EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs M Stroud	v	Mitie Group Plc

Heard at: Reading (In Chambers) **On**: 1 June 2023

Before: District Tribunal Judge Shields

JUDGMENT (COSTS)

The judgment of the tribunal is that the claimant's application for an award of costs is dismissed.

REASONS

The claim and judgment

1. The claimant was employed by the respondent from 7 January 2002 to 31 March 2020. She was employed in the role of a Quality Lead.

2. The claimant's claim was presented on 13 August 2020 after a period of Acas early conciliation from 17 June 2020 to 17 July 2020. The response was presented on 24 September 2020. The respondent defended the claim.

3. The liability hearing took place on 10 to 12 October 2022. The tribunal gave judgment on 12 October 2022. The tribunal decided that the claimant was unfairly dismissed by the respondent.

4. Written reasons were requested and these were sent to the parties on 23 November 2022.

The application for costs and the respondent's response

5. The claimant made an application for costs on 14 November 2022. The claimant says that the respondent acted unreasonably in bringing the proceedings (or part) or in the way that the proceedings have been conducted, and/or that the claim had no reasonable prospect of success.

6. The claimant relies on an open letter of settlement from her initial legal advisers dated 22 June 2020 and a without prejudice email which was sent on 31 March 2020 (before the start of the internal appeal process). There were additional supporting documents that I will summarise as "timesheets and evidence in support of the costs application calculations". The respondent did not accept the offers to enter into settlement discussions made by the claimant.

7. In response to the claimant's application, the respondent's solicitor served written representations on 26 January 2023.

8. The tribunal asked the respondent to comment on the claimant's suggestion that the costs application be dealt with on the papers, rather than at a hearing. The respondent wrote to the tribunal to agree with the claimant's suggestion.

9. On 27 January 2023, the claimant provided additional documents and made further written submissions in response to the respondent's correspondence to the Tribunal.

10. The tribunal agreed with the parties that, having considered Rule 2 of the Employment Tribunal Rules of Procedure 2013, in the interests of proportionality and saving costs, the application could be dealt with without the parties attending a hearing.

11. The costs application was considered by the Judge which had decided the claimant's claim.

The law

12. The power to award costs is set out in the Employment Tribunal Rules of Procedure 2013. Under rule 76(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 vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of 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."*

13. Rules 74 to 78 provide for a two-stage test to be applied by a tribunal considering costs applications under Rule 76. The first stage is for the tribunal to consider whether the ground or grounds for costs put forward by the party making the application are made out. If they are, the second stage is for the tribunal to consider whether to exercise its discretion to make an award of costs, and if so, for how much.

14. In determining whether unreasonable conduct under rule 76(1)(a) is made out, a tribunal should take into account the 'nature, gravity and effect' of a

party's unreasonable conduct (McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA). However, it is not necessary to analyse each of these aspects separately, and the tribunal should not lose sight of the totality of the circumstances (Yerrakalva v Barnsley Metropolitan Borough Council 2012 ICR 420, CA). At paragraph 41 of Yerrakalva, Mummery LJ emphasised that:

> *"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it has."*

15. When assessing whether the 'no reasonable prospect of success' ground in rule 76(1)(b) is made out, the test is not whether a party had a genuine belief in the prospects of success. The tribunal is required to assess objectively whether at the time it was put forward, the defence had no reasonable prospect of success, judged on the basis of the information known or reasonably available to the respondent, and what view the respondent could reasonably have taken of the prospects of the defence in light of those facts (Radia v Jefferies International Ltd EAT 0007/18).

Conclusions

Are there grounds for a costs order?

16. I first need to consider whether there are grounds for a costs order under rule 76(1)(a) or (b).

17. I have concluded that there are no grounds for a costs order: the respondent did not act vexatiously, abusively, disruptively or otherwise unreasonably in the way that the proceedings (or part) have been conducted and that the respondent did not have no reasonable prospects of success:

    17.1 The defence of the complaint of unfair dismissal was based on the dismissal being by reason of redundancy.

    17.2 I was satisfied the respondent had shown that the reason for the dismissal was a redundancy and that it was a part of the transformation programme at the company referred to as Project 2025; a fair reason for a dismissal under section 98(2).

    17.3 Although, I found that the dismissal was procedurally unfair, I made findings of fact and concluded that:

    17.3.1 the respondent did adequately warn the claimant of the impending redundancy on 4 March 2020,

    17.3.2 The company's approach to the pool on which to select the potentially redundant employee was not challenged by the claimant and I agreed that a pool of four Quality Leads would be appropriate as described,

    17.3.3 I concluded that criteria adopted by the company to assess the Quality Leads were objective.

17.4 I have weighed these elements above against those that the claimant referred to in her costs application.

18. The claimant was not formerly legally represented when she brought her claim (and throughout these proceedings). The respondent was formerly legally represented when they defended the claim and through these proceedings.

19. All parties would have been advised on the merits of the claims. At the time the defence was pursued, the respondent had some reasonable prospects of success. The issue of procedural fairness is a balancing act under section 98 of the Employment Rights Act 1996 and it could not be said at the date of the correspondence from the claimant or her representative that there were no reasonable prospects of success. I have concluded therefore that rule 76(1)(b) does not apply in relation to this complaint.

20. Further, I have concluded that the merits of the respondent's defence were such that it was reasonable for them to continue to defend the complaint after the claimant's offer to enter into settlement negotiations at the start of the appeal process and in June 2020, via her legal representative. The contents of both communications admittedly set out issues that I made later findings upon. However, the email from the claimant at the start of the appeal process and made on a without prejudice basis did not reference that it was "save as to costs". Both communications were made at an early stage and with a proper consideration of the merits of the defence, in light of the claimant's correspondences, it would not have been apparent that the defence had no reasonable prospects of success. Pursuing the defence after the claimant's correspondence was reasonable conduct of the proceedings, which means that rule 76(1)(a) also does not applies.

Exercise of discretion

21. I have found that there are no grounds to make a costs order against the respondent in respect of their defence, but even if there were grounds I do not consider that I would exercise my discretion to make an order for costs against the respondent. In doing so, I have in mind that costs are the exception in the employment tribunal, not the rule, and that they are compensatory not punitive.

22. The respondent is a PLC company and there are no concerns in its ability to pay a costs order.

23. The respondent had legal representation when they pursued their defence and throughout proceedings. There were no costs warnings by the claimant and therefore the respondent would not have known that there was a risk that they may have to pay some of the claimant's costs if the defence did not succeed. Furthermore, the claimant was not formally represented and whilst there was reference to a barrister representing the claimant at the final

hearing, this was just before the final hearing and again no risk of costs was stated to the respondent.

24. Objectively analysed, I do not consider that there would have been a point in time when defending the claim that the respondent would have been able to look at the evidence and say that their response had no reasonable prospects of success.

25. I have carefully considered the totality of the evidence and taking the above factors into account, I have concluded that the Tribunal should not make a costs order and I confirm that I would not have exercised my discretion to make an order for costs against the respondent even if the initial grounds for a costs order had been out under rule 76(1)(a) or (b).

The amount of the order

26. The amount to be awarded is therefore nil.

_____
District Tribunal Judge Shields

Date: 01 June 2023

Sent to the parties on: 2 June 2023

For the Tribunal Office