**Case No:** 2200478/2016

# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondents** |
|---|---|---|
| **Dilber Yazici** | **v** | **(1) M Taher & Co Ltd (2) Maryam Taher (3) Pantelis Pantelis (4) Abraham Ezekiel** |

**Heard at**: London Central

**On**: 4 May 2017

**In chambers:** 28 June 2017

**Before:** Employment Judge Lewis
Ms C Ihnatowicz
Mr S Soskin

**Representation**

**For the Claimant:** In person

**For the Respondents:** Mr D Martin, Counsel

## JUDGMENT ON RECONSIDERATION

1. The unanimous decision of the tribunal is that the application for reconsideration is not upheld.

## RESERVED JUDGMENT ON COSTS

1. The unanimous decision of the tribunal is that the claimant pay £7000 towards the respondents' costs.

2. The tribunal will pay over the £400 held on deposit, leaving a balance of £6600 to be paid in practice by the claimant to the respondents.

# REASONS

## Background

1. By a reserved judgment with reasons sent to the parties on 16 December 2016, the tribunal rejected the claims for discrimination, harassment and victimisation under the Equality Act 2010. The claim for failure to provide an itemised pay statement was withdrawn by the claimant and the holiday pay claim was settled. By email dated 29 December 2016, the claimant applied for a reconsideration of the judgment. .

2. On 9 May 2016, Employment Judge Wade had ordered the claimant to pay a deposit of £400 as a condition of continuing with her claims on the basis that the claims had little reasonable prospect of success. The claimant paid the deposit. The respondents now apply for costs.

## Reconsideration: application

3. By letter dated 29 December 2016, the claimant applied for reconsideration. In general, the Employment Judge considered that the application had no reasonable prospects of success. However, one matter was allowed to go forward for an oral hearing on 4 May 2017, ie paragraph 52 of the claimant's application for reconsideration, where she states that the racist remark in relation to Spanish IT personnel was mentioned in her initial instruction letter to Levenes. The full tribunal panel would consider whether that fact had any bearing on its finding that the remark was not made, since one of the grounds for the finding was that the remark was not referred to in the original ET1. If the tribunal made an alternative finding on this point, it would then go on to consider whether this affected any of the other findings.

## Reconsideration: conclusion

4. We have reconsidered our fact-finding at paragraph 33 of our original Reasons. We do not change it. It is correct that the incident was not mentioned in the ET1. Although it was mentioned to some extent in the initial instructions letter to Levenes, for reasons unknown to us, it was not put into the ET1. The fact remains that the claimant gave different versions at different times. It is also correct as we stated in our Reasons that Mr Ridings, who is not a named respondent, also confirmed Mr Pantelis did not make the alleged remarks.

## Costs: the law

5. The power to award costs is set out in the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. Under rule 76(1) a tribunal may make a costs 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.

6. Under rule 39(5), if the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order, the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and the deposit shall be paid to the other party, otherwise the deposit shall be refunded.

7. A deposit would have been ordered where a tribunal at a preliminary hearing considered that any allegation or argument in a claim had little reasonable prospect of success, as a condition of continuing to advance that allegation or argument.

8. The tribunal's power to order costs is more sparingly exercised and is more circumscribed by the tribunal's rules than that of the ordinary courts. There the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the tribunal, costs orders are the exception rather than the rule. (Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78, CA.)

9. 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 was 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.

10. Under rule 84, in deciding whether to make a costs order, and if so in what amount, the tribunal may have regard to the paying party's ability to pay.

**Costs: the issues**

11. The issues on costs were therefore:

11.2 Did the tribunal decide any allegations against the claimant for substantially the reasons given in the deposit order?

11.3 If so, is there any reason not to treat the claimant as unreasonable in having pursued the allegations?

11.4 Alternatively, did the claimant act unreasonably in any other way?

11.5 If the claimant did act unreasonably for any of the above reasons, does the tribunal exercise its discretion to award costs and in what sum?

11.6 In deciding the previous issue, what is the claimant's ability to pay and should the tribunal have regard to this?

**Costs: the application and conclusions**

12. The respondents apply for (i) payment of the claimant's deposit and (ii) further costs. The grounds for the application are under rule 76(1) that the claimant acted unreasonably in bringing the claim and / or in conducting the claim, and / or under rule 76(2) that the claim had no reasonable prospect of success. As well as arguing that the conduct of the case following the deposit should be deemed unreasonable by virtue of the deposit order, the respondents argued it was anyway unreasonable for various reasons set out in Mr Martin's skeleton argument.

13. The respondents apply for a costs on an indemnity basis. Their total costs are said to be over £120,000.

The deposit order

14. In summary, EJ Wade ordered a deposit in relation to the Equality Act claims on these grounds (which we paraphrase): (1) the claimant did not allege discrimination until her solicitor's letter of 4 February 2016, more than 3 months after her dismissal; the silence indicates she did not herself think at the time of dismissal that she had experienced discrimination; (2) Although the claimant did raise earlier that she had been told she was not a native speaker, it was unlikely a tribunal would infer from this that she had been discriminated against because of her national origin because two of the respondents were themselves not native speakers, because the respondents knew she was not a native speaker when they employed her, and because EJ Wade could see that the claimant's English language skills were not of solicitor standard; (3) and (5) there would be time-limit problems in proving a continuing act of discrimination and the tribunal was unlikely to find it just and equitable to extend time; (4) the respondents' explanation for dismissing the claimant was likely to stand up to examination, ie that there were language problems which they tried hard to resolve but could not; and (6) in relation to the holiday pay claim, it was unparticularised.

15. The reasons the present tribunal rejected the claims following a full merits hearing were substantially the same. The only exception was that this tribunal did not agree that a person who has been subjected to discrimination will necessarily say so immediately. Nevertheless, if matters are put in writing contemporaneously, that can be positively helpful for a claimant. We do not think the lesser emphasis on reason (1) makes any noteworthy difference between this tribunal's view and EJ Wade's. In essence, the respondents had employed the claimant only 6 weeks earlier, knowing she was not of British national origin; it was a multi-national firm; the respondents' reasons for dismissal stood up to examination (see, inter alia, paragraphs 96 and 98 of this tribunal's findings). On time-limits, see paragraph 104. Regarding the

holiday pay claim, this was still unparticularised as at the start of the hearing. There is of course a different level of detail and subtlety in the liability judgment compared with the deposit order judgment, but that is inherent in the difference between a deposit hearing and a full merits hearing. But as we have said, the reasons are substantially the same.

16. As the reasons for rejecting the claims were substantially the same as those in the deposit order, by virtue of rule 39(5), the claimant is treated as unreasonable in pursuing those allegations unless the contrary is shown. The claimant still maintains she was discriminated against, directly and indirectly, from day 1 and that she was therefore not unreasonable in pursuing the claims.

17. We find the contrary has not been shown, ie we do not find it shown that it was *not* unreasonable for the claimant to continue to pursue her claims. We recognise that it is difficult for a litigant in person to view their claim with objectivity. However, the claimant is a solicitor, albeit not an employment solicitor, and EJ Wade set out her reasons for the deposit order very clearly. She also took pains to advise the claimant to 'think carefully about ….. the potential costs liability at the end of the final hearing'.

18. In addition, the claimant was represented by a solicitor at the EJ Wade hearing. Further, the respondents' solicitors followed up by letter dated 2 June 2016 referring to the deposit order, quoting rules 76(1) and 39(5) and stating that the respondents would apply for costs should the claimant proceed and lose. The solicitors stated their estimate of costs already incurred as roughly £14,500 + VAT and further likely costs as between £12,000 and £17,000.

<u>Other unreasonableness in the conduct of the proceedings</u>

19. The respondents also referred to (1) the stress and hurt of defending the proceedings, the fact that three respondents were named personally and potential consequences for the reputation of individuals and the firm; (2) the claimant's text messages to Ms Molnar showing a desire to harness that stress and indeed a potential SRA investigation, to extract a settlement; (3) this being reflected in correspondence with the respondents which stated their practice certificates were at stake and that the matter would be pursued through the SRA if there was no settlement (as has indeed happened); (4) misrepresenting the respondents' comments in the hearing, notably what Ms Taher allegedly said about Kurds.

20. Although we understand why the respondents refer to all these matters, we do not think they are sufficient to amount to unreasonable conduct of the litigation.

21. Regarding point (1), although we have sympathy for the stress for the respondents in defending personal allegations of discrimination which ultimately the tribunal decided were unfounded, this is in the nature of

discrimination claims in the tribunal. It is not in itself a basis for finding the claimant's conduct unreasonable.

22. Regarding points (2) and (3), the claimant attempted to settle her case as indeed was encouraged by EJ Wade on issuing the deposit order. She felt that the respondents would not settle as long as they believed they could get her claim struck out or that she would be unable to afford to go to court. She engaged in text conversations with Ms Molnar, who was herself embittered by her treatment by the respondents. Although Ms Molnar suggested, and the claimant presumably accepted, the idea that threatening to go to the SRA might encourage a settlement, there is no evidence they were fabricating issues to take to the SRA. Ms Molnar was telling the claimant there were genuine areas of concern. We have no idea whether or not there were in fact reportable issues, but we accept the claimant believed that there were and there was therefore nothing improper in her going to the SRA.

23. To the extent that the claimant tried to use the threat of going to the SRA as leverage, this is not an approach we would commend, but we would not go as far as saying it was unreasonable conduct if there were in the claimant's perception genuinely reportable issues. Even if it did amount to unreasonable conduct, we would not consider it appropriate to award costs on that basis. In negotiation, lawyers speaking English as a first language and not representing themselves, would doubtless find a way indirectly to suggest the negative consequences of not settling. They would probably also be careful to speak on a 'without prejudice' basis. The claimant was representing herself. English was not her first language. She does not express herself in a subtle way anyway. But she was essentially doing what is commonly done in negotiations. Moreover, she was reacting to what she saw as a heavy-handed approach by the respondents towards her bringing a case.

24. Regarding point (4), we can understand that Miss Taher finds it very stressful and frustrating that the claimant misquoted her and continues to misquote her notwithstanding the tribunal's findings set out at paragraph 20. Moreover it was the claimant who introduced at the hearing the idea, before Miss Taher said anything, that Miss Taher was likely to be prejudiced against Kurds because of her own national origin. Nevertheless, the claimant has convinced herself that Miss Taher made a racist remark about Kurds. She cannot let go of this mindset. As time goes on, she extends what she believes she remembers. This can happen in stressful litigation. The claimant did not have the benefit of anyone sitting with her at the hearing who could help her. We do not think it was a deliberate misquote.

<u>Failing to comply with pre-trial Orders and general failure to be cooperative in case preparation</u>

25. These matters were set out in the respondents' written submissions at paragraph (g). We must point out that it is not unusual for there to be tensions in pre-trial case preparation, even when both sides are represented. Some opponents are more cooperative than others and this can affect the cost of

case preparation. Litigants in person cannot help but be emotionally involved in their own case and are likely to be cautious about making concessions. In complex and detailed cases, there are commonly disputes, lengthy and repetitive letters, suspicion and defensiveness. Sometimes there are accusations. All this is within the rough and tumble of litigation.

26. The claimant has not been an easy person to deal with through the litigation, but we do not see anything in her conduct of these matters which would bring them into the realm of costs (apart from the deposit issue). Indeed, the matter of privilege and related disclosure was complex.

27. Bearing in mind the claimant was a litigant in person for most of the time, we do not think her conduct meets the threshold of being unreasonable on these grounds, and even if it did, we would not consider it appropriate to award costs on this basis.

Unreasonable in bringing the proceedings

28. We do not think the claimant acted unreasonably in bringing the discrimination proceedings, although it should have been apparent it was not a strong case. At that point, she had not yet received the deposit order and costs warning from the tribunal. The respondents had not been clear with her that her job was at risk due to performance issues, and they had handled her dismissal badly, as we set out in paragraph 106 of our Reasons on liability. This encouraged the claimant to question why she had been dismissed. Taken together with Mr Ezekiel's reference during the dismissal conversation to the claimant not being a native English speaker, we cannot go as far as saying that the claimant was unreasonable in bringing the case.

No reasonable prospects of success

29. The deposit order was based on EJ Wade's view that the claims had little reasonable prospects of success. They were not struck out on the basis that it had no reasonable prospects of success. It appears that application was not made, and in any event, would not have been granted. We agree The discrimination claims had little reasonable prospects but we would not go far as saying none. The holiday pay claim, when it was eventually identified, had reasonable prospects.

Should we award costs?

30. The possibility of awarding costs is therefore engaged under rule 39(5) from the date of the deposit order onwards. The next question is whether it is appropriate to exercise our discretion to award costs and if so, in what amount.

*The claimant's means*

31. The claimant owns a house in Ramsgate, which she bought for £175,000 in about September 2015. The mortgage was £136,000. Mr Pantelis says the claimant told him at a work dinner in October 2015 that the claimant had received around £150,000 from friends / relatives in Turkey to buy a property. The claimant denies she said this or that she received such sum. The office manager, Mrs Collins, was present and told us there was a conversation about buying property in Ramsgate but she did not hear anything about sums having been received. We accept the claimant's evidence that she did not receive any sum to enable her to buy the property. There was only £39,000 equity in the property after deduction of the mortgage and the claimant's bank statement shows she has been making the mortgage payments.

32. Subsequent to the costs hearing, we received a letter from the respondents' solicitors dated 9 May 2017 stating that they had discovered the Ramsgate property had been listed for sale by estate agents on 24 March 2017 at the price of £300,000.The claimant responded by letter dated 19 May 2017. The claimant says she does not realistically expect the property to sell for that figure. Moreover she states that she no longer intends to sell the property but she was tied into the estate agents for six months. We are unable to make any finding as to whether or not the claimant intends to sell the property.

33. We have no accurate valuation of the Ramsgate house at the present time, but it is less than two years since purchase. The value is most likely to be somewhere between £175,000 and £200,000. We therefore find that the amount of equity in the house is currently about £40,000 - £50,000. It is possible the value has gone up since purchase, but equally there could have been slow down in house price increases as recently publicised in some areas.

34. The claimant initially let her property in Ramsgate, but the tenants were evicted in November/December 2016 for not paying rent. Some but not all of the rent has been recovered through insurance. The claimant is unable to rent again because the boiler is dangerous and needs replacing. This might also involve getting planning permission. The claimant's estimate varied from £2500 to £10,000 all in. We could not see any support for the £10,000 estimate. We would consider the figure closer to £2500. Once the claimant is able to rent again, she would anticipate getting £9000 per year in rent.

35. The claimant cannot live in the Ramsgate property because the commute to London would now be too expensive for her. She therefore rents a studio flat in London. She lives alone.

36. We broadly accept the claimant's evidence regarding her income and outgoings. Her bank statement confirms monthly rent of £750, mortgage of £556 and loan repayment of £467. The other figures are generally credible apart from £200 average monthly expenditure for gas and electricity. The house in Ramsgate is empty except when the claimant pays short visits, so there should be virtually no gas and electricity bills there. In London she lives

in a studio flat. Our own experience suggests £50/month at most for this. We therefore estimate her monthly outgoings as approximately £2750.

37. The claimant says she earns approximately £2360 / month net of tax. Her last couple of pay slips show her earning £2626 / month net of tax. She says this has been overtime because her employer is currently short-staffed. Nevertheless, we put £2600 into the equation.

38. On balance, therefore, the claimant just about breaks even in terms of income, or falls slightly below that threshold. The difficulty is caused by paying both mortgage and rent and not being able to let or live in the Ramsgate property. The claimant has occasional loans of one or two thousand pounds to help her keep going.

39. When we put means into the equation, the claimant cannot currently afford to pay any award of costs. On the other hand, she could borrow a few thousand pounds, as she has managed to do on occasion, get the boiler sorted out and then start letting the property again. Alternatively, given that neither she nor any tenants are currently living in the property, she could sell it and realise the capital. Either of those options might take some time.

*Other considerations*

40. We do not think it appropriate to award costs in respect of the holiday pay claim as it was belatedly clarified, and it appeared to have good merits at that stage, albeit we did not have to determine the claim because the respondents voluntarily paid the contested amount. However, any extra work involved as a result of the claim being unparticularised would have been marginal in the overall context. Moreover, it is extremely common for holiday pay claims, when ancillary to larger claims such as unfair dismissal or discrimination, to remain unparticularised at the start of the full merits hearing. They tend to get forgotten about by all sides. The remainder of our reasons therefore relate only to the discrimination claims.

41. We take into account that, on the one hand, EJ Wade was very clear in her reasons why the discrimination claims had little reasonable prospects of success and she asked the claimant to think carefully about proceeding. She clearly spelt out the costs risk. The claimant was represented by a solicitor at that hearing. She therefore had a person with a more objective view available to advise her. Further, the respondents' solicitors' letter of 2 June 2016 reinforced the costs risk and warned the claimant of costs totalling around £35,000 (albeit substantially less than the sum in fact incurred, but still very substantial). The claimant is herself a solicitor used to working in litigation environments though not the employment tribunal. She must have understood the risk.

42. On the other hand, the claimant was not an employment solicitor. It is difficult, even for a lawyer, to evaluate one's own case because of the emotions involved. She believed that EJ Wade could not have made a reliable

assessment based on only four hours' discussion and no close examination of evidence. She believed that when a full tribunal heard all the detailed evidence including from witnesses, it would reach a different view. She latched on to EJ Wade's statement that '… this decision is that the prospects of success are low, I am not saying that it is impossible that the claimant can succeed and I have not been asked to make a strike out order'.

43. Unfortunately many litigants faced with a deposit order and costs warning see things this way. That does not mean one should not give significant weight to the fact that a warning has been ignored, but it is also true that human psychology makes it difficult for many claimants to heed such warnings.

44. This is not a case where we have found the claimant deliberately lied. We found on the balance of probabilities that the claimant was incorrect in her account of what was said at various times, but that might have been a matter of unreliable memory, misperception or even misunderstanding. We believe that the claimant convinced herself both that she was discriminated against and that her various memories of conversations were accurate.

45. We also take account of what we have already said about the respondents' own conduct. They brought some of this situation upon themselves by the careless way they treated the claimant's recruitment and termination. The respondents did not tell the claimant prior to her dismissal that her job was at risk because of performance factors. They did raise certain matters including her standard of English with her, but she did not realise how seriously these were viewed. They dismissed her in 5 minutes in a conversation while walking round the streets. During that conversation, it was mentioned that she was not a native English speaker. They had not tested her level of written English when they took her on. They knew she was giving up a job with previous employers. Then they wrote a letter to her stating it had been a mutual termination when it clearly was not. All this provided the seeds of the claimant's later conviction that she had been discriminated against during her employment and on its termination. We also imagine it is difficult for someone to assess the standard with which they speak a second language, and the respondents had not behaved in such a way as to give the claimant confidence in their approach.

46. Balancing these factors, we consider that £7000 is an appropriate sum to award in costs in recognition of the claimant's unreasonableness in pursuing her claim after the deposit order and the costs incurred by the respondents as a result.

47. Finally, we consider the claimant's means. She has potential capital of £40,000 - £50,000 after expenses were she to sell her house. Alternatively she may be able to let the house in the future. She barely breaks even on day-to-day income and expenditure. She owns no other property. In the light of this, we see no reason to alter our figure of £7000. The claimant ought to be able to find that sum without being bankrupted and without being forced to sell her only property.

48. For the reasons set out above, our award of costs payable by the claimant to the respondents is £7000. The claimant need only pay £6600 and the tribunal will arrange for the £400 deposit to be paid over to the respondents.

Employment Judge Lewis
28 June 2017