EMPLOYMENT TRIBUNALS

Claimant: Ms A Harper

Respondents: Ribeye Steakhouse (Manchester) Ltd

HELD AT: Manchester **ON:** 16 September 2024

BEFORE: Employment Judge Childe

REPRESENTATION:

Claimant: No Attendance
Respondents: Mr Walton (Solicitor)

COSTS JUDGMENT

The respondent's costs application pursuant to rule 76(1) is not well founded and is dismissed.

REASONS

Relevant Law

1. The power to award costs is contained in the 2013 Rules of Procedure. The definition of costs appears in rule 74(1) and includes fees, charges, disbursements or expenses incurred by or on behalf of the receiving party.

2. Rule 75(1) provides that a Costs Order includes an order that a party makes a payment to another party "in respect of the costs that the receiving party has incurred while legally represented".

3. The circumstances in which a Costs Order may be made are set out in rule 76. The relevant provision here was rule 76(1) which provides as follows:

   "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) …

4. The procedure by which the costs application should be considered is set out in rule 77 and the amount which the Tribunal may award is governed by rule 78. In summary rule 78 empowers a Tribunal to make an order in respect of a specified amount not exceeding £20,000, or alternatively to order the paying party to pay the whole or specified part of the costs with the amount to be determined following a detailed assessment.

5. Rule 84 concerns ability to pay and reads as follows:

   "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."

6. It follows from these rules as to costs that the Tribunal must go through a three-stage procedure (see paragraph 25 *of Haydar v Pennine Acute NHS Trust UKEAT 0141/17/BA*). The first stage is to decide whether the power to award costs has arisen, whether by way of unreasonable conduct or otherwise under rule 76; if so, the second stage is to decide whether to make an award, and, if so, the third stage is to decide how much to award. Ability to pay may be considered at the second and/or third stage.

7. The case law on the costs powers (and their predecessors in the 2004 Rules of Procedure) include confirmation that the award of costs is the exception rather than the rule in Employment Tribunal proceedings; that was acknowledged in *Gee v Shell UK Limited [2003] IRLR 82*.

8. If there has been unreasonable conduct there is no requirement for the Tribunal to identify a precise causal link between that unreasonable conduct and any specific items of costs which have been incurred: *McPherson v BNP Paribas (London Branch) [2004] ICR 1398*. However, there is still the need for some degree of causation to be taken into account as the Court of Appeal pointed out in *Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78*:

   "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."

9. It is not unreasonable conduct per se for a claimant to withdraw a claim before it proceeds to a final hearing. As the Court of Appeal in *McPherson* observed, it would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs on withdrawal in circumstances where such an order might well not be made against them if they fought on to a full hearing and failed. It further commented that withdrawal could lead to a saving of

costs and that tribunals should not adopt a practice on costs that would deter claimants from making 'sensible litigation decisions'. On the other hand, the Court was also clear that tribunals should not follow a practice on costs that might encourage speculative claims, allowing claimants 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. The critical question in this regard was whether the claimant withdrawing the claim has conducted the proceedings unreasonably, not whether the withdrawal of the claim is unreasonable *McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA.*

Introduction

10. I had access to a bundle of documents which ran to 77 pages. This bundle of documents did not include the claim and response form, which I reviewed separately.
11. The claimant did not attend today's hearing and instead relied on written representations. The respondent relied on both written and oral representations.

Relevant Findings of Fact

12. Whilst it is not necessary for the tribunal to make any primary findings of fact to determine a costs application, I set out below the matters relevant to the claimant's conduct of this case. Any further matters that are relevant to my findings are set out in the decision section below.

The respondent's application

13. The respondent makes an application for costs on two bases:

    1. Firstly, that the claimant acted unreasonably or vexatiously in bringing the proceedings.

    2. Secondly, the claimant had acted unreasonably or vexatiously in the very late withdrawal of the claimant's complaints before the preliminary hearing on 10th June 2024. I will refer to this as the "Late Withdrawal Application".

The claimant's response to the respondent's application

14. The claimant's response to the first of the claimant's two arguments was that she had an arguable case and had not acted unreasonably or vexatiously in bringing the proceedings.
15. The claimant's response to the Late Withdrawal Application was firstly to accept that it would have been better had she withdrawn that application

earlier, but she had done because as the proximity of the preliminary hearing had approached, her health was exacerbated and ultimately, she decided it was better to withdraw at that stage rather than put the parties to further time and costs of attending the hearing, which was cancelled.

Decision

Has the power to award costs arisen, whether by way of unreasonable conduct or otherwise under rule 76?

16. Turning firstly to whether the claimant, in bringing proceedings, has acted unreasonably or vexatiously. I don't find that the bringing of proceedings by the claimant was vexatious or unreasonable. The claimant, a waitress, alleges she was sexually harassed by a chef on several occasions, the last date being 5 March 2023. The nature of the sexual harassment is said to be the head chef patted, slapped or grabbed the claimant's bottom. The claimant subsequently resigned on 5 April 2023.

17. That is a claim that is well capable of being understood and if the claimant was right about what she says, the claimant could potentially have succeeded in a claim of sexual harassment (section 26 Equality Act 2010) and, if she resigned due to the sexual harassment, a claim of discriminatory constructive dismissal (section 39 (2) (c) Equality Act 2010). Clearly the claimant's allegations needed to be tested at final hearing and there were several obstacles the claimant had to overcome to succeed in her claim, not least of which whether she was in work for the respondent on 5 March 2023. However, that is not to say that in bringing these claims the claimant acted vexatiously or unreasonably.

18. I'm also not persuaded that the fact the claimant ticked unfair dismissal as one of her claims, despite having less than two years' service, makes the bringing of that claim vexatious or unreasonably. The claimant could legitimately bring a claim for a discriminatory constructive dismissal with less than two years' service, as I have already mentioned in paragraph 17 above.

19. The respondent relies on the claimant's resignation email to suggest it was obvious she resigned to obtain another job and therefore in bringing a discriminatory constructive dismissal claim she has acted vexatiously or unreasonably. The claimant's resignation email can be read in more than one way. Again, the evidence would need to be tested, but the claimant refers to more than one reason for her resignation in her email of resignation. She says "*nothing has changed within the kitchen*" when explaining why she resigned, which could mean that she continued to be sexually harassed in the kitchen or it could mean something else. The claimant also suggested that a further reason for her resignation was because she had found alternative work, albeit the claimant potentially links this back to her employment with the respondent when she says she wanted to "*go to work somewhere where senior members of staff look after all their chefs*." This could be read to mean the claimant went to work for an employer who protect their staff from unlawful discrimination, or it could mean something else.

20. At this stage I can't read into the claimant's letter of resignation that the only reason the claimant left was because she found another job as suggested by the respondent in submissions and therefore the case of sexual harassment or for a discriminatory constructive dismissal is brought vexatiously or unreasonably.

21. Having reached the view that the claimant hasn't acted vexatiously or unreasonably in bringing proceedings I now turn to whether the way that proceedings have been conducted was vexatious or unreasonable.

22. It is said that the claimant failed to comply with the tribunal's orders dated 13 November 2023. The claimant didn't provide a schedule of loss, nor did she provide further particulars of her claim as ordered by the tribunal. This appears to be correct from the information I have seen. However, the question is whether in doing so the claimant acted vexatiously or otherwise unreasonably in conducting proceedings in failing to comply with the tribunal's orders.

23. The explanation by the claimant for why she didn't provide further details of her claim is set out in paragraph 6 of her response to the respondent's cost's application, dated 30 July 2024. The claimant says she can't recall the exact dates of the allegations and that the claimant believes the dates given in her claim form were correct and are the closest approximation she could make. Of course, as I've said, the claimant did give a specific day of 5 March 2023 when an allegation of sexual harassment took place, which in my view didn't require further particularisation. Equally, the claimant's constructive discriminatory dismissal claim is capable of being understood.

24. Given this context, I don't find that the claimant acted vexatiously or unreasonably in failing to provide further clarification about her claim. As the respondent rightly says, in the absence of further particularisation, some of the claimant's claims might have failed, but this doesn't take away from the fact that the allegation on 5 March 2023 was sufficiently particularised as was the discriminatory constructive dismissal claim.

25. The failure to provide a schedule of loss, whilst no doubt frustrating for the respondent, is not of itself the claimant acting vexatiously or otherwise unreasonably. This is particularly so given the parties were at an early stage in the life-cycle of the claim and respondent had not written to the tribunal to draw the claimant's failure comply with this case management direction to the tribunal's attention.

26. The respondent criticises the claimant's conduct in preparing for the strike out/deposit hearing on 10 June 2024. It's right to say the claimant didn't engage in communication regarding that hearing until 7 June 2024. On the other hand, the respondent didn't engage in communication regarding this hearing until 6 June 2024. I don't make criticism of either party here because there were no tribunal orders I was taken to that either party should engage in communication ahead of that hearing.

27. The first time the respondent communicated with the claimant about the strike out/deposit hearing on 10 June 2024, was on 6 June 2024. The respondent

sent their skeleton argument to the claimant on 6 June 2024. On 7 June 2024 the claimant then sent documentation to the respondent in connection with this hearing and later that day withdrew her claim.

28. The question for me then, considering the authority of *McPherson v BNP Paribas*, is whether the claimant made a sensible litigation decision in withdrawing her claim when she did, leading to a saving of costs for the respondent in the tribunal or whether the claimant was unreasonably or vexatiously bringing a speculative claim in the hope of settlement and then dropping it at the last minute.

29. In my judgement, given I've found that the claim wasn't speculative, this falls into the former category and, has resulted in the respondent saving costs and expense in dealing with the full merits hearing. It's very unlikely that this case would have been struck out at the preliminary hearing, given it contained untested evidence of alleged discriminatory conduct.

30. It clearly would have been preferable had the claimant withdrawn her claim before she did. However, I find that the respondent has failed to establish that the claimant, in bringing her claim and conducting her claim (including withdrawing it when she did), was conducting litigation vexatiously or unreasonably. In conclusion, going through the three-stage process that I must follow, I have decided that the power to award costs have not arisen in this case.

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Employment Judge Childe

16 September 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON

20 September 2024

FOR THE TRIBUNAL OFFICE

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