EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Anahita Ansari	**v**	**Prodent London Limited**

Heard at: London Central (in Chambers)

On: 15 January 2024

Before: Employment Judge P Klimov

JUDGMENT

The respondent's application for a costs order fails and is dismissed.

REASONS

1. On 3 March 2023, the claimant brought complaints of age, race (direct and indirect) and sex discrimination, unlawful deduction from wages and wrongful (constructive) dismissal. The complaints of age and sex discrimination were later dismissed upon withdrawal.

2. The remaining complaints were heard at a public hearing in the London Central Employment Tribunal by video over 4 days, between 31 October and 3 November 2023, by Employment Judge Klimov sitting with two non-legal Members. The claimant appeared in person and was assisted by a Farsi language interpreter. The respondent was represented by counsel, Mr A MacMillan. By unanimous decision of the Tribunal all the claimant's complaints were dismissed. When the judgment was announced at the last day of the hearing, the respondent indicated that it would be seeking a costs order against the claimant.

3. On 1 December 2023, the respondent submitted a costs order application, seeking a costs order under Rule 76(1)(a) of Schedule 1 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("**the ET Rules**") on the ground "*in that in that the Claimant's conduct of the proceedings was brought in a vexatious and disruptive manner given her repeated baseless accusations that documents contained within the bundle were 'forgeries' including her own signed contract*", and, in the alternative, under Rule 76(1)(b) of the ET Rules on the ground "*that the Claimants claim was found by unanimous decision to be wholly without merit*" and "*The Claimant was aware of (sic) the outset that her claim had no realistic prospects of success*".

4. On 14 December 2023, the Tribunal issued various orders in connection with the respondent's application.

5. On 22 December 2023, the claimant provided her representations on the respondent's application.

6. On 22 December 2023, the respondent provided a costs schedule, seeking in total £14,123.82.

7. On 5 January 2024, the claimant submitted further representations, including requesting a hearing to deal with the respondent's application. Upon reviewing the parties' submissions, I am satisfied that a hearing is not necessary for the fair determination of the respondent's application.

8. Both parties confirmed their agreement for the costs application to be decided by me, sitting alone, without the two non-legal Members.

The Law

9. Rule 76(1) of the ET Rules states:

1) 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.

[...]

10. Rule 78(1) of the ET Rules gives the Tribunal various options of assessing costs, including making an "*order the paying party to pay the receiving party a*

specified amount, not exceeding £20,000, in respect of the costs of the receiving party".

11. The following key propositions relevant to the tribunal's exercising its power to make costs orders may be derived from the case law:

    a. Costs awards in the employment tribunal are still the exception rather than the rule. The tribunals should exercise the power to order costs more sparingly than the courts (Yerrakalva v Barnsley Metropolitan Borough Council and anor 2012 ICR 420, CA)

    b. There is a two-stage exercise in making a costs order. The first question is whether a paying party has acted unreasonably or has in some other way invoked the jurisdiction to make a costs order. The second question is whether discretion should be exercised to make an order. Only if the tribunal decides to exercise its discretion to make an award of costs, the question of the amount to be awarded comes to be considered (Haydar v Pennine Acute NHS Trust UKEAT/0141/17).

    c. While the threshold tests for making a costs order are the same whether or not a party is represented, in the application of the tests it is appropriate to take account of whether a litigant is professionally represented or not. Litigants in person should not be judged by the standards of a professional representative (AQ Ltd v Holden [2012] IRLR 648).

    d. For term "vexation" shall have the meaning given by Lord Bingham LCJ in AG v Barker [2000] 1 FLR 759: *"[T]he hallmark of a vexatious proceeding is … that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be , its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process."* (cited with approval by the Court of Appeal in Scott v Russell 2013 EWCA Civ 1432, CA)

    e. "Unreasonable" has its ordinary English meaning and is not to be interpreted as if it means something similar to 'vexatious' (Dyer v Secretary of State for Employment EAT 183/83).

    f. In determining whether to make a costs order for unreasonable conduct, the 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 the correct approach is not to consider "nature", "gravity" and "effect" separately, but to look at the whole picture.

    g. While a precise causal link between unreasonable conduct and specific costs is not required, it is not the case that causation is irrelevant. However, the tribunal must look at the entire matter in all its

circumstances – (Yerrakalva v Barnley MBC [2012] ICR 420). Mummery LJ gave the following guidance on the correct approach:
"*41. 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. The main thrust of the passages cited above from my judgment in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment Tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances*".

h. Whether a claim had reasonable prospects of success is an objective test. It is irrelevant whether the claimant genuinely thought that the claim did have reasonable prospects of success – (Scott v. Inland Revenue Commissioners [2004] ICR 1410 CA, at para.46).

i. In considering whether a claim or defence had no reasonable prospects of success, the tribunal is not to look at the entire claim, but each individual cause of action – (Opalkova v Acquire Care Ltd EAT/0056/21), unreported, at para.17.

j. Whether a claim had no reasonable prospects of success from the outset is to be judged by reference to the information that was known or was reasonably available at the start of the proceedings – (Radia v. Jefferies International Ltd EAT/0007/18, unreported, at para.65).

12. Costs awards are compensatory, not punitive – (Lodwick v Southwark London Borough Council [2004] ICR 884 CA).

13. Under Rule 84 of the ET Rule, the tribunal may, but is not required to have regard to the paying party's ability to pay.

14. However, where the costs award may be substantial, the tribunal must proceed with caution before disregarding the paying party's means – (Doyle v North West London Hospitals NHS Trust [2012] ICR D21, EAT, at paras.14-15).

15. In Howman v Queen Elizabeth Hospital Kings Lynn EAT 0509/12, the EAT said that any tribunal when having regard to a party's ability to pay needs to balance that factor against the need to compensate the other party who has unreasonably been put to expense. The former does not necessarily trump the latter, but it may do so.

16. The Presidential Guidance on General Case Management state:

"*17. Broadly speaking, costs orders are for the amount of legal or professional fees and related expenses reasonably incurred, based on factors like the significance of the case, the complexity of the facts and the experience of the lawyers who conducted the litigation for the receiving party.*"

18. In addition to costs for witness expenses, the Tribunal may order any party to pay costs as follows: 18.1 up to £20,000, by forming a broad-brush assessment of the amounts involved; or working from a schedule of legal costs; or, more frequently and in respect of lower amounts, just the fee for the barrister at the hearing (for example);
….

21. When considering the amount of an order, information about a person's ability to pay may be considered. The Tribunal may make a substantial order even where a person has no means of payment. Examples of relevant information are: the person's earnings, savings, other sources of income, debts, bills and necessary monthly outgoings."

Analysis and Conclusion

17. The respondent's costs order application is somewhat cryptic and underdeveloped. In particular, the respondent's application under Rule 76(1)(a) is confusing. The respondent states that it would be just and equitable to make a costs order against the claimant because "***the Claimant's conduct of the proceedings was brought in a vexatious and disruptive manner*** *given her repeated baseless accusations that documents contained within the bundle were 'forgeries' including her own signed contract.* ***This involved significant correspondence*** *with the Claimant and* ***required additional time to spent dealing with these accusations*** *and* ***caused distress to the Respondent***" (***my emphasis***).

18. On a fair reading of this, it is not clear whether the respondent says that the claimant has acted vexatiously and disruptively in bringing the proceedings, or in the way she conducted the proceedings, or both.

19. If the first, the respondent does not explain what exactly it says was vexatious or disruptive in the claimant's bringing her claim. To the extent the respondent relies on the fact that the claimant's claim was unanimously dismissed by the Tribunal, and therefore, on the respondent's view, it had no reasonable prospect of success, and consequently the claimant has acted vexatiously and disruptively in bringing such a claim, I shall deal with this contention when considering the respondent's application on the alternative ground, i.e., under Rule 76(1)(b) of the ET Rules.

20. Otherwise, I can see nothing which could sensibly be described as vexatious or disruptive in the fact of the claimant's bringing her claim against the respondent. It was her statutory right, which she exercised.

21. If, however, the respondent claims that it was the claimant's conduct of the proceedings that was vexatious or disruptive, it appears that the respondent relies on the fact that at the final hearing the claimant made allegations that various documents in the bundle, including her signed contract of employment, were forgeries ("**the forgery allegations**").

22. The respondent also refers to "*significant correspondence with the Claimant*", which suggests that the respondent also takes issue with the claimant's conduct leading up to the final hearing. The respondent, however, does not develop this matter any further. It does not provide any such correspondence in support of its contention (if indeed it makes it) that the claimant has acted vexatiously and disruptively in the way she conducted the proceedings before the final hearing. Therefore, there is no factual basis whatsoever for me to decide that the claimant's conduct of the proceedings before the final hearing was vexatious or disruptive, and I make no such determination.

23. It follows that the only valid basis, upon which I can deal with the respondent's application under Rule 76(1)(a) of the ET Rules is the claimant's conduct during the final hearing, namely her making the forgery allegations.

24. It is not in dispute that the claimant has made the forgery allegations during the final hearing. It appears she has done that for the first time at the hearing, despite having the documents in question in her possession for some time before the hearing. The forgery allegations were dismissed by the Tribunal. This was largely because the forgery allegations came out of the blue when in cross-examination the claimant was taken by Mr MacMillan to these documents, which documents went against the claimant's case. The forgery allegations were not supported by any other credible evidence. The Tribunal preferred the respondent's evidence that the documents were genuine, which evidence was also supported by other contemporaneous documents in the bundle.

25. This, however, did not cause any disruption to the hearing, or to the respondent's ability to advance its defence. The respondent did not seek an adjournment to deal with the forgery allegations. It did not seek to call additional witness evidence to deal with this matter. The hearing proceeded as normal and finished within the allocated time. Mr MacMillan was able to deal with the forgery allegations in his final submissions to the Tribunal, including by inviting the Tribunal to prefer the respondent's witnesses' evidence as more reliable and credible, which the Tribunal did. I, therefore, do not accept the respondent's submission that the claimant's making the forgery allegations required additional time for the respondent to deal with them, at any rate if any additional time was required it was immaterial in the overall context. I, therefore, do not consider that in making the forgery allegations the claimant has acted disruptively.

26. The respondent also says that the allegations "*caused distress to the Respondent*". However, it does not explain how and to whom the forgery allegations caused distress. I, therefore, have no factual basis, upon which to make a finding that the forgery allegations caused distress to anyone on the respondent's side.

27. Whilst making the forgery allegations, and making them for the first time at the final hearing, and without any supporting evidence was perhaps ill-advised, and would have been wholly inappropriate if the claimant did not genuinely believe the documents were in fact forgeries (the claimant says in her response to the respondent's costs application that she did so genuinely believe), looking at the entire picture I do not find that the claimant's making such allegations reaches the threshold of vexatious conduct, within the meaning given by Lord Bingham LCJ in AG v Barker [2000] 1 FLR 759 (see paragraph 11.d above).

28. Therefore, I find that the claimant has not acted vexatiously or disruptively in the way the proceedings have been conducted by her at the final hearing, in particular by making the forgery allegations.

29. If, however, I am wrong on this, and the claimant's conduct amounts in law to vexatious or disruptive, I find that in all the circumstances and considering the nature, gravity and effect of the claimant's conduct, it would not be just and appropriate for me to exercise my discretion and make a costs order against the claimant.

30. For the sake of completeness, even if the claimant's conduct in making the forgery allegations could be said to be unreasonable, because the respondent does not advance such contention in its application, it is not open for me to make a costs order against the claimant on that basis. In any event, considering the nature, gravity and effect of the claimant's conduct in making the forgery allegations, I would have refused to make a costs order for unreasonable conduct, even if the respondent's application had included that contention.

31. Turning to the second ground of the respondent's application - Rule 76(1)(b) of the ET Rules. Firstly, it is to be noted that the respondent's description of the Tribunal's decision as finding the claimant's claim "*to be wholly without merit*" is wrong and inappropriate. The Tribunal did not use those words in its written judgment or in the oral reasons announced to the parties at the hearing.

32. It is true that the Tribunal decided that the claimant's complaint of indirect race discrimination was misconceived. However, this was not because it had no proper factual basis, but because how it was formulated from the legal point of view, namely by limiting the application of the alleged PCP of not being allowed to speak in mother tongue to the claimant and her non-white colleagues.

33. It is not uncommon for litigants in person, as the claimant was throughout the proceedings, to not know or to misunderstand the statutory meaning of "indirect discrimination", and use this term to describe conduct, which they perceive as covertly or disguisedly discriminatory (e.g. not being allowed to speak in their mother tongue). The respondent, being legally represented from the start of the proceedings, including by counsel at a preliminary hearing on 13 June 2023, perhaps should have done more in assisting the Tribunal in clarifying the issues in the claim and given to them their proper legal characterisation.

34. With respect to the claimant's other complaints in the claim, they have failed based on the Tribunal's factual findings. However, none of them were doomed to fail from the start.

35. In fact, the claimant's claim for unlawful deduction from wages has only failed because the Tribunal concluded that there was an overpayment of wages, and therefore the deductions were "excepted" under s.15 Employment Rights Act 1996, and because the claimant was not legally entitled to bonus payment she claimed. This, however, required the Tribunal to examine all the evidence before it and hear from all the witnesses before coming to these conclusions.

36. Equally, the claimant's claim for breach of contract (constructive dismissal) has failed because of the factual findings made by the Tribunal related, *inter alia*, to

the respondent's belated payment of pension contributions, and the respondent's contractual right to transfer the claimant to the alternative place of work and the claimant's acceptance of the transfer. All these matters were far from being obvious from the start of the hearing, let alone when the claimant had presented her claim.

37. Finally, the claimant's complaint on direct race discrimination also required a thorough examination of how she was treated in comparison to her chosen comparators. At the end, the Tribunal preferred the respondent's evidence and was satisfied with the non-discriminatory explanations provided by the respondent for the treatment the claimant complained about. This, however, is not the same as to say that the claimant's complaint had no reasonable prospect of success from the start, less so, as the respondent says in its application, that the claimant "*was aware of (sic) the outset that her claim had no realistic prospect of success"*.

38. For all these reasons, the respondent's application fails and is dismissed.

Employment Judge Klimov

15 January 2024

Sent to the parties on:

15/01/2024

For the Tribunals Office

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