EMPLOYMENT TRIBUNALS

Claimant: **Mrs A Oakley**

Respondent **G B Intelligence Ltd**

Heard at: **Cardiff** **On: 26th April 2019**

Before: **Employment Judge P Cadney**
Members: Mr P Bradney
Mrs L Bishop
Representation:
Claimant: Mr N Henry
Respondent: Mr B Beyzade

Costs/Remedy Judgment

The unanimous judgment of the Tribunal is:

i) The respondent's application for costs is dismissed;

ii) The claimant's application for costs is dismissed.

iii) The claimant is awarded £1052.62 (4 weeks' pay) for the breach of regulation 14 TUPE Regulations 2006.

REASONS

1. This is the decision of the tribunal in the case of Mrs A Oakley v GB Intelligence Ltd. The case comes before the tribunal today on the respondent's application that the claimant pay a part of its costs; in addition the claimant has today made an oral application that the

respondent pay her costs; and the issue of remedy for the claim in which the claimant was successful has not been resolved between the parties.

Respondent's Costs Application

2. In an application dated 23rd March 2018 it set out a claim for £9717.50 which is part of its costs. In the Costs Schedule provide today it total costs are some £18,351.59. In summary the respondent submits that the threshold for making an order for costs within the meaning of rule 76 has been crossed and that therefore we should consider making an order and exercise our discretion in the respondent's favour and that on the evidence the claimant is able to pay.

3. The claimant's submission in essence is that that an order for costs remains the exception rather than the rule in the Employment Tribunal and that this is not a case which falls outside that basic principle. There is nothing exceptional about it and the ordinary principle that each side should bear its own costs should apply. There were fundamental disputes of fact about which we were required to make findings. In this case our findings of fact determined the outcome of the hearing. Unfortunately for the claimant those findings of fact were in several critical respects against her and therefore she lost the majority of, and certainly her primary, claims. That is true on a daily basis in tribunals up and down the land and there is nothing exceptional about that having happened in this case. Accordingly the claimant submits that the issue of making an order for costs does not arise as the threshold for making an order has not been crossed.

4. The respondent in its written application alleges that the way that the threshold had has been passed is 1) that the claimant acted unreasonably in the way that part of the proceedings had been conducted namely by bringing a claim for indirect sex discrimination and part time workers status discrimination; 2) the claimant acted unreasonably in the way in which part of the proceedings was conducted namely by bringing a claim for unfair dismissal ; 3) the claims had no reasonable prospect of success in respect of the indirect sex discrimination and part time workers discrimination claims; 4) the claimant's reconsideration application had no reasonable prospect of success.

5. In support of that there are thirteen paragraphs of propositions, twelve of which in effect rely upon the findings of fact of the tribunal in the original judgment. The respondent also relies on a number of other matters in addition to those set out in its written application. In particular it has made submissions that the ET1 is poorly pleaded and that the witness statement

of the claimant did not set out all of the details of her case so as to allow the respondent to know the case it had to meet; and that the claimant rejected an offer of £5,000 to settle the claim, putting forward a counter offer of £13,000 which was equally rejected by the respondent. In fairness the respondent does not rely on those specifically as grounds for making a costs order or as unreasonable behaviour but asks us to take them into account in looking overall at the matters that they rely upon.

6. The essence of the respondent's application is that this case falls within the line of authorities and circumstances set out in *Daleside Nursing Home v Matthew [2009] All ER (D) 99 and Dunedin Canmore HA v Donaldson UKEAT/0014.* In both cases it was held that the claimant had lied in evidence to the tribunal about a fundamental aspect of the claim. In those circumstances it would be perverse of the tribunal to fail to conclude that the claimant had acted unreasonably. The respondent points to the fact that it is not necessary for the threshold to be crossed for there to be a finding of dishonesty, but that it is sufficient that there is a finding that there is a fundamental fact upon which the claimant's case is based which was not factually well founded as was, or should, have been known to the claimant. Essentially the respondent points to the fact that the claimants indirect sex discrimination and part time workers discrimination claims depended upon the fact of and contents of a meeting with her manager Mr Ryman which we held in the original judgment that we were not satisfied had taken place. As it had not, on the balance of probabilities, taken place it followed that those claims must fail. Equally we determined that the we did not accept the claimant's evidence as to events after 23rd November 2015 and that we preferred the respondents; and that both in relation to the questions of fundamental breach of contract and of causation that we were not satisfied on the balance of probabilities that the events had occurred or that she had resigned in response to them.

7. The respondent submits, therefore that this is a case in which the threshold for making an order for costs has been passed in that in respect of the critical elements of the claimant's claims we were not satisfied on the balance of probabilities that they had occurred.

8. On the face of it those are submissions with some merit. However, in considering whether to exercise our discretion we have to consider the overall facts of the case, and as set out in paragraph 2 of the original decision " *The tribunal has not found this an easy case to resolve simply because we have concluded that we do not accept either party's evidence in its entirety and we have been compelled to the conclusion that neither party has given wholly reliable evidence*." In relation to the respondent's evidence we did not accept their evidence that the claimant had not been promoted, and did not accept their evidence that the reason was that she

had received a verbal warning. The question of her status was potentially a significant issue as part of the claimant's constructive dismissal claim relates to her allegation that she was to be demoted. Because of our findings as to the claimant's evidence this did not in the final analysis prove a critical factual finding but that could not have been known in advance and it might have equally proven to be a critical finding in the claimant's favour.

9. The overall conclusion we have reached is that this was an extremely unusual case in that we were not satisfied that either party had either attempted to, or had in fact told the whole truth or that its evidence was reliable in all respects. In those circumstances should we exercise our discretion to make a substantial award of costs against one party, on the basis that findings in respect of the respondent were not critical to the outcome of the case whereas they were in respect of the claimant. We have determined that in our judgement in the unusual circumstances of this case that it would not be just to make an order of costs against either party and accordingly we have decided not to exercise our discretion to make the order for costs sought by the respondent.

Claimant's Application for Costs

10. Following our earlier decision the claimant has made an oral application that the respondent should pay her overall costs or alternatively and in any event that it should pay her costs of today's hearing.

11. The respondent points to the fact that no notice has been given in writing by the claimant of either application, and that, therefore, neither is formally before us today. If the claimant wished to make any such application it should have done so on notice. That in our judgment is correct and there is nothing for us to determine. However even if there had been the reasons for us rejecting the respondent's costs application apply equally to the claimant with exactly the same force. It is therefore extremely unlikely that had we formally been considering them that we would have acceded to either of the claimant's applications.

Remedy

12. In our original judgment we expressed the provisional view that we would be likely to make an award of four weeks wages for the failure to consult identified in the earlier decision. We were entitled to award a maximum of thirteen weeks pay. Both parties have sought to dissuade us from that view. The respondent submits that as it was a technical breach that we should make an entirely nominal order in the sum of £2. The claimant on

the other hand seeks an order for the maximum thirteen weeks pay. The principles we have to apply are that we start from the thirteen weeks (a similar starting point to that in a protective award) and then have to reduce to reflect the seriousness of the breach. For the reasons set out in pour original judgment, and having revisited our earlier provisional view we remain of the view that four weeks reflects properly and adequately the extent and gravity of the breach and is therefore the order we make. This is the sum of £1052.62.

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Employment Judge P Cadney
Dated: 2 May 2019

JUDGMENT SENT TO THE PARTIES ON

……5 May 2019…….

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS