EMPLOYMENT TRIBUNALS

Claimant: Ms Elizabeth Pitt

Respondent: Cambridgeshire County Council

Heard at: Cambridge Employment Tribunal **On: 29 & 31 July 2024**

Before: Employment Judge Michell
Ms Marg Harris
Mr Brian Smith

Appearances:

For the claimant: Ms Naomi Cunningham (counsel)
For the respondent: Ms Laura Bell (counsel)

RESERVED JUDGMENT

The unanimous decision of the tribunal is that the respondent should pay a costs contribution of £8,000 (including VAT) to the claimant.

REASONS

The background

1. The claimant worked for the respondent as a social worker. She is a lesbian. By a claim presented to the tribunal on 25 September 2023, she asserted that she was discriminated against/harassed on grounds of or for reasons relating to her gender critical beliefs and/or sexual orientation.

2. The background to the claim is that the claimant made various comments during a Zoom meeting of the respondent's LGBTQIA+ Group. The Zoom meeting had

begun with an attendee explaining that he identified his dachshund dog as gender-fluid. He explained that he put a dress on the dog, to prompt debate about gender. The conversation continued with some gender critical views being expressed by the claimant and a lesbian colleague of hers, who was also in attendance.

3. Some of the attendees found the claimant and her colleague's input offensive. For example, an attendee described the claimant as having "*a really aggressive tone*," and said he found it "quite inappropriate" that she and her colleague had commented on "*transwomen participating in women's sports and sharing women's spaces*." Some took issue with being talked over or disrespected etc (for the most part, by the claimant's colleague). However, it is clear from the documentation the attendees produced that the opinions the claimant had expressed by way of gender critical commentary -as opposed *simply* to the manner in which she (and more particularly, her colleague) had expressed herself- were considered to be part of the problem. Amongst other things, they took issue with the claimant's "nasty opinions."

4. The respondent wrote to the claimant on 26 April 2023 to tell her that a formal concern had been raised in relation to "some views" the claimant (and her colleague) had expressed during the Zoom meeting which were "*perceived to be of an inappropriate and offensive nature*". She was told the meeting would be used "*to hear the views you expressed*."

5. At the meeting, the claimant denied having been aggressive in tone (albeit she accepted she could be quite direct/forthright). She was asked if she felt the meeting was an appropriate place to discuss some of her views. The claimant in response questioned what the group was for, if it was not for that type of discussion.

6. Following that meeting, on 20 June 2023 the respondent prepared a report. In the report, it was said that "comments" made by the claimant at the Zoom meeting "*were perceived to be non-inclusive and transphobic*;" had "*caused significant offence*," and had been "*particularly inappropriate and ill-judged*." It

was said they had "*a detrimental impact on the mental health and well-being*" of the complainants.

7. The claimant was sent a written management instruction, expressing concerns that she had demonstrated "*behaviours that were non-inclusive and perceived as transphobic*." She was instructed in writing to act in a way which "*ensured her personal views and beliefs did not manifest themselves in comments or actions in the workplace that might discriminate against others on grounds of a protected characteristic*." She was asked not to contact any members of the LGBTQIA+ Ally and Support Group, or attend their events. She was also told that the instruction constituted the informal stage of the respondent's disciplinary procedure.

8. The claimant brought a grievance in relation to the above. In response to the grievance outcome, the claimant wrote "…*there is nothing in the grievance outcome that explains why it has been decided that there was an issue with the way my beliefs were expressed, so how has the conclusion on the expression of my beliefs been reached*?." She did not receive a substantive answer to that question.

The litigation

9. In her tribunal claim, the claimant asserted that the respondent's reaction to her expression of gender critical beliefs amounted to harassment/direct discrimination. She relied on both those beliefs and/or her sexual orientation as protected characteristics.

10. The claim was defended. The respondent accepted that the claimant's gender critical beliefs amounted to a philosophical belief within the meaning of section 10 of the Equality Act 2010. However, amongst other things, in the grounds of resistance it was said that the manner in which the claimant (and her colleague) "*chose to promote their views*" had been "*aggressive and confrontational- for example, talking over people and not allowing others to speak*," and that this was the issue.

11. The claimant had the advantage of crowd funding, and because of this from the start had in place an experienced legal team, who had already done a lot of work of this kind concerning gender-critical issues. They drafted the claim for her, and they had access to the key paperwork from inception. Despite that fact, no application to strike out some/all of the defence, or for a deposit order, was made at any point.

12. A preliminary hearing took place on 8 March 2024. Directions were given, and a final hearing diarised. The respondent indicated a willingness to engage in judicial mediation. The claimant was given until 29 March 2024 to notify the tribunal if she wished to engage in that process. She did not do so.

13. (Ms Cunningham realistically accepted that we could take the claimant's non-engagement with judicial mediation into account for the purposes of the costs application. She submitted that it was reasonable for the claimant "*not to want to settle this*;" that the respondent had treated the claimant with "*profound disdain*," and that the claimant "*wanted public vindication*."

14. She submitted that the chances of a respondent conceding liability on open basis as part of terms of settlement were "vanishingly rare." However, she also accepted the tribunal's point that 'if you don't ask, you [generally] don't get.' The claimant did not invite the respondent to concede liability, in whole or in part, 'WPSATC' or otherwise, until the Costs Letter described below. We also add that though it may be a rarity for a respondent to concede liability as part of a settlement, it is also rare for a respondent to concede liability in full on day 1 of the hearing.)

15. On 18 July 2024, the claimant's solicitors wrote to the respondent's solicitors, putting them on notice of their intention to apply for costs on grounds that "*in the light of the contemporaneous documents, your client's central factual contention has no reasonable prospect of success*" ("the Costs Letter"). It is said that the case was "factually very simple"- the contemporaneous documents (in particular the investigation report) left "*no sensible room for doubt*" that the views the claimant had expressed (as opposed merely to the manner in which she expressed them) had caused, in whole or in part, the respondent's impugned

conduct, which amounted to discrimination or harassment "*because of her gender critical belief*". The Costs Letter concludes by inviting the respondent to "*admit liability for harassment because of the claimant's protected belief*," and agreeing to "*a truncated hearing to deal with remedies only*." The author of the Costs Letter does not assert that the claimant's case relating to sexual orientation was equally 'slam dunk.' Indeed, no mention is made of that element of the claim.

The final hearing and costs application

16. On the morning of the first day of the final hearing (29 July 2024), we were told that the respondent had that morning admitted liability for harassment relating to the claimant's gender critical beliefs, as well as her sexual orientation. It was agreed that if the s.26 EqA claims succeeded, the s.13 EqA claims must therefore fall away. During the rest of the day, with our approval, the parties discussed remedy between themselves, and they agreed the amount the claimant ought to receive and proposed terms of any recommendation. We were invited to give judgement on liability and remedy in those agreed terms, which we have duly done under separate cover.

17. The costs application was made at the end of the first day of what was to be a three day hearing. At about 3:30pm, we were told that no agreement had been reached by the parties in relation to costs. The claimant therefore invited us to make an order for her full costs, to be assessed by the civil court if not agreed. The application was said to be made under r.76(1)(b) of the ET rules (no reasonable prospect of successfully defending the claim) and/or r.76(1)(a) (unreasonable conduct in continuing to defend the claim).

18. Ms Cunningham told us that the claimant's total costs amounted to £49,078.75 including VAT. Costs up to the 6 March 2024 preliminary hearing were said to be £4,565 including VAT. The costs of that preliminary hearing itself were said to be £5,323.40 including VAT.

19. We did not consider it appropriate for the costs application to be dealt with before it had been put in writing, and before the respondent had been given a chance to

consider its position. We also did not think there was sufficient time to deal with the application that day in any event. We therefore adjourned it until 31 July 2024 -which gave Ms Bell more time to prepare and take instructions- and we gave directions for written submissions to be exchanged on 30 July, together with any relevant authorities.

20. On 31 July, we heard from counsel, who spoke to their own and each others' written submissions. We read the written submissions with care.

21. The hearing took most of the day. So, judgment was reserved.

The submissions

Claimant

22. In her written submissions, Ms Cunningham says that the respondent's own contemporaneous documentation "*makes it unequivocally clear that the investigation, the investigation report and the management instruction were all in reality motivated by the claimant's manifestation of her protected belief*." She asserts that "*the central contention on which the respondent's resistance to the claim is based [i.e. the manner not message] is flatly contradicted by its own contemporaneous documentation*."

23. It is said to be unreasonable conduct "*to draft and present grounds of resistance so flatly inconsistent with the documentary evidence*."

24. She took us to **Radia v. Jeffries International Ltd** [2020] IRLR 431, In which HHJ Auerbach observed that, for r.76(1)(b) purposes, the tribunal "*must be careful not to be influenced by the hindsight of taking account of things that were not, and could not reasonably have been, known at the start of the litigation*". Here, though, she said, no hindsight is required to see from the "key documents" the fatal flaws in the respondent's defence. As she also rightly observes, there is little to distinguish a prospective or retrospective analysis of merits here.

25. As regards assessment of "reasonableness" for r.76(1)(a) purpose, she took us to **AQ v. Holden** [2012] IRLR 648, in which it was held that the extent to which a party has had the benefit of legal advice is relevant to the assessment of what

they knew or ought to have known, as well as to the exercise of the discretion as to costs.

26. She relied on **Barnsley MBC v. Yeraklava** [2012] IRLR 78, in which it was held that the whole of the picture must be examined to determine unreasonableness and its effect; also, to **Soloman v. University of Hertfordshire** [2019] UKEAT/0258/18, in which it was held that even where a part was legally represented "*there may be more than one reasonable course*". She also took us to **Cartiers Superfoods Ltd v. Laws** [1978] IRLR 315, in which it was held that when assessing (under previous ET rules) if a claim was "misconceived" or if conduct had been unreasonable, the tribunal was entitled to have regard to "*what a party knew or ought to have known if [it] had gone about the matter sensibly*".

27. In her oral submissions, Ms Cunningham pointed out that this respondent was comparatively sophisticated and well resourced. It therefore had the capacity to form a view as to merits at an early stage. She contrasted the situation with one "a million miles" from this case - where a litigant in person (usually, a claimant) is facing a potential strike out or deposit order, which can be "a kindness" to a claimant with a weak case. She said that in such instance, an employment judge may be "the first lawyer" to make a realistic assessment of a claim.

28. She again submitted that the contemporaneous documentation made it "abundantly clear" that there were fatal flaws in the respondent's case -even though the respondent in its witness statements had tried to "rewrite history." She said those flaws ought to have been obvious to this respondent when drafting the Grounds of Resistance- or, at the very latest, when formulating the witness statements. A party can, she said, be taken to have known "the true facts."

29. She acknowledged her client did not know exactly what had motivated the late concession of liability from the respondent, but she said (and we agree) we had to take it as "genuine"-that the respondent "*cannot admit with its fingers crossed*."

30. Ms Cunningham also acknowledged that her client had her present legal team in place from the start, having secured significant financial support via crowd funding. (She said the fact that the claimant had crowd funding was analogous to

after the event insurance, or to being given the funds by a partner. Thus, she said, it ought not to be taken into account. The precise terms of the crowd funding were not shared with us. But we did not understand the claimant to be legally obliged to repay anyone anything.)

31. She said that assessments of merits can often take place at various 'trigger points.' One would be the time when the claim was drafted. The next might be when witness statements are assembled. She did not seek to say that the claimant lacked the funds or the legal resources for an assessment of merits/next steps to be made -insofar as such an assessment had not already taken place at inception- long before witness statements were exchanged.

32. She accepted that if her submissions on merits were correct, from the inception of the claim the claimant (like the respondent) had all the "essential ingredients" to be able to show -as per the Costs Letter- the difficulties in the respondent's position. In particular, the claimant had the paperwork which demonstrated conclusively that the respondent's impugned actions were motivated, at least in part, by the claimant's manifestation (i.e. communication) of her gender critical beliefs.

33. She accepted that the claimant could have made an application to strike out the defence or secure a deposit order. She submitted that it was uncommon for a strike out/deposit order to be sought under cover of pleadings. (That may be right- though we observe that it can and does happen.) But she fairly conceded that such an application could have been made, and in hindsight that it "*might have been better*" if it had been made- albeit she submitted that the claimant could not be "seriously reproached" for not taking such a course, which was within (as she put it) 'the range of reasonable responses.'

34. We pointed out that the Costs Letter and costs application appeared premised on the assertion that the respondent had no reasonable prospect of the claim in so far as it was founded on the claimant's gender-critical beliefs. We asked if it necessarily also followed (notwithstanding the respondent's late concession) that the respondent also had no reasonable prospect of defending the claim in so far

as it was founded on the claimant's sexual orientation. Ms Cunningham suggested in broad outline that it did.

Respondent's submissions

35. In her submissions, Ms Bell accepted the legal analysis which Ms Cunningham set out in her written application.

36. Ms Bell said we ought not to infer that the respondent knew its defence could not succeed simply because it had belatedly conceded liability. To do so would "*deter parties from making sensible litigation decisions for a multitude of reasons, in fear that it would be automatically interpreted that the defence had no reasonable prospects of success*." We accepted that submission- though, of course, making an earlier concession (for whatever reason) may well have saved significant costs.

37. She denied that the contemporaneous documents demonstrated that the respondent was motivated by the claimant's manifestation of her protected belief. She argued that the fact the Costs Letter was sent only very shortly before the hearing undermined the assertion "*that the defence had no reasonable prospects of success from the outset*." For the reasons set out below, we did not accept that argument.

38. She was invited by the tribunal to take us to any paperwork which suggested that the claimant had been investigated etc *simply* for the way in which she had articulated her gender-critical beliefs. She did not take up that invitation. (She also accepted that part-motivation on proscribed grounds would suffice for a s.26 EqA claim.)

39. She did not seek to say that there was a reasonable argument to the effect that some/all the respondent's impugned conduct -even if it was related to the claimant's beliefs- did not amount to harassment.

40. She also made the following submissions, none of which (save as set out below) were contentious:

a. Costs are compensatory, not punitive. (Further to this, counsel agreed that if the tribunal exercises its discretion to make a costs order, it does not need to carry out a detailed or minute assessment but, instead, can adopt a broad-brush approach against the background of the relevant circumstances. **Sud v Ealing LBC** [2013] ICR D39, per Fulford LJ.)
b. Costs are an exception in tribunal, rather than the general rule.
c. If a statutory threshold was met, we must consider awarding costs, but we still then have a discretion to make an award/as regards the amount of any such award.
d. In the context of a claim withdrawn by a claimant, the tribunal must consider whether the party has conducted the proceedings unreasonably in all the circumstances. and not whether the late withdrawal was itself unreasonable (**McPherson v BNP Paribas (London Branch)** [2004] ICR 1398, CA). The same ought to apply to a late concession by a respondent.
e. The absence of an application to strike out/obtain a deposit can be a relevant factor (**AQ**; **Vaughan v. Lewisham** [2013] IRLR 713). (These cases concern instances where the application would potentially put a claimant on notice of the weakness of their claim. But we consider the absence of such an application can be relevant for broader reasons- see below.)

41. As regards the threshold for a finding of 'no reasonable prospect,' Ms Bell took us to several authorities concerning strike out applications. She submitted that the defence would not have been struck out at an interim stage. Thus, for r.76 purposes, it similarly ought not now to be said to have had no reasonable prosects of success. She submitted:
    a. As a general principle, cases should not be struck out on the ground of no reasonable prospect of success when the central facts are in dispute. See **North Glamorgan NHS Trust v Ezsias** [2007] ICR 1126; **Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly** [2012] IRLR 755. Hence it is only in an exceptional case that it will be appropriate to strike out a claim on prospects grounds, where the issue to be decided is dependent on conflicting evidence. A mini trial would not be appropriate. (That is right.

But such an exception might properly be made -whether looking at merits retrospectively or prospectively- where there is no real substance in the factual assertions made. Also, where the facts sought to be established by the claimant were "*totally and inexplicably inconsistent with the undisputed contemporaneous documentation*" (**Ezsias**, *per* Maurice Kay LJ).

b. The case of a party facing a strike out application ought to be taken at its highest, where no core findings of fact have yet been made. (That is also right, as a general rule. But cf where a case is inconsistent with undisputed contemporaneous documents, as above.)

42. Ms Bell did not seek to argue that the fact the claimant was seeking to recover costs received via crowd funding offended the indemnity principle. But she said we ought to take the source of the funding into account, because otherwise the claimant was getting 'a windfall.'

Discussion

43. Given the contemporaneous documents to which we have referred above, we consider that the respondent had no reasonable prospect of defending the claim, insofar as it was based on manifestation of the claimant's gender critical beliefs. Those documents are, we find, "totally and inexplicably" inconsistent with the respondent's case that the claimant's manifestation of her gender critical beliefs played no part in the impugned conduct.

44. Even if it could be argued that impugned conduct did not amount to harassment for s.26 EqA purposes -Ms Bell sensibly did not advance that case- we consider that the respondent had no reasonable prospect of defending itself against a s.13 EqA claim based on those beliefs.

45. We fully accept that on the face of the documents, the respondent had (at least) reasonable prosects of persuading the tribunal that the claimant was treated as set out above in substantial part because of (i) the perceived insensitivity of the claimant raising her views in a forthright manner and in that forum; (ii) her being seen as being deliberately provocative (perhaps largely by association, because

of her colleague's behaviour). However, we agree with Ms Cunningham that the contemporaneous documents unambiguously show that at least part of the reason for the respondent's impugned conduct was its response to the manifestation of the claimant's gender-critical beliefs.

46. We therefore consider the gateway under r.76(1)(b) has been opened. So, we therefore need to consider whether we exercise our discretion to make a costs order (and if so, for how much), bearing in mind the above principles. (We consider r.76(1)(a) is a better match to the facts of the case. In any event, even if the gateway under r.76(1)(a) was opened as well as under r.76(1)(b), we think it would properly result in the same outcome, set out below.)

47. The claimant had the benefit of experienced lawyers, who were particularly well versed in this area of the law and who had access to the paperwork they needed. The claimant was at liberty not to make a strike out application at an early stage, in the face of obvious fatal weaknesses in the ET3. (Similarly, she was at liberty not to have sent the Costs Letter much earlier, and to decline for the above reasons to participate in judicial mediation -or even ask in correspondence if the respondent would make open concessions as part of settlement.) We do not "seriously reproach" either the claimant or her lawyers for not making that application. But on the facts of this case, such an application would in all probability have saved the claimant most of the costs she now seeks- as well as securing 'public vindication'.

48. She probably would not have been able to secure a strike out the defence in relation to the 'sexual orientation' limb of her claim, even if she had applied to do so. But we think it likely that she would have secured judgment (or, at the very least, a deposit order) in relation to the 'belief' limb. In such case, we think that the rest of the claim would -as a matter of pragmatism, if nothing else- not been defended much longer. We are fortified in that assessment by the fact that when the respondent admitted liability on Day 1 of the final hearing, it did so in relation to both limbs of the s.26 EqA claim.

49. So, applying a broad brush approach against the background of the relevant circumstances, we allow the claimant costs of £8,000 including VAT, which is the approximate amount we consider may have been appropriately spent by her in giving instructions, articulating the claim, putting the respondent on notice of the weakness of some of its defence, and dealing in early 2024 with a strike out/deposit application in relation to (at least) the 'belief' limb of the claim.

50. (We have effectively disregarded the fact that the claimant was crowd funded. In other cases, and depending on the terms of funding, this might have been a persuasive or determining factor against awarding costs.)

Employment Judge Michell

Date:19 August 2024

SENT TO THE PARTIES ON
5 September 2024
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FOR THE TRIBUNAL OFFICE