



EMPLOYMENT TRIBUNALS

Claimant: Ms M Zigah

Respondents: (1) St Teresa's Catholic Primary School
(2) The Rosary Trust

Heard at: East London Hearing Centre

On: 27 April 2023

Before: Employment Judge Russell

Members: Ms J Forecast
Mr L O'Callaghan

Representation

Claimant: Did not attend and not represented

Respondent: Mr Paul Singha (Counsel)

JUDGMENT ON COSTS

1. The Claimant has conducted proceedings unreasonably, it is appropriate to make an order for costs.
2. The Claimant shall pay 50% of the Respondent's costs as set out in the schedule. The total amount of costs to be paid by the Claimant is £7,805.
3. If the Claimant provides evidence as to means within 28 days, the Tribunal will reconsider the amount of the costs ordered.
4. The amounts paid by the Claimant by way of deposit shall be released to the Respondent and credited against the total amount of costs due.

REASONS

1 By claim form presented on 7 July 2020, the Claimant brought complaints of race discrimination, harassment related to race, victimisation and automatic unfair dismissal because of a protected disclosure. A second claim form was presented on 26 December 2020 largely repeating the factual contexts of the first claim but with some subsequent events included.

2 The case came before me on 11 May 2021 at a Preliminary Hearing to consider strike out and deposit orders. The Claimant was required to pay a deposit of £10 in respect of six factual groups of allegations, described as kitchen assistants, reaction of MK, disciplinary process including investigation, amended duties, grievance process and dismissal. The Claimant was ordered to pay a deposit of £20 in respect of the automatic unfair dismissal claim. Reasons were given for making the deposit orders. In summary, I accepted the Respondent's submission that there was an inherent tension at the heart of the Claimant's case surrounding resignation or dismissal – the Claimant saying that she had been dismissed as part of a deliberate decision to remove her and yet the Respondent immediately allowed her to retract her purported resignation and go through the disciplinary process. Furthermore, I concluded that the Claimant's claim faced difficulties in so far as her case appeared to be that because the Respondent had handled the disciplinary and grievance processed unfairly, there should be an inference of discrimination, victimisation or harassment. In considering the likelihood of success, I concluded that the Tribunal would take into account the effect of the COVID pandemic on schools when looking at question of delay. For these reasons, I concluded that the Claimant had little reasonable prospect of establishing the required causal link and there was not evidence of facts from which the Tribunal could find that there had been discrimination, victimisation or harassment. I set the deposit orders at a low level because the Claimant gave evidence that she was not a woman of considerable means, she had three dependent children, was reliant on state benefits, two part-time jobs, charity and the support of friends and family.

3 The Claimant subsequently paid all deposits other than for the "reaction of MK" and "amended duties" which were therefore not issues to be decided at the final hearing. Immediately following the preliminary hearing on the 19 May 2021, the Respondent made a without prejudice save as to costs offer of settlement of £500 and a reference. The Claimant did not accept. A further without prejudice save as to costs letter was sent by the Respondent on 16 September 2021, offering £1,500, an agreed reference and no costs. The letter analysed in some detail the weaknesses that the Respondent identified in the Claimant's claims. The Claimant did not accept that offer either.

4 The final hearing took place between 16 and 19 November 2021. All claims failed and were dismissed. The Tribunal set out in some considerable detail the findings of fact underpinning our decisions and, from paragraph 76, our conclusions when applying the law to those facts. We consider each of the groups of factual allegations in turn.

- Kitchen assistants. The Tribunal found as a fact that the alleged shower comment had not been made, that Mrs Kelly, the headmistress, had misinterpreted the situation in deciding that it was the Claimant who was the cause of the tension in the kitchen and that she had been unwilling in evidence to admit candidly that she was wrong. As a result, the Tribunal considered that the burden of proof passed to the Respondent but accepted the Respondent's explanation that Mrs Kelly's poor handling of the situation was in no sense whatsoever caused by race.
- Disciplinary process, including investigation. The Tribunal concluded that the decision to suspend the Claimant was caused by an unreasonable assumption by Mrs Kelly that the Claimant was volatile and the cause of problems in the kitchen. It was undoubtedly unfair and unreasonable but we reminded ourselves that unreasonable conduct is not of itself discriminatory conduct. At paragraph 82, the Tribunal explained that whilst the Claimant may feel this was due to race, the

Tribunal disagreed - race had nothing whatever to do with the decision to commence the disciplinary investigation. In considering delay, the Tribunal did not consider it unduly lengthy taking into account the effect of the Covid pandemic on schools from late March 2020. We found that Ms Harris did not conduct a comprehensive investigation into the Claimant's shower allegation but that she did not ignore it. At paragraph 88, the Tribunal accepted the Claimant's case that Ms Harris did not carry out a thorough investigation, in particular due to her unquestioning reliance on information provided by Mrs Kelly and notes of Simone's untested account taken outside of the formal investigation process. At paragraph 89, we concluded that the fundamental flaws in the disciplinary were primary facts from which we could find that it was related to or because of race, such that the burden of proof passed. Having considered the matter more fully, the Tribunal accepted the Respondent's explanations and concluded that race played no part whatsoever.

- Grievance investigation. The Tribunal concluded that Mr Johnson had failed to carry out a full investigation and had unquestionably accepted the evidence provided to him by the headmistress. The Tribunal equally criticised the Claimant's failure to provide Mr Johnson with more information to enable a fuller investigation. Ultimately, the Tribunal however accepted that race played no part whatsoever in the handling of the grievance.
- Dismissal (discrimination and protected disclosure). The Tribunal concluded that the reason for dismissal was the Claimant's refusal to reply to the school on more than one occasion, effectively ignoring a reasonable management request, a new school year was due to start and it was important that the school knew whether or not it would need another kitchen assistant. Her persistent refusal to return and/or to engage with the school was the sole reason for dismissal.

5 Following promulgation of the Judgment and Reasons, the Respondent made an application for its costs in the sum of £15,610 as set out in a cost schedule covering the period from immediately after the Preliminary Hearing in May 2021 until the conclusion of the final hearing in November 2021. The application and costs schedule have been provided to the Claimant who has not commented on either.

Law

6 Rule 39(5) of the Tribunal Rules of Procedure provides that:

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

- (a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and**
- (b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),**

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who

received the deposit, the amount of the deposit shall count towards the settlement of that order.

The effect of rule 39(5) is therefore to create a mandatory but rebuttable presumption of unreasonableness if the paying pursues the specific allegation or argument and loses for substantially the reasons given for the imposition of the deposit order.

7 The need for the reason for failure to be substantially the same does not require the Tribunal to do through the given reasons for the making of the deposit order with a fine tooth-comb, see **Dorney & Others v Chippenham College** UKEAT/0010/97.

8 Although there is a presumption of unreasonableness, this only answers the first threshold question for a costs order. The Tribunal must still go on to exercise its discretion as to whether a costs order is appropriate at all, applying rule 76(1).

9 As made clear by Choudhury P in **Mihailescu v Better Lives (UK) Limited** UKEAT/0184/19/BA at paragraph 17, the structure of these provisions dictates a three-stage approach. The Tribunal must first consider the threshold question of whether any of the circumstances identified in rule 76(1) applies and, if so, it must then consider separately, as a matter of discretion, whether to make an award of costs. If it is decided that an award of costs should be made, the final stage is to decide what amount of costs to award.

10 In **Yerrakalva v Barnsley Metropolitan Borough Council** [2011] EWCA Civ 1255, Mummery LJ held that the Tribunal should consider the whole picture of what had happened in the case and ask whether there had been unreasonable conduct by the Claimant in bringing and conducting the case. If so, it should identify the conduct, what was unreasonable about it and the effect it had. The Tribunal should also take into account any criticisms of the employer's conduct and its effect on the costs incurred.

11 Rule 84 provides that the Tribunal may have regard to the paying party's ability to pay. This is a discretion, not an obligation, which must be exercised to all of the relevant circumstances of the case including evidence as to ability to pay and effect upon the paying party and any dependants.

Conclusions

12 The Claimant's case failed at the final hearing for substantially the same reasons as given for making the deposit orders. Whilst the presumption of unreasonable conduct is rebuttable, there is nothing in the circumstances of this case which justify doing so giving our conclusions on the merits of the case. The threshold of unreasonable conduct is established by the Respondent.

13 Just because there has been unreasonable conduct, it does not follow that there will necessarily be an order for costs. The Tribunal must consider the exercise of its discretion, looking at the whole picture of what happened. In this case, part of the reason for imposing the deposit was the assessment at the Preliminary Hearing that the Claimant would not be able to prove facts which would shift the burden of proof. In the event, the Claimant was able to shift the burden of proof on material aspects of the case, namely the criticism of the handling of the kitchen assistants situation, the assumptions of Mrs Kelly, the mishandling of the disciplinary investigation and the grievance investigation. Overall, the Claimant's case failed because the Tribunal accepted the explanation of the

Respondent and causation was not established. Looked at overall, the Tribunal concludes that it is appropriate for the Claimant to pay 50% of the Respondent's costs incurred since the date of the deposit order.

14 The Tribunal carefully considered the sums claimed in the costs schedule, both in terms of the work done and the hourly rate charged. Having done so, we are satisfied that the costs claimed were properly incurred, reasonable and proportionate. The total sum payable is therefore **£7,805.00** (50% of £15,610).

15 The Tribunal had regard to its discretion to take into account the Claimant's ability to pay such a large sum. This gave us considerable cause for concern. The information available at the Preliminary Hearing suggests that the Claimant will have significant difficulty paying and she has (or at least had then) three dependent children. However, the Claimant has not attended today and there is no up-to-date evidence as to the Claimant's means. Given that two years have passed since the Preliminary Hearing, the Tribunal does not consider it safe to proceed on the basis of an assumption that she continues to be reliant on state benefits, two part-time jobs or the assistance of others but it is clearly a very real possibility. The Claimant was given notice of today's hearing both to her personal email address and by normal post. No correspondence has been received from the Claimant relevant to today's hearing and she has not returned the Tribunal's telephone call which we caused to make this morning before hearing the Respondent's cost application.

16 In the circumstances, the Tribunal has no rational, evidence-based reason to reduce the amount of costs based upon the Claimant's ability to pay. However, we would encourage the Claimant upon receipt of this Judgment and Reasons to contact the Tribunal and provide evidence as to her means if she considers it relevant to her ability to pay. If the Claimant does so in writing within 28 days of this Judgment being sent to the parties, the Tribunal will reconsider the amount of the cost order in the interest of justice. In the meantime, the Respondent should take no steps to recover its costs from the Claimant. The Claimant must be aware that if she does not contact the Tribunal and provide any additional relevant evidence, this cost order will be enforceable against her and could have severe consequences.

17 The deposits already paid by the Claimant shall be released to the Respondent and credited against the total amount of costs due.

Employment Judge Russell
Dated: 19 May 2023