in fact, working.

v. She texted the Respondent on 29 December 2021 indicating that she intended to drop the case.

12. The Respondent noted in their application that they had put the Claimant on notice that they intended to seek costs. There was on the Tribunal file various pieces of correspondence from the Respondent to the Claimant in which the possibility of a costs application was raised.

13. The Claimant's position, in short summary, is that:

a. She does not accept that the case had no reasonable prospect of success (although she does accept that it was struck out, and she believed that would be the end of the matter).

b. She was entitled to take her former employer to Tribunal, and two previous Judges had refused to strike her case out.

c. The only reason her case was struck out was due to the difficulty caused by the fact there was a restraining order preventing her from having any contact with one of the Respondent's witnesses [this is simply wrong, as paragraph 43 of the written reasons for the strike out decision makes clear].

d. She is impecunious and could not afford to satisfy a costs order.

e. She had no access to legal advice; and specifically, she denies that she told Mrs Piggott that she had taken legal advice.

14. Within the correspondence outlined above, the Claimant queried why the original costs application was sent by Caroline Handscombe, Finance Officer, on behalf of the Respondent. All of the correspondence was stated to be sent on behalf of the two Directors of the Respondent. I do not consider that the fact that the costs application was prepared by Ms Handscombe undermines that application.

15. The Claimant also, within the various emails that were exchanged regarding costs, advanced a further potential reason for her dismissal – namely, to cover up alleged tax fraud by the Respondents. The Respondent denies the allegation. It is not relevant to the question of whether I ought to make a preparation time order. The Claimant does not suggest that I ought to reconsider my decision to strike out her claim on the basis of the tax fraud allegation. For the avoidance of any possible doubt, there is nothing within the correspondence which would persuade me that I ought to reconsider my decision on that basis.

The law

16. The Tribunal's power to make a costs order or a preparation time order is set out in Rule 76 of the Tribunal Rules, which insofar as relevant provides as follows:

> "76. (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; or
>
> (c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.
>
> (2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party…"

17. Rule 75 defines a costs order and a preparation time order.

18. The process for considering a costs order or a preparation time order is set out in rule 77, as follows:

> "77. 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."

19. Regarding the amount of a preparation time order, rule 79 provides as follows:

> 79.—(1) The Tribunal shall decide the number of hours in respect of which a preparation time order should be made, on the basis of—
>
> (a) information provided by the receiving party on time spent falling within rule 75(2) above; and

(b) the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required.

(2) The hourly rate is £33 and increases on 6 April each year by £1.

(3) The amount of a preparation time order shall be the product of the number of hours assessed under paragraph (1) and the rate under paragraph (2).

20. Costs in the Employment Tribunal are the exception rather than the rule. When considering whether to make a costs order under rule 76(1) or rule 76(2), the Tribunal must apply a two-stage test. First, the Tribunal must consider whether the relevant ground is made out. Secondly, the Tribunal must consider whether it is appropriate to exercise its discretion in favour of awarding costs.

21. When considering whether a claim had no reasonable prospect of success, the Tribunal must look at the information known or reasonably available at the start of the proceedings. The Tribunal must not have regard to information which would not have been available at that time (*Radia v Jefferies International Ltd* [2020] IRLR 431).

22. Costs in the Employment Tribunal are compensatory not punitive. The Tribunal must consider the effect of any unreasonable conduct on the part of the Claimant, although there is no need for a precise causal link between the Claimant's conduct and the specific costs being claimed (*Yerrakalva v Barnsley Metropolitan Borough Council and anor* [2012] ICR 420).

23. The threshold tests in the rules governing the award of costs are the same whether or not a litigant is professionally represented, but the Tribunal should not judge a litigant in person by the standards of a professional representative. Tribunals must bear in mind that lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. The fact that a party is unrepresented may also be a relevant factor in considering whether the Tribunal should exercise its discretion to award costs (*AQ Ltd v Holden* [2012] IRLR 648).

Discussion and conclusion

24. The first basis on which a preparation time order is sought is that the claim had no reasonable prospect of success. I reached the conclusion that the claim had no reasonable prospect of success and struck it out accordingly. But that decision was based on the information available to me at the Preliminary Hearing on 12 January 2023. In particular, it was predicated on the outcome of the parallel criminal proceedings (in which the Claimant pleaded guilty at trial, on 25 October 2022). In my judgement, that rendered the Claimant's contention that the telephone call could not have justified her dismissal no longer arguable [51].

25. For the purposes of considering costs, I must consider rather whether the claim had no reasonable prospects of success at the point of issue. What I

must consider is whether information which was reasonably available showed that the claim had no reasonable prospect of success.

26. In that regard, I am assisted by the decision of Employment Judge Lang on 17 March 2022. EJ Lang declined to strike out the claim, or to make a deposit order. The decision he reached, based on the information available to him at that hearing, was (in essence) that the claim had more than little prospect of success. I must, however, consider what was known to the Claimant about the telephone call – after all, she was the person who made it. I bear in mind that I have not heard evidence from the Claimant. But it is of particular relevance, in my judgment, that:

    a. The Claimant's position throughout has been that she did not accept that the telephone call was as seriousness as the Respondent considered it to be [45a, 47];
    b. The Claimant only pleaded guilty to the criminal proceedings at trial [38]; and
    c. In updating the Tribunal on those proceedings, the Claimant continued to take the position that she may well have successfully defended the criminal proceedings had she not pleaded guilty [38].

27. At the point that the claim was issued, there therefore remained a factual dispute as to the nature of the telephone call (and consequently whether it could have justified her dismissal).

28. Turning then to the remaining factors relied upon by the Respondent for pursuing an order on the basis that the claim had no reasonable prospect of success:

    a. *The Claimant told the Respondent's receptionist, Mrs Piggott, that she had taken legal advice had been told "she did not have a leg to stand on".* This is a case which was struck out before trial. As such, the Tribunal has not made detailed findings of fact. I am not in a position, without hearing evidence, to make any findings of fact about the conversation between the Claimant and Mrs Piggott. Even if I was in a position to do so, a second-hand report of some legal advice from an unspecified adviser would not evidence that the claim had no reasonable prospect of success from inception. It would merely reflect the professional opinion of the adviser. At most, it may have gone to whether the Claimant reasonably believed she had prospects, which is not the right test.

    b. *The claim form consisted of one line only, and the Claimant did not disclose any documentary evidence or call any witnesses in support.* It is not unusual for claims to be skeletally pleaded in the Tribunal; that does not, in and of itself, suggest a lack of merit. It is also, in the experience of this Tribunal, commonplace for the bulk of the documentary evidence to be held by the Respondent, and for the majority of the witnesses to be called by the Respondent. Neither of those factors tend to suggest, in and of themselves, that a claim is misconceived.

    c. *The Claimant's case on whether there were any procedural flaws*

evolved during the course of the proceedings. The Claimant's case regarding procedural fairness narrowed rather than broadened. The thrust of the Claimant's case was that her dismissal was substantively unfair, in that the telephone call could not have justified her dismissal. The fact that her case narrowed somewhat did not suggest that the claim was misconceived at inception.

d. *The Claimant made an unsubstantiated allegation that she had been in a relationship with one of the Respondent's Directors.* Because the claim did not go to trial, that is a matter on which no findings of fact have been made. I can entirely appreciate why the Respondent may have wished to have had the Tribunal make findings of fact on the point, given their position that the allegation was unfounded. But the case was struck out. No findings of fact have been made. The allegation cannot be said to be either substantiated or unsubstantiated – it has not been adjudicated on.

29. The test of "no reasonable prospect of success" is a high threshold. The Claimant was a litigant in person; she lacked either the legal training or the objectivity of a professional representative. Stepping back and looking at all of those factors in the round, I am not persuaded that it was apparent from the information available at the point of issue that the claim had no reasonable prospect of success.

30. I then consider the Claimant's conduct of the proceedings. Again, this must be seen through the lens of the fact that the case has not been to trial, so no detailed findings of fact have been made. Taking the points raised by the Respondent:

a. *The Claimant's repeated failed to copy the Respondent into correspondence with the Tribunal.* In the experience of this Tribunal, it is regrettably not uncommon for parties to fail to copy each other into correspondence; either intentionally or accidentally (I stress that this should not be seen as condoning such a failure). Furthermore, the Respondent sent the Tribunal a letter to the Claimant dated 15 December 2021, in which they (in essence) accused the Claimant of harassment. They indicated to the Claimant that any further correspondence should be sent to a solicitor employed by the Association of Optometrists (who was not on the record). They concluded by saying this:

> "Should there be any further direct communication from you, we will notify the Police."

In light of that, it does not in my judgment lie comfortably in the mouth of the Respondent to criticise the Claimant for failing to copy them into correspondence.

b. *The Claimant's failure to attend the second part of the Preliminary Hearing before Employment Judge Lang on 17 March 2022.* EJ Lang dealt with that in his Case Management Orders, by making an unless order [para 28]. He apparently accepted the Claimant's explanation for her non-attendance. At the subsequent Preliminary

Hearing, EJ Hogarth was satisfied that the unless order had been complied with.

c. *The Claimant's allegedly harassing, antagonistic and abusive behaviour towards the Respondent.* In order to consider this, I would need to make findings of fact about the alleged harassment. I could not do so without hearing evidence from the Claimant about the alleged behaviour. As the Respondent has requested that the application be dealt with on paper, I am not in a position to make findings of fact about the Claimant's behaviour.

d. *The Claimant allegedly falsely telling the Tribunal that she was unemployed when she was, in fact, working.* Again, no findings of fact have been made, and I am not in a position to do so. In any event, the Claimant had indicated that she was not seeking a compensatory award [31]. So even if this was right, I cannot see that it would have affected the conduct of the proceedings.

e. *The Claimant texting the Respondent on 29 December 2021 indicating that she intended to drop the case.* The Respondent did not explain why they considered this to be unreasonable. I can entirely see why a Respondent would be disappointed where, having thought that proceedings were about to be withdrawn, the Claimant then resolved instead to continue them. But I cannot see that the Claimant changing her mind about whether to withdraw her claim was unreasonable.

31. Having considered the factors relied upon by the Respondent individually, I step back and take a look at the Claimant's conduct in the round. Having done so, I do not consider that the Claimant's conduct of the proceedings was unreasonable.

32. It follows that neither of the tests in rule 76(1)(a) or (b) is made out. The Respondent's application therefore fails and is dismissed.

33. For completeness, had I considered that the test in rule 76(1)(a) was made out, I would not in any event have exercised my discretion to make a costs order. The Claimant has been unrepresented throughout the proceedings. She had attended two previous open preliminary hearings at which strike-out of her claims was considered. Her claim was not struck out on either occasion. I can therefore see how the continuation of the proceedings had, in her eyes, been sanctioned by two different Employment Judges. I do not consider it would have been just, in those circumstances, to have made an award of costs on the basis that the claim was (effectively) hopeless from inception and ought not to have been brought.

34. Furthermore, it was clear from the correspondence before me that there was significant factual dispute about the Claimant's means. Had I considered that either of the tests in rule 76(1) was made out, I would have listed the matter for a hearing to consider the Claimant's means before making a costs order.

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Employment Judge Leith
Date 10 April 2023

Judgment & reasons sent to the Parties on 20 April 2023

For the Tribunal Office