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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant **Respondent**
MEENA AGARWAL **AND** **CARDIFF UNIVERSITY**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: CARDIFF ON: 8TH / 9TH JULY 2021

EMPLOYMENT JUDGE MR P CADNEY **MEMBERS: MRS M WALTERS**
MRS M HUMPHRIES

APPEARANCES:-

FOR THE CLAIMANT:- **MR D READE Q.C. (COUNSEL)**

FOR THE RESPONDENT:- **MR D MITCHELL (COUNSEL)**

COSTS JUDGMENT

The unanimous judgment of the tribunal is that:

The respondent's application for costs is dismissed.

Reasons

1. The claimant was dismissed from her employment by the respondent on 29 February 2016. She brought a number of claims against the respondent. By the final hearing the remaining claims before this tribunal were unfair dismissal, automatic unfair dismissal, race discrimination contrary to section 13 (direct discrimination) Equality Act 2010, section 26 (harassment) Equality Act 2010, and section 27 (victimisation) Equality Act 2010, and a claim in respect of the underpayment of notice pay.

Following a hearing held between 16th October and 3rd November 2017 we dismissed all the claims.

2. On 28th May 2018 the respondent made a costs application against the claimant. That hearing has been delayed both by the appeal process and the hearing of a complaint to the Bar Council. All those matters are now resolved. The claimant had made a costs application against the respondent but at the TCMPH on 12th March 2021 Mr Reade Q.C. confirmed that the application was withdrawn.

Preliminary Issue

3. On 10th June 2021, one month before the hearing and some three years after the original application the respondent sought to amend the application to include new grounds for the making of a costs order (paras 3.3 - 3.7) relating to the conduct of Mr Andrew Bousfield counsel for the claimant at the original hearing. The claimant objected and we declined to permit them to rely on that ground for the reasons given orally. In summary those reasons were that the allegations were that the claimant's counsel had personally acted vexatiously, abusively, disruptively and unreasonably during the hearing (3.5). These are serious allegations which we took the view would require us to give Mr Bousfield the opportunity to answer before we would or could make findings of fact in relation to them. This would necessarily mean adjourning the hearing. Neither party wanted the hearing to be adjourned and in those circumstances we concluded it would not be fair to permit the respondent to rely on the new allegations at this hearing.

4. The respondent also served a witness statement from Ms Helen Mullens to which the claimant objected. The contents of the statement are purely factual and the claimant indicated she had no questions for Ms Mullen and did not challenge the contents. In the circumstances we concluded there would be no prejudice to the claimant to admit the witness statement.

Means

5. At the TPH permission was given to the claimant to serve a witness statement as to means if she wished us to take her means into account in the event that we held that the threshold for making a costs order had been reached. The claimant did not do so and expressly does not invite us to consider her means.

6. As a result the issue for us is purely the question in principle of whether the threshold for an order for costs has been met.

Amount of any Award of Costs

7. The full amount of costs claimed is £222,418.74. The parties are agreed that in the event that we decide to make an award falling within the limit of our powers of summary assessment they are happy for us to do so. If we decide in principle to make an award above that limit the question will need to be referred for detailed

assessment. As a result we have not heard any evidence or submissions in relation the detail of the costs schedule.

Basis of the Application / Respondent's Submissions

8. The legal principles are not in dispute but for completeness sake the respondent relies on the power to make a costs order contained in r76 (ET Rules 2013), as set out in greater detail below, and asserts the following principles:

i) The ET is under an obligation to consider whether to make an order where the relevant ground is made out; but

ii) The ET has a wide and unfettered discretion; and

iii) Does not have to establish a causal link between the conduct and the costs claimed or awarded;

iv) The Calderbank rule does not apply in the ET but the rejection of an offer of settlement can be taken into account in deciding whether to make an award of costs.

9. The respondent asserts that the claimant had no reasonable basis for bringing the claim; had no conviction in her own claim; and has acted unreasonably in bringing the claims, and in the manner of her conduct of proceedings (application para 2.1).

10. No Reasonable Prospect of Success (r76 (1) (b)) – The first basis for the application is that the claims had no reasonable prospects of success, which the claimant either knew or should have known (Radia v Jeffries International Ltd). It relies on the following:

    i) The claims were wide ranging and unfocussed;

    ii) All of the claims of sex and age discrimination were withdrawn at an early stage;

    iii) The disability discrimination claims were struck out as a result of EJ Moore's decision that the claimant was not a disabled person within the meaning of s6 Equality Act 2010;

    iv) The claimant continued to rely on material found to be irrelevant at the final hearing (the evidence of Isabella Santamaria specifically, and criticisms of EIA generally; and the reliance on Professor Bhugra's review);and the circumstances of the application to call Professor Bligh.

    v) All of the harassment and victimisation claims were dismissed;

vi) The respondent adopts and relies on the tribunal's reasons for dismissing allegations a) -i) including that all except i) were out of time and we held that it would not have been just and equitable to extend time;

vii) In addition the claim for unfair selection for redundancy was not only "comprehensively" dismissed (for the reasons set out on greater detail in paras 35/36 of the written submissions) but that each of the specific complaints were rejected;

viii) Similarly the claims of direct discrimination and automatic unfair dismissal were dismissed.

11. Unreasonable rejection of settlement offers – The respondent made three (without prejudice save as to costs) settlement offers. The first dated 15th August 2017 was for £88,335. The second was a joint offer made by the respondent and the Health Board to settle all claims against both employers made on 29th September 2017. The third was an offer to settle this claim for £30,000 on 11th October 2017. The respondent points in particular to the analysis of the case which accompanied the first offer and which the claimant rejected in a peremptory fashion, and which was essentially the same analysis as that of the final decision of the tribunal.

12. Unreasonable conduct of proceedings – The respondent relies on the claimant's (or the claimant's counsel's) apparent belief at the commencement of the hearing that she could simply call witnesses who attended as a result of witness summonses without preparing or serving witness statements from them despite earlier case management orders as to the mutual exchange of witness statements. Secondly that this is particularly "egregious" as the tribunal rejected all of that evidence as irrelevant. The respondent in essence contends that the claimant did not in reality advance this evidence because she had any belief that it was relevant to any of her claims but in order to mount a "collateral attack" on the respondent and its witnesses.

13. The respondent submits that in considering its application we should bear in mind that the claimant is a highly intelligent and qualified medical professional and academic, that she was professionally represented throughout and therefore had access to legal advice at all stages ,

Claimant's Submissions

14. The claimant makes a number of primary submissions. Firstly that a costs order is exceptional and that the employment tribunal is not a forum in which costs ordinarily follow the event. Secondly that the fact that the claimant lost does not in and of itself displace that basic principle and that the judgment does not contain any finding that the claimant has lied in giving evidence or brought any claim in bad faith. In essence the claimant submits that despite the fact that this was a lengthy hearing and has involved the successful respondent in significant cost here is nothing which makes it

exceptional or takes it out of the standard employment tribunal claim in which no order for costs is made.

15. Specifically in relation to a number of points made by the respondent she makes the following submissions. In relation to the early withdrawal of the age and sex discrimination claims, and the dismissal of the disability discrimination claims, no application for costs was made at the time; and that the tribunal which heard the final hearing (rather than the earlier hearings) is simply in no position to assess whether those claims should not have been brought in the first place (and in any event she relies upon the well-known comments of the Court of Appeal in McPherson v BNP Paribas as to the costs consequences of withdrawal), or in the case of disability discrimination claim that the claim should not have been pursued. Secondly that the claimant's conduct in the early withdrawal of the sex and age discrimination claims is evidence of her reasonable conduct of proceedings in limiting the claims at an early stage rather than the contrary. Thirdly, specifically in relation to the disability discrimination claim EJ Moore's findings and conclusion that the claimant was not a disabled person were based largely on the claimant's own evidence which she accepted.

16. In respect of the fact that the respondent is significantly funded from public funds the claimant submits firstly that the threshold for making an order for costs is not lower against a publicly funded party, and nor is there any authority for the proposition that the discretion to make an order should be exercised more readily; and fundamentally that it is a matter for the respondent how it chooses to expend its funds and if it chooses, as it is entitled to, to use significant amounts of its funds to pay its lawyers to defend claims that is its own choice.

17. In relation to the matters that were relied on by the claimant as matters from which inferences could be drawn, the EIA and the Professor Bhugra review, she submits that it is rare to have direct evidence of discrimination and common for claimants to rely on matters from which inferences can be drawn, and equally common for claimants to rely on matters where it is the cumulative effect of them that allows the inference to be drawn. The fact that the tribunal in the final analysis concludes that it will not draw those inferences is no basis for concluding that it was unreasonable to place that evidence before the tribunal.

18. In relation to the question of the late submission of witness statements which delayed the start of the hearing the claimant submits that the hearing was still completed within the time allocation, and that there is no evidence that it caused the respondent to incur any extra costs.

19. In respect of the fundamental question of whether the claims had no reasonable prospect of success and/or that the claimant acted unreasonably in bringing the claims the claimant also refers us to *Radia v Jeffries International Ltd* and in particular paragraphs 61 – 69 of the decision. The relevant principles are that:-

i) There is in effect a two stage test for the tribunal. In respect of r76 (1) (b) the test is objective and requires the tribunal to determine whether in fact the claims had no reasonable prospect of success; and if so

ii) The r76(1)(a) test and/or the exercise of the discretion will include consideration of whether the claimant either new or ought to have known from the outset (or if not at the outset from what subsequent point) that the claims had no reasonable prospect of success;

iii) The tribunal in answering those questions has to assess them on the basis of the information that was known or reasonably available at the start;

iv) The fact that there were factual disputes to be resolved does not necessarily mean that the tribunal cannot conclude that the claim had no reasonable prospect of success and/or that the claimant did not or ought not to have appreciated that.

20. The claimant submits that both questions should answered in her favour. There is no basis for concluding objectively that the claims had no reasonable prospect of success at the outset, and the fact that the tribunal accepted the respondent's evidence and explanations at the final hearing is no basis for asserting that it was inevitable from the outset that it would do so or that the claimant did or should have appreciated that it would. In reality the respondent relies on the fact that the tribunal's ultimate conclusions matched those reached by the respondent in its own assessment of the case. However it does not logically follow that the claimant should have made the same assessment.

21. In respect of the offers of settlement the second should be ignored as it was a joint offer to settle from two respondents and related to all proceedings between all three parties and there is no basis for this tribunal being able to assess the offer in those circumstances. In respect of the first and third offers in reality they add little or nothing to the points in respect of the reasonableness of pursuing the claims. If the in the claimant's view she had a reasonable prospect of success, and if that view was not itself unreasonable, neither of the offers was a sum so significant that it would come close to any likely award, particularly in relation to the discrimination claims, and particularly if the tribunal had accepted that dismissal was the last in a series of acts of discrimination spanning many years that it cannot be said that it was unreasonable to have declined to settle for those amounts.

Conclusions

22. In broad terms, whilst we have concluded that some of the points made by the respondent (as set out below) are persuasive, we accept the claimant's submissions. Looked at overall we are of the view that it objectively was clear and should have been clear to the claimant that there were significant obstacles to succeeding in her claims. The Medic Forward programme which was at the heart of the claims relating to the dismissal was lengthy, detailed and well documented; and some of the challenges to it, such as the proposition that as "Surgery Research" was not a pre-

existing group that it was not open to the respondent to adopt it within the Medic Forward programme were hard to sustain. Similarly in our view some of the points relied on by the respondent in relation to the "irrelevant" material are well made. In particular the points made by the claimant in relation to the EIA were (as is apparent from our judgment) essentially untenable. However, whilst there are legitimate criticisms of some aspects the claimant's claims, it is not possible to say, in our view, that there was no reasonable prospect of establishing at least some arguable procedural points in relation to the unfair dismissal claim, or some of the earlier discrimination claims, or that there was no reasonable prospect of us extending time. Looked at overall if the test were based on the balance of probabilities, or even possibly that of having little reasonable prospect of success the application may have succeeded, but we are not persuaded that we can conclude that objectively the claims had no reasonable prospect of success or that the claimant ought to have appreciated that from the outset.

23. It follows that we do not conclude that this case falls within r76(1)(b) or that it was unreasonable to bring the proceedings (r76(1)(a)).

24. Similarly we accept the claimant's submissions in respect of the rejection of the settlement offers and are not persuaded that the failure to settle on those terms should attract cost consequences.

25. The issue which has concerned us most is whether the claimant's conduct in failing to obtain witness statements from the witnesses she wished to call and which delayed the start of the hearing should be considered the unreasonable conduct of proceedings. It was certainly extremely curious conduct particularly for a legally represented party. However we decided to admit the evidence (with the exception of that of Ms Santamaria) and we accept the claimant's submission that in those circumstances the evidence in rebuttal would have needed to be secured in any event. In the end we have concluded that even if it did cross the threshold of unreasonable conduct that in the absence of any evidence that any extra costs were incurred because of it, that as a stand-alone issue that we would not exercise our discretion to make what in the context of this case would be a token award.

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EMPLOYMENT JUDGE

Dated: 4th August 2021

Judgment entered into Register And copies sent to the parties on 6 August 2021

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for Secretary of the Tribunals