Case Number: 3303322/2015

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Dr C Escargueil	**v**	The Medicines and Healthcare Products Regulatory Agency

Heard at: Watford **On**: 1 November 2017

Before: Employment Judge R Lewis
Members: Mrs A Brosnan and Mrs S Low

Appearances

For the Claimant: Ms K McKay (friend, morning only)
For the Respondent: Ms C McCann (counsel)

JUDGMENT

The claimant is ordered to pay to the respondent costs of £20,000.00.

REASONS

1. These reasons were given by the tribunal of its own initiative as it is in the interest of justice to do so.

2. This case was heard by the present tribunal between 3 and 27 October 2016, and our judgment (62 pages) was sent on 12 December 2016. In these reasons we refer to that judgment simply by the capital letter J, so where we say J27, that cross refers to paragraph 27 of the reasons sent on 12 December 2016.

3. We noted from the tribunal file a number of strands of event since judgment was sent.

4. In the first strand the claimant applied for reconsideration which by letter from the tribunal of 16 March 2017 was refused by the judge alone on the papers.

5. By a second strand, the claimant appealed. The tribunal file shows a letter from the EAT of 31 March 2017 setting out the reasons of the judge (Mrs Justice Simler) refusing leave to appeal. The claimant renewed her application and the tribunal file also contains the judgment of HHJ Richardson given on 4 July 2017 and sent on 16 August 2017, refusing her leave to appeal. It is fair to comment that both judgments are expressed in trenchant language.

6. The third strand of which we were told is that the claimant has submitted a notice of appeal to the Court of Appeal, to which the respondent has answered with a response statement. The matter awaits consideration of the application of leave.

7. The fourth strand, which was before us today, was that on 9 January 2017 the respondent applied for costs. Notice of the present hearing was sent on 15 August 2017. The claimant had been in correspondence with the tribunal. She submitted a medical certificate dated 8 June 2017 from a French doctor stating that her health status would not permit her to attend the costs hearing in September (the matter had originally been listed for that month). No further health information was provided.

8. Shortly before this hearing, the claimant submitted written representations, to which she attached a selection of documents from the trial bundle, and two or three items of without prejudice correspondence. She notified the tribunal that she would not be in attendance at this hearing, and that Ms Mackay (who was present as McKenzie friend at the first week of the hearing in October 2016) would represent her.

9. On behalf of the respondent, Ms McCann presented a bundle of some 260 pages.

10. At the start of the hearing, we informed the parties of that much of the procedural history, and asked Ms McCann to explain the current state of the Court of Appeal procedure, as she understood it. We noted that the claimant had made an application to adjourn.

11. At 10.45am we adjourned for 20 minutes to enable Ms Mackay to consider matters and if need be speak to the claimant. We resumed, and Ms Mackay told the tribunal that she had had the opportunity to speak to the claimant, who was still waiting to hear the outcome of her application to the Court of Appeal. The claimant asked us to adjourn dealing with the costs application until after that matter had been determined.

12. Ms McCann in reply stated that the claimant had had an opportunity to have the matter reconsidered. She submitted that two highly experienced specialist judges of the EAT had rejected the claimant's attempts to appeal, giving careful reasoned outcomes in both cases. She submitted that the claimant's attempts to appeal further were entirely speculative, and that the respondent was entitled to a decision on an application which it had made ten months

previously. She submitted that there was no good reason to postpone, possibly for a period which could not be determined.

13. The tribunal adjourned briefly and then informed the parties of our decision which was to proceed. We therefore refused the application to adjourn. It seemed to us in the interest of justice that the employment tribunal stage in this matter should achieve finality, and without wishing to comment on the correctness of our judgment, we noted the robust and detailed language of two specialist judges of the EAT.

14. Ms McCann then made her application, and addressed the tribunal for about an hour. After she had finished, we offered Ms Mackay the opportunity of an adjournment to consider preparation or to speak again to the claimant, but she wished to proceed. We reminded her that she had the opportunity, if she wished, to place before us at that stage information about the claimant's means in relation to her ability to meet any award for costs.

15. After Ms Mackay had concluded and Ms McCann had briefly replied, we adjourned and gave judgment after 2.00pm. Ms Mackay told the tribunal that she might not be instructed to remain for the judgment to be given, and we replied that that was entirely understood, and the tribunal would in that event proceed in her absence. In the event, Ms Mackay was not present when we resumed at 2.05pm.

16. This was an application made under the costs jurisdiction of the employment tribunal, set out at rules 74 to 78 of the Employment Tribunal Rules of Procedure. We approach the matter through three stages. At the first stage we ask whether the power to make a costs order has arisen under either rule 76 (1a) or 76 (1b).

17. Rule 76 (1a) provides that a costs order may be made where the tribunal considers that "a party…has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings... or that the way the proceedings…had been conducted." Ms McCann's submission was that the claimant had brought and conducted the proceedings unreasonably.

18. Rule 76 (1b) enables a costs order to be made where the tribunal considers that "any claim…had no reasonable prospect of success."

19. At the second stage the tribunal must consider whether as a matter of discretion it is in the interests of justice to make an award for costs. There are a number of general considerations to be borne in mind. The tribunal is not a jurisdiction where costs follow the event, and a costs award is exceptional. The tribunal has traditionally been an open access system of justice, which claimants should approach without fear of costs; on the other hand however, the tribunal is duty bound to pay regards to the interests of others involved in the tribunal process, notably the interests of respondents in not being burdened with unmeritorious claims; and the interests of the tribunal system in ensuring that its finite resources are well used.

20. At a third stage (or more conventionally at the later half of the second stage) the tribunal should consider how much an award should be and how expressed. Ms McCann produced a schedule showing costs in excess of six figures, but in the interest of finality asked us to make a capped award at the maximum capped figure of £20,000.

21. At the first stage, and with reference to Ms McCann's submissions, we find that the test under rule 76 (1a) is met and that the proceedings were brought unreasonably in the following respects.

22. We accept first that the claimant brought a claim which was diffuse, unstructured, and near random in its targets; all of which we encompass in Ms McCann's word, "scattergun." She reminded us of our findings at J208. Some of the claims which the claimant wished to advance were not properly pleaded, or were out of time, and portions of her claim were rendered unviable by the preliminary judgement of Employment Judge Henry, who had both struck out the disability claims and set a cut off point in time, which excluded a large portion of historic background claims relating to Dr Sesardic. As Ms McCann pointed out more than once, the claimant had for a long period up to shortly before the hearing before us been professionally advised.

23. Ms McCann submitted that the claimant had conducted the case unreasonably in light of this tribunal's findings at J34-39, but especially J37-39 about her credibility. We do not express the matter so widely. We agree that our findings on credibility constituted unreasonable conduct of proceedings at J44.9 to 44.11, namely that it was unreasonable that the claimant advanced claims which were at odds with documents signed by her or on her behalf at the time of events.

24. We accept further that our findings at J39, J44.2, 44.8, 44.10 and 44.13 indicate that the claimant conducted the litigation unreasonably by advancing a case which was in denial of the reality of events around her.

25. We take as further specific instances of the above our findings at J142 and 144, and find that it was unreasonable to advance the arguments recorded there, which were plainly not reconcilable with the overwhelming body of evidence to the contrary. Both paragraphs are stark instances, and we hesitate to identify one as stronger than the other.

26. We also accept under this heading a matter which Ms McCann relied on in support of her submission under rule 76 (1b), namely knowledge of protected acts, which we deal with below.

27. When we turn to Ms McCann's alternative submission, we find that the following matters had no reasonable prospect of success, and that therefore the test under rule 76 (1b) was met. In doing so, we take care to avoid the wisdom of hindsight, and to apply an objective test of the reasonable claimant at the time in question. We mean by this that while the claimant may have had genuine belief in the unsustainable arguments which she advanced, the sincerity of her belief does not objectively create prospects of success. We

agree with Ms McCann therefore that in the following respects the claim had no reasonable prospect of success.

28. As pleaded, and as set out in a trail of document at the time (J39.5 and J153 to 157) the effective date of termination of employment was 20 August 2015. There was no reasonable basis whatsoever for a claim for pay thereafter.

29. The claim of breach of the right of accompaniment had no reasonable prospect of success in light of our findings at J158, namely that the claimant had been advised in writing of her opportunity to exercise that right and had declined it.

30. We commented at a number of stages (J139, 140, 143, 145, 150 and 33.3) that the claimant did not challenge the group of witnesses who said that they could not have victimised the claimant because they had no knowledge of any protected act or protected disclosure at the time of the event in question. The claimant readily admitted that she had no concrete evidence to the contrary.

31. At J49 to 50 we dealt briefly with the claimant's complaints of race and sex discrimination. In light of our findings there, we agree with Ms McCann that the claims of race discrimination and sex discrimination had no reasonable prospect of success.

32. Despite Judge Henry having struck out those portions of the claim which dealt with the claimant's grievances against Dr Sesardic, the claimant nevertheless advanced the submission (J48.7) that she had manipulated others and made the material decisions. The claimant had no reasonable prospect of proving that to be the case. When, in this part of the submission, the judge intervened to refer Ms McCann to J47.6, Ms McCann said, and it is right that we record, that the respondent did not allege against the claimant that she had proceeded for an improper motive.

33. Finally, we agree that aspects of the redeployment claims (J136-52) had no reasonable prospect of success, and without wishing to repeat that lengthy part of portion of our judgment, we refer in particular to J142, J144, and the recurrent allegations in those sections of victimisation.

34. The third limb of Ms McCann's submission referred to without prejudice correspondence between the claimant's then solicitors, Messrs Irwin Mitchell, and the Government Legal Department between 9 June and 1 September 2016. The claimant was offered and rejected a settlement figure of £30,000 to conclude the matter. Ms McCann placed considerable weight on Messrs Irwin Mitchell's reply of 10 June 2016, which stated that the claimant would accept in settlement re-engagement, plus contribution towards her legal costs of about £42,000. The letter stated: "Should your client continue to refuse the reasonable offer of re-engaging our client, the only way for Dr Escargueil to get her career back on track would be for her to continue to fight her claim at the hearing next week and the full hearing in October and ask the tribunal to order this remedy." This was repeated in a without prejudice letter of 5 August 2016.

35. Ms McCann submitted that the claimant's refusal to settle was unreasonable conduct of the proceedings. We do not go so far. A member of the public is entitled to seek non-monetary vindication from the tribunal. Most recently Lord Reed has reminded us of the social value of employment tribunal claims which are of little monetary value (Unison v Lord Chancellor, 2017 USC 51, eg at paragraphs 32 and 96).

36. However, the difficulty with the claimant's submission which we have quoted is that although re-employment is the primary remedy for unfair dismissal, it is true to comment (as the GLD did in reply) that it is ordered in under 1% of cases. It is also more material to note that the statutory remedy for failure to comply with such an order is further compensation only, and that an order for reinstatement or re-engagement cannot be enforced.

37. We agree with Ms McCann that there was an unreasonable conduct element in this part of the case. We find that it was unreasonable to pursue litigation of this scale to achieve an objective which was available on paper only, and which could not have been delivered even if the claimant had succeeded.

38. Turning to the exercise of discretion, we accept with Ms McCann that the interest of justice weighs in favour of an award for two reasons. The first was that the lengthy procedural history of this matter indicates that the claimant had many opportunities to withdraw or restructure her claims, so as to achieve some degree of focus and proportionality. That opportunity remained open to her up to the start of the hearing, and in light of the order of Judge Henry. The second was that we accept with Ms McCann that it is a material consideration that the respondent is a public body, and its significant costs have been paid out of public funds, all of which had better use and application.

39. We then turn to the question of how much should be awarded, and Ms McCann applied for an order for £20,000. Ms Mackay in reply informed us that the claimant could not send the tribunal financial information that day because she was not at home. She told us that the claimant had taken up a fixed term contract of the Pasteur Institute (which we were delighted to hear); Ms McCann reminded us of the claimant's schedule of loss had indicated a relatively short period of unemployment. We noted that in the without prejudice negotiations shortly before this hearing, the claimant had been in a position to offer an immediate settlement payment of £5,000.

40. We were troubled by the question of whether or not the claimant had understood that the tribunal could proceed today on the basis of such information about her means as it was given. Looking at the history since the costs application was initiated in January as a whole, we noted that the claimant had had the support of solicitors and counsel for her EAT hearing in July; and the advice of a solicitor whom she had consulted early in October 2017 about this costs hearing. It did not seem to us in the interest of justice to adjourn to enable the claimant to submit information about means, in particular as she had exercised her right not to attend today, had failed to give

Ms Mackay anything like adequate instructions, and there was no guarantee that an adjournment would change the position.

41. We therefore proceeded on the basis that the claimant has had employment since dismissal; is now in employment; is a respected and successful research scientist, and trilingual; was able to put forward a settlement offer shortly before this hearing; and was able to instruct solicitors in the month of this hearing. We also have regard to the possibility of her continued earning capacity in the future.

42. For all of those reasons, we consider the award which we have made appropriate.

43. As the claimant was not present, we record one matter, in case Ms Mackay omitted it from her notes or report to the claimant. Although enforcement is not a matter for this tribunal, we think it right to record that Ms McCann stated on behalf of the respondent that contrary to the claimant's submissions, it does not seek to bankrupt the claimant; and that on the contrary it would seek to resolve matters by some form of payment plan to be agreed with the claimant or if need be through the County Court. We repeat that we record this remark because we think it right to ensure that the claimant is informed of it and understands it.

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Employment Judge R Lewis

Date: ……22/11/2017……..

Sent to the parties on: .....

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For the Tribunal Office