EMPLOYMENT TRIBUNALS

Claimant: **Ms J Ete**

Respondent: **Royal Pharmaceutical Society of Great Britain**

Determined on the papers

Before: **Employment Judge John Crosfill**

COSTS JUDGMENT

1. The Respondent's application for an order that the Claimant pay its costs of proceedings is dismissed.

REASONS

1. In an ET1 presented on 29 February 2020 the Claimant brought proceedings against the Respondent alleging:

    a. Unfair dismissal (relying on Sections 95(1)(c) and 103A of the Employment Rights Act 1996; and

    b. Claims under Sections 47B and 48 of the Employment Rights Act 1996 alleging that she had been subjected to a detriment for making protected disclosures; and

    c. Direct discrimination because of race; and

    d. Direct discrimination because of sex.

2. The proceedings were resisted by the Respondent. The claims were denied in their entirety. In respect of some claims the Respondent contended that they had been presented outside the applicable statutory time limits. The Respondent made applications to strike out some or all the claims. The application was listed,

by me, and was due to take place on 25 January 2021. On 22 January 2021 the Claimant withdrew all her claims which were subsequently dismissed by a judgment dated 18 February 2021.

3. By a letter dated 5 February 2021 the Respondents make an application for the costs of these proceedings. The Respondent suggested that the matter be dealt with on the papers. By a letter dated 10 March 2021 I ordered the Claimant to write to the Tribunal indicating whether she opposed the Respondent's application and if she did whether she was asking for the matter to be determined at a hearing. On 24 March 2021 the Claimant responded in written submissions from Counsel. She set out why she says that a costs order cannot/should not be made. She asked for the matter to be determined on paper.

The relevant law

4. 20. The jurisdiction to make an order of costs is found in schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) 2013. Rule 76 provides:

> "When a costs order or a preparation time order may or shall be made
>
> (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;
>
> (b) any claim or response had no reasonable prospect of success"

5. There is essentially a 2 (or perhaps 3) stage test. Other than in defined circumstances, before there is any jurisdiction to award costs at all the tribunal must be satisfied that one or more of the threshold conditions set out in Rule 76(1) has been satisfied. If, and only if, it has should the tribunal move on to consider whether, in the circumstances of the particular case, it is right to make a costs order. Finally, it is necessary to decide what amount, if any to award. See ***Monaghan v Close Thornton Solicitors*** **[2002] EAT/0003/01**

6. Notwithstanding the existence of the jurisdiction to award costs the exercise of that jurisdiction remains exceptional ***Gee v Shell Ltd*** **[2003] IRLR 82**.

7. In ***Barnsley BC v Yerrakalva*** **[2012] IRLR 78** CA Mummery LJ said:

> *"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."*

8. The meaning of the phrase 'vexatious' has been the subject of a number or cases. In ***ET Marler Ltd v Robertson*** **[1974] ICR 72** Sir Hugh Griffiths said at 76:

> *"If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously, and likewise abuses the procedure. In such cases the tribunal may and doubtless usually will award costs against the employee …"*

9. Lord Bingham CJ in ***A-G v Barker*** **[2000] 1 FLR 759**, at para 19, suggested that the emphasis is less on motive and more on the effect of the conduct in question:

> *'"Vexatious" is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process."*

10. The 'Caulderbank' principle has no direct application in the Employment Tribunal. This does not mean that the Tribunal will not have regard to any offer of settlement made 'without prejudice save as to costs' but that the threshold for considering an award of costs will not be met unless the refusal of any such offer was itself unreasonable. See - ***Kopel v Safeway Stores plc*** **[2003] IRLR 753**.

11. There is no need for the tribunal to find a causative link between the costs incurred by the party making the application for costs and the event or events that are found to be unreasonable, see ***McPherson v BNP Paribas*** **[2004] ICR 1398 CA**

12. Rule 84 of the procedure rules provides that when deciding whether to make a costs order and if so in what amount the Tribunal may have regard to the means of the paying party. The rule is permissive rather than mandatory although it would be an unusual case where the means of the paying party were not a material factor. In ***Vaughan v London Borough of Lewisham*** **[2013] IRLR** the Employment Appeal Tribunal, following ***Arrowsmith v Nottingham Trent University*** **[2012] ICR 159** held that an assessment of means was not

necessarily limited to the ability to pay at the time that the order is made but can have regard to the future prospects of the paying party.

The threshold test

13. The first way in which the Respondent says that the threshold test is met is that it says that the claims had no reasonable prospects of success. In support of that it is said that some of the claims were 'out of time'.

14. In answer Ms Gyane on behalf of the Claimant says that it is quite impossible for the Tribunal to adjudicate on the merits of a claim that has been withdrawn. She says that whilst some claims had been presented outside the ordinary 3-month limitation period there was every prospect that the tribunal would have found that these claims formed part of an act extending over a period and/or would have extended time on just and equitable grounds.

15. I agree with the position taken by the Claimant. The test in rule 78 is the same as that in rule 37 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The Respondent would need to show that the claims had no reasonable prospects of success. I am not able to infer that the claims had no reasonable prospect of success simply from the fact that they were withdrawn.

16. Whilst it was accepted by the Claimant that her earliest claim which related to events in a public house took place outside the ordinary limitation period. In her ET1 the Claimant describes the (if true) unpleasant comments that she was subjected to. She says that the event was a 'works drink'. The Respondent's ET3 does not deny that the comments were made but says that it is not vicariously liable for the actions of its employee. It says that the events were only a social occasion.

17. In her ET1 the Claimant's narrative of events flows from the earlier events. Whether to give an extension of time for a discrimination claim is a broad discretion. I accept that the burden would have been on the Claimant to show why it was right to exercise that discretion. I do not think that it could possibly be said that the Claimant had no reasonable prospects of persuading the Tribunal to extend time.

18. The Respondent in its costs application simply asserts that the claims had no reasonable prospects of success. Other than the very narrow time point the coasts application wholly fails to say why the Tribunal must accept that this was the case. The Respondent says that the Claimant failed to go through any grievance process. I fail to see how that would support the contention that the claims she brought had no reasonable prospects of success.

19. The Respondent says that the withdrawal of the claims before a preliminary hearing to determine an application to strike out the claim indicates not only that

the Claimant recognised her claims were hopeless but also that she must have known that all along. I disagree. Ms Gyane in her written submissions points to a host of sensible reasons why a claim might be withdrawn. Taking the claims at their highest they were at the very least arguable. There is no basis for me to infer that the reason for the withdrawal was because the Claimant recognised that they would inevitably fail even less so that she must have been advised that that was the case from the outset.

20. Taking the Claimant's claims at their highest I do not think that, had the preliminary hearing proceeded, the Respondent would have persuaded the Tribunal that the claims had no reasonable prospects of success on the basis of the substantial merits. I do not think that it is possible for me to say that the Claimant ought to have realised that the jurisdictional point taken in respect of her sex discrimination claims was insurmountable. Objectively that is not the case. The Claimant had a reasonable chance of persuading the Tribunal that it would be just and equitable to extend time. Accordingly, the threshold to make any costs order on that basis that the claims had no reasonable prospect of success is not passed.

21. The next basis for saying that the threshold to making a costs order is passed was that the Claimant conducted a social media campaign attacking the Respondent in regard to its approach to equalities issues by particular reference to the claim she had brought. One example of such a post is given in the application and I am satisfied that there are many more. The Respondent suggests that this is conduct falling within rule 76(1)(a). It appears from paragraph 12 of the application that the Respondent says that this demonstrates that the claim was brought vexatiously or abusively.

22. Ms Gyane argues that any post by the Claimant on social media are entirely unrelated to this litigation. I do not accept that. In the one example I have seen the Claimant specifically refers to her own claim. I would accept that a claimant who conducts a social media campaign in support of a claim with little merit in order to obtain a settlement of proceedings could be said to be acting unreasonably. I am not persuaded that the same conduct would necessarily be categorised as vexatious or abusive as it seems to me to fall outside the meaning identified in ***A-G v Barker***. **In the light of my earlier conclusion that is academic.** The difficulty I have is the same as that identified above which is that other than the pleadings and the fact that the Claimant withdrew her case there is little material which would allow me to assess the merits of the case. I have already said that taking the case at its highest it could not have been said to had had no reasonable prospects of success.

23. It is not necessarily vexatious or abusive to conduct a social media campaign highlighting the issues in a particular claim or response. Indeed, many claims in this day and age are funded as a result of social media campaigns.

24. The sums sought by the Claimant in her schedule of loss were calculated in a conventional manner and were relatively modest. There is no evidence of the

Claimant seeking a settlement in excess or what, if successful, she might have obtained by way of an award.

25. It is said that in part of the social media campaign the Claimant referred to without prejudice negotiations. If true that was very unwise. However, the without prejudice rule primarily relates to the admissibility in evidence of without prejudice conversations. The Respondent's application does not set out the material it considers objectionable.

26. I consider that there is simply insufficient material available for me to conclude that the Claimant was acting abusively or vexatiously or otherwise unreasonably in posting material about the Respondent. I cannot infer from the withdrawal of the claims that there was no discrimination about which the Claimant could rightly wish to draw attention. I cannot infer that she was posting on social media only for the purposes of obtaining a settlement. I am not satisfied that the Claimant's use of social media during the proceedings amounted to conduct that falls within any of the limbs of rule 76(1)(b).

27. The third basis upon which the application is made is that it is said that the Claimant acted unreasonably in respect of settlement. It is said that the Claimant unreasonably refused offers to settle. The Respondent also says that the Claimant asked for remedies that she could not obtain in the tribunal.

28. The Respondent does not set out the entirety of the offers it made to the Claimant. I am told that there were 4 offers made that included a cash payment to the Claimant. I have seen the Claimant's schedule of loss in which fairly modest sums are claimed. If the Claimant had succeeded in her claims then the sums offered by the Respondent (a maximum of £4,000) would have been far less than the Claimant would have reasonably expected as an award. In her response the Claimant says that, at this stage, the negotiations stalled because the Respondent would not issue a letter or regret.

29. I do not consider that in respect of the offers that include payment there is any basis for me concluding that the Claimant acted unreasonably in refusing them. I have held that the claims taken at their highest were arguable. I see no knock out blow that should have been obvious to the Claimant. The focus should not be on whether the Claimant achieved more or less than that which was offered but whether she has acted unreasonably. I see no basis for concluding that she did.

30. There were then a series of offers that the parties 'drop hands'. It is clear that the negotiations stumbled on the terms of the settlement and not on the principle that there should have been a drop hands settlement. Ms Gyane says that the Respondent sought to exclude the right of the Claimant to bring future claims. It is a moot point as to whether such a clause could ever be lawful in respect of statutory complaints to an employment tribunal as it is difficult to see how it refers to any 'particular complaint'. The law is not settled in this area. As such it is difficult to see how an employee could be said to be acting 'unreasonably' in refusing to sign a settlement agreement including such a term.

31. I conclude that I do not find that the Claimant acted unreasonably in respect of any settlement negotiations. It is common for parties to seek remedies in settlement agreements that they could not obtain in a tribunal. The fact that at some points the Claimant sought the dismissal of persons she said had acted unlawfully is perhaps optimistic but not necessarily unreasonable. I note that the Respondent does not say that any offer was rejected because that remedy was not included.

32. Next it is said that the Claimant acted unreasonably as her case was poorly pleaded. I agree that the pleadings could have been clearer but by the standards of many ET1s the claims were tolerably clear and were resolved by voluntary further particulars. Putting it bluntly if the threshold for costs was as low as contended for by the Respondent there would be costs orders in a vast number of cases before the tribunal. I do not accept that the pleadings in this case came anywhere close to conducting the proceedings unreasonably. That is not to say that more care should not have been taken.

33. The last point made by the Respondent is what it has described as the late withdrawal of the claim. The Claimant withdrew the claim on the last working day before the PH to determine strike out/deposit orders. The Respondent's chronology of the without prejudice negotiations makes it clear that there had been months of negotiations on the basis that the Claimant would withdraw her claims in a drop hands settlement. Negotiations continued to 21 January 2021 when the Respondent made its final offer.

34. It is well established that a withdrawal of a claim is not of itself unreasonable see ***McPherson v BNP Paribas***. I do not understand the Respondent to say anything to the contrary. The Respondent's complaint is that the decision was made so late in the day that it had already instructed counsel.

35. The Claimant says that the decision to withdraw was only reached once attempts to agree terms of settlement failed. That assertion is consistent with the Respondent's application where it refers to an offer of a drop hands settlement being made on 21 January 2021. It is said that the Claimant cannot have acted unreasonably because she also incurred the costs of preparing for the preliminary hearing.

36. I consider that whilst a decision to withdraw a claim would rarely be unreasonable it could be unreasonable to delay in making a decision about a withdrawal if it would have been reasonable to have made it sooner OR it could be unreasonable to fail to communicate a decision that has been made timeously so as to avoid the opposing party incurring costs. I do not accept that the fact that the Claimant incurred costs of her own provides much assistance. She could have unreasonably wasted her own money as well as the Respondents if she unreasonably delayed in taking the decision.

37. I am dealing with this application on paper which means that the facts asserted by the parties remain untested. It is said by the Claimant that she was willing to

enter a drop hands settlement (implicitly including a withdrawal) but that the terms were not agreed. I am told that the sticking point was that the Respondent insisted on the inclusion of a term preventing claims for matters that might arise in the future. It is said that only when the Respondent refused to agree to this did the Claimant act unilaterally. I will proceed on the basis that that is an accurate account.

38. I consider that a clause in a settlement agreement that seeks to exclude claims for matters that have not yet arisen is a matter that could quite reasonably cause an employee to have reservations about entering in to such an agreement. That remains true whether or not it is legally enforceable.

39. I have held that the Claimant had claims which were at least arguable. In terms of the jurisdictional points taken by the Respondent on time I consider that the Claimant had a respectable chance of persuading the tribunal that it was just and equitable to extend time for her sex discrimination claims. Had she carried on with her claims she and the Respondent would both have been put to significant costs. The Claimant's decision had the benefit of stopping any further costs accruing.

40. I do not find that the Claimant acted unreasonably in seeking a drop hands offer on agreed terms. It is unsurprising that it the Claimant was prepared to give up her claims she would initially seek the reassurance that she would not be facing an application for costs. It is said on behalf of the Claimant that there were discussions in October about the removal of social media posts in exchange for a letter of regret. It appears that here the sticking point was that the Claimant sought a small donation to charity. These are somewhat unusual requests by both parties although in the context of this case they are understandable on both sides. I have no evidence which would support a finding that the negotiations were conducted unreasonably.

41. I accept that the Claimant withdrew her claims only when it became clear to her that a negotiated withdrawal would not be possible. There is no evidence before me that would contradict what the Claimant says in that respect. I do not find that the Claimant delayed in communicating her withdrawal. She told the Tribunal and Respondent promptly once she had made the decision.

42. Overall, I am not satisfied that I can infer from the timing of the withdrawal that the decision was unreasonable either by the delay in taking it or in any failure to communicate the decision.

43. It follows that I find that the threshold conditions set out in rule 76 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 are not met in this case. It follows that I do not have to consider whether I should as a matter of discretion make an order for costs and if so for how much.

44. If I had found that the Claimant had unreasonably delayed her decision to withdraw her claims or communicate that to the Respondent I would have held that to be unreasonable conduct. I would have exercised my discretion to make a costs order in those circumstances. However, I would have limited those costs to the costs associated with the unreasonable conduct. In my view these would be limited to the costs of the preliminary hearing. In respect of the sums claimed it is impossible for me to see how much of the Respondent's solicitor's bill might have been incurred as a consequence of any late withdrawal. It is likely that Counsel's brief fee would fall within the costs I would have awarded. I share Ms Gyane's view that whatever costs the Respondent has chosen to incur it would not be reasonable to expect the Claimant to pay a brief fee of £3,000 for a 3 hour hearing where well known legal principles on time limits and on the application of rules 37 and 39 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 were to be considered.

45. The Respondent's application is refused.

Employment Judge John Crosfill
Date: 23 April 2021