EMPLOYMENT TRIBUNALS

Claimant: Mrs K Cairns

Respondent: The Wellness Zone t/a KLNIK

Heard at: Manchester Employment Tribunal (On the papers)

On: 04 October 2023

Before: Employment Judge M Butler

JUDGMENT ON COSTS

1. The claimant is ordered to pay the respondent £20,000 in costs.

REASONS

INTRODUCTION

1. Liability in these proceedings was determined by Employment Judge Brian Doyle, following a final merits hearing that was heard across 05-06 January 2023 and 07-08 February 2023. Judgment was handed down by Judge Doyle at the conclusion of that hearing on 08 February 2023. The decision was that the claim for unfair dismissal did not succeed, with the claimant having been found not to have been constructively dismissed. The respondent applied for written reasons, and those reasons were sent to the parties on 13 February 2023.

2. The respondent applied for costs at the conclusion of the liability hearing, with directions made in respect of that application. In compliance with those directions the respondent made a written application for costs on 27 February 2023, and an application for a costs hearing on 06 March 2023.

3. On 13 July 2023, Regional Employment Judge Franey wrote to the parties to postpone the costs hearing, that had been listed for 21 July 2023, following an application by the claimant on medical grounds. Within this correspondence, REJ Franey sought the views of the parties as to whether they had any objection to another Employment Judge determining the application as EJ Doyle was not available until Spring 2024, and whether the matter of costs could be determined

on the papers without the need for a hearing.

4. No objections were received in respect of the application being determined by a different employment judge.

5. The costs hearing was listed before me to be heard on the papers on 04 October 2023.

6. For this costs hearing. I have received and considered the following:

    a. The respondent's bundle of documents which is 55 electronic pages in length. This includes the application for costs. The respondent's costs schedule. Documents relating to offers of settlement. Costs warning letters sent on behalf of the respondent. And documents relating to some aspects of the claimant's financial position.
    b. A set of documents that I will refer to as the claimant's bundle of documents (these were sent in as separate documents, but were helpfully put into a paginated bundle by the respondent's representative for which I am grateful). This runs to 50 electronic pages. This includes submissions made on behalf of the claimant opposing the application for costs, the claimant's witness statement as to her financial means, and various documents disclosed in respect of the claimant's financial means.
    c. Submissions made on behalf of the respondent in respect of the application, along with electronic copies of the relevant authorities.

7. Although not included in either of the bundles, I have read and considered the liability judgment for this case, which runs to 121 paragraphs.

COSTS APPLICATION

8. The application for costs was made on the ground of unreasonable conduct by the claimant. And this was advanced in three ways:

    a. The Claimant acted unreasonably in issuing the claims of unfair dismissal, disability discrimination, detriment/dismissal whistleblowing, redundancy payment and notice pay (all of which were withdrawn apart from the unfair dismissal claim);
    b. The Claimant acted unreasonably by waiting until 8 December 2022 to withdraw her claim of PIDA;
    c. The Claimant acted unreasonably in failing to withdraw her claims following receipt of the costs warning letters on 9 September 2022 and 15 November 2022.

9. The application was further explained to have been made for the following reasons:

    a. The Claimant was found to have engineered her own dismissal (paragraph 117 of the liability judgment Reasons);
    b. The Claimant was found to be mendacious (paragraph 21 and 117 of the Reasons)
    c. The Claimant has failed to engage with the Respondent's attempts to agree costs or at the very least provide evidence of her means in order to ascertain the need for a costs application, see email exchange. This further evidences the Claimant's complete disregard for the Respondent, the costs being incurred and her dogged determination to cause more difficulties for the Respondent and the tribunal.
    d. The Claimant had been informed of the risks of costs and was informed in letters dated 9 September 2022 and 15 November 2022 that if she did not

withdraw the claims the Respondent would pursue an application for costs.

e. The Claimant's behaviour throughout these proceedings, for example:
    i. the claiamnt was asked for further particulars in December 2021 and at the PH held on 4 May 2022 counsel for the Claimant had no instructions which meant the PH achieved very little (paragraph 6 of the written reasons), EJ Sharkett was particularly disappointed at the hearing (see email note from counsel);
    ii. the Claimant raised various allegations in her statement and at the hearing without any regard for the consequences of raising those allegations,
    iii. The Claimant was ordered to provide particulars of her claim by 20 May 2022. The further particulars provided did not address a number of points relating to the whistleblowing allegations. As such this was challenged, and the Claimant provided some further details which again required further clarification. A number of such exchanges occurred between the parties before the Claimant's claim regarding whistleblowing was sufficiently particularised.

f. The Claimant put forward an offer of £46,000 in order to settle the claim during ACAS conciliation. The Claimant submitted a further offer to settle the claim at £30,000 on 13 October 2021 and then £18,000 on 10 November 2022. This along with the Claimant's withdrawal of a number of claims, evidences the motivation for the Claimant was purely to maximise any monetary settlement she could seek from the Respondent.

10. The respondent is seeking a costs order for the tribunal proceedings (and as this exceeds £20,000 would be by way of detailed assessment) or, in the alternative, a contribution of £20,000 towards the costs incurred.

11. The application was supplemented by written submission made by Mr Gilroy KC on behalf of the respondent.

RESPONSE TO APPLICATION

12. The claimant resists the application on the following grounds:

a. Costs should be the exception rather than the rule.
b. That the live claim at the final hearing concerned constructive dismissal, which is fact sensitive and could only be determined after oral evidence.
c. That the claimant had a genuine belief that she had been forced to resign, and that the decision ultimately turned on the tribunal having preferred the evidence of the respondent's witnesses.
d. That the claim as set out in the list of issues was capable of meeting the test for constructive dismissal.
e. Whilst the Tribunal Judge made some critical observations of the Claimant as a witness, it failed to identify the specific findings of fact of fact relating to the specific agreed list of issues, which would reasonably justify the exceptional step of a costs award.
f. The claimant was subject to lengthy cross examination, and on matters beyond the list of issues.
g. That the way the claimant gave evidence, should be considered in context. Namely her difficulty during cross-examination, that it strayed beyond the issues and the effect it had on her. All which effected er evidence was perceived.
h. That this is a case where the claimant's evidence did not come up to proof, noting more.
i. The allegation of a false allegation made by the claimant was outside of

the list of issues.

j. That despite whistleblowing having been withdrawn, the cross-examination was extended into this area.
k. The claimant tried to reasonably settle the claim. But now has no means to enter discussions to settle costs.
l. That the claimant issued proceedings without legal assistance. And that the legal representatives agreed before the first preliminary hearing that further and better particular would be produced within 4 weeks of that hearing.
m. That the claimant did withdraw the whistleblowing allegations, which was a genuine and reasonable litigation decision, and one that would have resulted in a cost saving given it was done before disclosure stage. And financial pressures played into this decision.
n. That the claimant is in a dire financial position as a result of these proceedings.

THE RULES

13. The power to award costs by the Employment Tribunal is contained within the Employment Tribunals Rules of Procedure Regulations 2013. Rule 76 specifically deals with the grounds for which a costs order can be made. Rule 78 deals with the ‘amount’ of a costs order and Rule 84 deals with the ‘ability’ of the paying party to pay a costs order.

14. Under Rule 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*”.

15. Under Rule 78(1) “a costs order may – (a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party; (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles …"

16. Under Rule 84, in deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party’s (or, where a wasted costs order is made, the representative’s) ability to pay.

RELEVANT PRINCINPLES

17. In terms of general principles that I have reminded myself of in advance of considering this matter, these include:

    a. costs are the exception, not the rule;
    b. costs are designed to compensate the receiving party for costs unreasonably incurred, not to punish the paying party for bringing an unreasonable case, or for conducting it unreasonably.
    c. I should follow a 3-stage process: first, I should decide whether the threshold in Rule 76 had been crossed. Secondly, I should then consider as an exercise of discretion whether that conduct merited a costs order; it was not automatic that because I had the power, I should exercise it. Thirdly, if I decided to make a costs order, I should consider the

appropriate amount of costs incurred by the respondent in defending the unreasonable claims.

18. The issue of being untruthful or lying is matter raised in this case by the respondent. I reminded myself that a lie will not necessarily of itself be sufficient to make an order for costs. In doing so I considered the case of **HCA International Limited v May-Bheemul [UKEAT/0477/10, 23 March 2011 unreported]** where Cox J made the point that no case established a point of principle of general application that lying, even in respect of a central allegation in case must inevitably result in an award of costs and that "it will always be necessary for the Tribunal to examine the context and to look at the nature, gravity and effect of the lie in determining the unreasonableness of the alleged conduct". The principle that lying will not automatically justify an award of costs was applied by the EAT in **Kapoor v Governing Body of Barnhill Community High School [UKEAT/0352/13].** In that case Singh J held that a Tribunal which, in awarding costs against a Claimant who had been untruthful in putting forward her case, had stated without more, to conduct a case by not telling the truth is to conduct a case unreasonably, it is as simple as that, had misdirected itself in law in a manner that had tainted its whole approach to the exercise of its discretion.

19. Lord Justice Mummery had set out the general principle to follow at this third stage, in his judgement in **Yerrakelva v Barnsley MBC [2012] ICR 420**, at paragraph 41:

> *'The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment Tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed.'*

20. Any assessment or consideration of means need not be limited to the paying party's means as at the date the order is made. It is sufficient that there is a "realistic prospect that [they] might at some point in the future be able to afford to pay" (**Vaughan v London Borough of Lewisham [2013] IRLR 713, EAT**).

21. With regard to the paying party's ability to pay, Rule 84 allows the tribunal to have regard to the paying party's ability to pay, but it does not have to, see **Jilley v Birmingham and Solihull Mental Health NHS Trust and Single Homeless Project v Abu UKEAT/0519/12**. The fact that a party's ability to pay is limited, does not, however, require the tribunal to assess a sum that is confined to an amount that he or she could pay see **Arrowsmith v Nottingham Trent University**, which upheld a costs order against a claimant of very limited means and per Rimer LJ "her circumstances may well improve and no doubt she hopes that they will." One reason for not taking means into account is the failure of the paying party to provide sufficient and/or credible evidence of his or her means.

22. Insofar as it does have regard to the paying party's ability to pay, the tribunal should have regard to the whole means of that party's ability to pay, see **Shield Automotive Ltd v Greig UKEATS/0024/10** (per Lady Smith obiter). This includes considering capital within a person's means, which will often be represented by property or other investments which are not as flexible as cash, but which should not be ignored.

23. The ET may have regard to the means of a party's spouse or other immediate

family members (**Abaya v Leeds Teaching Hospitals NHS Trust UKEAT/0258/16**).

24. Last but not least, discretion must be exercised so as to give effect to the overriding objective (rule 2) to deal with cases justly and fairly, having regard to: (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.

ANALYSIS AND CONCLUSIONS

Unreasonable conduct. Has the claimant conducted the proceedings unreasonably?

25. I consider that in the circumstances of this case, the claimant has conducted these proceedings unreasonably. In reaching this conclusion I considered the reasons and findings contained in the liability judgment prepared by EJ Doyle.

26. As set out by Mr Gilroy in his written submissions, the claimant herself concedes that the respondent should be entitled to recover costs in this case (see paragraph 1 of the claimant's cost hearing witness statement). The claimant's witness statement, in short, appears to be the claimant accepting that the grounds for awarding costs have been established, however is seeking to persuade the tribunal not to use its discretion to award costs due to her current financial position. This concession is arguably enough to move to the second part of my analysis of whether to award costs. However, I consider it prudent to give some consideration as to whether the claimant has acted unreasonably at this point in any event, to at least satisfy myself whether it can be said that the claimant has acted unreasonably during this process.

27. The respondent informed the claimant of its intention to pursue costs on two occasions, if the claimant continued to pursue claims which it considered to be vexatious and/or having no reasonable prospects of success (in letters dates 09 September and 15 November 2022). Although costs warning letters are often part of litigation tactics, this is a factor to be taken into account.

28. The claimant appears to have had legal representation in place from at least 13 October 2021 (see p.8 of the respondent's bundle). As on that date an offer to settle in the sum of £30,000 was made. This was in advance of presenting her claim form. The claimant names her representative in her claim form as being a solicitor from Stevensons Solicitors LLP. There is further correspondence on behalf of the claimant by the same solicitor firm on 16 September 2022 and 10 November 2022 (this being the latest offer for settlement at £18,000). With no evidence to the contrary, the claimant appears to have been represented throughout these proceedings, including at the point of presenting her claim form. Despite this, at the preliminary hearing before EJ Sharkett on 04 May 2022, the claimant's representatives were recorded as not having been able to take instructions with respect the particulars of the claim since December 2021, and therefore it was not possible to make progress in that respect at that hearing. The claimant later withdrew the public interest disclosure part of her claim on 08 December 2022.

29. As set out in the liability judgment, the claimant 'failed many of the tests of a credible and reliable witness' (see para 20), and that in her oral evidence there were some 'obvious untruths', that she introduced evidence not raised before, was 'evasive in answering questions', employed a 'distraction technique' when answering questions rather than focussing on the question being asked, 'ought to

place reliance on documentary evidence to support her oral evidence, but where the documentary evidence simply did not bear the weight or interpretation she sought to place upon it', that her evidence was 'riddled with exaggeration and hyperbole', contained 'many examples of sheer contradiction', and there were places where 'her evidence was not simply honest but mistaken, but actually mendacious' (all at para 21 of the liability judgment).

30. EJ Doyle continued at paragraph 22 and expressed that:

> *"The net result is that, while the Tribunal does not reject the claimant's evidence in its entirety nor accept the respondent's evidence without some reservation in places, it does not feel at all confident in being able to rely upon the claimant's pleaded case nor her witness evidence. The Tribunal draws its primary findings of facts almost entirely from the respondent's pleaded case and the evidence in chief of Dr Ravindran and Mr Parkes."*

31. In his conclusions, EJ Doyle states:

> *"It is implicit in the Tribunal's findings above that the claimant engineered her resignation and made a false allegation against Dr Ravindran to the GMC (and apparently to the police). The respondent would have been entitled to dismiss the claimant summarily or within a relatively short period of time, thus engaging the Polkey exceptional principles."*

32. Taking a step back and considering the conduct of the claimant as a whole, I consider that given that set out above, even without any concession in respect that the respondent should be entitled to recover costs, the claimant has acted unreasonably in the manner that she has conducted these proceedings. Particularly in respect of bringing a range of serious complaints without adequately setting out the particulars of that claim whilst having legal representatives available to her, before delaying the withdrawal of part of those complaints, and maintaining those complaints where the evidence does not support any of the allegations made, leading to the tribunal to conclude that she had 'engineered her resignation'.

33. Further supporting my conclusion that this satisfies being unreasonable conduct is the observations made by EJ Doyle of the claimant's oral evidence (recorded above), with the untruths, placing of misleading interpretation on documents, exaggeration and giving of mendacious evidence being in respect of matters that went to the core of her claim.

<u>Discretion as to making a costs order</u>

34. The next question I ask myself, having found that there are grounds for making a costs order, is whether to making one is appropriate in this case. I consider that it would be appropriate to make a costs award in this case for the following reasons:

    a. Although costs are the exception rather than the rule, this is one of those exceptional cases where a costs order is appropriate.

    b. I am mindful that telling of untruths does not automatically lead to justifying an order as to costs, however, the untruths in this case go to the heart of the claim. These must have been known to be untruths by the claimant at the outset and were maintained throughout the proceedings. In those circumstances, the exaggerations present, the untruths and the other matters referred to above must merit an award of costs.

c. The claimant had access to professional legal advice throughout this matter.

d. The claimant was put on notice early on in the process that the respondent would be applying for costs if she continued to pursue the claims, and was given the opportunity to withdraw her claims without costs being pursued.

e. The liability judgment made it clear that the claimant engineered her resignation, rather than it being for the reasons pursued in respect of constructive dismissal (the only live claim at the final hearing).

f. It cannot be in the interests of justice to permit a claimant to bring and maintain a claim that they know is not well-founded.

35. I will deal with ability to pay separately below, before concluding on the question as to whether a costs award will be made or not. The matter of ability to pay appears to be the focus of the claimant's witness statement and the submissions made on her behalf, at least in respect of whether the discretion to award costs should be used.

<u>Ability to pay</u>

36. The claimant's witness statement before me today provides very little detail in respect of her financial means. It gives no explanation of her income, nor of her outgoings. Further, she provides no details of the financial means of her household as a whole. At its height it explains the following:

a. That the claimant spent a significant proportion of time out of work following her resignation and was only in receipt of state benefits. However, she did commence work prior to the liability hearing.
b. She has various outgoings, including mortgage payments, car finance, utility bills and various other bills.
c. The claimant then appears to contradict herself in saying that over the past 12 months she has not been able to contribute to her usual mortgage or household bills.
d. She has received gifts/loas from friends and family.
e. She cannot cover basic household outgoings and has started using food banks.
f. That she has no funds to satisfy any costs awards made.

37. The claimant has provided some documents relating to her financial means. However, these are somewhat limited. However, I make the following observations:

a. There is evidence that during the period before the liability hearing the claimant was earning from a variety of different sources, and not in receipt of state benefits only. For example, on 12 June 2022, the claimant received a payment of £375 from the City of London Dental School. There is evidence of income from the Dental School but also other bodies including the Eden Wellness. The claimant's statement is therefore untruthful in that respect.
b. The claimant's bank statements go back to 01 March 2022. There are no mortgage payments in those documents taken form the claimant's bank account.
c. There is no evidence that the claimant in the bank statements provided pays utility bills or council tax.
d. There is a payment from the claimant's Everyday Current Account for car finance of £412.71. However, this was for a 5-year term form 12 January

2019. And therefore, these payments will end in January 2024.

e. I cannot see any evidence relating to payments into the claimant's accounts from friends/family.
f. The claimant appears to regularly shop, presumably for groceries and food, at Lidl. There is no evidence of having attended at food banks regularly.

38. There are no documents relating to the financial position of the claimant's spouse before me. Given that there is no evidence that the claimant is paying the mortgage on her house or the associated bills, then I can only presume these are being paid by her husband (who is named on the mortgage statement I have seen), and therefore these would have been relevant in respect of the financial means of the claimant.

39. In these circumstances, given that the claimant's witness statement does not demonstrate her financial means, given that the financial position of the claimant's household has not been included and is unknown to me and given that there are contradictions in her witness statement to what appears to be her financial reality (at least when considering the financial documents provided), I have decided that no regard is to be given to the claimant's financial means.

40. In these circumstances, taking all the above into account, I consider that it would be appropriate to award costs against the claimant.

<u>What amount of costs should the claimant be ordered to pay?</u>

41. I again reminded myself that the purpose of an award for cost is to compensate the party in whose favour the costs award is made, and not to punish the party ordered to pay the costs.

42. As far as the ability to pay is concerned, for the reasons outlined above, the claimant has not produced satisfactory evidence in this respect, and her statement appears to conflict with some of the documentary evidence provided. In those circumstances, it does not assist me greatly when considering the level of award to be made.

43. The current schedule of costs is contained at pp.5-6 of the respondent's bundle. Although this has not taken into account any work done in respect of this costs application. Save for costs in relation to this costs application, the respondent had incurred costs of £89,427.30 (net of VAT). This figure does appear rather a large figure in the circumstances of this case.

44. When considering whether to refer this matter for a detailed assessment or to undertake a summary assessment, I have concluded that it would be appropriate to exercise my discretion for summary assessment. The claimant has given an indication, although not satisfactorily for the purposes of persuading me not award costs, that she does have financial constraints. And there is evidence in that the claimant has medical reasons making her currently unfit to attend at a further hearing. Further, I consider that a summary assessment would be in accordance with the overriding objective in saving costs to both parties, and in saving time, especially in light of the claimant's current medical situation.

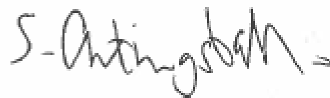
45. I have had sight of the claimant's most recent mortgage statement. As of 31 May 2022, there was a balance of £155,222.92. The balance is reduced by circa £500 per month according to the mortgage statement provided. Currently there must be an outstanding balance of circa £147,000 (it being some 17 months on from that statement). According to current Zoopla estimates, the house is worth something in the region of £300,000 (see p.53 of respondent bundle).

46. I have taken into account this capital asset, where the claimant has at least £145,000 equity in her property (if not more). I have taken into account that the clamant is now working. I have also taken into account that the current outgoings on her car will cease from January 2024, as the Hire Purchase Agreement comes to an end. In other words, she has the assets available to her to meet a costs award and her financial position is improving and will likely continue to improve.

47. In these circumstances, and although I do consider the costs schedule to be somewhat excessive for a claim of this nature, I assess that the claimant should be ordered to pay £20,000 as a contribution to the respondent's costs. This is a proportionate sum to the complexity and importance of the issues being determined. Especially when considers the progress of this case, and what commenced as a 2-day hearing was extended to be a 4-day hearing.

Employment Judge **M Butler**
Date_04 October 2023____

JUDGMENT SENT TO THE PARTIES ON
12 October 2023.



FOR THE TRIBUNAL OFFICE

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