# EMPLOYMENT TRIBUNALS

| **Claimant:** | | **Respondent:** |
|---|---|---|
| Mr G Parkash | **v** | British Airways Plc |

# JUDGMENT ON COSTS

The claimant's application for costs is dismissed.

# REASONS

**Background**

1. The claimant brought a complaint of unfair dismissal against the respondent which was determined in the claimant's favour at a hearing on 20 and 21 September 2018. I made a finding that, given the claimant's absence history, there was a 50% likelihood that he would have been dismissed in any event. He was awarded compensation in the sum of £17,465.98. Written reasons were requested and sent to the parties on 22 October 2018.

2. On 19 November 2018 the claimant's solicitors made a written application for costs against the respondent in the sum of £5,950.53. The claimant's solicitor relied on Rule 76(1)(b) of the Tribunal Rules on the basis that the respondent's response had no reasonable prospect of success.

3. Further, the claimant's solicitor said that the respondent had conducted proceedings unreasonably in its conduct of settlement discussions. The respondent had rejected a settlement offer of £18,500 made without prejudice save as to costs by the claimant on 12 September 2018 and had made no counter offer in response. The respondent had also rejected a lower settlement offer of £8,000 made by the claimant on 20 September 2018 (the morning of the first day of the full merits hearing), and made a counter-offer of a reference only, which the claimant did not consider to be reasonable.

4. The respondent replied to the claimant's application for costs in a letter dated 5 December 2018, submitting (amongst other points) that the claimant could have made a strike-out application if the response had no

merits, that the claimant's approach was unreasonable in that he over-valued his claim, and that he took an unreasonable approach to proceedings having made a postponement application.

5. The claimant replied to the respondent in a letter dated 2 January 2019, pointing out (inter alia) that the respondent had also applied for a postponement application earlier in proceedings.

**The Law**

6. The power to award costs is set out in the Tribunal Rules. 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 .... the way that the proceedings (or part) have been conducted; or*

   (b) any ..... response had no reasonable prospect of success."

7. Rules 74 to 78 provide for a two-stage test to be applied by tribunals in considering costs applications under Rule 76. The first stage is for the tribunal to consider whether the ground or grounds for costs put forward by the party making the application are made out. If they are, the second stage is for the tribunal to consider whether to exercise its discretion to make an award of costs, and if so, how much.

**Conclusions**

8. I first need to consider whether there are grounds for an award of costs under rule 76(1). The claimant has applied for costs under rule 76(1)(b) on the basis that the response had no reasonable prospects of success.

9. I have considered the respondent's response carefully. I do not consider that it can be said that it had no reasonable prospect of success, for the following reasons.

   9.1. The claimant had a significant sickness absence record and steps were taken by the respondent under its absence management policy. Although I have found that viewed as a whole, the circumstances were such that dismissal fell outside the range of reasonable responses, this is not the same as the response having no reasonable prospects of success.

   9.2. There had been a previous successful claim for unfair dismissal against the respondent in respect of a dismissal involving the same attendance management procedure, the same dismissing manager and the same appeal manager. However, the earlier decision was not binding in respect of this case and, although there were significant similarities, the facts in the two cases, such as length of absence were

sufficiently different such that it could not be said that there was no reasonable prospect of success in this case.

9.3. A substantial *Polkey* reduction was made and this is an important factor: the respondent was entitled to have this issue considered and determined by the tribunal.

10. The claimant has not applied for costs under rule 76(1)(a), ie on the basis that the respondent has acted vexatiously, abusively, disruptively or otherwise unreasonably in the way that the proceedings or part of the proceedings have been conducted.

11. For completeness, I do not consider that the respondent's conduct in respect of the without prejudice settlement discussions (or any other conduct complained of) amounted to vexatious, abusive, disruptive or otherwise unreasonable conduct of the proceedings. The *Calderbank* principle does not apply in full to employment tribunal litigation and a failure to beat a settlement offer does not, by itself, lead to an order for costs. Failures to accept a settlement offer or to make any financial counter offer are relevant factors in considering whether the discretion to award costs should be exercised, but I do not consider that the conduct in this case is such that the grounds for costs under rule 76(1)(a) are made out, either by the respondent's conduct in settlement discussions or any other conduct complained of by the claimant.

12. For these reasons, I have concluded that the grounds for costs to be awarded against the respondent are not made out, and the second stage does not arise.

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Employment Judge Hawksworth

Date: ……26 April 2019………………..

Judgment and Reasons

Sent to the parties on: ......................

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For the Tribunal Office

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