EMPLOYMENT TRIBUNALS

Claimant: Ms F Zaidi

1st Respondent: Insight investment Management Limited
2nd Respondent: Bank of New York Mellon

Representation:

Claimant: In person
1st and 2nd Respondent: Mr S Nicholls of Counsel.

Preliminary Hearing heard by CVP on 19 February 2024

JUDGMENT

1. The Respondents' claim against the Claimant for a costs award under Rule 76 (1) (a) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 succeeds and the Claimant is ordered to pay the Respondents the sum of £500 by no later than 18 March 2024.

2. Oral reasons were given to the parties at the hearing. The Respondents requested written reasons.

REASONS

The Application and the parties' various submissions

3. This is an application brought by the Respondents for costs in relation to the Claimant's continuation of the argument that the Second Respondent, Bank of New York Mellon, should remain a party to the proceedings. There was a detailed application on behalf of the Respondents in a document dated 4 December 2023. In essence they state that an application is made pursuant to Rule 76 (1) (a) for costs of up to £20,000 on the basis that the Claimant has acted disruptively and unreasonably in conducting the proceedings. They set out the background, to include a chronology of what they say constitutes the Claimant's unreasonable conduct.

4. The Respondents assert that they have incurred costs of over £20,000 as a result of the Claimant's unreasonable persistence in contending that the Second Respondent should remain party to the proceedings. Mr Nicolls accepts that it was not unreasonable for the Claimant to include the Second Respondent initially, but

that it was unreasonable that she persisted in doing so when it should have been apparent that that claim was unmeritorious and should have been withdrawn. The Respondents have submitted a schedule for costs incurred relating to this issue in the period 11 September 2023 until 1 December 2023. Whilst the applicable costs exceed £20,000 they have expressly limited the amount claimed to the maximum I have the discretion to award under the Rules.

5. The Claimant responded with a detailed objection to the Respondents' cost application in a document dated 8 December 2023. She sets out the chronology and rebuts the contention that she had acted unreasonably. I will refer to documents in the relevant chronology.

6. The Respondents refer to the grounds of resistance dated 27 July 2023, specifically paragraphs 4 and 5 which assert at paragraph 4 the Claimant was at all material times and remains employed by the First Respondent, a wholly owned subsidiary of the Second Respondent, and paragraph 5 the Respondents do not consider that any claim as articulated in the ET1 claim form and attached particulars of claim is brought against the Second Respondent. It is the position of both Respondents that the claims against the Second Respondent should be dismissed. The employer of the Claimant is the First Respondent. The Respondents at paragraph 7 of that grounds of resistance state that there should be an open preliminary hearing to consider the removal of the Second Respondent as a party in accordance with Rule 34 of the ET Rules and/or the strike out of the claim in so far as it relates to the Second Respondent in accordance with Rule 37(1) (a).

7. The Claimant then responded in a document dated 10 August 2023, in which at paragraph 5 she asserted that she objected to the removal of the Second Respondent. She set out various evidence which she contended justified its retention, referred in general terms to a duty of care and potential grounds upon which the Second Respondent could be liable. She referred to the decision of the Court of Appeal in <u>Okpabi and others v Royal Dutch Shell and others UKSC/0068</u> which I found at the strike out hearing on 6 November 2023 to be not relevant as it concerns potential liability in tort rather than being specifically referable to an employment relationship. The Claimant made various further assertions as to why the Second Respondent should be retained.

8. Pinsent Masons LLP, solicitors for the Respondents, then set out in a letter dated 23 August 2023 why the Second Respondent should be removed. They referred amongst others to <u>United Taxis Limited v Comolly and others</u> [2023] EAT 93 in support of the contention that dual employment was very difficult and that there needed to be exceptional circumstances why it would apply. The Claimant says that she did not consider that decision in any detail.

9. The Claimant responded to that letter on 24 August 2023 in a four page letter. She accepts that the First Respondent is a legal entity but she says it is irrelevant to the matters that need to be discussed. The substantial question is one of liability and duty of care especially as it is the Second Respondent's flexible working policy that has been enforced and in this instance the group structure is relevant. Mr Nicolls asserts that at this point the Claimant had made a pivot away from the existence of an employment relationship with the Second Respondent. He further asserts that the Claimant had failed to engage in the crucial point, namely that there was no employment relationship between her and the Second Respondent.

The 6 November 2023 Open Preliminary Hearing (the OPH)

10. A case management hearing was listed for 1 September 2023 with Employment Judge Burns directing that it should be a closed preliminary hearing. I was the Judge assigned. There was a case management agenda prepared by the Respondents, that included at paragraph 1.2 that the Second Respondent should be dismissed as Respondent to the claim as it is not, and never has been, the Claimant's employer. At paragraph 4.2 reference was made to the removal of the Second Respondent pursuant to Rule 34.

11. At that case management hearing various directions were given by me for the future conduct of the claim. However, I determined that it would be inappropriate, in accordance with the Rules, for the application for the claim to be dismissed against the Second Respondent to be determined solely under Rule 34. I took the view, and I remain of the view, that it was tantamount to a strike out application pursuant to Rule 37(1) (a) and for it to be heard at a closed preliminary hearing without the required 14 days' notice would be contrary to the Rules. Whilst the Claimant now asserts that had I made a determination pursuant to Rule 34 she would have complied with it, I explained to the parties that that would not justify a contravention of the requirement under the Rules that a strike out application needs to be considered at an open hearing with 14 days' notice having been given to the parties. At that hearing when I set out my concerns, Mr Nicolls on behalf of the Respondents concurred, and the case was listed for an open preliminary hearing on 6 November.

12. At that hearing, as recorded at paragraph 1.1 of my case management order I raised as a possibility as to whether the Claimant may seek to contend that the Second Respondent should be included as a party to the proceedings pursuant to s.111 and s.112 of the Equality Act 2010 on the basis that it had aided and abetted alleged acts of discrimination. That was not a point which was pursued further by the Claimant. I also recorded at paragraph 1.3 that for the avoidance of doubt, Mr Nicolls reiterated the assurance previously provided in writing that the First Respondent was at all times the Claimant's employer and would therefore be liable for any compensation the tribunal may award.

13. The Claimant in a 10 page document dated 15 September 2023 set out grounds for inclusion of the Second Respondent. It primarily relied on what she contends was a duty of care. It is a detailed document containing quite sophisticated analysis of the group company structure, what she contends is the existence of a tripartite agreement between the First and Second Respondent, the relevant group policies, the origin of those group policies, the corporate governance framework and intricacies of the case calling for a hearing to determine this issue.

14. Pinsent Masons LLP then in a letter dated 29 September 2023 set out in a four page document a rebuttal of the arguments asserted by the Claimant. It is not necessary for me to set out in detail those arguments. They also on 29 September 2023 sent a, without prejudice save as to costs and subject to contract, letter to the Claimant. This included referred to Claimant's limited prospects of success at the OPH on 6 November 2023, asserted that the claims against the Second Respondent have no reasonable prospect of success and are bound to be struck out at the OPH on 6 November. They invited the Claimant to withdraw that claim

in exchange for not pursuing their costs.

15. They stated that the First Respondent is and always has been since January 2016 the Claimant's employer and as such is the only correct Respondent to her claims. They said as I had noted at the preliminary case management hearing on 1 September 2023 it is not unusual for a parent company to draft policies that apply to their subsidiaries. They state in the section entitled the legal position, you appear to have manufactured a number of legal arguments in your correspondence dated 15 September 2023 as to why the Second Respondent is your employer as well as the First Respondent. They reiterate that the First Respondent has stated that it accepts responsibility as your employer and as the correct Respondent.

16. There is then a section entitled our clients' costs. They assert that significant additional legal fees have been incurred as a result of what they contend is the incorrect inclusion, and persistence of the incorrect inclusion of inclusion of the Second Respondent. They indicate that those costs are currently in the region of £12,000-£15,000 plus VAT but that figure subsequently increased. They invited the Claimant to withdraw the proceedings against the Second Respondent by 6 October 2023 in return for their not pursuing a cost application.

17. The Claimant then responded in a letter of 6 October 2023 marked without prejudice save as to costs and subject to contract. In the section entitled claims against the Second Respondent she asserted; you appear to be stuck on the word employer which evidences to me that you have not addressed all my points as you so claim. The fact is that Insight and BNYM clearly have an agreement in place where employment responsibilities are jointly owned between the two legal entities even the admission that there is only one employer does not automatically mean that the other entity bears no responsibility or accountability in every circumstance. She then includes a couple of paragraphs regarding what she asserts is the legal position. The correspondence became increasingly acrimonious and the Claimant perceived that she was being insulted by the contention that her arguments were not well formulated cogent or compelling. The Claimant herself then says that she was seeking her costs.

18. The OPH took place on 6 November 2023. At that hearing having considered the arguments I gave an oral judgment that the claim against the Second Respondent was struck out as having no reasonable prospect of success. That was then set out in a short form judgment promulgated on 7 November 2023 and neither party requested written reasons.

<u>The parties' submissions in respect of the cost application</u>

19. Both parties made fairly detailed submissions largely repeating the matters I have referred to in the chronology and documents set out. The Claimant says that the Respondents' costs are absolutely inflated particularly from 10 October 2023.

20. In accordance with Rule 84 I made inquiries as to the Claimant's means. She says that she had been without income since April 2023 and has two children under the age of five. Her husband takes responsibility for all family financial matters and expenditure. She says that her ability to pay is zero but when questioned indicated that she had a personal bank account with between two and three thousand pounds in it. The Claimant says that she is currently living at her mother in law's

house but she and her husband have one jointly owned property which she believes has a market value of circa £400,000 but she is not aware what the mortgage is. She was on a base salary prior to maternity leave of over £100,000 with bonuses and deferred bonuses of circa an additional 30%. As such Mr Nicolls asserts that it is surprising that the Claimant has such limited financial means.

The Law

Costs orders and preparation time orders:

Rule 75.—(1) A costs order is an order that a party ("the paying party") make a payment to—

(a)another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative.

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

76.—(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.

Relevant case law:

21. There is a two-stage exercise to 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 the discretion should be exercised to make an order (Oni v Unison ICR D17).

22. Costs orders in the Employment Tribunal are the exception rather than the rule (Gee v Shell [2003] IRLR 82, Lodwick v Southwark [2004] ICR 844).

23. While a precise causal link between unreasonable conduct and specific costs is not required, it is not the case that causation is irrelevant. In Yerrakalva v Barnley MBC [2012] ICR 420 Mummery LJ said:

> "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".

24. The EAT in Radia v Jeffries International 007/18 gave guidance on the approach to costs applications on the basis of no reasonable prospects of success. It emphasised that the test is whether the claim had no reasonable prospect of success judged on the basis of the information that was known or was reasonably available at the start. The tribunal must consider how as at that earlier point the prospects of success in a trial that is yet to take place would have looked.

25. Rule 78 (a) limits the amount without a detailed assessment to a maximum of £20,000.

Conclusions and discussion

Has the Claimant acted unreasonably?

26. I have taken account of the fact that the Claimant is a litigant in person. Mr Nicolls asserts that she is a sophisticated litigant in person. Undoubtedly the Claimant has been extremely diligent and has the ability to write detailed well structured letters. She is not, however, a lawyer and whilst she asserts that she spent circa 500 hours researching issues, to include the question of the potential liabilities of the Second Respondent, she does not have legal experience in the interpretation of legislation and case law.

27. What I need to consider is whether the first stage of the test set out in Oni and Unison has been engaged as to whether the Claimant has acted unreasonably in maintaining her position that the Second Respondent should be named as a Respondent. I find that her conduct was unreasonable and the reason I reach that decision is that the Respondents, from the time of their grounds of resistance on the 27 July 2023, were unequivocal that the First Respondent was the correct employer and was therefore liable for any award of compensation the Tribunal may make. As such their assertion that the Second Respondent should be removed would not have caused any prejudice to the Claimant.

28. Whilst the Claimant in very protracted correspondence set out multiple grounds as to why she believed the Second Respondent had been correctly named as a Respondent it became increasingly unclear as to why that was being asserted in terms of the claims brought. Her position became increasingly less predicated on the basis that the Second Respondent was her employer and increasingly on based on a more abstract concept of a duty of care and commonality of policies and group structure. She did not particularise any grounds upon which she would be prejudiced if the claim solely proceeded against the First Respondent where

from 27 July onwards, and reiterated on 1 September 2023, and in correspondence on behalf of the Respondents it was unequivocally stated that the First Respondent was her employer and accepted liability for any findings/ and that the First Respondent was not facing the risk of an insolvency event thereby compromising the ability of the Claimant to enforce any judgment which may be made.

29. That position was set out in detail in correspondence and then subsequent to the hearing on 1 September 2023 the Respondents set out the position in a detailed costs warning letter on 29 September 2023. Rather than the Claimant accepting the very strong indication stated by Mr Nicolls and the Respondents at the 1 September 2023 hearing, she doubled down on her assertions that the Second Respondent was correctly named as set out in her document dated 15 September 2023. In my opinion the Claimant was unwilling to countenance the position without a judicial ruling that the Second Respondent had been incorrectly named. As such the Respondents had no alternative other than to pursue the strike out application, as the alternative would have been to allow a situation where the Second Respondent remained a party to the proceedings for the full merits hearing. Whilst the Claimant asserts that this would not have caused the Second Respondent any prejudice I do not accept that argument. There would undoubtedly have been additional cost with two Respondents named. There may or may not have been additional witnesses but I consider it was entirely to be expected and reasonable that in a situation where two group companies are named and one has unequivocally accepted that it was the employer that it would be reasonable for that other Respondent to seeks its removal from the proceedings and the Respondents did that in the most appropriate and cost effective way.

30. So, I have found that at least from 1 September 2023 onwards, or shortly afterwards, it should have been apparent to the Claimant that pursuit of the Second Respondent was unreasonable. At the very least that should have become apparent from the Respondents' without prejudice save as to costs letter on 29 September 2023.

<u>What award of costs should be made?</u>

31. What I now need to consider is what award of costs should be made. This is a discretionary award. I am mindful of the fact that the Respondents' schedule of costs appended to the application does not include a specific breakdown of fees incurred by calendar entry but rather a lump sum for work undertaken from 11 September 2023 to 1 December 2023.

32. I am mindful of the enquiries I have made pursuant to Rule 84 as to the Claimant's means.

33. I do not consider it would be reasonable or proportionate for an award of costs to be made against the Claimant for the full amount of costs, or for an award to be made for all costs incurred in relation to time from 1 September 2023, or a later date, possibly that of the costs warning letter dated 29 September 2023. I accept that the Claimant's means are relatively limited and whilst there may be grounds for some degree of scepticism about the level of her savings she has in response to a judicial enquiry said that her only asset in her sole name is savings of between £2,000 and £3,000. Everything else is jointly owned with her husband.

34. Mr Nicolls initially said that the Respondents wished the application to be

determined today without further enquiries being made as to jointly owned matrimonial savings and assets. Having taken instructions during the adjournment he said that depending on the potential level of award the Respondents would wish for full enquiries to be made as to joint matrimonial assets given the degree of scepticism regarding the Claimant's relative paucity of savings given her previous earnings.

35. I do not consider that more than a relatively nominal award is appropriate. I consider that the figure of £500 is appropriate for the following reasons. I do not consider that the fact that the claim against the Second Respondent was struck out as having no reasonable prospect of success it therefore follows that the Claimant's conduct was automatically unreasonable conduct pursuant to Rule 76 (1) (b). There are many claims which will fail, to include being struck out as having no reasonable prospect of success, without the automatic consequence that a cost award should be made. Costs are very much the exception rather than the rule. Many claims are pursued in the employment tribunals which on the face of it have very limited prospects of success but do not result in an award of costs being made.

36. Further, I accept that the Claimant has been extremely diligent and conscientious and has put forward well-structured and articulate arguments in support of her contentions as to why the Second Respondent should be included. It may well be, and I have found it to be the case, that those arguments are misconceived. The Claimant arguably became entrenched in pursuit of a position which was ultimately found to be wrong. It is for that reason I find that the Claimant's conduct has been unreasonable and thereby engaged the costs provisions as I have set out. The Claimant has been intransigent in the pursuit of a particular course which has ultimately failed and has quite clearly caused the Respondents to occasion unnecessary costs.

37. However, applying considerations of proportionality in terms of the unreasonable conduct, its impact on the Respondents, and the Claimant's stated means £500 is in my opinion sufficient. It applies an appropriate sanction on a party who has unreasonably persisted with an argument without merit, and without obvious benefit to her, but at the same time does not in effect represent a punitive measure which could be construed as designed to discourage her from the continuing pursuit of the claim against the First Respondent.

38. In reaching that decision I should emphasise that was the position I had taken before Mr Nicolls' intervention regarding the Respondents wishing to make further enquiries as to the Claimant and her husband's joint means and assets. Therefore it is not conditional on any further enquiry as to the Claimant's families' means. For the reasons set out I would not have gone beyond £500 even if the Claimant had greater means than she has asserted.

39. Whilst the costs rules do not have a particular date I am going to provide for it to be paid to the Respondents within 28 days in accordance with Rule 76.

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Employment Judge Nicolle

Dated 26 February 2024

7 March 2024
Judgment sent to the parties on

M PARRIS
For the Tribunal Office