Case No: 1600852/2022

EMPLOYMENT TRIBUNALS

Claimant: Mrs S Foreman

Respondent: Green Willow Funerals Limited

Heard at: Cardiff (in chambers) **On:** 17 June 2024

Before: Employment Judge C Sharp
Mrs A Burge
Mrs J Beard

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Claimant unreasonably pursued claims of direct sex and marriage discrimination and victimisation with no reasonable prospect of success from 2 December 2022 until their conclusion which was found to be in breach of Rules 76(1)(a) and (b) of the Employment Tribunal Rules of Procedure;

2. The Tribunal will exercise its discretion to order that the Claimant pays costs incurred by the Respondent;

3. The Claimant is directed to pay £10,000 to the Respondent.

REASONS

The application

1. Following the promulgation of a liability Judgment on 14 February 2024 dismissing the Claimant's claim of victimisation (and recording the dismissal of various other claims which were withdrawn), the Respondent applied for a costs order on 4 March 2024.

2. The basis of that application was that the Claimant had acted unreasonably in the way that the proceedings had been conducted by her. In the alternative, the Respondent argued that the Claimant's claims had no reasonable prospect of success. It sought £10,000, which it said did not reflect its full legal costs, which were asserted to be in excess of £25,000.

3. The Tribunal refreshed its memory of its liability decision using the detailed notes of the Judge as written reasons had not been requested by the parties. It also was provided with a 118-page bundle, containing the submission of the parties and the evidence relied upon by them. Numbers in square brackets are references to the costs hearing bundle provided to the Tribunal.

Unreasonable conduct/no reasonable prospect of success

4. The Respondent submitted that the Claimant had conducted proceedings unreasonably by pursuing claims which had no reasonable prospect of success, and not withdrawing the majority of the claims until day 1 of the final hearing. By this point, it had incurred substantial legal costs. The Respondent pointed out that the Claimant had not adduced evidence in support of many of the contentions before the Tribunal, and had failed to establish the existence of any protected acts or detriments for the remaining claim of victimisation which was determined by the Tribunal. The Respondent highlighted the number of costs warning letters and attempts by its representative to explain why the claim of marriage discrimination had no reasonable prospect of success and issues with the other claims; it also pointed out that the Claimant conceded that the reason for the restructure of the Respondent was appropriate and due to the findings of two independent reports. The Respondent also reminded the Tribunal that its profits were gifted to a charity, the YMCA Cardiff, but the legal costs incurred dealing with the Claimant meant that the donation was reduced.

The Claimant's response

5. The Claimant in her written submissions failed to provide evidence of her means. She said that she had no income and relied on her husband, but provided no evidence why she was not working, the assets and income available to the household, or its outgoings. The Claimant had been directed to provide a witness statement and evidence on this issue.

6. The Claimant said that she genuinely believed that she had a reasonable prospect of success and no-one, including the solicitors she consulted *pro bono* and the judge at the case management hearing, said otherwise. The Claimant further said that she had been willing to mediate and used the services of ACAS; the Tribunal reminded itself that discussions with ACAS are not disclosable and must be excluded under s251B Trade Union and Labour Relations (Consolidation) Act 1992. The Claimant said that she had complied with case management orders, and the Respondent had not made a strike out application. The Claimant acknowledged that the Respondent had explained the law to her about marriage discrimination and provided copies of the relevant authorities to her, but said that she thought the cases showed a lack of clarity about the law, and it was not a substantial claim in any event. The Claimant accepted that it was when the Judge at the outset of the final hearing took her through the claims and the legal questions that she decided to withdraw the claims of direct marriage and sex discrimination and unfair dismissal, and noted that this reduced the length of the final hearing.

Law

7. The Tribunal must deal with costs applications in three stages:

   a) Has the threshold for the making of a costs order been met? This is likely to require findings of fact about the paying party's conduct.

   b) If so, should the Tribunal exercise its discretion to award costs?

   c) If it chooses to make a costs order, how much and in what form?

8. Rule 76 of the Employment Tribunal Rules of Procedure state:

   "(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;

   (b) any claim or response had no reasonable prospect of success;…"

9. The common meaning of the word "*unreasonable*" apply to this application; the test is not whether the impact of the conduct on the Respondent was unreasonable. However, the Tribunal should take into account the "*nature, gravity and effect"* of a party's unreasonable conduct (**McPherson -v- BNP Paribas** 2004 ICR 1398, CA). If the Tribunal finds unreasonable behaviour during the conduct of the proceedings by the Claimant (or by bringing the proceedings), it does not mean that the Tribunal must make a costs order against her.

10. The Tribunal when considering whether to make an order under Rule 76(1)(b) (no reasonable prospect of success) bore in mind the guidance offered in **Radia -v- Jefferies International Ltd** (2020) IRLR 431 - where there is an overlap between unreasonable bringing of or conducting the claim under Rule 76(1)(a) and no reasonable prospect of success under Rule 76 (1)(b), the key issues for consideration by the tribunal are in either case likely to be the same: did the complaints in fact have no reasonable prospect of success, did the claimant in fact know or appreciate that, and finally, ought they, reasonably, to have known or appreciated that? ***Radia*** notes that tribunals should focus on what the parties knew about their cases at the time, not what the tribunal knows after hearing the evidence.

11. Turning to the issue regarding whether the claims (in whole or in part) had "*no reasonable prospect of success"*, merely losing a claim or a central allegation does not necessarily mean costs should be awarded (**HCA International Ltd -v- May-Bheemul** UKEAT/0477/10/ZT). When considering if a party should have realised that the claim had no reasonable prospect of success, the Tribunal can consider what that party knew or ought to have known if they had "*gone about the matter sensibly*" (**Cartiers Superfoods Ltd -v- Laws** [1978] IRLR 315) (though this authority is based on an older different version of the Tribunal rules, it simply further confirms that the Tribunal should consider what a party knew or ought to have known as set out in ***Radia***). However, caution in

making such an assessment is wise as what is obvious with hindsight may not be so clear during the "*dust of battle*" (**Marler -v- Robertson** [1974] ICR 72).

12. ***Vaughan -v- London Borough of Lewisham and others*** 2013 IRLR 713 EAT saw the appeal tribunal state that the respondents' failure to seek a deposit order, or otherwise to issue any costs warning asserting that the claims were hopeless, was not cogent evidence that those claims had any reasonable prospect of success. In paragraph 14(4) of that judgment, the EAT said:

"(4) The fact that the claim depended on issues of fact about the motivation of the individual respondents or other council employees did not automatically mean that it was reasonable for the appellant to believe that she had a good chance of success. It depends on the facts and the allegations in the particular case. If, as the tribunal found, there was no evidence to support the interpretation put by the appellant on the acts of which she complained, all of which had in fact more obvious innocent explanations, to assert that the claims were 'fact-sensitive' is nothing to the point. Nor does it make any difference that some questions were only finally resolved as a result of the evidence at the hearing. That will generally be the case; but it does not mean that a reliable assessment of the prospects of success could not have been made at an earlier stage, as the tribunal evidently believed was the case here."

In paragraphs 18 & 19, the judgment went on to say:

"18. We do not believe that as a matter of law an award of costs can only be made where the party in question has been put on notice, by the making of a deposit order or otherwise, that he or she is at risk as to costs. Nor, however, do we believe that the absence of such notice, or warning, is necessarily irrelevant … What, if any weight it should be given in any particular case must be judged in the circumstances of that case; and it is, as we have already observed, regrettable that the tribunal does not expressly address the question.

19. In our view the fact that the appellant had not been put on notice was not in the present case a sufficient reason for withholding an order for costs which was otherwise justified. In the first place, we do not believe that it would be just to deprive the respondents of an award of costs because they had not sought a deposit order: there may, as discussed above, be good reasons why a party may prefer not to take that course. If there is any criticism, it could only be that they did not write to her at an early stage setting out the weaknesses in her claims and warning that a costs order would be sought if they failed. But what is significant is that the appellant at no stage in her submissions to the tribunal or before us asserts that if she had been given such a warning she would have discontinued her claim; and nor in any event does it seem to us that any such assertion would have been credible. She was, as the tribunal emphasises, convinced, albeit without any rational or evidential basis, that she was the victim of a conspiracy and of a serious injustice, and it seems to us highly unlikely that a letter from the respondents, however well-crafted, would have caused the scales to fall from her eyes."

13. The Tribunal has a discretion and should consider all relevant factors. Costs orders in the Employment Tribunal are the exception, rather than the rule (***Yerrakalva -v- Barnsley Metropolitan Borough Council 2012*** ICR 420, CA). Rule 76 uses the word "*may*" when talking about circumstances which may lead to the making of such an order. It is a relevant factor to consider whether any

application for strike out or a deposit order was made by the receiving party (**AQ Ltd -v- Holden** [2012] IRLR 648).

14. The purpose of costs orders is to compensate the receiving party; punishment of the paying party is not a relevant factor (***Lodwick -v- Southwark London Borough Council*** 2004 ICR 884 CA). This means consideration of the loss caused to the receiving party as a result of the identified basis of any costs order is required. The case of ***Yerrakalva*** demonstrates that costs should be limited to those "*reasonably and necessarily incurred*".

15. The ability to pay of the paying party can be a relevant factor in deciding how to exercise the Tribunal's discretion (and also when considering how much should be paid). However, this is a factor to be balanced against the need to compensate the receiving party if they have been unreasonably put to expense (***Howman -v- Queen Elizabeth Hospital Kings Lynn*** EAT 0509/12). The Tribunal is not required to consider ability to pay, but it may choose to do so. Any assessment of the Claimant's ability to pay must be based on evidence before the Tribunal; the Claimant has chosen not to adduce such evidence.

16. Another potentially relevant factor can be whether the paying party was legally advised (***AQ Ltd***).

Findings

Stage 1 - Did the Claimant act unreasonably in the conduct of proceedings? Did the Claimant bring claims with no reasonable prospect of success?

17. As ***Radia*** confirms, the key issues for consideration by this Tribunal when dealing with Stage 1 overlap between the two limbs relied on by the Respondent. Whether the Claimant was unreasonable in bringing or continuing the claims is closely connected to the issue as to whether the claims had no reasonable prospect of success and whether the Claimant knew or ought to have known that. The limbs in this case cannot be sensibly separated in the Tribunal's view, and so were considered together.

18. The Claimant can only be taken to have known what she knew, or ought to have known, and cannot be expected to have predicted the findings of the Tribunal. The Tribunal must also consider the nature, gravity and effect of conduct when deciding if it was unreasonable.

19. No further evidence was before the Tribunal for the costs application about what the Claimant did or did not know. The Claimant was legally advised at points, but has not provided any evidence of the advice given. She asserted that the nature of the advice was that available for free; the nature of such advice is limited compared to paid-for advice. While legal privilege has not been waived, it is reasonable for the Tribunal to conclude that it is more likely than not that the Claimant was given advice about both the claims and what would need to be evidenced at the final hearing to succeed.

20. The Tribunal concluded that the Claimant ought to have known that the claim of direct marriage discrimination had no reasonable prospect of success. As early as 2 December 2022 [6], the Respondent's representative explained in clear terms that the claim could not succeed if the problem was the person to whom the Claimant was married, not the marriage itself. The Tribunal

disagreed with the Claimant's submission that the authorities provided later to her by the Respondent showed a lack of clarity – they were the leading authorities and set out unambiguously the legal position. The Respondent's representative sent those authorities to the Claimant on 6 February 2023 [9] and followed that up with further correspondence [12-13].

21. The Claimant said that no-one she consulted explained to her that as her issue was plainly because she was married to the now-former CEO of the Respondent, her claim of direct marriage discrimination would fail. There is no evidence of what the pro bono lawyers advised, but the Tribunal considers this unlikely to be correct as the point is obvious. In addition, while the Claimant said Employment Judge Moore did not comment, [68] paragraph 21 of the case management order of 19 October 2023 showed that Judge Moore did explain this point to the Claimant. It is evident that the Claimant did not appreciate what Judge Moore was saying, and it is possible that the same thing happened when the solicitors gave advice.

22. The Tribunal accepted that the Claimant genuinely believed that the claim of marriage discrimination had merit; it further accepted that it was not until the Judge at the final hearing took the Claimant and her lay representative through the issues that the Claimant realised that the claim had no reasonable prospect of success. However, the Claimant ought to have known this as early as December 2022 when the Respondent's representative explained it to her, and certainly by February 2023 when the authorities were provided. It is also relevant that the Claimant provided no evidence, including within her witness statement, supporting such a claim. The Tribunal concluded that the claim of direct marriage discrimination had no reasonable prospect of success, and it was unreasonable of the Claimant to pursue it from 2 December 2022 onwards. It put the Respondent to considerable expense and inconvenience defending a discrimination claim, particularly as it was closely intertwined with the sex discrimination claim. Its inclusion led to the final hearing being listed for longer than ultimately required.

23. The Tribunal turned to the claim of direct sex discrimination. This was based on the same allegation as the claim of direct marriage discrimination [71]. The Tribunal noted that the Claimant at no point in her witness statement explained how the alleged detriments were related to her sex or how they could reasonably be viewed as detriments. It was at the hearing before Judge Moore that these allegations were explored and the Claimant was told the relevant legal questions. Again, the Tribunal considers that it is more likely than not that the lawyers she consulted would have explained the necessity to link the treatment complained of to sex. The Claimant ought to have known that without such evidence, the claim of direct sex discrimination had no reasonable prospect of success, and the earliest date that the Tribunal can identify (in the absence of any evidence about when the Claimant obtained legal advice) is 19 October 2023, though it notes the earlier efforts of the Respondent's representative to get more information as early as 2 December 2022 [6]. Again, the Tribunal accepted that it was not until day 1 of the final hearing that the Claimant withdrew, but the Judge said nothing different to what was within the list of issues created by Judge Moore, though the oral explanation was in plain English and more fulsome. As previously found, the inclusion of this claim increased the Respondent's costs and the listed length of the final hearing.

24. The Tribunal took a different view about the claim of unfair dismissal. There was no explanation by the Respondent's representative of any issues with this claim, with the exception of the reference to the Claimant's acceptance of the need for restructuring. At its highest, the Respondent's application here appeared to be based on the withdrawal at day 1 of the final hearing. Withdrawal is not automatically unreasonable, and the Tribunal bore in mind that the Claimant was a litigant in person. While the claim itself was in truth based on an argument about suitable alternative employment, whether there was a redundancy situation at all, and the redundancy process, as the Claimant did not sustain an argument about the need for restructure, the Tribunal did not consider it to be so weak that it had no reasonable prospect of success or that the Claimant ought to have known that. It also did not consider that the Claimant acted unreasonably in withdrawing it so late in the process.

25. The claim of victimisation was the only claim ultimately determined by the Tribunal. As the Tribunal set out in its liability judgment, the Claimant provided no evidence of 10 alleged protected acts and withdrew 7 of those at the submission stage. The Claimant failed to show that any protected act existed or that any alleged detriment was a detriment; failure of a claim is not enough to find no reasonable prospect of success though. In the judgment of the Tribunal, the Claimant ought to have known that she had no evidence of 10 alleged protected acts – Judge Moore had told her the legal questions and it is more likely than not that the *pro bono* lawyers explained how to substantiate a victimisation claim. The Claimant also ought to have known that a protected act is (in this case) an assertion of a breach of the Equality Act 2010, and not vague complaints about her pay generally – again Judge Moore set it out, it is more likely than not that the *pro bono* lawyers explained this, and the Respondent's representatives as early as 2 December 2022 [6] set the requirements out to the Claimant. The Claimant also in the judgment of the Tribunal acted unreasonably in asserting that it was a detriment to be told about the restructuring and a new job role that she had repeatedly insisted was required; getting what you seek is not something which could reasonably be viewed as a detriment. The Tribunal considered that the Claimant acted unreasonably in pursuing the victimisation claim with no reasonable prospect of success from 2 December 2022 onwards; it substantially increased the Respondent's costs and for no good reason in the absence of evidence supporting the Claimant's case.

<u>Stage 2 - How should the Tribunal exercise its discretion?</u>

26. The Tribunal was asked to consider a number of factors when exercising its discretion. The Claimant provided no evidence of her ability to pay, so this could not be considered. The Tribunal did not consider the fact that both parties were open to settlement to be of assistance, nor did it consider that the Claimant complied with case management orders as required to be relevant (parties are expected to comply). The Tribunal did not think that it was particularly relevant that the Respondent did not seek a strike out order as it is very difficult to obtain one in discrimination claims and would have increased costs. It also did not think that the submission that the Respondent donates its profits to the YMCA to be of assistance in the circumstances.

27. The Tribunal did bear in mind that the Claimant was a litigant in person who genuinely believed in her claims, despite the explanations from both the Respondent's representative and Judge Moore about the issues in the case. It

reminded itself that costs orders are "*not the norm*" in this jurisdiction, and no-one wished to discourage good claims being brought to the Tribunal nor the withdrawal of claims, even at a late stage.

28. However, the Tribunal considered that the Claimant had met the threshold for the making of a costs order and had put the Respondent to significant expense defending claims with no reasonable prospect of success, even when she ought to have known that. The Claimant had not provided any evidence as to her means, and the Tribunal knew from the liability hearing that both the Claimant and her husband received substantial sums from the Respondent when leaving its employ. It was more likely than not in their stage of life that there were assets available, and the Claimant by her own admission appeared to be choosing not to work, rather than unable to do so. The Respondent's position was that it had been put to costs through no fault of its own, and the Claimant's response that in summary that she felt to be in the right and only realised the difficulties she faced during day 1 of the final hearing. This overlooks the fact that the Claimant had been told by Judge Moore what the issues were and that she had to prove her case, but the Claimant failed to adduce any evidence for several key issues. The Claimant had obtained advice in addition (though its nature was unknown) and still put the Respondent to the expense of a final hearing.

29. The Tribunal concluded that considering all the relevant factors, it would exercise its discretion to make a costs order in the favour of the Respondent.

Amount to be paid

30. The Respondent provided limited evidence of the costs incurred in the proceedings. There is no differentiation in the solicitors' costs between these proceedings and the equal pay claim (which is in its early stages) and little information to allow the Tribunal to summarily assess whether the time costs sought are appropriate. There is no dispute that the Respondent has incurred legal costs, and the hourly rate for Mr Morgan, a partner and likely to be a Grade A fee-earner, of £225 plus VAT is compliant with the standard costs guidelines for this region.

31. However, the time costs of the Respondent's solicitor are £20,812. Counsel's fees are £6000. Both are subject to VAT. The Respondent only seeks £10,000. The reality is that in the experience of the Tribunal, it would cost more than £10,000 to deal with the claims brought by the Claimant which had no reasonable prospect of success. There was no benefit in spending time carrying out a more detailed consideration of the Respondent's legal costs in the circumstances.

32. What was required was a consideration of what costs which were reasonably and necessarily incurred would compensate the Respondent. The Tribunal is satisfied that £10,000 is an underestimate of such costs, even allowing for the points made above in paragraph 30. Three days of Tribunal time were required (and four days were listed), and the time to prepare to deal with the claims with no reasonable prospect of success would have been more than the amount sought by the Respondent. It was reasonable of the Respondent to instruct one experienced employment solicitor at Grade A to deal with potentially serious claims, and to instruct Counsel to attend the hearing. Even allowing a deduction for any elements relating to equal pay or unfair dismissal, more than £10,000

would have been incurred. Accordingly, the Tribunal considered that £10,000 was the sum that it is appropriate to order the Claimant to pay to the Respondent, particularly given the lack of evidence that she is not in a position to pay such a sum.

Employment Judge C Sharp
Dated: 17 June 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 18 June 2024

FOR EMPLOYMENT TRIBUNALS Mr N Roche