Case Number: 2304964/2022
2300837/2023

EMPLOYMENT TRIBUNALS

Claimant: **Miss M Mettle**

Respondent: **HCRG Care Limited**

Heard at: **London South (Croydon) a CVP hearing** **On: 15/4/2024 – 19/4/2024**

Before: **Employment Judge Wright**
Ms Y Batchelor
Mr S Sheath

Representation:
Claimant: **In person**

Respondent: **Mr O Lawrence - counsel**

RESERVED COSTS JUDGMENT

The respondent's application for its costs to be paid by the claimant under Rule 76(1) (a) and (b) is successful. The claimant is ordered to pay to the respondent the sum of £900 exclusive of VAT within 28 days.

REASONS

1. A final hearing took place between 15/4/2024 and 19/4/2024. Oral Judgment was delivered on the morning of the 19/4/2024. The claimant's claims failed in their entirety, were not well-founded and were dismissed.

2. The respondent made an application that the claimant pay its costs.

3. The main basis of the respondent's application was that various elements of the claimant's claim had no reasonable prospects of success. Such that the rejection of the settlement offer(s) was unreasonable. In relation to the Tribunal's discretion, the respondent relied upon the findings of the Tribunal in the Judgment given. The respondent conceded that some parts of the claimant's claim may have been thought to have reasonable prospects of success; which may require evidence being heard and considered. The Tribunal's Judgment however indicated that many of the other claims the claimant brought never had any prospect of success. Based upon the claim as presented, the claimant had not made out any case in respect of her victimisation, breach of contract and the direct discrimination claim. Elements of the Judgment are apposite to this application.

4. In respect of the victimisation claim, what is fatal to it and which feeds into it being unreasonably advanced, is causation. The claimant did not advance any link between the email and any detriment. There was nothing to link Ms Budgen (or Mr Tizora) to the email sent to Ms Godden. Such that the victimisation claim had no reasonable prospect of success.

5. In respect of the rota change; this allegation had no reasonable prospect of success. It was an innocuous act which the respondent explained. It was not reasonable to advance this argument as harassment, victimisation or breach of contract; especially when the claimant did not attend the shift.

6. The same point is made in respect of the allegation regarding the CQC. There was no breach of contract and no suggestion as to how it was related to race or related to the protected act. The Tribunal also found the burden of proof did not transfer.

7. The claim in respect of the reduced hours had no reasonable prospect of success. It was impossible to see what was detrimental about agreeing to the claimant's proposal. The same can be said for the follow up paperwork Ms Godden sent to the claimant. The disadvantage to the claimant was that she was paid less whilst she was suspended. That however, was as a result of an

agreement she had initiated. There was no prospect of success in claiming, that was a breach of contract.

8. In respect of the victimisation claim, the Tribunal found the claimant did not address the burden of proof to show the email sent on 22/1/2021 created the proscribed environment.

9. Furthermore, in respect of direct discrimination, no comparator was identified and the respondent submitted this meant the entire claim under this prohibited conduct was misconceived from the outset. The claimant did not have any grounds nor did she advance any grounds as to why she thought these allegations were less favourable treatment because of her race.

10. Mr Lawrence submitted those are the main elements of the Tribunal's findings which showed that the various claims had no reasonable prospect of success. This was a bloated claim, which should not have been so bloated; and the result is that the respondent was put to extra costs in defending it.

11. In respect of the Tribunal's discretion, it was submitted that it should be exercised in making a costs award. The claimant declined a substantial offer of £15,000. In doing so, the respondent then incurred counsel's fees and further costs. It is unclear why the claimant refused the offer, she was legally represented, had legal advice and her solicitor was conducting the correspondence. The conclusion the Tribunal is invited to come to is that the respondent should not have had to defend this claim or have been put in this position; as such, the claimant has acted unreasonably.

12. The respondent seeks its costs in respect of counsel's fees only, the sum of £8,450, that is comprised of a brief fee of £5,750 and three refreshers of £900. No vat is claimed.

The Law

13. The respondent made an application for costs under Rule 76(1)(a) and (b) of the ET Rules[1].

14. The material provisions of the ET Rules 2013 governing costs applications are excerpted below:

> Rule 74. Definitions

[1] The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1.

(1) “Costs” means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). […]

Rule 75. Costs orders and preparation time orders

(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.

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

(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.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

Rule 77. Procedure

A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

Rule 78. The amount of a costs order

(1) A costs order may—

> (a) 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;
>
> (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed

> assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; […]
>
> (3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.
>
> Rule 84. Ability to pay
>
> 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.

15. When determining an application for costs, the ET should apply a three-stage approach:

    a. Is the relevant jurisdictional threshold in rule 76 met?

    b. If so, should the ET exercise its discretion in favour of making a costs order?

    c. If so, what sum of costs should the ET order?

16. For the purposes of rule 76(1)(a) the word 'unreasonable' is to be given its ordinary English meaning and is not to be interpreted as meaning something similar to vexatious (Dyer v Secretary of State for Employment UKEAT/0183/83).

17. The Tribunal should consider the nature, gravity and effect of the unreasonable etc conduct, but it is appropriate to avoid a formulaic approach and have regard to the totality of the relevant conduct. As Mummery LJ explained in Yerrakalva v Barnsley MBC [2012] ICR 420, CA at §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 […]

18. It should, however, be noted that the Tribunal is not confined to making an award limited to those costs caused by the unreasonable conduct. As Mummery LJ confirmed in McPherson v BNP Paribas (London Branch) [2004] ICR 1398, CA.

19. Mummery LJ did emphasise in Yerrakalva that whilst the Tribunal is not limited to awarding those costs incurred by the receiving party as a result of the

paying party's unreasonable conduct, the 'effect' of the unreasonable conduct will often be a relevant factor in the Tribunal's exercise of its discretion.

20. In circumstances where the Tribunal finds that the jurisdictional threshold in rule 76 is met, the Tribunal retains a broad discretion as to whether to make a costs order and the amount of any costs awarded. Whilst there is no closed list of factors relevant to the exercise of the Tribunal's discretion, the following factors are often relevant:

    a. Costs orders are intended to be compensatory, not punitive (Lodwick v Southwark LBC [2004] ICR 884, CA). Therefore, the extent of any causal link between the unreasonable etc conduct and the costs incurred will normally be a relevant discretionary factor (Yerrakalva), albeit there is no requirement to establish a causal link between the unreasonable conduct and the costs incurred before an order can be made (McPherson).

    b. The paying party's ability to pay is a factor which the Tribunal is entitled, but not obligated, to consider (see Rule 84). Where regard is had to the paying party's ability to pay, that factor should be balanced against the need to compensate the receiving party who has unreasonably been put to expense (Howman v Queen Elizabeth Hospital Kings Lynn UKEAT/0509/12).

    c. Any assessment or consideration of means need not be limited to the paying party's means as at the date the order is made. It is sufficient that there is a 'realistic prospect that [they] might at some point in the future be able to afford to pay' (Vaughan v London Borough of Lewisham [2013] IRLR 713, EAT).

    d. Where the Tribunal does decide to take the paying party's means into account, it must do so on the basis of sufficient evidence (for example by the paying party completing a county court form EX140) (Oni v NHS Leicester City UKEAT/0144/12).

    e. There is no requirement to limit costs to the amount the paying party can afford (Arrowsmith v Nottingham Trent University [2012] ICR 159, EAT).

    f. The Tribunal may have regard to the means of a party's spouse or other immediate family members (Abaya v Leeds Teaching Hospitals NHS Trust UKEAT/0258/16).

    g. Whether a party is legally represented may be a relevant factor. An

unrepresented litigant may be afforded more latitude than a party who has the benefit of professional legal advice and representation (AQ Ltd v Holden [2012] IRLR 648, EAT).

21. In Radia v Jefferies International Ltd UKEAT/0007/18/JOJ the EAT said:

> '61. It is well-established that the first question for a Tribunal considering a costs application is whether the costs threshold is crossed, in the sense that at least one of Rule 76(1)(a) or (b) is made out. If so, it does not automatically follow that a costs order will be made. Rather, this means that the Tribunal may make a costs order, and shall consider whether to do so. That is the second stage, and it involves the exercise by the Tribunal of a judicial discretion. If it decides in principle to make a costs order, the Tribunal must consider the amount in accordance with Rule 78. Rule 84 provides that, in deciding both whether to make a costs order, and if so, in what amount, the Tribunal may have regard to ability to pay.
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> 62. At the first stage, accordingly, it is sufficient if either Rule 76(1)(a) (through at least one sub-route) or Rule 76(1)(b) is found to be fulfilled. There is an element of potential overlap between (a) and (b). The Tribunal may consider, in a given case, under (a), that a complainant acted unreasonably, in bringing, or continuing the proceedings, because they had no reasonable prospect of success, and that was something which they knew; but it may also conclude that the case crosses the threshold under (b) simply because the claims, in fact, in the Tribunal's view, had no reasonable prospect of success, even though the complainant did not realise it at the time. The test is an objective one, and therefore turns not on whether they thought they had a good case, but whether they actually did.
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> 63. In this regard, the remarks in earlier authorities, about the meaning of "misconceived" in Rule 40(3) in the 2004 Rules of Procedure, are equally applicable to this replacement threshold test in the 2013 Rules. See in particular Vaughan v London Borough of Lewisham [2013] IRLR 713 at paragraphs 8 and 14(6). However, in such a case, what the party actually thought or knew, or could reasonably be expected to have appreciated, about the prospects of success, may, and usually will, be highly relevant at the second stage, of exercise of the discretion.'

Conclusions

22. The threshold in Rule 76 is met in this case. The claimant and/or her representative behaved unreasonably in pursuing many elements of her claim. The claimant was asked at the outset and she confirmed that she was pursuing all of the allegations in the list of issues.

23. On any reading of the allegations, it is not only difficult but impossible to understand how a legally represented claimant could believe that some of her allegations had any reasonable prospect of success. The matters the respondent highlighted in its application are noted. As per the liability Judgment; there is nothing detrimental about agreeing to a proposal put by the claimant to reduce her hours (3.1.3)[2]. How can there possibly be anything wrong in acquiescing to something the claimant had requested? Not only that, the claimant said nothing in her evidence-in-chief to suggest how this was harassment related to race. Besides the fact the allegation is simply not a detriment, the legally represented claimant has not even attempted to link it to the prohibited conduct she relies upon.

24. The Tribunal cannot say enough times that it is not sufficient to refer to something the claimant is unhappy or disgruntled about (something that is a detriment, whereas in this case, particularly in this example, the allegation is simply not detrimental) and to then rely upon a protected characteristic (in this case race). A claim framed as such is doomed to fail. That fails to address the burden of proof, which is upon the claimant. She has to establish some facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent has contravened the EQA, in this case in respect of the prohibited conduct of harassment and victimisation.

25. The other failings referred to in the liability Judgment as highlighted by the respondent are noted.

26. The Tribunal sees too many of these claims brought by litigants in person who do not understand the complexities and technicalities of the EQA. For example, the need to identify a comparator for a direct discrimination claim and to provide evidence of that comparator. In this case however, the claimant was legally represented since 31/8/2023. Presumably her legal representative drafted her witness statement or at least reviewed it. The claimant's representative made a detailed application to amend her claim on the 6/12/2023. The one substantive amendment was allowed 'marginally'. This does demonstrate that her legal representative had a grasp of the claim which the claimant advanced; yet this did not find its way into her witness statement.

27. Another example is the way the claimant framed this element of her case during the hearing. She sought to claim that the respondent should not have simply agreed to her request to reduce her hours. She said her request should have caused the respondent to make enquiries of her as to why she wanted to reduced her hours, presumably she was suggesting that there is some sort of duty of care upon the respondent in this regard. This was

[2] The allegations are set out in the written reasons for the liability Judgment.

notwithstanding the fact that she had set out in her email application the reason why she wanted to reduce her hours. Even if this were the basis of the claimant's misconceived case; it was not set out in her evidence-in-chief.

28. The same observations could be made of allegations: 3.1.1 (adjustments to the rota, the claimant did not establish how this was related to her race or transfer the burden of proof, furthermore, it was not a breach of contract); 3.1.2 (speaking to the CQC, the claimant did not establish how this was related to her race or transfer the burden of proof, furthermore, it was not a breach of contract); 3.1.4 and 5.1.1 (suspending her for things which had appeared online much earlier, the claimant did not establish how this was related to her race or religion, she did not transfer the burden of proof and there was no breach of contract); 3.1.5 (trying to get the claimant to sign a new contract – this allegation simply was not made out); 3.1.6 and 5.1.4 (the reason for the suspension – this allegation was not made out); 3.1.7 (the allegation that there was a delay in the suspension, the Tribunal found there was no delay and that furthermore, once the claimant had seen the respondent's disclosure and witness evidence, she should have realised this was so); 3.1.8 and 5.1.5 (being informed the suspension was lifted and to return to work – this was not a detriment, particularly as the claimant had complained about the length of the suspension).

29. The allegation of religious harassment (5.1.2) in respect of comment by the Safeguarding Lead was (as previously stated) allowed 'marginally' by means of amendment. This should have put the claimant on notice that this was not a particularly strong claim; or to put it another way, it was considered to be a weak claim. This should have caused reflection. Notwithstanding the fact the amendment application was successful, it does not automatically follow that the claim should be pursued. Allegation 5.1.3 was not made out.

30. In respect of the allegations of direct discrimination, the fatal flaw was not to identify a comparator. There was a legitimate explanation for the respondent's decision to suspend and it was not because of the claimant's race (6.1.2). The claimant did not transfer the burden of proof. There was no dismissal by the respondent (6.1.1). Even if the claimant intended this to refer to direct race discrimination forcing her to resign, again, she did not set this out in her evidence-in-chief.

31. There was no breach of contract and therefore there was no shortfall in wages.

32. The respondent had sent three 'without prejudice save as to costs' letters to the claimant, during the time she was legally represented. Those letters were sent on 2/1/2024, 10/1/2024 and 26/3/2024. The content and tone of the letters was reasonable. The respondent made two substantive offers once

the first offer was rejected. The claimant's counter-offers were unreasonable and unrealistic. The respondent pointed out the failings in the claimant's case, which were mirrored by the Tribunal's findings; the respondent correctly identified the difficulties the claimant was facing.

33. This all amounts to unreasonable conduct. In addition, the allegations had no reasonable prospects of success and this should have become apparent once witness statements were exchanged.

34. The nature, gravity and effect of the unreasonable conduct is the time, effort and cost the respondent was put to in defending the claims. The respondent's witnesses were put to the trouble of drafting their witness statements, attending the hearing and being questioned by the claimant. That not only distracted them from their everyday duties; it is also an unpleasant experience. That is compounded by serious allegations of unlawful discrimination contrary to the EQA which had been hanging over them since 25/12/2022; which were without foundation.

35. Stepping back and looking at the whole picture of what has happened, claims which legally had no merit were unreasonably pursued. In reasoned correspondence the respondent pointed this out to the claimant's legal representative. The claimant's witness statement did not address how the burden of proof was transferred to the respondent and some allegations were either not made out, or, there was no detriment identified.

36. The threshold having been met, the Tribunal is prepared to exercise its discretion in making a costs award. Pursuing egregious and misleading allegations is unreasonable conduct.

37. The respondent only seeks its costs in respect of Mr Lawrence's brief fee and refreshers. The respondent does not claim its costs in preparing for the final hearing and as per its application, tacitly accepted there was at least one element of the claimant's claim which required the evidence to be heard and determined; notwithstanding the claimant was unsuccessful.

38. In light of that application/concession the Tribunal has taken the view that of the (eventual) four day final hearing, that only one hearing day (and so one day's refresher) would have been saved, had the claimant withdrawn her unmeritorious claims.

39. The Tribunal considered the claimant's ability to pay any costs which were awarded. The claimant's evidence was unsatisfactory. The claimant did not refer to her orphaned niece for who she said she paid school fees in her schedule of loss dated 3/8/2023 (page 77).

40. It is not accepted that she receives £938 in benefits per month, that her rent is also £938 per month and that she then lives off hand-outs from her family. Furthermore, as a qualified nurse who resigned from her role in November 2022 (she was therefore not dismissed and had no conditions placed upon her registration); that she has not been able to source some income, including bank shifts. The claimant said she had been in touch with colleagues who had left the respondent and she had 30 years' experience. She earned £40,500 pa. That is notwithstanding the claimant's age (60 at the time of her resignation, with her state retirement age being 67). The Tribunal finds that there was nothing to prevent the claimant from working and earning a salary after her employment ended and certainly once time had moved on after her resignation.

41. The Tribunal was however prepared to accept that the claimant does not have any savings.

42. The Tribunal did not accept the claimant's evidence regarding her income and outgoings. It also took into account the availability of work for a qualified nurse, which the claimant does not appear to have explored. The Tribunal is therefore prepared to order the claimant to pay one day's refresher fee in respect of Mr Lawrence's fee and Orders her to pay to the respondent the sum of £900.

19 April 2024

Employment Judge Wright