Case No: 2206437/2018

EMPLOYMENT TRIBUNALS

Claimant: **Dr. C. Mallon**

Respondent: **Ela8 limited**

Heard at: **London Central** **On:** **24 June 2019**
Before: **Employment Judge Goodman**

Representation
Claimant: did not attend
Respondent: Mr. M. Davis, respondent's managing director

COSTS JUDGMENT

The claimant is ordered to pay the respondent £1,845 in costs.

REASONS

1. The claimant withdrew his claim for disability discrimination after receiving the response disputing liability. The claim was then dismissed on withdrawal under rule 25. The respondent has applied for costs, arguing that bringing the claim was vexatious or unreasonable.

2. Unlike the position in the courts, in the employment tribunal costs do not follow the event, but costs can be awarded in some circumstances. Rule 76 of the Employment Tribunal Rules of Procedure 2013 sets out what these are:

> **When a costs order or a preparation time order may or shall be made**
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> 76.(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
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> (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.

3. A tribunal may award up to £20,000 on summary assessment (and may order detailed assessment of an unlimited sum). By rule 84 it may take account of the paying party's ability to pay, when deciding whether to make an order, or how much.

4. Vexatious is an old word. In *A-G v Barker [2000] 1 FLR 759*, Lord Bingham said:

> '"Vexatious" is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.''

Factual Summary

5. The claimant suffers dyspraxia, which affects his written communication. In September 2018 he applied for work with a tax firm, using a recruitment agency. The CV submitted said he had dyspraxia, but this had not prevented him carrying out many client facing tasks and gave the link to the NHS website explanation of the condition. He asked for a short phone call as a reasonable adjustment, which the respondent says was what they had contemplated in any event. He was shortlisted along with three other applicants for the post, and then had an 18 minute telephone interview on 17 September 2018. Another candidate was offered the job, at £40,000 per annum.

6. The claimant asked for feedback inn a letter 20 September to which he attached his original CV and documents about disability discrimination and dyspraxia, though none about him personally. The respondent wrote to him twice, on 25 September and on 1 October 2018. They said the advertisement said preference would be given to tax qualified staff, and of the four interviewees, two were fully and one partly qualified. He had been interviewed despite the lack of qualification, because he seemed to have significant relevant experience, but in interview this had not been demonstrated. Further, they had been concerned about his reply to a question about dealings with HMRC not showing an understanding of good practice, and he had higher salary expectations than others (£65,000). In the second letter he was asked to send further correspondence to their solicitors.

7. The claimant Claimant replied on 1 October "I will take us to a ACAS and

tribunal as your feedback now is different to at interview, telling me that I have communication difficult is not acceptable and we will see what the judge says". Then he went to ACAS for early conciliation.

8. On 13 October he presented a claim, which said: "I applied for a job and make it clear all about my disability on my CV. I had a telephone interview for 18 mins and then was rejected the feedback that came from the agent that I was experienced but I had problems communicating, I explained to the agent and the company this was because of my medical condition but I was still rejected. I was very upset by this discrimination and not dealing with ACAS feedback has now changed, the feedback was given to the agent and then to me, I cannot help my disability but I know this was discrimination as I worked in this field of this job for about 4 years". Asked about remedy said he looked for "£6,000 for hurt to feelings and another £3000 for lost wages from this job over what I was doing".

9. The claim form was sent parties on 8 January 2019, with a notice of hearing on 30 and 31 May 2019.

10. The respondent's solictors asked the claimant for documents about his other employment, and applications made after the interview wither respondent, designed it seems, to assess the value of the claim, but the claimant said this was confidential, and would be included in the hearing bundle, meanwhile "any other settlement ideas through ACAS please".

11. The respondent filed a response on 5 February 2019, attaching detailed grounds, drafted by solicitors, covering 15 pages. This quoted from the Job advertisement, stated that the recruitment agent informed them the claimant had approved the CV that was submitted, gave details of the interview dates of candidates, and explained that he had not been appointed because of his lack of tax qualifications, his reply in interview on dealing with HMRC, and his experience, which was not a wide as they had thought. They also quoted from the letters they had sent giving feedback, and that claimant had in fact started employment with another company on 7 September 2018, the day before the interview, on a salary of £50,000, with a notice period of 3 months. Finally, the respondent listed that he had brought about 19 claims of discrimination in English employment tribunals between April and October 2018, and all had been withdrawn. A claim in Northern Ireland was said to have been dismissed. It was denied that he been subjected to less favourable treatment because of disability arising from disability, or that they had failed to make reasonable adjustments to the interview process. He was not suitably qualified and experienced, his HMRC reply was contrary to the respondent's practices and ethos, they could not have met his salary expectations, he was already employed elsewhere at significantly higher salary and would not have accepted an offer from them, nor could he have started work on or around 19th November 2018 as expected by the respondent. The respondent asked for the claim to be struck out, or for a deposit order, and reserved the right to apply for civil restraint order because of the claimant's "habit of bringing unmeritorious and vexatious claims in the employment tribunal".

12. On 9 February 2019 that claimant withdrew his claim, saying that he unaware that the recruitment agency had changed what it said on his CV about his disability. As for qualifications, as he had a BSC, MSc, PhD and

MBA. (his degree is in Chemical Engineering), he found that hard to understand. He had started a new role the day before, but his notice period was only one month. He had been told the salary was up to £65,000.

> "I am sorry that the facts of any complaint now as nobody had told me my CV was changed so I believed my case was strong".

The other cases had been closed:

> "as there was not enough technical disability evidence on my CV to win a case, so I changed my CV and started to apply for work again, 9 months later, the judge in London on the case management pointed this out as I immediately close the other cases as I didn't waste any more court time as I am not legally trained and learning one case at a time".

13. In the respondent's bundle is a list of 35 claims the claimant has made to date (not including this one) where there are decisions on the public website. The claimant has withdrawn 33 of these, 2 have been struck out, and there are 2 other claims (with 2018 case numbers) mentioned in written reasons but not on the website. Of the 33 withdrawn, I counted 12 withdrawn before this claim was presented on 13 October 2018: 1 in 2017, and 11 between May and October 2018. Seven more claims were withdrawn between the date this claim was presented on 13 October 2018 and withdrawn in February 2019.

14. Claimants withdraw claims either because they have decided not to pursue them, or because they have been settled through ACAS. A withdrawal decision does not indicate the reason for withdrawal. It is not known whether any of the withdrawn claims resulted in a payment to the claimant.

Costs Application

15. On 22 February 2019, the respondent, by solicitors, applied for costs in the sum of £2,214 (£1,845 plus VAT) on the basis that there was no reasonable prospect of success, and the claimant's conduct was vexatious. On 27 February 2019, the respondent added a witness statement from Mr. Tony Campbell of the recruitment agency, stating that prior to the putting the claimant's CV to the respondent he had had a video discussion with the claimant about altering the CV in relation to the text about dyspraxia, to which the claimant had agreed, and that the recruitment agency had preserved the recording.

16. On 13 May 2019 the tribunal listed the costs application for hearing today. The standard letter states that 3 hours had been allocated to the hearing, that it is the responsibility of a party to ensure that any relevant witnesses attend and to bring relevant documents, and: "you may submit written representations for consideration at the hearing. If so, they must be sent to the tribunal and to the other parties not less than 7 days before the hearing. You will have the chance to put forward oral arguments in any case."

17. The same day the claimant emailed the tribunal:

> "Sorry this case has been closed by myself can you please withdraw this claim as we have resolved this ourself".

18. The respondent replied that the costs application had *not* been resolved. On 14 May the claimant emailed saying he closed the case once he knew the recruiter had changed his application, and:

> "I am not here to be a bad person, they should be chasing the recruiter and not me as they caused this problem by changing my CV without letting me know, I built this CV so I would get a fair application treatment when I applied for work as I talk better than I type".

On 8 June the claimant emailed the tribunal:

> "Can I please share this below the case against me please find below more evidence below why an oral application works best for me".

The evidence was an article about dyspraxia in the Financial Times, but he has also provided a report from a previous university setting out tests he had taken and diagnosing dyspraxia resulting in impeded written communication, but not affecting oral communication.

19. On 10 June he sent the tribunal a credit card bill and a letter about his entitlement to job seekers allowance.

20. On 14 June the respondent sent the tribunal written representations and documents in support. This included a list of 35 other claims brought by the claimant shown on the public website for England and Wales as having been withdrawn, and 2 others struck out, and one struck out in Northern Ireland., together with the written reasons for three decisions on strike out and costs.

21. The claimant next emailed the tribunal asking if he needed to attend. He lived in Cannock, (in Staffordshire) and it would expensive to attend. The tribunal staff did not print the email for the file or refer it to a judge, and it was only drawn to my attention by the respondent at the start of today's hearing. I then adjourned to check for other material from the claimant and read it.

The Parties' Representations

22. The respondent attended by their managing director, but not by solicitor so as to limit their costs bill. The claimant did not attend today. I had already read the written material submitted by either side. I adjourned to find out what emails had been received from the claimant since 10 June (the last that had been placed on the file). I then heard a short oral submission from the respondent and then, as the claimant would need written reasons to understand a decision given in his absence, I reserved judgment rather than deliver it in tribunal.

23. I note that the claimant does not dispute the evidence of the recruiter. He explains he was interviewed for the job when he had recently started work because he was still looking for better pay, and says he only needed to

give one month's notice, not three. That may be true, btr is not supported by any document.

24. Summarisng the respondent's submission, the respondent says the claim had no reasonable prospect of success. Given the facts known to the claimant when he presented the claim, there was nothing new in the response that justified withdrawing at that stage. Further, they say it was not brought because the claimant thought he would succeed, but because he hoped for a settlement. It is suggested his conduct on all the other claims he has withdrawn leads to this conclusion.

Discussion and Conclusion

25. It is usually unreasonable, in the absence of any other stated reason, to bring a claim if it has no reasonable prospect of success. Here, the claimant sought an adjustment for disability by oral rather than written communication in his application. In fact, he made it through to shortlisting, and only failed at oral interview. A claim of failing to make a reasonable adjustment for disability must always have been doomed to failure because he had the adjustment he wanted.

26. As for the other claims – direct discrimination under section 13, or unfavourable treatment because of something arising from disability under section 15 – the respondent had explained to the claimant in their feedback letters prior to the commencement of proceedings that the other candidates had tax qualifications, which he did not, that his experience was not as extensive as they had thought, that they had concerns about his approach to HMRC, and his expectations as to pay were high - certainly higher than the appointment they in fact made. Further, if they were disinclined to appoint him because of dyspraxia, it is hard to understand why they should shortlist and interview him. The reason that they were interested in his apparently extensive experience indicates why they did, and is not related to dyspraxia. The only reason for believing this was a reason for not appointing him was that he thought (erroneously) that his CV contained extensive generic material about dyspraxia which he thought would prejudice them against him. The witness statement from the recruiter shows the claimant already knew the CV only contained a brief reference to the condition. But in any case, if he thought the *fact* of his dyspraxia was the reason for not offering him the job, he would not have withdrawn when he did, because the CV *did* mention it, and he was still interviewed. His grounds of claim suggest it was his performance in the interview that was affected by his claim, but he has never maintained that his oral competence is affected by dyspraxia.

27. At best the claimant seems to have been very confused about what he needed to do to establish discrimination. His reference to having been told by an employment judge he needed to have it on his CV indicates that if he was to argue discriminatory recruitment, he needed to establish that the would-be employer knew of the condition. Here the employer did know of the condition, interviewed him orally, as requested, and then rejected him for other reasons, which they fed back to him at the time. His reason for withdrawing – because he had learned the recruiter did not leave all the text about dyspraxia on his CV – is also hard to understand. He already knew that. He does not dispute the evidence of the recruiter to that

effect. The employer's response did not tell him anything he did not already know.

28. The tribunal has to exercise discretion in making an award of costs even if it finds the claim has no reasonable prospect of success. The tribunal should consider that disability law can be hard to understand, at any rate for non-lawyers, and a litigant in person like the claimant may not understand discrimination law, and may be confused on what he has to prove.

29. I have not been able to assess the claimant's ability myself, as he is not here. I observe his written communication is poor, neglecting capital letters and punctuation, and probably not checking for mistakes and mistypes. He does however have a number of academic qualifications in chemical engineering, including a doctorate, so must be intelligent and able to understand how reasoning is applied to evidence to reach conclusions. There is an assessment report from one of the universities he attended, indicating average competence in reading, below average in writing, and above (70th centile) in mathematics. Even so, experience suggests that intelligent lay people can still be confused about tribunal process and about discrimination law.

30. The numerous other claims suggest however that this claimant is well engaged with employment tribunal process, and with disability discrimination. With at least 38 claims that are known about, he has had opportunities to reflect and learn. Does this claim go beyond not understanding the law? Was the claimant trying to use the process for financial advantage, without wanting to take any claim to a hearing for determination?

31. There is nothing wrong with parties seeking to settle claims rather than take them to hearing. Courts and tribunals encourage parties to see if they can resolve disputes without a hearing. What is wrong is where a claimant who has no intention of pursuing a claim to a hearing, because he knows it is flimsy and will not bear examination, only brings his claim because he hopes to take advantage of a respondent wanting to avoid the considerable legal cost of defending a claim that may not be worth very much, or may be worth nothing, seeking a "commercial" settlement as the lesser of two evils. The claim may be settled and he then withdraws it. Or if is stoutly defended, he withdraws and waits for another opportunity. Claims never go to a hearing. That picture suggests vexatious claims, ones where the claimant hopes to make some money by claiming, but not because of the merits of his claim.

32. Is this what the claimant was doing? There must be strong suspicion that he was, given the long sequence of claims brought and then withdrawn. Returning to the definition of what is vexatious, the inconvenience and expense of a claim bore little proportion to the advantage to the claimant, who already had a job paid at more than the successful candidate was earning, and where the prospective value of an award for injury to feelings had to be discounted by the poor prospect of proving the claim, knowing what the claimant did about the facts on which it was based. Added to that, his practice of serially bringing and withdrawing claims which never went to hearing (except when a respondent applied for strike out and there

was a preliminary hearing) pointed to his bringing this claim for "a purpose or in a way which is significantly different from the ordinary and proper use of the court process", which is to get a ruling on an alleged breach of the law. Disability discrimination is important, and getting a declaration would have been a proper purpose of making a claim, even if for other reasons it had little value. Yet he did not seek a declaration, or press on to hearing in the hope of an award for injury to feelings. It suggests he never intended the claim to go that far. That indicates vexatious conduct. I must be cautious about this conclusion, as the claimant does not express himself well on paper, but he has had the opportunity of putting his case orally today, and has not taken it up.

33. There is discretion to make or not make an order for costs even if one or more of the rule 76 grounds are made out.

34. In exercising discretion I can take account of the claimant's ability to pay. When he made the application he had been out of work, but was then earning £50,000 gross per annum. His CV, though vaguely dated, shows a pattern of reasonably frequent short-term work with intervals of unemployment. In a recent email he states that the job that he started on 17 September 2018 (the day before the telephone interview) and was paid £50,000 came to an end on 3 May 2019. From 11 May 2016 he is entitled to £73.10 per week in job seeker's allowance. He owes £9,063 on a credit card. Nothing is said of his bank account balances, housing equity, wife's employment status, savings, and so on, though I was shown some emails exchanged with the respondent about four cars he owns which discuss their various states of repair.

35. I have in the bundle the reasons of other employment judges making costs orders or when considering deposit orders as an alternative to strike out, and I have combed these for a record of his means. EJ Sharett recorded in January 2019 that the claimant had not supplied information as to means. E J Findlay in Birmingham in March 2019 found that the claimant had £46,000 of equity in his house, shared with his partner. EJ Clark in Nottingham recorded on 2 March 2019 that he had a mortgage of "over £200,000", and that his wife worked part-time; he was said to be earning £50,000 per annum. E J Burgher in East London recorded on 9 May 2019 that the claimant had recently *resigned* his employment.

36. I conclude that while the claimant is currently unemployed, there is no reason to think he will not find other reasonably remunerated employment soon. He has an asset in his house. There may be savings. Even if he could not pay immediately, he could pay later or by instalments.

37. Besides ability to pay, I heed that discrimination claims are important, even if they have a low monetary value, and people who believe they have been discriminated against because of a protected characteristic should not be discouraged from bringing a claim because they are worried about costs orders being made against them. I also recognise that it is in human nature to be reluctant to concede what is obvious but unwelcome, and that might explain why a claimant brings or pursues a claim when he knows nothing is likely to turn up to improve it. But even after taking these factors into account, I conclude that this is a case both where the claimant had no reasonable prospect of success, and the tribunal should exercise

discretion to make an order for costs. By the time he started this case the claimant knew or should have known a lot about disability claims in recruitment, and also knew more than most litigants in person about tribunal procedure. He was routinely making claims which were either dismissed or which he withdrew. It is not known if he settled any, but none went to a hearing. It does very much look as if he brought claims to see if he could get a payment in settlement, and then abandoned them. That is not a proper use of the tribunal process, and it is not a reason why potential employers should have to incur legal costs defending claims that a claimant does not intend to pursue.

Amount of Costs

38. The respondent seeks £1,845 at £225 per hour. That amount of work is not unreasonable given the 15 page grounds of response, which are carefully and clearly structured, based on the documents, and set out relevant law. Taking into account the need to take instructions, find documents and research the law before starting to draft, 8 hours is reasonable.

39. The solicitor's firm is based in Reading. The costs guidelines for 2010 put this in national 1 band, where a solicitor of 8+years was set at £217 per hour and for 4+ years at £192 per hour. Given ongoing inflation in the next 8 years (24.19%, cumulatively) and the likely seniority of a solicitor preparing such clear and comprehensive grounds, the hourly rate claimed is reasonable.

40. Nothing is said on whether the respondent is registered for VAT. Most businesses are so registered, unless very small indeed. I assume the respondent is registered, so I do not add the solicitor's VAT, as that is recoverable by the respondent. If I am wrong in the assumption the respondent can apply for reconsideration.

41. The claimant is ordered to pay the respondent £1845 in costs.

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Employment Judge Goodman

Date 24 June 2019

JUDGMENT SENT TO THE PARTIES ON

26 June 2019

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FOR THE TRIBUNAL OFFICE