Case No: 2408857/2021

EMPLOYMENT TRIBUNALS

Claimant: Mrs Jayne Potter

Respondent: St Helens & Knowsley Teaching Hospitals NHS Trust

Heard at: Liverpool **On:** 21 September 2023 (in chambers)

Before Employment Judge Benson
Mrs D Price
Mr J Murdey

JUDGMENT ON COSTS

No order for costs.

REASONS

Application

1. All claims brought by the claimant (being unfair dismissal (ordinary and automatic), disability discrimination (discrimination arising from disability), a failure in the duty to make reasonable adjustments, and detriment (whistleblowing) were dismissed by judgment of the Employment Tribunal dated 6 June 2023. This followed a 6 day hearing,

2. By email dated 7 June 2023, the respondent made application for payment of its legal costs, limited to £3000, which was a small proportion of what it had incurred. That application was made on the basis of Rule 76(1)(a) of the Employment Tribunal Rules of Procedure 2013 being that a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of proceedings or the way the proceedings have been conducted; and/or under Rule 76(1)(b) that the claims had no reasonable prospect of success.

3. The claimant provided her response and further information was supplied by both parties in the form of emails. All correspondence has been considered in deciding this application together with Mr Boyd's written submission on behalf of the respondent, which is essentially a summary of the law.

4. The respondent submissions are limited. It says in the email of 7 June 2023 that the claimant was given the opportunity to withdraw her claim on several occasions via ACAS (emails 17 and 18 August 2022 and redacted email update to client 3 November 2022). That the claims failed on every count and in respect of every factual allegation, as the respondent informed the claimant it would. That the respondent's position was made clear to the claimant in the pleadings, including updated grounds and day to day correspondence, and more specifically in without prejudice discussions via ACAS (emails of 17 and 18 August 2022).

5. The claimant has explained that she considered (and still believes) that all her claims had merit. She points to her not having legal representation and that impacted upon her ability to present the case in the way she might otherwise have done so. She further refers to the importance of access to justice and that the imposition of costs can impede the pursuits of legitimate claims.

6. With the consent of both parties the application was decided on paper without the need for a further hearing.

7. The Tribunal met on 21 November 2023 in chambers to make its decision.

Findings of Fact

8. Written reasons for the substantive judgment were provided to the parties dated 25 September 2023. They set out the findings of the Tribunal and our reasons for them. We do not repeat them here.

9. The additional findings of fact relevant to the application before us are as follows:

a. The claimant was a litigant in person.

b. She had received initial preliminary legal advice that she had a reasonable claim. She was unable to afford further advice and litigated the claim with the assistance of her partner, Mr Gildea. She had instructed a solicitor and paid for advice but was let down shortly before the first preliminary hearing.

c. The respondent put a proposal to the claimant via ACAS that if she withdrew her claim it would not seek an order for costs against her.

d. The respondent did not write to the claimant warning her that if she did not withdraw her claim or accept its proposal, it would seek costs against her if she lost and setting out their reasons why she would not succeed.

e. No application was made prior to the final hearing to strike out any of the claims or that a deposit order be made.

f. The only issues which were raised concerning the merits of the whistleblowing claim were after exchange of witness statements and these were in relation to additional disclosures which the claimant agreed not to pursue.

The Law

10. The power to award costs is contained in the 2013 Rules of Procedure. The definition of costs appears in rule 74(1) and includes fees, charges, disbursements or expenses incurred by or on behalf of the receiving party. Rule 74(2) makes it clear that legal representation in this context can include the assistance of a person who is employed by the party, such as an in-house lawyer.

11. Rule 75(1) provides that a Costs Order includes an order that a party makes a payment to another party "in respect of the costs that the receiving party has incurred while legally represented".

12. The circumstances in which a Costs Order may be made are set out in rule 76, and the relevant provision here was rule 76(1) which provides as follows:

> **"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."**

13. Rule 78 empowers a Tribunal to make an order in respect of a specified amount not exceeding £20,000, or alternatively to order the paying party to pay the whole or specified part of the costs with the amount to be determined following a detailed assessment.

14. Rule 84 concerns ability to pay and reads as follows:

> **"In deciding whether to make a costs, preparation time or wasted costs order and if so in what amount, the Tribunal may have regard to the paying party's (or where a wasted costs order is made the representative's) ability to pay."**

15. HHJ Auerbach in Radia v Jeffereies International Limited 2020 IRLR 431

> **61. It is well-established that 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 Rule 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. If it decides in principle to make a costs order, the Tribunal must consider the amount in accordance with Rule 78. Rule 84 provides that, in deciding both whether to make a costs order, and if so, in what amount, the Tribunal may have regard to ability to pay.**
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> **62. At the first stage, accordingly, it is sufficient if either Rule 76(1)(a) (through at least one sub-route) or Rule 76(1)(b) is found to be fulfilled. There is an element of potential overlap between (a) and (b). The Tribunal may consider, in a given case, under (a), that a complainant acted unreasonably, in bringing, or continuing the proceedings, because they had no reasonable prospect of success, and that was something which they knew; but it may also conclude that the case crosses the threshold under (b) simply**

because the claims, in fact, in the Tribunal's view, had no reasonable prospect of success, even though the complainant did not realise it at the time. The test is an objective one, and therefore turns not on whether they thought they had a good case, but whether they actually did.

63. In this regard, the remarks in earlier authorities, about the meaning of "misconceived" in Rule 40(3) in the 2004 Rules of Procedure, are equally applicable to this replacement threshold test in the 2013 Rules. See in particular Vaughan v London Borough of Lewisham [2013] IRLR 713 at paragraphs 8 and 14(6). However, in such a case, what the party actually thought or knew, or could reasonably be expected to have appreciated, about the prospects of success, may, and usually will, be highly relevant at the second stage, of exercise of the discretion.

64. This means that, in practice, where costs are sought both through the Rule 76(1)(a) and the Rule 76(1)(b) route, and the conduct said to be unreasonable under (a) is the bringing, or continuation, of claims which had no reasonable prospect of success, the key issues for overall consideration by the Tribunal will, in either case, likely be the same (though there may be other considerations, of course, in particular at the second stage). Did the complaints, in fact, have no reasonable prospect of success? If so, did the complainant in fact know or appreciate that? If not, ought they, reasonably, to have known or appreciated that?

65. I should say something further about how the Employment Tribunal should approach an application seeking the whole costs of the litigation, on the basis that the claim "had no reasonable prospects of success" from the outset. It should first, at stage 1, consider whether that was, objectively, the position, when the claim was begun. If so, then at stage 2 the Tribunal will usually need to consider whether, at that time, the complainant knew this to be the case, or at least reasonably ought to have known it. When considering these questions, the Tribunal must be careful not to be influenced by the hindsight of taking account of things that were not, and could not have reasonably been, known at the start of the litigation. However, it may have regard to any evidence or information that is available to it when it considers these questions, and which casts light on what was, or could reasonably, have been known, at the start of the litigation.

16. The first stage is to decide whether the power to award costs has arisen, whether by way of unreasonable conduct or no reasonable prospect of success under rule 76; if so, the second stage is to decide on the exercise of discretion as to whether or not to make an award, and if so, the third stage is to decide how much to award. Ability to pay may be taken into account at the second and/or third stage.

17. The award of costs is the exception rather than the rule in Employment Tribunal proceedings Gee v Shell UK Limited [2003] IRLR 82.

18. In exercising its discretion at stage two, factors which the Tribunal may (or may decide not to) take into account include the principle that costs are compensatory not punitive, the claimant's ability to pay, any costs warnings, whether the party has taken legal advice, whether the party is represented, any rejection of a settlement offer, and whether the nature of the evidence changed such that the merits of the case were not apparent until later in the proceedings.

19. If there has been unreasonable conduct, there is no requirement for the Tribunal to identify a precise causal link between that unreasonable conduct and any specific items of costs which have been incurred: McPherson v BNP Paribas

(London Branch) [2004] ICR 1398. However, there is still the need for some degree of causation to be taken into account as the Court of Appeal pointed out in Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78:

> **"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 had."**

Decision

20. The stating point is for us to consider whether we consider that the claimant has acted unreasonably (which is the contention of the respondent) in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or any of her claims had no reasonable prospect of success.

21. We consider at this stage whether the claims, in fact, had no reasonable prospects of success rather than whether it was reasonable for the claimant to hold the view that she did. Although the Tribunal found in the respondent's favour in respect of the majority of the factual issues, particularly in respect of Ms Brockley's evidence and that of Mr Roscoe this was not clear cut and required us to consider both the claimant's and the respondent's witnesses' versions of these events and others in order to decide whose evidence we preferred. This required exploration at a hearing. There were issues raised about the fairness of the process which again was something which a Tribunal hearing was needed to determine. Although this claim related to an employee who had considerable amounts of absence because of sickness and ill health (395 out of 596 days) the allegations and issues which needed to be decided were nuanced and not straight forward. This was not a case where either the respondent or indeed the Tribunal sought to have the claims listed to consider they should be struck out or a deposit or made because of a lack of merit.

22. Other than the public interest disclosure claims (whistleblowing) which we refer to below, we do not find that it can be said that the claims had no reasonable prospect of success or that the claimant was unreasonable in her pursuit of them.

23. We do find that the claimant had no reasonable prospect of succeeding in her claim of public interest disclosure (unfair dismissal and detriment). It was apparent in her evidence before the Tribunal that she had difficulty in identifying those parts of her meeting with Mr Mannion amounted to disclosures, and further she suggested that another, alternative, reason she was taken down a capability route resulting in her dismissal; this being that she had a disciplinary issue raised against her. She put forward no evidence that Ms Pickstock or Mr Cooper knew about the comments which she made and therefore causation was a clear problem.

24. It is therefore necessary for us to move to stage two and consider whether we should exercise our discretion in relation to the claims of public interest disclosure and make an order for the claimant to pay the respondent's legal costs.

25. We have considered the factors we consider relevant.

26. We have reminded ourselves that costs are the exception and are not intended to be punitive. The claimant was unrepresented. She sought legal advice, although at the very initial stages, and was advised that she had a reasonable case. Through no fault of her own the further advice she sought was not forthcoming, having been let down by the solicitor she approached. We have considered the correspondence to which we were referred by the respondent and we are not satisfied that it sets out as clearly as it suggests the weaknesses it identified in the public interest disclosure claim. There is no "costs warning letter". The correspondence of we have had sight, and which is relevant is with ACAS and from its representatives, not to the claimant. The element of costs relevant to the public interest disclosure claim is not identified by the respondent and in any event, we consider would not have reduced the time in preparation and at the final hearing by anything significant.

27. Taking all of those factors into account having exercised our discretion we make no order for costs.

Employment Judge Benson
Date 21 September 2023

JUDGMENT SENT TO THE PARTIES ON
23 September 2023

FOR THE TRIBUNAL OFFICE

Note
Written reasons will not be provided unless a written request is presented by either party within 14 days of the sending of this written record of the decision.

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