EMPLOYMENT TRIBUNALS

Claimant: Ms C Taylor

Respondent: Lloyds Pharmacy Limited

Heard at: Liverpool **On:** 20 November 2023

Before: Employment Judge Aspinall
Ms L Heath
Dr H Vahramian

REPRESENTATION:

Claimant: In person, supported by her sister
Respondent: Ms Rezaie

JUDGMENT having been sent to the parties on 20 November 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS ON COSTS

Introduction

1. The claimant's complaints of race discrimination under section 26 and 27 Equality Act 2010 and her claim for unfair dismissal under the Employment Rights Act all failed. The judgment on liability was sent to the parties on 1 April 2023. The respondent made its application for costs in writing. The claimant sought written reasons and reconsideration and appealed the liability judgment but her appeal was made out of time. She appealed the Employment Appeal Tribunal's determination not to extend time and was unsuccessful.

2. The costs application came to its hearing, after several postponements, on 20 November 2023

3. The claimant was a litigant in person and was supported throughout In accordance with the Equal Treatment Bench Book.

4. The Tribunal noted that the respondent's costs schedule came to £66,000 or thereabouts. The respondent wished the Tribunal to hear this case notwithstanding the limitations of its jurisdiction to order a maximum of £20,000 in costs. The respondent wished to submit to summary assessment by this panel (the panel that heard the final hearing in this case) and not to seek a full indemnity basis assessment by a County Court assessor or indeed go to County Court for an award for a fuller amount.

Evidence

5. The Tribunal had a bundle of documents; the supplemental costs bundle that had been provided by the respondent, and at the start of the hearing the claimant brought along some documents relevant to ability to pay and they were added to the bundle at page 114 onwards. The Tribunal also had the final liability hearing bundles represented. They comprised two large lever arch files. The Tribunal was taken by each side to documents in the final hearing bundle on the issue of costs.

6. The Tribunal also had regard, of course, to its own written reasons. The parties agreed to proceed by way of submission only save for evidence on ability to pay, if relevant.

7. The Tribunal heard submissions from Ms Rezaie for the respondent taking 45-50 minutes with submissions for the claimant in response both in writing and oral again taking 45-50 minutes and supported by the panel in doing that. The Employment Judge had a good note of Ms Rezaie submissions and was able to take the claimant back through them to make sure that she had responded to each of the points made. The claimant had her sister with her taking notes and they were also able to check those notes and make sure that she was given an opportunity to respond to each of the submissions that had been made on costs.

The Relevant Law

9. 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". 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 theproceedings (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."**

10. 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.

11. 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."**

12. His Honour Judge Auerbach in Radia v Jefferies International Limited [2020] IRLR 431 set out the three stage test. At the first stage the Tribunal must consider whether or not what are considered the threshold or gateway tests in Rule 76 are met. The respondent made its applications both on the Rule 76(1)(a)basis of *vexatious, abusive, disruptive or otherwise unreasonable conduct* and (1)(b) that the claimant knew or ought to have known that there was *no reasonable prospect of success*. That is the first stage establishing one of those gateways or threshold tests met. The second stage is the exercise of discretion.

13. Gee v Shell UK Limited [2003] IRLR 82 provides that the award of costs is the exception rather than the rule in the Employment Tribunal. McPherson v BNP Paribas [2004] ICR 1398 is the authority that says if there has been unreasonable conduct there is no requirement for the Tribunal to identify a precise causal link between the unreasonable thing the claimant did and the specific items of cost incurred as a result of it. The Tribunal also had regard to the Court of Appeal authority in Barnsley v Yerrakalva [2012] IRLR and it is worth reciting:

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

14. The Tribunal accepts Ms Rezaie's submission that if it is to find unreasonable conduct it must identify exactly the conduct that it thinks is unreasonable.

15. The Tribunal also had regard to the authority of Daleside Nursing Home v Matthew UKEAT 0519; Nicholson v Nicholson [2010] IRLR 859; Arrowsmith v Nottingham Trent [2011] Court of Appeal Civ 797. These are the cases that look at where there has been some dishonesty; where someone has been proceeding under a lie. They demonstrate collectively that there is no absolute rule that an award of costs should follow from a finding that a party has not told the truth to a Tribunal, but that it is necessary to look at the nature, the gravity and the effect of any deception or misconstruction.

16. The Tribunal also had regard to AQ Limited v Holden [2012] IRLR 648 EAT case on the status of the claimant as a litigant in person, and Vaughan v London Borough of Lewisham [2013] IRLR 713. It also had regard (particularly in relation to the unfair dismissal element of the complaint to Gibb v Maidstone [2010] Court of Appeal 678.The Tribunal accepts Ms Rezaie's submission in relation to the Treska v University College Oxford case about parties having been given full opportunity to deal with points that are put in terms of a lie or bad faith, and it was satisfied that because those points were made in the costs application the claimant had had a long time in

which to be fully ready to respond to those allegations today and indeed she did so in both her written and her oral submissions today.

17. The law provides that where the discretion is exercised, the Tribunal then goes on to have regard to ability to pay, and that would require the Tribunal to hear oral evidence from the claimant as to her financial circumstances.

Application of Law to Facts

18. The Tribunal shared with the parties a timeline that recorded the date of commencement of proceedings, the date that the ET3 was lodged, the date of termination of employment, the amended grounds of response following the claimant's application to amend to include unfair dismissal and the fact that during the final hearing the claimant was given guidance about whether or not to seek an adjournment to apply to make an amendment to include disability discrimination. In the event she decided not to. It had regard to that timeline and it reminded itself that its determination requires it to look at the claimant's conduct and her own assessment of prospects of success objectively viewed in the conduct of the litigation and not her conduct during her employment.

19. The Tribunal turned to the first stage; whether or not the claimant acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing her race discrimination complaints. A race discrimination complaint is often a fact sensitive matter. Having regard to the conduct of the litigation, the Tribunal went back and looked at the claim form, the response form, the Case Management Order, the outcomes of case management hearings, the application to amend and the amended grounds of response, and the Tribunal is unanimously of the view that the claimant was reasonable in proceeding with those race discrimination complaints. It cannot say that she acted unreasonably in seeking a determination by this Tribunal as to whether or not her race discrimination allegation amounted to harassment or victimisation because it was fact sensitive. A determination was needed as to what had actually been said and by whom.

20. In response to the claimant’s submissions the Tribunal comments as follows:

20.1 It does not accept the claimant's interpretation of the documents. The claimant took the Tribunal to a final hearing bundle, to Ms Banks’ document where Ms Banks recorded what the claimant had alleged – racist remark/racist comment. That did not mean at final hearing, and it does not mean at costs hearing, that Rebecca Banks thought that Harriet had made a racist remark. The Tribunal heard oral evidence from Rebecca Banks at the final hearing and all it meant was that she knew that the claimant thought it did and she wrote down what the claimant thought because she was going to look into it. The claimant's attempt to persuade the Tribunal to revisit liability issues and to find that Ms Banks’ note meant that she (Ms Banks) thought it was racist has not succeeded. Similarly, Ms Din (Ruby Din’s outcome) was to describe the impact of the remark on the claimant and nobody has ever disputed that the impact of that remark has been detrimental for the claimant. The Tribunal accepts that she has been made more unwell that she was before by that remark. The Tribunal notes that the claimant had fibromyalgia and irritable bowel syndrome and a history of anxiety and depression before the

Tribunal complaint, and it accepts her submission today that what happened to her at work made all of those things worse

20.2 The Tribunal also rejects the submission that the document the claimant took it to in relation to Mr Singh suggests what she thought it suggested. The notes the Tribunal saw were Mr Singh recording what the claimant wished to happen; the claimant wished to have all three persons who had been present on 17 February interviewed because she thought then that might show….and so on. The Tribunal disagree that the documents the claimant took us to mean what she would have it believe that they mean and resists her attempt to retry liability points at a costs hearing.

21. However, in relation to the claimant's right to proceed to have a Tribunal decide as a fact whether or not what was said to her, was said, and if said amounted to race discrimination, the Tribunal finds that she was not unreasonable in wanting to have that decision made by a Tribunal. The first stage test on harassment and victimisation under 76(1)(a) unreasonable conduct is not met.

22. Turning then to the discrimination complaint (section 26 and 27) and Rule 76(1)(b) on no reasonable prospect of success, the Tribunal cannot say that the claimant had no reasonable prospect of success and that is because the complaints were fact sensitive. The fact sensitivity here related to the context of the mediation, the persons present at that meeting on 17 February and the fact that the mediation itself had arisen out of a troubled relationship between the claimant and Harriet Boachie-Dapaah. The claimant has persisted throughout (and Written Reasons record this) in saying that she had no issue with Harriet before the remark on 17 February. The claimant persisted at final hearing and persists at costs hearing in that position. The claimant's own grievance from December 2019 recorded the issues she had with Harriet Boachie-Dapaah prior to the mediation. That was illustrative to the Tribunal of the claimant's ability to hold to a view in the face of clear evidence to the contrary, even in her own hand. That point needed determination by the Tribunal. It was determined at final hearing.

23. In relation to 76(1)(b) the Tribunal cannot conclude that there was no reasonable prospect of success. A decision was needed as to who said what at the mediation meeting. The first stage test was not met.

24. Turning then to the unfair dismissal complaint. The claimant knew when she commenced proceedings for unfair dismissal of the efforts that had been made by everyone, and the Tribunal recited in its Written Reasons the number of managers involved at Lloyds in trying to get the claimant to engage, trying to get her back to work. The claimant knew that an enormous amount of effort had been made to try and get her back to work. The claimant knew that she had steadfastly refused to move branch and to work with Harriet Boachie-Dapaah. The claimant said it was unsafe, and she shifted on what "unsafe" meant. The claimant initially said "unsafe" meant because she would be accused of racism, and she then shifted to say that "unsafe" meant because there would be communication difficulties. In the face of that factual knowledge of the efforts made to shy away from dismissing the claimant and to get her back to work the claimant could have no reasonable belief that a claim for unfair dismissal would succeed. The claimant left her employer with no alternative but

to terminate her employment because she refused to come back to work or to even engage in discussions about moving elsewhere. It was her intransigence that led to her dismissal.

25. In relation to both 76(1)(a) unreasonable conduct and 76(1)(b) no reasonable prospect of success the Tribunal finds that the threshold test for costs is met. This claimant (and no-one objectively, knowing what was known to this claimant) could think that an unfair dismissal complaint could succeed in a situation in which it was the claimant's own insistence that she would not return to branch, would not work with Harriet but would not move either could mean that she was unfairly dismissed.

26. The Tribunal moved to consider the second stage of the test and reminded itself of BNP Paribas that there need not be a causal link between the unreasonableness and the costs incurred. The Tribunal reminded itself of the recent decision in the Jefferies case on the exercise of discretion and remained aware that the claimant was a litigant in person.

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

27. The Tribunal looked at the way in which the claimant conducted the litigation on her own behalf and the tenor of her correspondence with the Tribunal and with the other side. She was a capable litigant in person and has been someone throughout who has been able to advocate on her own behalf, particularly in relation to emotional appeal and talking about the impact of things on her. She has been less able to match the relevant law to the facts upon which she relies and she would have the Tribunal make factual findings, but that is not unusual and the Tribunal supported her in accordance with the Equal Treatment Bench Book to make sure, so far as possible, that she has been, both at final hearing and on costs, on an equal footing with the respondent in making the relevant connections between the facts and submissions she relies on and the relevant legal tests.

28. The Tribunal considered, in looking at the whole picture, the impact on the respondent of the claimant proceeding with the unfair dismissal complaint unreasonably, it made little or no difference because there was always going to be the race discrimination complaint to determine. The factual background was the same for both; what was said on 17 February and the claimant's reaction to it.

29. The Tribunal had regard to the presence or absence of deposit orders or cost warnings in this case. No deposit order was made by the Tribunal of its own volution at case management stage, no application for a deposit order was made at any stage nor application for strike out by the respondent. The Tribunal is grateful to the respondent for checking the detail in relation to costs warning letters; there was no costs warning letter during conduct of the litigation and the only costs position that was put to the claimant in writing was put later during the final hearing and subsequently in relation to the costs application itself. The claimant was a single parent in receipt of benefit and not yet capable of going back to work though she will have good earning potential in the not too distant future.

30. The Tribunal had regard to its Written Reasons and looked at the rounded picture. In the exercise of discretion at the second stage the Tribunal decided unanimously that in this case of race discrimination and unfair dismissal and having had regard to the claimant's conduct and prospects of success, it would not be just and equitable to exercise the discretion. There was always going to be a fact sensitive determination needed. Accordingly, no costs order is made.

Employment Judge Aspinall
Date: 28 December 2023

REASONS SENT TO THE PARTIES ON
5 January 2024

FOR THE TRIBUNAL OFFICE