Case No. 2207791/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Ms R Heelis	AND	Hodge Jones & Allen LLP

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON** 14 February 2017

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: Mr K Ali of Counsel
For the Respondent: Mr J Bromige of Counsel

JUDGMENT and ORDER

The respondent's applications are dismissed.

RESERVED REASONS

1. This is the judgment following the hearing of two applications which have been made by the respondent and which have been resisted by the claimant. The first is for the claimant's claims to be dismissed following their withdrawal by the claimant. The second is for the respondent to be paid its costs of defending this action against the claimant. I am grateful for the helpful and detailed submissions of Counsel on behalf of the respective parties.
2. General Background
3. The claimant is a solicitor and was a salaried partner in the respondent firm of solicitors from 3 June 2013 until 5 April 2016. The respondent's firm is mainly based in London, and the claimant was a lone worker in its Falmouth office in Cornwall. The claimant alleges that she suffered from stress and anxiety as result of undue work pressures and lack of support. The claimant raised a formal grievance following a period of certified sickness absence. About two weeks later the respondent decided to close its Falmouth office and the claimant was given notice of dismissal by reason of redundancy.
4. A shortened chronology of this matter is as follows. The claimant issued these proceedings on 15 September 2016. She alleges that she first made the respondent aware of her stress issues in July 2015, and continued to do so during the autumn of 2015. She sought medical assistance for her anxiety symptoms in October 2015 and continued to report concerns of stress and the pressure of her work. She submitted a detailed written grievance on 6 January 2016. Two weeks later she was informed of her

potential redundancy and her dismissal took effect on 5 April 2016. Her particulars of claim suggest that she was subjected to unlawful disability discrimination and that she was unfairly dismissed. She concluded her claim by saying "she seeks the following: compensation for financial loss, injury to feelings and personal injury; compensation for unfair dismissal; interest at the appropriate rate."

5. The respondent filed its notice of appearance on 28 October 2016. The claims were all denied. In addition, the respondent has always denied that the claimant met the statutory definition of disability and/or that they knew of any such disability. Furthermore the respondent asserted that the claimant's claims of discrimination arising from the earlier alleged breaches to support the claimant in her workplace were clearly out of time.
6. The matter was listed for a case management preliminary hearing on 14 December 2016. Before that by way of e-mail dated 28 November 2016 the respondent made an offer to the claimant in settlement of her claims. The e-mail was headed "without prejudice and subject to contract, save as to costs", and expressed to be the offer of a commercial settlement only in the sum of £3,000. The claimant's solicitors responded by way of e-mail dated 9 December 2016 rejecting that offer and seeking an overall settlement in sum of £26,000. No further negotiations ensued.
7. Meanwhile the claimant sought detailed counsel's advice following the receipt of the respondent's notice of appearance. She decided to withdraw her claims and to pursue a personal injury claim in the County Court. By e-mail dated 12 December 2016 the claimant's solicitors made it clear that as a result of the recent legal advice she wished to withdraw her employment tribunal claims but that her claim should not be dismissed in order "to enable her to pursue matters against the respondent in another jurisdiction". That e-mail also suggested that the case management preliminary hearing, which was listed for the following day 13 December 2016, should be cancelled, which it then was.
8. The respondent's application for dismissal
9. By letter dated 13 December 2016 the respondent's solicitors wrote to the tribunal as follows: "We note the request not to dismiss the claims, but respectfully fail to understand this request. The claimant presented claims of unfair dismissal and discrimination, claims which are incapable of being brought in another jurisdiction. The claimant did not issue a stand-alone claim for personal injury or breach of contract which might otherwise be pursued in the county court and therefore, we do not consider there to be a legitimate reason for expressing a wish to reserve the right to bring the same claims elsewhere. Similarly we do not consider it to be in the interests of justice not to dismiss these claims." Mr Bromige for the respondent has very helpfully and thoroughly expanded these arguments today. Mr Ali for the claimant opposes that application.
10. The relevant law
11. The relevant provision to be applied is Rule 52 in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 ("the Rules"). Rule 52 provides: "Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same common complaint) unless – (a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be a legitimate reason for doing so; or (b) the Tribunal believes that to issue such a judgment would not be in the interests of justice.
12. I have also been referred to two authorities, namely Ako v Rothschild Asset Management Ltd [2002] IRLR 348 CA; and Verdin v Harrods Ltd [2006] IRLR 348 EAT. Each of these cases addresses dismissal and withdrawal, albeit under the two previous manifestations of the Employment Tribunal Rules before the 2013 Rules were introduced.
13. Judgment
14. The claimant has withdrawn her unfair dismissal and disability discrimination claims, which include a claim for personal injury arising from the alleged discrimination. She relies on Rule 52 (a) and (b) to reserve her right to pursue her claims in the County Court (to the extent that the County Court has jurisdiction to hear them), and for her claims not to be dismissed on withdrawal. The respondent seeks to have them dismissed, in order

presumably to defend the personal injury claim at least partly on the basis of cause of action estoppel.

15. The principle established in Ako and confirmed in Verdin is that when it is clear that an applicant was not intending to abandon the claim or issue that was being withdrawn, then he or she will not be barred from then raising the point in subsequent proceedings unless it would be an abuse of process to permit that to occur. In this case, although the claimant is a solicitor and had access to professional advice throughout, her tribunal proceedings were issued to protect her position partly because of the short limitation period in the Employment Tribunal. She then obtained further specialist advice after the respondent had defended the proceedings. The respondent's defence to the action included arguments that the claimant was not disabled, and/or that the respondent did not know of the disability, and/or that the discrimination claims were out of time. The claimant's personal injury claim relied upon establishing discrimination and this discrimination claim faced these three additional potential defences. The claimant was advised by counsel and decided to pursue her personal injury claim in the County Court where there is a longer limitation period, and no need to prove discrimination in order to found the personal injury claim. The claimant then promptly withdrew her Tribunal claims to enable her cause of action for personal injury to proceed, but this was always expressed to be on the basis of the claimant was not abandoning that course of action.
16. Such a course of action is expressly contemplated in Rule 52. In my judgment that was not an abuse of process, and it would not be in the interests of justice to allow the respondent's application to dismiss the Employment Tribunal claims. To allow the respondent's application might well be determinative of the claimant's personal injury claim merely on the basis of cause of action estoppel and without that matter having been heard in full.
17. Accordingly the respondent's first application is dismissed.
18. The Application for Costs
19. The respondent makes an application for its costs on the basis that the claimant has acted vexatiously or otherwise unreasonably in the way in which the proceedings have been conducted, and that the claim had no reasonable prospect of success. The claimant resists the application.
20. The Rules
21. The relevant rules are the Employment Tribunals Rules of Procedure 2013 ("the Rules"). Rule 76(1) provides: "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.
22. The Relevant Case Law
23. I have been referred to or otherwise have considered the following cases: Gee v Shell Ltd [2003] [2003] IRLR 82 CA; McPherson v BNP Paribas [2004] ICR 1398 CA; Monaghan v Close Thornton [2002] EAT/0003/01; NPower Yorkshire Ltd v Daley EAT/0842/04; Kapoor v Governing Body of Barnhill Community High School UKEAT/0352/13; Barnsley BC v Yerrakalva [2012] IRLR 78 CA; Maler Ltd v Robertson [1974] ICR 71.
24. The Relevant Legal Principles
25. The correct starting position is that an award of costs is the exception rather than the rule. As Sedley LJ stated at para 35 of his judgment in Gee v Shell Ltd "It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to people without the need of lawyers, and that in sharp distinction from ordinary litigation in the UK, losing does not ordinarily mean paying the other side's costs …" Nonetheless, an Employment Tribunal must consider, after the claims were brought, whether they were properly pursued, see for instance NPower Yorkshire Ltd v Daley. If not, then that may amount to unreasonable conduct. In addition, the Employment Tribunal has a wide discretion where an application for costs is made under Rule 76(1)(a). As per Mummery LJ at para 41 in Barnsley BC v Yerrakalva "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." However, the Tribunal should look at the matter in the round rather that dissecting various parts of the claim and the costs application, and compartmentalising it. 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, and also Kapoor v Governing Body of Barnhill Community High School in which Singh J held that the receiving party does not have to prove that any specific unreasonable conduct by the paying party caused any particular costs to be incurred.

26. When considering an application for costs the Tribunal should have regard to the two-stage process outlined in Monaghan v Close Thornton by Lindsay J at paragraph 22: "Is the cost threshold triggered, e.g. was the conduct of the party against whom costs is sought unreasonable? And if so, ought the Tribunal to exercise its discretion in favour of the receiving party, having regard to all the circumstances?"
27. The respondent relies on Maler Ltd v Robertson to the effect that: "if an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or with some other improper motive, he acts vexatiously."
28. Where a claim has been withdrawn, the question for the Tribunal is not whether the withdrawal of the claim is itself unreasonable, but whether the party concerned has acted unreasonably in the conduct of the proceedings, see McPherson v BNP Paribas. A tribunal should not therefore award costs simply because the claimant has withdrawn his or her claim. It should determine whether the conduct overall is unreasonable, and this includes the impact of the later withdrawal.
29. Conclusion
30. In the first place the respondent suggests that the claimant's claims had no reasonable prospect of success. In this case the claimant reported to the respondent that she was suffering from stress and anxiety and complained about the pressure of her work. She sought medical advice from her GP in connection with her stress-related issues. I have not seen sufficient evidence to determine one way or the other whether the claimant met the statutory definition of disability. It is not a particularly high test, and it is certainly possible in this case that the claimant did meet the statutory definition of disability. The respondent was also aware at some stage that the claimant was suffering from a stress-related illness. It is therefore possible in the circumstances that the statutory duty to make reasonable adjustments had arisen. The claimant raised a formal grievance in writing, and within about two weeks was informed that she was likely to be made redundant. It may well be that her dismissal by reason of redundancy was a straightforward matter and given that the Falmouth office was closed and the claimant was the only employee that the dismissal was fair by reason of redundancy. Equally the timing of the announcement was such that the claimant could well have concluded that it was prompted by her grievance and her disability issues and that her dismissal was therefore tainted by disability discrimination. All these matters are possible. I have not heard evidence (and such was not the purpose of today's hearing) to determine these issues one way or the other. However, I set out these issues because in my judgment the claimant's claims were at least arguable and cannot in these circumstances be said to have been fanciful. I do not agree with the respondent's contention that the claimant's claims had no reasonable prospect of success. They may well have failed, but that is not the same as concluding that they had no reasonable prospect of success. The test in Rule 76(1)(b) is not therefore satisfied.
31. They respondent's claim for costs is otherwise brought under Rule 76(1)(a) and more particularly on the basis that the claimant has acted vexatiously or otherwise unreasonably in either bringing the proceedings, or the way in which they have been conducted. In the first place I reject the argument that the claimant has acted vexatiously, for instance in the way described in Maler Ltd v Robertson and as relied upon by the respondent. In my judgment she cannot be said to have had a hopeless claim with "no

expectation of recovering compensation but out of spite to harass his employers or with some other improper motive." The claimant's claims might well have ultimately failed, but equally she had an arguable case.

32. The remaining question is the extent to which the claimant was unreasonable in either issuing or otherwise conducting her claims. The respondent asserts that it was put to unnecessary expense by her cynical attempt to force an early offer of compensation in the wrong forum, in order to save the time and costs of the personal injury protocol and procedures in the County Court. In my judgment the claimant had at least an arguable chance of succeeding in her discrimination claims, particularly if the burden of proof had shifted to the respondent in some aspects of her claims. It was not of itself unreasonable to issue Employment Tribunal proceedings in the first place, particularly giving the short period of time between her raising a formal written grievance and being told for the first time that she faced redundancy. Similarly, once she had sought specialist advice on the defence which had been submitted by the respondent, it was not unreasonable at that stage to seek to pursue the personal injury claim in the County Court. It was a legitimate expectation of her do so in order to seek to defeat the other defences which were raised and would apply in the Employment Tribunal jurisdiction only (namely proving disability, knowledge of disability, and the shorter time limitation point).
33. With regard to the conduct of the proceedings, within about six weeks only of receiving the respondent's notice of appearance and grounds of resistance the claimant had sought further specialist advice and decided to withdraw her tribunal claims. She did so before the case management preliminary hearing to avoid the cost of that hearing. Beyond submitting its notice of appearance and grounds of resistance, and undertaking some preparation for that preliminary hearing, the claimant withdrew her claims before any substantial and unnecessary costs could be incurred by the respondent. Applying McPherson v BNP Paribas the tribunal should not award costs simply because the claimant has withdrawn his or her claim. It should determine whether the conduct overall is unreasonable, and this includes the impact of the later withdrawal. In these circumstances I do not agree that the claimant's conduct during the short life of these proceedings has been in any way unreasonable.
34. Accordingly I do not accept that the test set out in Rule 76(1)(a) has been met. Applying Monaghan v Close Thornton the cost threshold is not triggered. It follows therefore that I also dismiss the respondent's application for costs.

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Employment Judge N J Roper
Dated 14 February 2017

Judgment sent to Parties on

27 February 2017