EMPLOYMENT TRIBUNALS

Claimant: **Mrs V. Churchhouse**

Respondent: **Paragon Asra Housing Limited**

Heard at: **London South ET, in chambers**

Before: **EJ G. King, sitting alone**

JUDGMENT

1. The Respondent's application for a cost order is refused.

REASONS

Background

1. By a claim form dated 30 March 2022, the Claimant brought claims for unfair dismissal, age discrimination and victimisation.

2. In the Judgment given on 9 August 2024, the Tribunal dismissed all of the Claimant's claims.

3. Following the oral Judgment, the Respondent made an application for a Costs Order under Rule 75 and 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, dated 5 September 2024. The costs sought are £22,586.28, inclusive of VAT.

4. The Claimant was ordered to provide her comments by 25 October 2024, which she did.

5. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 were superseded by the Employment Tribunal Procedure Rules 2024, which came into effect on 6 January 2025.

6. Employment Tribunal Procedure Rules 2024 apply to all new and existing cases from that date. This costs application has therefore been considered under the Employment Tribunal Procedure Rules 2024. This makes no difference to the outcome; it would have been the same if the application

had been considered under the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

The Respondent's Costs Application

7. The Respondent makes the application under the following grounds:

    a. The Claimant acted unreasonably – Rule 76(1)(a) (The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013) - by having read and considered the Respondent's witness statements in preparing her own statements and that she acted *"vexatiously…or otherwise unreasonably"* in misleading the Tribunal into believing that she had not. The Respondent contends, had the Claimant not misled the Tribunal, the Tribunal would have granted the Respondent's strike out application and the case would not have proceeded;

    b. The claims of age discrimination and victimisation had no reasonable prospects of success – Rule 76(1)(b);

Relevant Law

8. Rule 3 of the Employment Tribunal Rules of Procedure 2024 sets out the Overriding Objective.

    (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
    (a) ensuring that the parties are on an equal footing,
    (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues,
    (c) avoiding unnecessary formality and seeking flexibility in the proceedings,
    (d) avoiding delay, so far as compatible with proper consideration of the issues, and
    (e) saving expense.

    (2) The Tribunal must seek to give effect to the overriding objective when it—
    (a) exercises any power under these Rules, or
    (b) interprets any rule or practice direction.

9. Rule 73 of the Employment Tribunal Rules of Procedure 2024 sets out the definition of a costs order: -

    (3) A costs order is an order that the paying party make a payment to—
    (a) the receiving party in respect of the costs that the receiving party has incurred while represented by a legal representative or a lay representative, or

(b) another party or witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at a hearing.

10. Rule 74 sets out the test to be applied by the Tribunal in considering whether to grant a costs application: -

(1) The Tribunal may make a costs order or a preparation time order (as appropriate) on its own initiative or on the application of a party or, in respect of a costs order under rule 73(1)(b), a witness who has attended or has been ordered to attend to give oral evidence at a hearing.

(2) The Tribunal must consider making a costs order or a preparation time order 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 of it, or the way that the proceedings, or part of it, have been conducted,
(b) any claim, response or reply had no reasonable prospect of success, or
(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which that hearing begins.

(3) The Tribunal may also make a costs order or a preparation time order (as appropriate) on the application of a party where a party has been in breach of any order, rule or practice direction or where a hearing has been postponed or adjourned.

11. Rule 75 sets out the procedure for determining such applications: -

(1) 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.
(2) The Tribunal must not make a costs order or a preparation time order against a party unless that party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order).

12. The principle in the Rules is that costs in the employment Tribunal do not follow success as they do in other areas of civil litigation. Rather, the Tribunal has power to make awards of costs in the circumstances set out in the Rules. In this case, the relevant provision is Rule 74(2)(a) and 74(2)(b) which gives the Tribunal a discretion to award costs where the conduct of a party meets the threshold test set out in the Rule.

13. All the above grounds are discretionary — i.e. the Tribunal may make a costs (or preparation time) order if the ground is made out but is not obliged to do so.

14. In *Yerrakalva v Barnsley Metropolitan Borough Council and anor 2012 ICR 420, CA*, the Court of Appeal reiterated that costs in the employment Tribunal are still the exception rather than the rule. The burden lies on the party seeking costs to establish that the costs jurisdiction is engaged (*Haydar v Pennine Acute NHS Trust EAT 0141/17*). If the Tribunal does have that jurisdiction, it is then for the Tribunal to satisfy itself that it is right and proper to exercise the discretion to award costs, having regard to all the relevant factors.

15. The Tribunal's discretion to award costs is not fettered by any requirement to link any unreasonable conduct to the costs incurred (*McPherson v BNP Paribas (London Branch)* [2004] ICR 1398 and *Salinas v Bear Stearns International Holdings Inc* [2005] ICR 1117, EAT). However, that is not to say that any issue of causation is to be ignored and the Tribunal must have regard to the *"nature, gravity and effect"* of any unreasonable conduct (*Barnsley Metropolitan Borough Council v Yerrakalva* [2012] IRLR 78).

16. The Tribunal takes into account that the *"no reasonable prospect of success"* provision is not the same as that when assessing whether a claim should be struck out or not. In those cases, the Tribunal as not heard full evidence, and so the test for strike out is a high bar. In assessing whether or not a claim has no reasonable prospect of success when considering an argument for costs the Tribunal has the benefit of having heard all the evidence in relation to the Claimant's claims and the Respondent's response to those claims.

Deliberation

17. In this Judgment in respect of the application for a Costs Order, the Tribunal does not intend to repeat the full reasons for the liability Judgment. The reasons were given orally on 9 August 2024 and there has been no request for written reasons.

18. The first decision for the Tribunal is whether this hearing should be a paper hearing - that is, a hearing where the Judge will review the written submissions of both parties without hearing oral evidence and without the need for the parties to attend (as requested by the Respondent), or oral hearing with the parties in attendance, (as requested by the Claimant).

19. The decision of the Tribunal is that it is possible for this matter to be fairly decided by way of a paper hearing by a Judge sitting alone. In reaching this decision, the Tribunal has given regard to the overriding objective. The Respondent's application was submitted in writing and the Claimant has had the opportunity to respond to this application with her own written comments. The Tribunal therefore considers the parties are on an equal footing. A paper hearing in front of a Judge sitting alone is proportionate to the complexity of the issues. Hearing oral submissions is unlikely to assist

the Tribunal further. Listing this for an oral hearing will also involve considerable delay, which is to be avoided, so far as compatible with proper consideration of the issues. A paper hearing will also save expense for both parties and the Tribunal.

20. The Tribunal has therefore considered the Respondent's costs application on the papers alone.

21. The Tribunal rules impose a three-stage test: first, the Tribunal must ask itself whether a party's conduct falls within rule 74(2)(a) or 74(2)(b) – in other words, is the Tribunal's costs jurisdiction engaged? If so, secondly, the Tribunal must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party taking into account all the relevant factors. The third stage is the determination of the amount of any award (*Daly v Newcastle Upon Tyne Hospitals NHS Foundation Trust EAT 0107/18)*. A Tribunal that jumps from stage one to stage three without actively considering the discretion inherent in stage two will fall into error (see *Monaghan v Close Thornton Solicitors EAT 0003/01*; *Lewald-Jezierska v Solicitors in Law Ltd and ors EAT 0165/06*; and *Anderson v Cheltenham and Gloucester plc EAT 0221/13*).

22. At the beginning of the five-day final hearing, the Tribunal heard the Respondent's application for striking out the Claimant's case. The Respondent's application was that the Respondent did not believe it would have a fair trial because the Claimant had seen and considered the Respondent's witness statements prior to her preparing her statements in response.

23. The Claimant replied to this and denied that she had seen the Respondent's witness statements and denied having prepared her witness statements based on knowledge of what the Respondent's witnesses were saying.

24. During the hearing, the Claimant raised issues with the credibility of the Respondent's witness Mr Hickman Brown. This was in relation to the change that Mr Hickman Brown wanted to make to his statement, where he pointed out a correction he wished to make to paragraph 24 of his statement in relation to Flat 14. The paragraph is headed *"Flat 14"*, but in the paragraph he described as a *"bungalow"*. He said he wished to amend this to *"flat"*. He also said that the last sentence of that paragraph related to a different property and therefore could be removed from his witness statement.

25. The Claimant's representative said that Mr Hickman Brown had muddled his evidence, and he was only now correcting it as the Claimant had proved that he had made a mistake. The Claimant's case was that this proof was in a statement from the daughters of the late resident of Flat 14. This statement was appended to the Claimant's witness statement, labelled 12A. There are, in fact, three documents labelled 12A appended to the Claimant's witness statement; this is the second of those three. The third 12A is the email from the late resident's daughters sending the statement.

26. The documents appended to the Claimant's witness statement at 12A, namely the email and statement, do show that the Claimant had been

showing the Respondent's witness evidence to other people who she was using to support her case, and getting them to draft statements directly in response to the Respondent's evidence. The statement clearly says *"in response to the statement under flat 14, point 24…"*.

27. On the second day of the main hearing, it emerged that a page of the Claimant's witness statement had been missing when she submitted it to the Respondent and the Tribunal. During the hearing, the Claimant's representative sent a copy of the missing page to the Tribunal, which the Tribunal did not consider and did not allow to be presented into evidence given that it was submitted too late.

28. The Respondent contends that the missing page demonstrates that the Claimant had considered the Respondent's witness statements in preparation of her own statement, which undermines what she led the Tribunal to believe at the strike out hearing. The missing page of the Claimant's statement, para 5.1.3, states: *"In Sally-Anne Underhill and Suzanne Howarth's witness statements they make reference to Mr Solomon raising the case with the police. I volunteered to be interviewed by the police and provided information relating to the case about Ruth Solomon"*.

29. The Tribunal accepts that the above demonstrate that the Claimant not only considered the Respondent's witness statements prior to making her statement but that she also responded to them in making her statement and obtaining those of her supporting witnesses, which conflicts with what she said to the Tribunal at the strike out hearing. The Tribunal is satisfied that this is vexatious or otherwise unreasonable conduct on the part of the Claimant. It is therefore open for the Tribunal to exercise its discretion to make an order for costs under Rule 74(2)(a). This finding relates to both the Claimant's conduct in relation to the witness statements, and her misrepresentation to the Tribunal at the beginning of the final hearing.

30. The Tribunal is also satisfied that the claim of victimisation had no reasonable prospect of success. In order for there to be claimed victimisation there needs to be a *"protected act"*. The first protected act that the Claimant alleged was the grievance she submitted in November 2021. The documents are at pages 686 and 687 the bundle. These are grievances against Ester de Costa and Dawn Cooke. The Claimant complains about the way she was spoken to; that she felt intimidated; and says she felt allegations will be made against her. There is no reference to any protected characteristic in either of these letters. There is nothing to suggest that the Claimant is alleging discrimination. There is no suggestion that there been any contraventions of the Equality Act 2010.

31. The Tribunal understands that the Claimant was acting as a litigant in person without the benefit of legal advice. There is, however, a limit as to how much leniency can be granted in the circumstances. It should have been obvious to anyone that a grievance that had nothing to do with the Equality Act could not be a protected act under the Equality Act. The claim of victimisation in respect of the grievance of November 2021 therefore had no reasonable prospect of success. It is therefore open for the Tribunal to exercise its discretion to make an order for costs under Rule 74(2)(b).

32. The detriment alleged by the Claimant in her claim of victimisation is the series of events regarding Tree Close. The emails around these are at pages 1002, 1003, 1004. On 21 March 2022 that the Claimant was informed by Tina Marshall that the property is no longer available. It was the Claimant's own case that the Respondent caused this to happen, and that the Respondent did so because the Claimant had been dismissed following allegations of theft and gross misconduct. Again, those reasons, whether they are true not, do not fall under the Equality Act, and therefore cannot be used to support a claim of victimisation.

33. The only protected act done by the Claimant was the bringing of a claim for discrimination (the claim heard on 5 – 9 August 2024). The Claimant did not submit her ET1 until 30 March 2022. An alleged detriment that occurred on 21 March cannot be because of something that happened on 30 March. This should have been apparent to anyone, regardless of their level of familiarity with the law. The claim of victimisation therefore had no reasonable prospect of success. It is therefore open for the Tribunal to exercise its discretion to make an order for costs under Rule 74(2)(b).

34. The Claimant's claim for age discrimination was also dismissed at the final hearing. The Respondent now argues that claim also had no reasonable prospect of success. There was little evidence put forward by the Claimant in support of her claim of age discrimination, however, in her witness statement she did say that the Respondent decided to pursue false allegations against because of her age. She goes no further than that. The claim of age discrimination may have had little prospect of success, but the Tribunal is not satisfied that it had no realistic prospect of success.

35. It having been found that it is open for the Tribunal to exercise its discretion to make an order for costs under Rule 74(2)(a) and 74(2)(b), the Tribunal then has to consider the second stage of the test, which is to consider whether it is appropriate for the Tribunal to exercise its discretion in favour of awarding costs against the Claimant.

36. The Claimant has provided details of her income. This equates to just over £1,500 per month. She confirmed that the final hearing that she had no savings to enable her to seek private accommodation and was reliant on the council to provide her with accommodation. If a costs order was made in the sum sought, the Claimant would have no means of paying this immediately. If the Claimant was to pay at £500 per month (and the Tribunal is not satisfied that this is a sum she could actually afford) then it would take over three years and nine months to pay the cost in full. The Tribunal finds that this would place an unfair burden on the Claimant and the Tribunal is satisfied that it is not appropriate in the circumstances for the Tribunal to exercise its discretion and make an award for costs against the Claimant.

37. The Tribunal has further considered that the outcome of the Claimant's dismissal by the Respondent had consequences that were more far-reaching than might usually result from a typical case of an employee being dismissed. Not only did the Claimant lose her job, but she also lost her home. To reiterate the findings of the Tribunal at the final hearing; the Claimant was fairly dismissed, but the resulting consequences of her being homeless also leads the Tribunal to conclude that it is not appropriate in the

circumstances for the Tribunal to exercise its discretion and make an award for costs against the Claimant.

38. Given the above findings, the Tribunal has not gone on to consider the third stage of the test, namely the amount of any award. The Tribunal observed, however, that even a token payment of some hundreds of pounds is likely to be a significant burden on the Claimant, whilst contributing very little to the sum sought by the Respondent. The Tribunal is satisfied that no order for costs is appropriate.

39. The Respondent's application for costs is therefore dismissed.

Employment Judge G. King

Date: 22 January 2025

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