



EMPLOYMENT TRIBUNALS

Claimant: Mrs C Blackhurst

Respondent: Parklands Private Day Nursery Limited

HELD AT: Liverpool

ON: 11-13 July 2016

BEFORE: Employment Judge Buzzard
Mr J Roberts
Mr R Cunningham

REPRESENTATION:

Claimant: Mr C Mackintosh, Solicitor
Respondent: Mr S Flynn, Counsel

JUDGMENT having been sent to the parties on 21 July 2016 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS FOR DECISION ON RESPONDENT'S APPLICATION FOR COSTS

1. As a result of an administrative error, these written reasons, prepared in response to the respondent's request for written reasons for their successful application for costs, have been significantly delayed.

The Issues

2. The claimant presented three claims to the Tribunal, namely that she was constructively unfairly dismissed, discriminated against on the basis of her age and discriminated against on the basis that she was a part time worker.

3. The claimant indicated that she wished to withdraw her claim based on age discrimination prior to the hearing and confirmed this at the outset of the hearing. The remaining claims were heard at Liverpool Tribunals on 11-13 July 2016.
4. All the claimant's claims were dismissed in an oral decision with reasons given at the hearing on 13 July 2016.
5. Following the decision the respondent's representative made a costs application against the claimant on the basis that
 - 5.1.1. the claimant's claims were unreasonably brought; and / or
 - 5.1.2. the claimant's continued prosecution of the claims was unreasonable; and /or
 - 5.1.3. the claimant's claims had no reasonable prospect of success.

The Law

6. The respondent's application for costs was made under Rule 76 of the Employment Tribunals Rules of Procedure "the Rules". This Rule states:

76.—(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; or

(b) any claim or response had no reasonable prospect of success.

7. Under rule 74 costs include "*expenses incurred by or on behalf of*" a party. In this case it was suggested that the respondent may have some legal expenses insurance, the details of which were not explored. Accordingly, the question of insurance is not of significance. An insurance company can incur costs and these would fall within the definition of costs provided they were incurred on behalf of that party.

8. The respondent's application was on the basis that:
 - 8.1. all three of the claimant's claims were unreasonably brought;
 - 8.2. the two claims continued at hearing were unreasonably conducted; and
 - 8.3. none of the three claims presented by the claimant had a reasonable prospect of success.

9. The claimant's representative's response to the respondent's application was that the claims had all been reasonably brought as the claimant had a genuine belief that she had been constructively dismissed and discriminated against. Further, it was submitted that at no point was the conduct of those claims unreasonable.
10. Costs in the Employment Tribunal are the exception, they are not awarded to a party simply because they were successful in a substantive hearing. They can only be awarded when the tests laid down in the Rules are met, specifically here Rule 76(1).

The Evidence

11. The Tribunal only heard evidence from the claimant. This evidence was brief and confined to the issue of her ability to pay any award of costs. In that evidence the following relevant findings were made:
 - 11.1. The claimant has a small income from her work at Farmer Ted's, which the claimant estimated to be in the region of £200 per month. Specifically, the notes of evidence taken by the panel suggest that the claimant said this income was "a couple of hundred a month".
 - 11.2. The claimant is married. Her husband does not work and is in receipt of disability benefit.
 - 11.3. The claimant stated she had no other form of income. She is aged 65. She has savings of about £5,000.
 - 11.4. The claimant owns her own house jointly with her husband. It is a four bedroom detached house in Halsall. The property is owned outright with no outstanding mortgage against it.
 - 11.5. The claimant initially gave evidence that she had no other assets. Under cross examination the claimant conceded she owns a car, specifically a "2002 Ford Focus" of "limited value". The claimant later conceded that her husband also owns a car, specifically a "2001 BMW", which is currently off the road.
 - 11.6. The claimant's evidence was that she had no idea about her monthly outgoings because she did not deal with them, she does not look after the bank account. The claimant could be no more specific than to indicate that she lives carefully and frugally.
 - 11.7. Under cross examination the claimant confirmed that she does not get any pension despite her age because she has chosen to defer that pension.
 - 11.8. The claimant was specifically asked, and after initially being reluctant to reveal this, conceded that her husband has collected art work, specifically around ten paintings. The claimant's evidence was that she had no idea about the value of those paintings; indeed, none of them had been sold and there was no intention to sell any of them. The claimant further confirmed

those paintings were not insured. Under further cross examination the claimant stated that the paintings had been inherited by her husband before she knew him, and that she was aware that there had been a lot of “death duty” paid by her husband on his inheritance. It appeared to the Tribunal panel that the claimant was referring to Inheritance Tax at this point in her evidence.

- 11.9. The claimant confirmed that, in her view, if she were made to pay costs then that would place her in dire financial straits.
12. No other evidence was heard, although the Tribunal was able to take into account the evidence presented at the substantive hearing, both oral and documentary.

Submissions

13. The respondent’s primary submission was that many of the claimant’s actions from the presentation of the claim to the conclusion of the hearing had, in one way or another, been unreasonable. Specifically the following points were submitted:
 - 13.1. In presenting an indirect age discrimination claim and then withdrawing that claim prior to the hearing the claimant has acted unreasonably. The respondent went on to submit that there was at no point any credible evidence or even a credible argument that any age based discrimination had occurred. The respondent invited the Tribunal to consider the claim pleadings and the case management discussion in support of this contention.
 - 13.2. The claimant’s claim of discrimination under Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 was not a credible claim and, accordingly, the claimant acted unreasonably by presenting the claim. That claim was dismissed having been found to have been presented out of time. The respondent accepted that the Tribunal had not heard that claim and any evidence relating to it, but argued that the basis of the claim, as set out in the claimant’s claim form, was before the Tribunal. This sets out that the claim was based upon the claimant’s belief that the reason that she was asked to transfer to another site was because she was a part-time employee and this was, accordingly, discriminatory. The respondent drew the Tribunal’s attention to the claimant’s resignation letter which complains that she had been picked on to transfer for a different reason, namely because she was not a “*key worker*”. Uncontested evidence from the substantive hearing was that a “*key worker*” was assigned to specific children to ensure that the young children have continuity of care and presence at the nursery. The respondent submitted this shows that the claimant did not believe that her selection for transfer was because she was part-time.
 - 13.3. The respondent argues that the claimant’s third claim of constructive unfair dismissal was also misguided for similar reasons to the part-time discrimination claim. The claimant’s constructive dismissal claim was made on the basis that she resigned in response to being transferred to another site. In evidence at the substantive hearing the claimant stated quite clearly

under cross examination that the reason which made her decide to resign was the way the respondent wrote to her when handling her grievance. The respondent argued that bringing a claim of constructive dismissal on the basis of one repudiatory breach of contract and then in evidence stating that her resignation was in response to a different alleged breach is unreasonable. The respondent further submitted that the Tribunal had found at the substantive hearing that the actions argued by the claimant in evidence to be the breach that caused her to resign were entirely innocuous. The respondent submitted this was further evidence that the claimant's bringing of this claim was unreasonable.

- 13.4. The respondent further submitted that, after hearing the claimant's evidence at lunchtime on 12 July 2016, they had noted the change in the claimant's position regarding the actions of the respondent which caused her to resign. In the light of this realisation the respondent had invited a discussion about whether the claimant's claims should continue, highlighting the change in evidence and the fundamental undermining of the claimant's case which appeared to follow from that. At that point the claimant clearly indicated through her representative that she wished to press on, even in the light of the evidence which had been given. The respondent says that to continue from this point was unreasonable conduct.
14. The respondent also made representations regarding the amount of costs sought. The Tribunal had been given by the respondent a document headed "Respondent's Cost Schedule". The Tribunal noted that there are a number of errors in this document. There is an hourly rate for a "*Matthew Yates*" stated, which should presumably refer to "*Matthew Young*". No attempt has been made in the costs schedule, to break down the costs between the three claims. The respondent's representative was unable to provide anything more than estimates to assist the Tribunal regarding the breakdown of costs. Specifically of relevance to this application, the respondent's representative estimated that if the claimant had conceded that her claim was not going to succeed after giving her evidence, around midday on 12 July 2016, the costs incurred by the respondent would have been reduced by between £750 and £1,000.
15. The claimant's representative submitted that the claimant had not intended to act unreasonably, and had not acted unreasonably at any point. He further submitted that the claimant had a right to have "*her claim ventilated*". This submission was not clear, but given that the claimant withdrew her age discrimination claim prior to the hearing, he cannot logically have been referring to that claim in this submission.
16. The claimant's representative went on to submit that he took issue on the claimant's behalf with the fact that the respondent's Schedule of Costs was not signed, or as he expressed the point, it was "uncertified". He further submitted that the respondent was insured, and accordingly had not met, and would not have to meet, the costs themselves in any event.
17. He submitted that costs are the exception, they do not follow the event. The claimant must have acted unreasonably for costs to be awarded against her,

which she has not. In relation to the claimant's evidence and the finding that it contradicted her pleaded case in a fundamental way, he submitted that she had given her best evidence; that she was not used to the Tribunal environment; that she became confused when she was giving her evidence, and it was "*regrettable*" that she gave the evidence that she did.

18. Finally, the claimant's representative stated that it was not possible for the Tribunal to apportion the respondent's costs between the claimant's individual claims.
19. Regarding the claimant's ability to pay, the respondent's representative submitted that the claimant clearly had significant assets, primarily her home and savings of £5,000. The claimant's representative submitted that the claimant was very upset, that she lives a very frugal life and that she would be financially in difficulty if required to pay an order for costs.

Conclusions

19.1. Age Discrimination

The Tribunal's unanimous view was that the claimant's actions by presenting her age discrimination claim were clearly unreasonable. The evidence presented to this Tribunal does not suggest that there has been, at any point, any credible basis for the claimant to believe that any part of her treatment by the respondent was influenced consciously or sub-consciously by her age in any way. Accordingly, this claim is found to have been unreasonably brought.

20. Part Time Worker Discrimination

The Tribunal has been presented with no evidence which suggests that this claim presented by the claimant had any reasonable prospect of success. The claimant's own resignation letter makes it clear that she believed the reason she was treated as she was was because she was not a "*key worker*" who accordingly was assigned to specific children. This does not accord with her assertion in her claim form that her treatment was because she was part-time. Accordingly, this claim is found to have been unreasonably brought.

21. Unfair Dismissal

- 21.1. The claimant's unfair dismissal claim is not found to have been unreasonably brought. It is clear that the respondent's conduct, as found by this Tribunal, in giving the claimant little or no notice of a secondment after 24 years of service primarily at the same place, apart from the odd day, is an unreasonable way for an employer to behave. The fact that this Tribunal found that unreasonableness did not reach the threshold required to amount to a fundamental breach of contract is a question which it was proper to ask a Tribunal to determine.
- 21.2. However, having heard the claimant's evidence midway through the second day of the three day hearing, it was clearly apparent that there were significant difficulties faced by the claimant in this claim. Her oral evidence

was fundamentally inconsistent with her pleaded case regarding the reason for her resignation. The claimant was given time to take advice and consider the respondent's submission that her claim had no prospect of success at this point. Having had that advice, the claimant continued with her claim, on the basis that her pleaded reason for resignation was the real reason, and the explanation of her reasons for resignation in evidence was not accurate.

- 21.3. The claimant declined to waive her right to privilege regarding the advice she was given, and accordingly the Tribunal cannot take into account whether or not the claimant was following the advice she was given. However, once the clear and unequivocal evidence from the claimant regarding the reasons for her resignation was heard, the continuation of the claim beyond that point was clearly unreasonable as there were no prospects that the claimant could establish that her resignation was a constructive dismissal.

Costs Award

22. Given the findings that two claims were presented unreasonably and the third was continued beyond midday of the second day of this hearing unreasonably, the question becomes what costs, if any, should be awarded to the respondent.
23. Regarding the unfair dismissal claim, the claim has been found to have been reasonably brought. The claimant unreasonably continued the claim beyond mid-way through the second day of hearing. The Tribunal were not given the benefit of a detailed breakdown of costs incurred beyond that point, but do have the benefit of the estimate given by the respondent's representative of the costs that could have been saved by the claimant withdrawing her claim at lunchtime on the second day. The estimate given was somewhere between £750 and £1,000. This does not appear to be an unreasonable estimate for costs for the second half of day two of the hearing and for day three. However, given the lack of specificity, the award has been determined to be at the lower end of this estimate.
24. The remainder of the costs have been estimated by reference to the costs which were reasonably incurred as a result of the claimant bringing her discrimination claims. It is noted that there would have been a hearing of the claimant's unfair dismissal claim even if there been no discrimination claims included. There would not, however, have been the need for a case management hearing, requiring preparation and attendance by the respondent, if the discrimination claims had not been brought. There may well have been further costs incurred as a result of the discrimination claims, but the respondent presented no evidence or submission to seek to quantify any such costs.
25. The respondent's Schedule of Costs is of no assistance in estimating the costs which were incurred in preparing for and attending the case management hearing. Accordingly, the Tribunal panel have had to make their own estimate. Based on the relative simplicity of the issues at that case management hearing a reasonable estimate, erring on the low side given the lack of evidence from the respondent to justify a different approach, is that costs in the region of £750 were incurred by the respondent.

Ability to Pay

26. The claimant's ability to pay an award was considered. The evidence presented was that the claimant has savings of approximately £5,000 and has an equitable right to at least half of a property worth a substantial sum. In addition the claimant and her husband own a number of smaller assets including a number of paintings; however there was no evidence regarding the value of these assets.
27. In the circumstances it is found that the claimant is able to pay an award in the amount of £1,500. Further it is found that such an award would not cause the claimant undue hardship. The claimant could meet such award from using less than half her savings, without needing to involve any further assets.

Conclusion

28. Considering the above, it is appropriate to order the claimant to pay costs to the respondent in the sum of £1,500.

Employment Judge Buzzard

Date : 12 April 2017

REASONS SENT TO THE PARTIES ON

24 April 2017

FOR THE TRIBUNAL OFFICE