EMPLOYMENT TRIBUNALS

Claimant: **Miss C Drayson**

Respondent: **ABM Catering Ltd**

Before: **Employment Judge Eeley**

JUDGMENT

The respondent's application for costs dated 23 February 2024 is refused.

REASONS

1. There was a preliminary hearing in the claimant's case on 9 February 2024. At that hearing I struck out the claimant's claim of unfair dismissal. I gave an oral decision and reasons at the hearing and then provided written reasons for the decision which were sent to the parties on 20 March 2024. Those written reasons set out the basis for my decision.

2. By email to the Tribunal dated 23 February 2024, the respondent's solicitor made a written application for costs. The respondent asked that I determine that application on the papers and without a hearing. Attached to the application were two costs schedules and a costs warning letter which had been sent to the claimant on 23 November 2023, after an earlier preliminary hearing.

3. The costs application was sent to the claimant and she was given an opportunity to respond in writing. She provided her comments in an email dated 26 February 2024 and made some further representations in emails dated 7 and 8 March 2024.

4. I felt able to determine the application without a further hearing.

5. The respondent's application was apparently made pursuant to rule 76(1)(b) of the Employment Tribunal Rules of Procedure 2013 on the basis that the claimant's claim had no reasonable prospects of success. In determining the application I had to consider whether the ground in rule 76(1)(b) was made out and, if so, whether the Tribunal should exercise its discretion to make a costs order, taking into account all the relevant circumstances of the case.

6. There is no rule in the Employment Tribunal that 'costs follow the event' (in other words, that the loser routinely pays the winner's costs.) The Tribunal has to be satisfied that one the grounds for awarding costs in rule 76 is made out in the circumstances of the case.

7. A consideration of the written reasons for my strike out decision shows that I had to make a determination on the facts, after hearing witness evidence, as to what was said or disclosed by the claimant to the respondent which might be said to constitute a protected disclosure. The claimant's unfair dismissal claim could only succeed if a protected disclosure had been made.

8. I heard evidence from the claimant and from the respondent's witness as to what was said during the relevant conversation. Neither party could be sure, in advance of the preliminary hearing, as to which version of events I would prefer and find proven on the balance of probabilities. The decision was largely made on witness evidence. Thus, it could not be said in advance of the hearing that the claimant had no reasonable prospects of successfully establishing that her account of events was accurate. She had a reasonable prospect of establishing her version of events as the accurate one in this case.

9. As I preferred the respondent's witness evidence on this point at the preliminary hearing, I did not consider whether the claimant's account, if proved, would amount to a protected disclosure. If the claimant's account had been proved she would have asserted that it constituted a protected disclosure in relation to health and safety (section 43B(1)(d) Employment Rights Act 1996). As the putative disclosure was said to relate to safeguarding of vulnerable adults in a housing context, it could certainly be argued that, depending on the facts found proven, this *could* amount to a protected disclosure with the necessary public interest element. In short, I am unable to say that the claimant's case, based on her version of events, had no reasonable prospects of success.

10. I also take account of the fact that the claimant is a litigant in person who has apparently not taken legal advice. She cannot be judged by the same standards as a professionally represented party who pursues a hopeless case even though, it is to be assumed, they have been advised as to the weakness of their claim.

11. I am aware that the respondent sent an email to the claimant on 23 November 2023 warning her of its intention to apply for costs if she continued her claim. The respondent was entitled to send this costs warning letter. However, the letter did little more than assert that the claimant's case was without merit. It did not provide a detailed rationale for this assertion. It was being read by an unrepresented lay person who could not necessarily be expected to 'take the respondent's word for it' that her claim had no reasonable prospects of success in the absence of a clearly explained rationale. This was not one of those cases where the 'writing was on the wall' showing the claimant that her case was hopeless and that she should not pursue it to the preliminary hearing. Although Judge Tobin's case management summary showed that he had struggled to understand the claimant's case such that he listed the preliminary hearing, it did not amount

to a clear costs warning to the claimant that she was at risk of a costs order if she pursued the claim to the next preliminary hearing.

12. I also note that the claimant says she is of limited financial means. Her current income from benefits does not, she says, cover all her outgoings. This is a further factor which weighs against making a costs award in this case.

13. In all the circumstances of this case, I am not satisfied that the relevant ground for awarding costs has been established. Furthermore, I would not have been persuaded that it was appropriate to exercise the Tribunal's discretion to make a costs order in the circumstances of this case.

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Employment Judge Eeley

Date: 9 April 2024

JUDGMENT SENT TO PARTIES ON

23 April 2024

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