EMPLOYMENT TRIBUNALS

Claimant: Mrs Zohra Amri-Khellaf

Respondent: Evergreen Homecare Services Ltd (formerly SureCare Barnet Ltd)

Heard at: **Watford** **On:** 1 November 2023

Before: Employment Judge Dick

Representation
Claimant: Mr P Clark (McKenzie Friend)
Respondent: Mr T Walshe (solicitor)

RESERVED JUDGMENT ON COSTS

The claimant is ordered to pay the respondent's costs in the sum of £ 6,000.

REASONS

INTRODUCTION

1. This judgment concerns an application by the respondent for an order that the claimant is to pay the costs incurred in defending what I will call the second claim, 3323856/2021. There was no dispute that the first claim, 3313830/2020, was materially the same as the second claim. For that reason it is necessary for me to set out the history of both claims.

THE FIRST CLAIM

2. The claimant had been employed by the respondent, a domiciliary care agency, for four years as a carer and it was her case that she was unfairly dismissed, as the respondent had dismissed her for no good reason and without following a proper procedure. She also claimed to be owed an unparticularised sum of

money. The respondent's case was that the claimant had been dismissed, after due process, because, in breach of her employment contract, she had assisted in setting up a rival agency, to the extent that she was the registered manager of the rival agency before the date she was dismissed by the respondent.

3. The first claim was dismissed by Employment Judge ("EJ") C H O'Rourke following a hearing on 29 July 2021 at which the claimant was represented by Mr Feld, a paralegal, of Legal Intelligence London Ltd ("LIL"). The dismissal resulted from EJ Rourke's finding that the claimant had failed to comply with an "unless order" under rule 38. The unless order had been made with a view to ensuring the claimant provided particulars, relating to the remedy which she sought, of when she said her employment with the respondent ended and her next job began. This was of particular relevance given the issues I have set out in the previous paragraph. An amended version of the judgment and reasons for the dismissal was sent to the parties on 9 September 2021.

4. On 13 October 2021, following an application by the respondent, EJ O'Rourke ordered the claimant to pay the respondent's costs for the first claim in the sum of £ 20,000. EJ Rourke's written reasons record the following. The claimant had sought to blame the failure to comply with the unless order upon a retired trade unionist who, she said, had told her that ACAS would essentially conduct the litigation for her, and also upon her representatives at the hearing of 29 July. She also submitted that she would be unable to pay a costs order, relying upon a letter from a hospital confirming her appointment for a biopsy (which, she said, meant that she would need to be off work to recover before a major operation) and bank account summaries (not statements) showing monthly payments between £3000 and £4000 and average balances of £1000 to £2000.

5. It is not necessary for me to set out the detailed reasons for EJ O'Rourke's decision, though I set out the following extract from paragraph 12, which I consider it appropriate to take account of (though I do not consider myself bound by it in coming to my own decision on what is a separate application):

> (a) The Claimant consistently and almost certainly deliberately withheld the disclosure requested by the Respondent because she realised that to do so would damage her claim and potentially justify her dismissal (and she does not seek to deny that … in her response to their application). That is entirely contrary to the duty imposed on litigants, … to disclose all relevant material, regardless of whether it disadvantages them, or not. It also indicates that she will have likely known, from the outset that her claim was misconceived and had no reasonable prospects of success, if the true position came out. This is, I consider, vexatious and unreasonable behaviour on her part, bringing a claim that she is likely to consider had little merit, in the hope of inconveniencing the Respondent, or extracting some settlement from them,
>
> (b) To maintain that position through to a final hearing, despite having been clearly told what was necessary to comply, is the definition of unreasonable behaviour.

6. I observe at this point that even if the claimant had been in some doubt as to the merits of her claim before the judgment on costs, she can have been in

absolutely no doubt about it afterwards. The costs judgment and reasons were sent to the parties on 1 November 2021.

7. The claimant did not apply for the dismissal to be set aside under rule 38. She did not ask for a reconsideration of any of EJ O'Rourke's findings, nor did she seek to appeal against them.

THE SECOND CLAIM

8. The second claim was presented on 27 December 2021. As I have said, there was no dispute that it was materially the same as the first claim (save that it did also purport to deal with the reasons why the first claim was dismissed). In the second claim form, the claimant named Mr Feld of LIL as her representative. In advance of the first hearing for the second claim, the respondent submitted grounds of resistance and an application to dismiss the claim. The respondent pointed out that the claimant had still not provided a calculation of the remedy she sought with supporting evidence. It argued that the new claim was an abuse of process and that the Tribunal had no jurisdiction to hear it as it was out of time.

9. At a public preliminary hearing on Monday 10 October 2022 the second claim was dismissed upon withdrawal. The claimant was represented by Mr Feld. A note provided by counsel for the respondent records that Mr Feld did not dispute on the claimant's behalf that the second claim was an abuse of process. He told the Tribunal that the claimant had been advised by counsel the previous week that her claim had "no prospects" [of success]; Mr Feld's later comments suggested that advice had been provided on the Friday before the hearing. The claimant received further advice from Mr Feld that day during a short break and the claim was withdrawn, said Mr Feld, "on the matter of non-compliance and time and not because [the claimant] accepts her claim was vexatious". Mr Feld told the Tribunal that the claimant continued to believe she was unfairly dismissed.

10. The respondent applied for its costs in defending the second claim in writing on 17 October 2022. The application was listed for a hearing by order of EJ R Lewis. Before dealing with the basis of the application for costs, I first set out the applicable law.

LAW

11. For the purposes of this case, Rule 76(1) sets out the grounds upon which a costs order may be made:

76. When a costs order or a preparation time order may or shall be made

(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 the proceedings (or part) or the way that the proceedings (or part) have been conducted;

(b) any claim or response had no reasonable prospect of success; or

…

12. Since the amount claimed is under £ 20,000, I assess the application summarily under rule 78(1)(a) (rather than making a detailed assessment in accordance with the Civil Procedure Rules under rule 78(2)).

13. Also relevant is rule 84:

84. Ability to pay

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.

14. The following points are clear from the above rules and from the decided cases:
    a. If the grounds under rule 76 are made out, although the Tribunal must *consider* an order for costs, whether or not to *make* the order is still a matter for the Tribunal's discretion.
    b. It is appropriate for a litigant in person to be judged less harshly in terms of his or her conduct than a litigant who is professionally represented (*AQ Ltd* v *Holden* 2012 IRLR 648, EAT), though lay people are not immune to costs orders.
    c. So far as the grounds for considering an order are concerned:
        i. 'Vexatious' was defined in *ET Marler Ltd* v *Robertson* 1974 ICR 72, NIRC: 'If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously.' Simply being 'misguided' is not sufficient to establish vexatious conduct (*AQ Ltd*, above). A later case in the Court of Appeal, however, suggests that the effect of the conduct is more important than the motive behind it (*Scott* v *Russell* 2013 EWCA Civ 1432, CA).
        ii. "Unreasonable" has its ordinary English meaning: *Dyer* v *Secretary of State for Employment* EAT 183/83.
    d. In considering whether to exercise the discretion:
        i. Costs in the Employment Tribunal are the exception, not the rule. *Yerrakalva* v *Barnsley Metropolitan Borough Council and anor* 2012 ICR 420.
        ii. A party cannot escape responsibility for costs incurred by withdrawing a claim, though it would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs upon withdrawal (*McPherson* v *BNP Paribas (London*

Branch) 2004 ICR 1398, CA). The issue will not be whether it was unreasonable to withdraw the claim, but whether the proceedings were conducted unreasonably.

e. Regarding ability to pay:
    i. This is something that the Tribunal may, not must, take into account.
    ii. This applies both to the decision whether to make an order and to the amount ordered.
    iii. Any assessment of a party's means (i.e. ability to pay) must be based upon evidence.
    iv. The fact that a party's ability to pay is limited as at that date does not preclude a costs order being made against him or her, provided that there is a 'realistic prospect that [he or she] might at some point in the future be able to afford to pay'. If there were a realistic prospect that the claimant might at some point in the future be able to afford to pay a substantial amount, it was legitimate to make a costs order in that amount so that the respondent would be able to make some recovery when and if that occurred. It had to be remembered that whatever order was made would have to be enforced through the county court, which would itself take into account the individual's means from time to time in deciding whether to require payment by instalments, and if so in what amount — *Vaughan* v *London Borough of Lewisham and ors* 2013 IRLR 713 EAT (as summarised at *IDS Employment Law Handbook Volume 6* at 20.127).
    v. The EAT in *Vaughan* summarised the questions for the employment tribunal to ask on the basis that it was right to have regard to the claimant's means as follows:
        1. Was there a reasonable prospect of the claimant being able, in due course, to return to well-paid employment and thus to be in a position to make a payment of costs?
        2. If so, what limit ought nevertheless to be placed on her liability to take account of her means and of proportionality?
    vi. See also *Arrowsmith* summarised below. Similarly, the Presidential Guidance on General Case Management for England and Wales states that a tribunal may make a substantial order 'even where a person has no means of payment'.
f. Whether or not the party applying for costs holds insurance for their legal expenses is irrelevant *Mardner* v *Gardner and ors* EAT 0483/13.

15. During the course of the hearing I was referred by Mr Walsh to the following cases. Mr Walshe had brought copies and I offered Mr Clark the opportunity to consider them during a short adjournment:
    a. *Kovacs* v *Queen Mary and Westfield College and anor* [2002] EWCA Civ 352, which held that ability to pay was not be taken into account when deciding to make a costs order under the 1993 Employment Tribunals rules. On reflection, Mr Walshe agreed that this case would not greatly assist me given the changes since 2002 and in particular the clear terms of the current rule 84.

b. *Barnsley MBC* v *Yerrakalva* [2011] EWCA Civ 1255. In that case, the Court Appeal held that the claimant should not be liable for *all* of the costs incurred where the respondent's conduct had also contributed unnecessarily to the costs. (Mr Walshe argued that although, as that case showed, the full amount need not be ordered, in the case before this Tribunal the full amount should be ordered as all the respondent's costs had been incurred wholly as a result of the claimant's unreasonable conduct).
c. *Arrowsmith* v *Nottingham Trent University* [2011] EWCA Civ 797 at paragraph 37 – where the Employment Tribunal had decided that the claimant's ability to pay a costs order was "extremely limited", that did not require the ET to assess a sum that was confined to the amount she could pay, given that her circumstances "may well" have improved.

THE COSTS HEARING FOR THE SECOND CLAIM

Procedure

16. At the costs hearing before me the claimant was represented by Mr Clark of LIL. Both parties' representatives had made written submissions – in the respondent's case, by way of the written application I have already mentioned and in the claimant's case by way of a skeleton argument.

17. At the start of the hearing I heard submissions from the parties about the appropriate procedure. During the course of these preliminary submissions I was told that the claimant had paid almost none of the order for costs made following the first claim. What little had been paid had been paid as a result of court enforcement action taken by the respondent, which the respondent had paused pending these new proceedings. Given this, I considered that it would be in the interests of justice for me to exercise my discretion to consider the claimant's ability to pay any order I would make (her "means") – there was at least a possibility of an inability to pay (although the other possibility, of course, was a simple unwillingness to pay). In advance of the hearing the claimant had not provided the respondent or the Tribunal with any evidence, either in the form of a witness statement or other documents, about her means. The claimant wished to rely upon her own oral evidence and a two page extract from her GP's records which she had brought along. On behalf of the respondent, Mr Walshe submitted that any such evidence should have been provided in advance in order to give the respondent time to consider it; relying mainly on oral evidence here posed a particular difficulty as, Mr Walshe submitted, it was evident given the history of the case that some things the claimant said should not be treated at face value. I had some sympathy for this argument. Although the claimant was not *ordered* to provide any evidence as to means in this second claim, it is abundantly clear to me that, given the history of the first case, she will have appreciated the purpose of this hearing and the fact that (as it did last time) the Tribunal would wish to consider documentary evidence on the point. Also, I understand that LIL were re-instructed about four weeks before this hearing, so there seemed to me to be no good reason why evidence could not have been served in advance. I balanced the obvious prejudice to the respondent in proceeding as suggested by the claimant against

the difficulty the Tribunal would have in considering means without the evidence. (It was not suggested by anybody that an adjournment, the other possibility, was appropriate in this case.) Ultimately I concluded that it was in the interests of justice to consider the claimant's evidence, giving it such weight as I considered appropriate in all the circumstances.

18. Before hearing the claimant's evidence, I heard submissions on behalf of the respondent on the basis for the costs application. After hearing evidence from the claimant I heard submissions from both advocates.

Evidence

19. The claimant, who is seventy years old, told me that she was working part time, receiving about £ 1500 per month and was in receipt of a pension which took her monthly income up to just under £ 2000. She supported her adult daughter who was unable to work due to illness and depression. After paying the usual bills, and rent of £ 980 per month, she was left with around £ 400 per month. However, she was awaiting an operation on her knee and did not anticipate being able to work, at least for a time, after that – she expected to be reliant upon the state pension. As to assets, she did not own any houses or other property. She had debts amounting to £ 20,000 and had so far paid about £ 390 of the £ 20,0000 she owed on the first costs order. She did not know how she would pay the rest.

20. The document from the claimant's GP said that the claimant was "suffering from problems which are described in the attached list and as a result she is in urgent need of protection, safety and stability in her life to safeguard her which is very important for her wellbeing". The attached list recorded a "stress-related problem" on 17 October 2023 and, two years earlier (10 November 2021) a giant cell tumour (which under cross-examination the claimant explained was cancerous).

21. While I would not go quite so far as to say that the claimant's answer about her assets was not the whole truth, it is certainly right to say that the claimant did not go out of her way to present me with the full picture. This became apparent under cross-examination, when she accepted that the person she was paying rent to was her husband, with whom she no longer lived and was in the process of divorcing. In those proceedings in the family court she had applied to be allowed to stay in the flat and not pay any rent. She believed there to be a mortgage of around £ 100,000. Her husband owned the flat and she had lived there for twenty years. She also said that she had around £ 700 credit in one bank account and almost nothing in another. She denied that she had deliberately withheld any relevant documents during the course of her claims. The part-time work she currently did was caring for two private clients, for which she was paid directly by social services. In answer to a question from me, the claimant said she believed the property, a one-bedroom flat in Watford, was worth about £ 250,000. She was unable to say when the divorce proceedings were likely to be finalised.

Submissions

22. The respondent submits that the grounds under r 76(1)(a) are made out in that the claimant acted abusively, disruptively or otherwise unreasonably, both in bringing the proceedings and in her conduct of the proceedings. Mr Walshe expanded upon his written submissions, setting out the history of the first claim and then of the second claim. He pointed out that the claimant had still not provided the information which she had failed to provide in the first claim (and which had led to that first claim being dismissed). I accept that this is of some significance, albeit that no orders for disclosure were made in the second claim given that it was withdrawn at an early stage – again, the respondent was left in a position where it was unaware of a significant detail of the case it had to meet. The respondent relied particularly on the fact that, given the claimant's knowledge of the first claim, she must have been in no doubt about the chance of her second claim succeeding.

23. The claimant, Mr Clark said, had presented the second claim as she was "upset" with the decision about the first claim. She did not, he argued, have the means to meet any order I might make, and had already been "punished enough" by the first costs order. That submission in my judgment overlooks two significant points. Firstly, the costs jurisdiction does not exist to punish, but to compensate, albeit that in the Employment Tribunal it is only generally only engaged by what might be described as blameworthy conduct. Second, the fact that one order has been made can clearly not amount to a licence to unreasonably incur further costs in the future. Mr Clark further submitted that the second claim was not an abuse of process due to the claimant's genuine belief that she had been unfairly dismissed and what he said was poor advice at the outset of her first claim. I note of course that the claimant's representative at the hearing before this one had explicitly conceded that the claim *was* an abuse of process (bundle p 64). Mr Clark finally argued that the fact that the respondent had offered to settle the first claim (an offer which was rejected by the claimant) showed her claim had merit.

CONCLUSIONS

24. The first question for me is whether I accept the respondent's submission that the claimant acted vexatiously, abusively, disruptively or otherwise unreasonably in submitting her second claim and pursuing it until the morning of the preliminary hearing. For the reasons set out below, I find that the claimant's conduct was vexatious, abusive and unreasonable from the moment the second claim was presented until the moment it was withdrawn, i.e. it was the act of bringing the second claim and pursuing it to the point of a preliminary hearing, not the act of withdrawing the claim, which was unreasonable etc.

25. I do not accept that in the circumstances it was reasonable to present the claim and then wait for advice from counsel before withdrawing it. It is not clear to me how long in advance of the preliminary hearing LIL had been instructed, but even before receiving legal advice for the second claim the claimant in my

judgment must have known, and did know, that her claim was hopeless. Although Mr Clark conceded on the claimant's behalf that the claim was always going to fail on account of it being out of time (and that may well be the case) it goes well beyond that in my judgment. The claimant may or may not honestly have believed she had been wronged by the respondent. She may or may not honestly have felt aggrieved that her first claim was dismissed. Neither of these are, however, relevant to my decision, having reached the inescapable conclusion that, after receiving EJ O'Rourke's reasons, the claimant must have known that a second claim had no realistic prospect of success. I do not accept the suggestion that, since her first claim had been dismissed rather than being considered on the merits, she was entitled to believe that there was somehow a chance of success if she simply presented the same claim again, without troubling to challenge the dismissal of the first claim in any of the ways I have referred to above at paragraph 7. I was not asked to revisit EJ O'Rourke's findings that the claimant deliberately withheld disclosure in the first claim, and I do not need to make my own findings about whether disclosure was deliberately withheld in the second claim since no order for disclosure was in fact made in the second claim. The relevant point is this. EJ O'Rourke's unchallenged findings were that the claimant had pursued the first claim, likely knowing from the outset that her claim was misconceived and had no reasonable prospect of success. In all of the circumstances, the claimant must have known, and did know in my judgment, that simply submitting the same claim again could only have the same result, i.e. that the claim would not be allowed to proceed. It was also of course clear to the claimant, given what happened in the first claim, that there could be costs consequences for the second claim.

26. The claimant's actions, therefore, can quite properly be described as vexatious (in the sense set out above, taking into account the effect of the claimant's actions, which were more than merely misguided in my judgment) and abusive (in the sense that simply resubmitting her claim in the circumstances as I have described them was an abuse of the process of the Tribunal) and/or otherwise unreasonable. I would have come to these conclusions even had I found that the claimant was simply proceeding having shut her eyes to the inevitability of her claim failing, rather than, as I have found, knowing it would fail. As will be apparent, had I been asked to I would also have concluded under rule 76(1)(b) that the claim had no reasonable prospect of success.

27. Having so found, I am obliged to consider whether to make a costs order and if so in what amount. Given the claimant's conduct as I have set it out, it seems to me that this is one of those cases where, despite the general rule, some order for costs is appropriate, even having taken into account that it may be that the claimant was not represented when the second claim was presented – she had already had ample advice about her case. By that point any poor advice (if indeed that is what it was) at the outset of her first claim can in my judgment no longer be relevant.

28. I accept the respondent's submission that on the facts of this case I should not take account of any offer the respondent may have made to settle the first claim. This clearly did not affect the claimant's own assessment, having taken

advice, of the merits of her first claim (since she withdrew it) and, more significantly, there may well as Mr Walshe says have been sound commercial reasons for the respondent wishing to avoid yet more litigation given the time likely to be expended and the exceptional nature of this Tribunal's costs jurisdiction.

29. On the claimant's behalf, the submission was made that, to paraphrase somewhat, given how hopeless the claim was the respondent need not have spent so much time defending it. "Cakeist" as this submission might be, I should of course take into account of what costs were reasonably incurred. For the reasons I have already set out, on the facts of this case I consider it appropriate to take account of all costs reasonably incurred since the second claim was presented. The amount claimed is made up of £ 3,720 for counsel's fees which include VAT and settling the grounds of resistance, advising in conference, attending the preliminary hearing and VAT. This amount appears reasonable to me. The remaining £ 9820.40 is the solicitor's fee including VAT . A detailed breakdown of the time spent has been provided. This consisted of 21 six-minute units (i.e. just over two hours) for an administrative assistant at £ 95 per hour and 259 units (25.9 hours) for a Grade A fee earner at a discounted rate of £ 316 per hour. Since counsel settled the grounds of resistance (and the skeleton argument in support of the respondent's strike-out application) the work done by the solicitors consisted of considering the claim form, preparing the response form, communications with their client, instructing counsel and preparing the preliminary hearing bundle and other documents including the written application for costs. Given that the same firm dealt with the first claim, the time spent would have been less than it otherwise might have been (and indeed much less was claimed this time). Although it seems a little on the high side, I do not take issue with the amount of time spent. However it does seem to me that a grade A fee-earner was not required for all the work; indeed Mr Walshe did not seek to persuade me otherwise. I consider that 80% of that work could properly have been done by a more junior fee-earner (grade B at the Outer London rate of £ 232). 20.72 hours at £232 plus 5.18 hours at the Outer London rate of £ 282 makes a total of £ 6,497.30 (including also the administrative assistant's time). The respondent has confirmed that it will not be able to recover the VAT on the amount paid to its legal advisors, so adding VAT to that and also adding counsel's fees and makes a total of a little over £ 11,500. That is the amount I would have awarded on summary assessment had I chosen not to take account of the claimant's means.

30. As I indicated at the hearing, I do consider it appropriate to take some account of the claimant's means. As to the claimant's means at this moment, the claimant chose not to provide any independent or documentary evidence about her current income and outgoings, and I therefore treat her oral evidence with some care. I do nevertheless accept, considering the reality of the situation, that at this time the claimant would have difficulty making an immediate payment much in excess of a few hundred pounds. That is not the end of the matter, however. I have to look to whether there is a realistic prospect of payment, taking into account that court enforcement action could itself take account of means, including by allowing payments in instalments. I accept the claimant's evidence about her medical condition, as it corroborated (albeit to a

minimal extent) by the written evidence from the GP. When she has her operation she may be unable to work for an unknown time. But the operation not happened yet and on her own evidence, until it does she is able to work. I also take account of the fact that, even without the operation, the claimant is at an advanced age in a role involving some amount of physicality – she plainly will not be able to work for very much longer. On the other hand, on the claimant's own evidence, there is at least some prospect that, as a result of the divorce proceedings, she will gain a significant share in the flat. This is something I consider it appropriate to take some account of, whilst keeping in mind that there could be no money without the sale of her and her daughter's home (assuming there was no prospect of equity release). Despite the claimant's age, health and uncertain future employment prospects, therefore, I do find that there is a reasonable prospect of her being able to pay a substantial proportion of the amount sought by the respondent, even given her existing liabilities.

31. Having answered the first of the questions posed in Vaughan (above), I move to consider the second: what limit ought nevertheless to be placed on the claimant's liability to take account of her means and of proportionality. I take account of all the points I have considered above in considering both the claimant's means and proportionality (and in particular the large sum the claimant already owes as a result of the first claim). I balance the pragmatic consideration that the first order has yet to paid against the consideration that, whatever sympathy there might be for claimant's personal circumstances, her unreasonable actions have caused the respondent to incur costs and there is a reasonable prospect of her being able to pay a substantial proportion of those costs.

32. Taking all of that into account, in my judgment it is appropriate to order the claimant to pay £ 6000.

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Employment Judge **Dick**

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Date: 22 November 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON
4 December 2023

FOR THE TRIBUNAL OFFICE