



EMPLOYMENT TRIBUNALS

Claimant: Mr S Mistry
Respondent: City of Bradford Metropolitan District Council
Heard at: Leeds **On:** 15th March 2017
Before: Employment Judge Eeley

Representation: The application was determined on the basis of written representations without an oral hearing.

JUDGMENT

The Claimant's application for costs dated 2 March 2017 is dismissed.

REASONS

1. The Claimant brought claims of unfair dismissal and unlawful deductions from wages which were upheld by the Tribunal following a final hearing. Judgment and reasons were given orally and a request for written reasons was subsequently made. Written reasons have been provided. The issue of remedy was adjourned to a separate hearing date which was subsequently vacated as the parties had reached agreement in respect of remedy. A consent order was duly endorsed by the Tribunal.
2. By email dated 2nd March 2017 the Claimant's representatives made an application for costs. The basis of the application was set out in writing and a schedule of costs was provided. The Respondent provided its response to the application in writing. The parties have agreed that the costs application should be determined without the need for an oral hearing.

The Claimant's application

3. The Claimant makes an application for costs pursuant to rule 76(1) of the Employment Tribunals Rules of Procedure 2013 on the ground that the Respondent has acted unreasonably in the way they have conducted the proceedings. The Claimant relies in this respect upon an exchange of without prejudice correspondence prior to the Liability Hearing on 12 and 13 January 2017. The Claimant relies upon:
 - a. A Calderbank letter from the Claimant to the Respondent dated 4th January 2017.
 - b. The Respondent's response to the Calderbank letter dated 6th January 2017

Copies of the correspondence have been provided.

4. The Claimant's Calderbank letter indicated that he was prepared to accept the sum of £12,000 plus an agreed reference in full and final settlement of his claim. It contained a costs warning. The Respondent's response was to reject the offer without making a counter offer whilst stating that the Respondent was prepared to rely upon its case as set out in the Grounds of Resistance. The Claimant's representative makes the point that the Respondent made no attempt to negotiate whatsoever.
5. The Claimant's representatives make the point that his claim succeeded and the agreed sum of compensation exceeds that which was offered to the Respondent prior to the Liability hearing. The Claimant's representatives assert that had his offer been accepted or had the Respondent been prepared to negotiate then the Liability Hearing and its attendant costs could have been avoided. In light of that they submit that it was unreasonable of the Respondent to have rejected the offer and that this unreasonableness was compounded by the failure of the Respondent to negotiate at all and to push on with the Liability Hearing regardless. The costs schedule provided covers the Claimant's costs for the period from 6th to 13th January 2017.
6. The Claimant's representatives further refer to the guidance of Mrs Justice Slade in *Raggett v John Lewis Plc* UKEAT 0082/2012 and suggest that the tribunal should have regard not only to the rejection of the Claimant's offer but also to the Respondent's unwillingness to negotiate or countenance settlement at all in circumstances where it ultimately failed to do better than the Claimant's offer.

The Respondent's submission

7. The Respondent's representative makes the point that costs do not "follow the event" in the Employment Tribunal. They assert that an award of costs is the exception and not the rule. They refer to the cases of Monaghan v Chase Thornton Solicitors UKEAT/3/01/2002 and Kopel v Safeway Stores Ltd [2003] IRLR 753 and assert that in these cases the EAT expressed concern about the use of Calderbank offers in the Employment Tribunal. The Respondent asserts that whilst the conduct of a party in rejecting a Calderbank type offer of settlement can be taken into account in

determining whether the threshold trigger had been reached the failure to beat the offer will not of itself justify an order for costs.

8. The Respondent urges the Tribunal to look at the whole picture and ask not only whether the party in question behaved unreasonably in conducting their case but also to identify the relevant conduct, what was unreasonable about it and what effects it had (Barnsley Metropolitan Borough Council v Yerraklava [2012] IRLR 78)
9. The Respondent says that it was entitled to take into account its own belief in the merits of the claim and its potential value, particularly given the terms and timing of the offer one week before the hearing. It is said that the Respondent did not act unreasonably in doing this. Reference is made to the OED definition of unreasonableness.
10. The Respondent's representative also asserts that this is not a case where the Claimant challenged the stance of the Respondent to any significant degree either when putting forward the offer or in response to its rejection. Reference is made by the Respondent to conversations outside the Tribunal but without specifics as to what was said. In any event, the Respondent refers to the terms of the Claimant's offer and makes the point that it does not indicate that the Claimant considered that the Respondent was acting unreasonably.
11. The Respondent then goes on to deal with rule 76(1)(b). However, the Claimant's application was not made on the basis of section 76 (1)(b). The application referred only to unreasonableness and not to the Respondent's response having no reasonable prospect of success. This limb of the rule therefore need not trouble the Tribunal.

Determination

12. The application for costs in this case is made solely on the basis that the Respondent acted unreasonably in rejecting the Claimant's Calderbank offer and in failing to put forward any counter offer. No further or additional element of unreasonableness is identified or relied upon by the Claimant. I am not asked to consider the merits of the Respondent's defence to the claim. I am essentially asked to conclude that the failure to accept the offer or put forward a counter offer is, in and of itself, unreasonable conduct.
13. I have had regard to the case law referred to by both parties. I note that in Raggett there was no appeal against the decision to make a costs order, rather the appeal concerned the amount of costs awarded and the factors which should be taken into account in assessing the amount of costs. Indeed, the order for costs in that case was imposed because the Claimant's claim was misconceived. It is not suggested in the current case that the Respondent's defence to the claim was misconceived (or indeed that it had no reasonable prospect of success).

14. It is correct that costs do not follow the event in Employment Tribunal claims. There is no system for Part 36 offers with attendant sanctions as is found in the Civil Procedure Rules applied in the County Court.
15. The Tribunal has had regard to the cases of Monaghan and Kopel referred to by the Respondent. Whilst it is apparent that the Tribunal can have regard to a Calderbank offer in considering an application for costs it is also apparent that it does not follow that a failure to beat a Calderbank offer alone should lead to an order for costs against the Respondent. I would have to find that the conduct of the Respondent in rejecting the offer itself was unreasonable before the rejection of the offer became a relevant factor. I do not find the necessary element of unreasonableness here. The offer itself made no reference to the merits of the defence and set out no reason why the Claimant thought the defence would fail. It did not explain why the offer put forward was considered reasonable by the Claimant. It did not put the Respondent on notice as to why rejection of the offer would be unreasonable. Furthermore, the application for costs does not plug that gap and explain why rejection of the offer was unreasonable. All it says is that the Respondent failed to beat the offer. This does not establish unreasonableness. Rather, it seeks to rely on a Calderbank offer as being sufficient, without more, to meet the test set out in the Tribunal's rules.
16. For the reasons set out above I am unable to find the requisite element of unreasonableness in the conduct of the Respondent in this case and therefore do not consider that I have the power to award costs in this case.

Employment Judge Eeley

Date: 15 March 2017

Sent on: 27 March 2017