Case Number: 1600560/2016

EMPLOYMENT TRIBUNALS

Claimant: **Ms Sharon Morris**

Respondent: **Dijla Ltd**

Heard at: **Cardiff** **On: 25 September 2017**

Before: **Employment Judge P Cadney**
Members

Representation:
Claimant: Mr R Vernon (Counsel)
Respondent: Mr J Allsop (Counsel

COSTS JUDGMENT

The judgment of the tribunal is that the respondent's application for costs against the claimant and/or wasted costs against the claimant's legal representatives is dismissed.

Reasons

1. The case comes before the Tribunal today on the Respondents application either that the Claimant pay its costs under the provisions of rule 76 (1) of the Employment Tribunal Rules or alternatively that we make an order for wasted costs against the Claimant's solicitors under the provisions of rule 80. The Respondent submits, as against the Claimant, that this case fall within both rule 76 (1)(a) and (b) in as much as they assert that the Claimant has acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing the proceedings; and that the claims had no reasonable prospect of success. Effectively both applications are based on the same premise that it should have been apparent to the Claimant either from the initial stages of proceedings, or at least at some point thereafter, that her claims were doomed to failure and that therefore it was an abuse of process to continue with them (R76(1)(a)) and/or that they had no reasonable prospect of success(R76(1)(b)).

2. Both the parties have set out their positions in written submissions, firstly in an email from the Respondent dated 23 May 2017; and then in a letter in reply from 30 May from Lyons Davidson the Claimant's solicitors. The Respondents essentially submit that the starting point is a letter that they wrote to the Claimant on 13 January 2017 saying in part "*We consider that the witness statement of the Claimant is most unconvincing. Much of what she says is vague and unsubstantiated and certain aspects are flatly contradicted by documents which she herself has disclosed. We have no doubt that had it not been for the intervening Christmas and New Year holidays and the proximity of the hearing date we would be applying to the Tribunal for an order that the claim be struck out or failing that that your client should be ordered to pay a deposit as a condition of proceeding with this claim*", and goes on to express the view that given the proximity of the hearing date that the Tribunal would be unlikely to list the case for a strike out deposit hearing and concludes, "*we have little doubt that any insurer on an objective assessment of the evidence which has now been made available would soon conclude that the Claimant does not have a reasonable prospect of success and that funding is unlikely to continue*."

3. The Respondent submits that this is a case in which there were substantial pleadings, questions arising from those pleadings, then a request and a reply to further and better particulars and that in the circumstances the Claimant and/or her legal advisers should have reached the conclusion expressed in that letter, at least by that point, if not sooner. Specifically they rely on passages of our Judgment which we need not repeat here but are from paragraphs 16, 17, 18, 19, 20 and 21 from which they invite us to conclude not merely that the Claimant's claim properly failed, but was bound to fail and that the Claimant, and/or her legal advisers, should have realised this from an early stage and accordingly the threshold for an order for costs is made out.

4. Mr Vernon, in response on the part of the Claimant, does not accept that this is a case which falls within the Tribunals power to award costs in that he submits that the threshold has not been reached. This is a case, in his submission, which falls within the ordinary provisions by which there is no order for costs and it is not in any sense exceptional. Essentially the reason for that is that he asserts that the Respondent is now doing what it accused the Claimant of doing during the hearing, which is taking matters out of context. Effectively Mr Vernon submits that the central factual dispute in the case revolved around a meeting of 14 April. He submits that if that factual dispute had been resolved in the Claimant's favour then she would have been likely to have succeeded in her claim for sexual harassment, and given that she resigned four days later in part expressly on the basis of that sexual harassment, she would also have been likely to have succeeded in her claim for constructive dismissal. It follows, he submits, that this case falls entirely within the ordinary run of cases in

which the Tribunal has had to make findings of fact. The point that the Respondent makes from and about our judgment in essence ignore the starting point which is our findings of fact from which we drew the conclusions about that meeting of 14 April.

5. He submits that the task before us was to decide whether we accepted Mr Al Ibrahim's account and that effectively the comments that were made were part of a continuation of a conversation which had been going on for a very long time about the Claimant's health condition and that there was nothing out of the ordinary in what was said or how it was said on 14 April. As that was the conclusion we reached, then it obviously fell to us to make the conclusion we did about whether the Claimant had made up her case for sexual harassment. However he submits that it was not inevitable that we should reach those conclusions and that had we accepted the Claimant's evidence, that what was said was in tone and expression different from what had gone before, and that that was the reason why she took exception to it on that day when she hadn't taken exception earlier, it would have been open to us to have concluded that her claim was made out factually, and therefore she had a prospect of succeeding in the sexual harassment claim which inevitably means she had a prospect of succeeding in the claim for constructive dismissal.

6. Mr Vernon therefore submits that this is not a case where even with the benefit of hindsight it can be said that it was inevitable the Claimant's claim was bound to fail and therefore had no reasonable prospect of success and that therefore it cannot properly be said that at any stage prior to the hearing itself that either the Claimant or her legal advisers could or should reasonably have taken the view that it was inevitable that it was bound to fail, but that they were entitled to take the view had the Claimant's evidence been accepted that there was a prospect of her claim succeeding and in that respect it is no different from countless other cases which come before the Tribunal in which a Claimant and the Claimant's advisers have to work on the basis that if the evidence is accepted can they succeed. He submits that in this case, had her evidence been accepted then she could have done and that therefore this case doesn't fall outside the ordinary run in which there should be no order for costs.

7. We have considerable sympathy for the Respondent in this case having spent a very large amount of money defending claims in which he has ultimately been vindicated, but having heard both parties submissions we are persuaded by Mr Vernon that this is a case which depended on our findings of fact, that those findings of fact were not themselves inevitable and that therefore this is not a case which falls outside the ordinary run of cases for which there should be no order for costs.

Employment Judge P Cadney
Dated: 4 October 2017

ORDER SENT TO THE PARTIES ON

16 October 2017

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FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS

NOTES

(1) Any person who without reasonable excuse fails to comply with this Order shall be liable on summary conviction to a fine of £1,000.00.

(2) Further, if this Order is not complied with, the Tribunal, under Rules 37(1)(c) and 76(2), may (a) make an Order for costs or preparation time against the defaulting party, or (b) strike out the whole or part of the claim, or, as the case may be, the response, and, where appropriate, direct that the respondent be debarred from responding to the claim altogether.

(3) You may make an application under Rule 29 for this Order to be varied or revoked.