Cases No: 2302755/2012 &
2333557/2013 &
2300307/2014

EMPLOYMENT TRIBUNALS

Claimant: **VERNA OLALEYE**

Respondents: **(1) THE LONDON BOROUGH OF SOUTHWALK**
(2) ANGELO IULIANO
(3) HEATHER CRAWFORD
(4) DELE BAMGBOYE

Heard at: **LONDON SOUTH (CROYDON)** **On:** **4 May 2017**

Before: Employment Judge Crosfill

Representation

Claimant: In person
Respondent: Peter Linstead of Counsel instructed by the 1st Respondent

JUDGMENT

1. The Respondents application for costs is dismissed.

REASONS

1. By a letter dated 9 January 2017 the Respondents make an application for their costs, or a proportion of their costs, in defending the claims brought by the Claimant. In their application the Respondents had indicated a time estimate of one day for the hearing. For reasons which, are not entirely clear, but which might relate to previous requests by the Claimant for hearings to start in the afternoon, the hearing was listed to start at 2 PM on 4 May 2017. The matter was due to be heard by Employment Judge Martin but following a request by the Claimant that the matter be dealt with by a judge with no previous involvement the matter was listed before me.

2. I was provided with a paginated lever arch file of documents by the Respondent and a further file of papers by the Claimant. I also had the tribunal file of the claims listed above and associated claims brought against Liberata UK Limited ("Liberata"), the Claimant's previous employer. Both the Claimant and Respondent had helpfully prepared written submissions in

writing in which they had set out their principal contentions. Given the shortage of time to hear the application I proposed that I heard oral submissions from both parties who could refer me to such documentation as they thought necessary and thereafter I undertook to read all of the material that I had been provided with. I indicated that, in those circumstances, I would deal with the principle of whether a costs order should be made and, only if the Respondent was successful, would I deal with the question of the amount of any costs to be paid. The parties agreed with that course and therefore I did not hear any evidence from the parties.

A summary of the litigation history

3. Mr Linstead had very helpfully prepared a procedural chronology which set out the principal events and main steps in these proceedings. Other matters emerged from the papers, including previous judgments, that I have read. Whilst the chronology was not agreed I did not understand the Claimant to dispute any of the following matters:

3.1. the Claimant had been employed by Liberata working in an open plan office.

3.2. from around 2008 she had been suffering from incontinence and following an operation and a period of sick leave at the end of 2009 the Claimant made a request that she be permitted to work from home in around April 2010. That request was refused and the Claimant instigated first of four sets of proceedings against Liberata in January 2011; and

3.3. On 1 April 2011 the Claimant's employment transferred to the first respondent by way of a TUPE transfer.

3.4. on 21 June 2011 at a preliminary hearing directions were made by Employment Judge Macinnis in standard form to deal with the issue of whether or not the Claimant suffered from a disability. It seems that disability was not conceded by Liberata.

3.5. In April 2012 this the Claimant issued her first claim against the present Respondents the allegation made was that there had been a failure to make reasonable adjustments for the Claimant's disability.

3.6. On 17 August 2012 there was a preliminary hearing before Employment Judge Downs. That hearing had been listed to deal with the issue of whether the Claimant suffered from a disability. A dispute arose as to the nature of the disability relied upon by the Claimant. She had made mention during the hearing of insomnia, stress and anxiety. it seems that the Respondents had prepared for the hearing on the basis of a physical disability only. Employment Judge Downs decided that whilst

the Claimant had referred to insomnia her claim forms did not refer to stress and anxiety and therefore she was, in that respect, trying to raise new disabilities. He did not permit her to amend her claim to include these matters. The issue of disability was not determined at that hearing but was adjourned for a further preliminary hearing with directions, including a direction that the Claimant file a witness statement dealing with the impact of her disability on her day-to-day activities.

3.7. On 2 October 2012 the Claimant applied for a review of the order of Employment Judge Downs in particular seeking a reversal of the refusal to permit reliance upon stress and anxiety. On 23 October 2012 that application was refused.

3.8. On 23 October 2012 the Claimant sought to appeal the original order made on 17 August 2012 to the Employment Appeal Tribunal. That appeal was out of time and an application to extend time was refused.

3.9. the Claimant made a further appeal to the Employment Appeal Tribunal on 15 November 2012 in this case appealing against the review judgment dated 23 October 2012.

3.10. during the period that it took for the proceedings to be determined at the Employment Appeal Tribunal the Claimant did not comply with the direction that she supply the Respondents with the disability impact statement that Employment Judge Downs had directed she serve. The First Respondent had written to her on a number of occasions asking her to supply that statement and ultimately applied for and unless order. It seems that the Employment Tribunal did not act on that application.

3.11. on 26 October 2013 the Claimant requested an adjournment of a preliminary hearing that had been listed for November 2013. She considered that she was unable to file a witness statement dealing with her disabilities until it was clear from any EAT decision whether she was entitled to refer to stress and anxiety.

3.12. on 29 October 2013 the Claimant's appeal was finally determined by a judgment of Lady Stacey. The Claimant's appeal was allowed to the limited extent that she was permitted to lead evidence of any stress and anxiety attributable to the physical impairments which she had already identified.

3.13. On 21 January 2014 there was a further telephone Preliminary Hearing conducted by Employment Judge Baron. In advance of that hearing the Respondents had sought to agree a list of issues with the Claimant. They further requested that the outstanding issues of their “unless order” applications be dealt with. In the event Employment Judge

Baron made fresh orders for a disability impact statement. He then directed that the issue of whether the Claimant suffered from a disability should be heard on 31 March 2014. It appears that all of the orders made at that hearing were substantively complied with.

3.14. The hearing on 31 March 2014 was conducted by Employment Judge Hall Smith. He gave a reserved Judgment promulgated on 9 June 2014. He held that the Claimant had suffered from a disability at the material time by reason of her urinary incontinence but that she did not suffer from a disability by reason of her IBS bowel incontinence and further that she did not suffer from stress and anxiety as a consequence of her urinary incontinence. He held that the Claimant had exaggerated the effect of her illnesses.

3.15. The Claimant appealed the decision of Employment Judge Hall Smith but on 17 July 2017, at a rule 3(10) hearing HHJ Eady found that the grounds of appeal had no reasonable prospects of success. An application for permission to appeal to the Court of Appeal was dismissed by Lewison LJ on 7 November 2016.

3.16. On 10 November 2016 the Claimant wrote to the Respondents and the Employment Tribunal withdrawing her claims. She provided clarification that the said withdrawal was intended to refer to all of the Respondents on 15 November 2016. The Claimant asked that her claims were not dismissed as she wanted to leave open the possibility of other civil proceedings. The Claimant maintains her original claim against Liberata and the individuals named in that claim.

3.17. At a further Preliminary Hearing on 12 December 2016 heard by Employment Judge Harrington the Respondents made applications that all of the Claimant's claims be dismissed. Employment Judge Harrington did dismiss some claims but declined to dismiss claims which were based on factual allegations that could potentially support civil proceedings.

The law

4. The jurisdiction to make a costs order in these circumstances is set out in rule 77 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The material parts read as follows:

When a costs order or a preparation time order may or shall be made

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.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

(3)-(5)

Procedure

77. A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

The amount of a costs order

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; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993(23), or by an Employment Judge applying the same principles;

(c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;

(d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or

(e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(2)…..

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

Ability to pay

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.

5. The effect of Rule 77(1) is that if a tribunal finds that a party has conducted the proceedings in the way described it must consider whether to make a costs order. At that second stage the tribunal has a discretion whether or not to do so in the circumstances of the particular case. Rule 84 provides that a tribunal may, but is not obliged to, take the paying parties means into account both on the issue of whether to make any order at all and if so in what amount.

6. The Respondents directed me to ***McPherson v BNP Paribas*** **[2004] IRLR 558** in which the Court of Appeal gave the following material guidance about a decision to withdraw a claim:

> *"In my view, it would be legally erroneous if, acting on a misconceived analogy with the CPR, tribunals took the line that it was unreasonable conduct for employment tribunal claimants to withdraw claims and that they should accordingly be made liable to pay all the costs of the proceedings. It would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs on withdrawal, which might well not be made against them if they fought on to a full hearing and failed. As Miss McCafferty, appearing for Mr McPherson, pointed out, withdrawal could lead to a saving of costs. Also, as Thorpe LJ observed during argument, notice of withdrawal might in some cases be the dawn of sanity and the tribunal should not adopt a practice on costs, which would deter applicants from making sensible litigation decisions.*
>
> *On the other side, I agree with Mr Tatton-Brown, appearing for BNP Paribas, that tribunals should not follow a practice on costs, which might encourage speculative claims, by allowing applicants to start cases and to pursue them down to the last week or two before the hearing in the hope of receiving an offer to settle, and then, failing an offer, dropping the case without any risk of a costs sanction."*

7. ***McPherson v BNP Paribas*** as later clarified in ***Barnsley Metropolitan Council v Yerraklava*** **[2011] IRLR 78** is authority for the proposition that in the exercise of the discretion a tribunal should have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion. It is not necessary for there to be a precise causal link between the unreasonable conduct complained of and the costs incurred however the existence of such a causative link may be a relevant matter.

8. Whilst not referred to expressly by Mr Linstead, but implicitly recognised in his submissions, it may be a relevant matter that a party is acting without representation although that should not be thought to mean that a litigant in

person is entitled to act unreasonably ***A Q Ltd v Holden*** **[2012] IRLR 648**. An honest but misguided belief in the merits of a claim does not mean that a costs order will not be made if the case is objectively without any merit.

9. There is no rule that a party who has been dishonest in proceedings will automatically be ordered to pay the other parties costs see ***Arrowsmith v Nottingham Trent University*** **[2012] ICR 159, CA**. It is important to have regard to all of the facts of the case including the gravity or seriousness of the conduct and whether the dishonesty went to the heart of the case.

Discussions and conclusions

10. It was the Claimant's assertion, supported by the chronology, and not contradicted by any evidence from the Respondent, that she decided to withdraw her claims once her appeal against the judgment of Employment Judge Hall Smith had failed. I accept that explanation and assess its reasonableness below.

11. I have carefully read the judgment of Employment Judge Hall Smith. It is quite clear that he rejected parts of the Claimant's evidence. He finds that she exaggerated the difficulties arising from her IBS and that they did not have a substantial effect on her day to day activities. He did however accept the fact that the Claimant did suffer from these conditions and found that they were "clearly troublesome on occasions". I consider that there is no clear finding the Claimant was dishonest in the sense that she had set out to lie.

12. The Respondent's application for costs details 9 reasons why it is said that the Claimant's conduct was unreasonable. In his skeleton argument Mr Linstead expands upon the original letter and raises further matters that he says amounted to unreasonable conduct of the litigation. Whilst I shall deal with all of the matters raised on an individual basis and examine whether they demonstrate conduct which would require me to consider making a costs order I consider that the authorities referred to above suggest I should then stand back and look at the bigger picture to see whether, taken as a whole, the Claimant has acted unreasonably.

13. The first criticism that the Respondent makes is that the Claimant has withdrawn her claims. It says in its application that the Claimant has given no reasons for doing so. It is clear to me that the Respondent recognised that the trigger for the Claimant's decision was the decision of the Court of Appeal to reject her appeal which concerned the scope of her disability. That is what the Claimant told me and it seems obvious that that was the case. The issue is whether or not that was unreasonable.

14. The Respondent sought to persuade me that the rejection of the appeal could not have influenced a decision to withdraw Case No 2333557/2013 as

that case was not founded upon an allegation of disability discrimination. The same argument was advanced in respect of the parts of the third claim that did not concern disability. The Claimant's submission was that all of her complaints had the same foundation and all flowed from the decisions of Liberata and the First Respondent to refuse to permit her to work from home. Once that case was undermined by the narrowing of the scope of her disability, she had decided to abandon her claims.

15. I have read each of the Claimant's ET1s. The narrative content of each supports the Claimant's submission. Each document focuses on the refusal to permit home working and what the Claimant claimed were the ramifications of her complaining of that refusal. The "protected disclosures" relied upon in the latter two claims were the fact that the Claimant had complained of a failure to make reasonable adjustments for her condition. I consider that the Claimant could quite reasonably have considered that the Judgment of EJ Hall Smith undermined her claims. I note that the Respondent denies that the Claimant made any protected disclosures. One element of any protected disclosure would be a reasonable belief that the information disclosed tended to show a relevant failure. The scope and existence of a disability would be a matter relevant to the reasonableness of such a belief. I do not consider it as simple as the Respondent has suggested to disentangle the issue of disability from the claims.

16. It clearly became apparent to the Claimant once her appeal to the Court of Appeal had finally been rejected that any contention that the Respondents should have permitted her to work from home was very likely to fail. I consider that she was right to recognise this. In the words of Thorpe LJ in ***McPherson v BNP Paribas*** this appears to have been the "dawn of sanity".

17. The Respondents argue that it must be unreasonable to pursue claims for (up to) four years and then abandon them. I cannot agree. What would be unreasonable is bringing or continuing claims which have no merit in the sense that they have no realistic prospects of success. That would be true regardless of how long the claims were pursued for. If the Claimant had established that the scope of her disability was such that she would have been substantially disadvantaged working in an open plan office then it seems to me that the claims could not have been said to have no reasonable prospects of success the issue would have been whether any adjustment was or was not reasonable. Once that contention was at least seriously damaged by the judgment of EJ Hall Smith then it is likely that the reasonable adjustment claim would have had no reasonable prospects of success. The Claimant would have been acting unreasonably in continuing. She cannot be said to have been acting unreasonably by recognising that.

18. The real issue it seems to me is not whether the Claimant acted unreasonably in withdrawing her claims but whether she acted unreasonably by presenting them in the first place or in her conduct of them. The Respondent has not sought to say that the pleaded claims could never have succeeded or that they never had any reasonable prospects of success.

Indeed, I note that the only application that was made to strike out the claims related to the individual respondents.

19. The difficult aspect of this application is whether or not the finding that the Claimant's exaggerated her evidence made by EJ Hall Smith means that the Claimant acted unreasonably. I note above that there is no clear finding of dishonesty. That said there is a finding of exaggeration, at least to a degree.

20. A point is made against the Claimant both in the application letter and in Mr Linstead's skeleton argument was that the Claimant joined in the second to forth Respondent's to her claims. Having looked at the ET1 forms it is clear to me that those respondents were joined only to the Claimant's first claim. That claim is only a claim for reasonable adjustments under the Equality Act 2010. It is generally open to a person to join the individuals she says are the actors in any discrimination case. Equally it is open to an employer to rely upon the statutory defence provided by Section 109(4) of the Equality Act 2010. Individuals are commonly joined to Equality Act claims and may now be joined to claims arising from protected disclosures. There may be some cases where joining in an individual alleged perpetrator might be unreasonable but none have been identified here. I note that in the list of issues drafted by Mr Linstead in respect of the first claim he lists as an issue the question of whether an individual can ever be responsible for a failure to make reasonable adjustments. That is an interesting question. Before me no authority was cited to suggest that the matter has been decided. I consider it to be very arguable that there is no reason for believing that a reasonable adjustment case should be distinguished from other forms of discrimination. Certainly, it would not be unreasonable to advance that position.

21. It is said that the claims are "overloaded" and complex. I cannot agree. The first claim appears to be quite simple. It is a claim for reasonable adjustments. The Respondents' counsel was able to sum up the issues in the second case on one and a half sides of paper. The third case is no more complex and surrounds only the dismissal. Quite obviously the Claimant could not complain of her dismissal in 2012. She had not been dismissed. If she wanted to complain about that she needed to present a further claim or amend the existing one. The Tribunal is commonly presented with claims of far greater complexity. Complexity itself would not amount to unreasonableness. Baseless or unarguable claims would be a different matter.

22. It is further said that the claims are not clearly pleaded. It is correct that the claims are not entirely clear but that is common even where professional representatives are involved. The Claimant's efforts as a litigant in person are by no means the worst and I do not find that she has been unreasonable in this regard.

23. Mr Linstead argued that the fact that the Claimant has brought three appeals demonstrated a refusal to accept the decisions of the tribunal and is

unreasonable. That submission requires to be broken down. The first 2 appeals were in practically, if not legally, against the same decision namely they related to the decision that the Claimant could not amend her disability to include stress and anxiety. There were two appeals because the Claimant applied for a review and awaited the outcome before appealing the original decision. She was then out of time to do so. She then appealed the review decision. Whilst the Claimant did not achieve very much from that appeal it must be acknowledged that the appeal was allowed. The EAT considered her grounds of appeal to be correct. Mr Linstead says that the Claimant ought to have been satisfied with the suggestion by Mr Justice Mitting that she was not precluded from advancing evidence about stress and anxiety when he considered the appeal on the sift. I do not accept that. That decision was to reject her appeal. It had no binding effect on the Employment Tribunal. The decision ultimately obtained from Lady Stacy did have binding effect and clarified the ambit of what the Claimant could, or could not, advance as to the scope of her disability.

24. It is correct that the Claimant doggedly appealed the decision of Employment Judge Hall Smith all the way to the Court of Appeal. She was told at each stage that her appeal had no reasonable prospects of success. The Claimant ultimately accepted that and withdrew her claims following that final decision. There is no suggestion that the Claimant's conduct of those appeal stages was unreasonable and neither of the superior courts made any costs orders. The involvement of the Respondents was of course minimal as permission to appeal was never obtained.

25. The Claimant submitted that there could never be anything unreasonable about a party exercising a right of appeal. I do not agree. All depends on the individual circumstances. In the present case the it was clearly important to the Claimant's case that she establish that her bowel incontinence made working in the office environment difficult. Without that her case was likely to fail. She recognised that and withdrew her case when her appeal failed. I do not consider that the fact that the Claimant appealed the decisions identified could be said to be unreasonable.

26. Mr Linstead identified a further matter in addition to the matters put forward in the application. He says that the Claimant failed to comply with the order that she file a disability impact statement and disclose her medical records. It appears to me that Mr Linstead is factually correct in this regard. However, the context is equally clear. The order was made at the hearing before EJ Downs. The Claimant was challenging the order made at that hearing on the basis that it improperly narrowed the material she would be entitled to rely upon in her impact statement. She ultimately succeeded in her appeal albeit on a limited basis. A further order was then made and there is no suggestion she failed to comply with it. It is correct to say that unless revoked an order of the Tribunal remains in force regardless of any pending appeal. The proper step to take is to seek a stay of any order affected by an appeal not simply to refuse to comply with the order. The Claimant did then strictly fail to comply with an order of the Tribunal.

27. The next matter relied upon by Mr Linstead, again not noted in the application, is the fact that in the run up to the Preliminary hearing on 21 January 2014 the Claimant failed to engage in the process of agreeing a list of issues. I have reviewed the correspondence. It is correct to say that on 11 December 2013 the Claimant, with no explanation, says that she would be unable to respond to the proposed list of issues until January. The Claimant said in her written submissions that she had had word processing issues with tracked changes and she had as a consequence prepared her own list of issues which is in the bundle. It does seem to me that there was some failure to engage by the Claimant at that stage in the proceedings. At the least I would have expected the Claimant to explain why, on 11 December, she could not deal with matters until the new year.

28. Finally, as an additional matter, Mr Linstead says that at the hearing conducted by EJ Harrington the Claimant asked for breaks and left the hearing room during his submissions. I note that the record of that hearing essentially confirms what Mr Linstead says but refers to the needing a "comfort break" initially. I note the medical conditions that the Claimant suffers from and am unsurprised that she might have had to leave the room quickly. I do consider that it might have been thought that her subsequent requests for a long break and to deal with the remaining matters in writing were excessive. In fact the hearing was satisfactorily concluded. Mr Linstead also relies upon an alleged disagreement between the Claimant and EJ Hall Smith who had suggested she was late to the hearing. This appears to have taken place but the Claimant says and I accept that when she showed EJ Hall Smith that she had arrived on time, by showing him the security log, he accepted that he had been in the wrong.

29. Stepping back from those findings above I know look at all of the matters in the round and ask myself whether there has been unreasonable conduct that requires me to consider making a costs order. I do not find that there is. My principle concern was the finding of exaggeration made by EJ Hall Smith. I read his decision not as a finding of dishonesty but as saying that the Claimant has overemphasised the illnesses that she actually suffers from. In other words, she has picked the evidence most favourable to her rather than being objective. I find that a far less grave charge than dishonesty although it does reflect badly on the Claimant. I have found other matters where the Claimant's conduct of the litigation fell short of what might be expected. I do not condone the Claimant's dogged persistence of her claims nor, in some aspects, the conduct of them. However, I do not consider that any of the matters set out above whether individually or collectively amount to unreasonable conduct.

30. I have found that the Claimant was in technical breach of two of the tribunals orders. I have set out the context above. She should have sought a stay of those orders or complied with them but she did not. However, I consider that the Claimant's default was not such that in the exercise of my discretion I should make any order for costs.

31. Accordingly, I refuse the Respondents' application.

Employment Judge Crosfill

Date 16 June 2017