**Case Number: 2200348/2016**

# EMPLOYMENT TRIBUNALS

**BETWEEN**

| **Claimant** | **and** | **Respondents** |
|---|---|---|
| **Mr U M Nwakwu** | | **Westminster City Council** |

## JUDGMENT ON COSTS OF THE EMPLOYMENT TRIBUNAL

**SITTING AT: London Central** **ON: 27 August 2019**

**BEFORE: Employment Judge A M Snelson (in chambers)**

On considering the written representations of the parties, the Tribunal adjudges that the Respondents' application for costs is refused.

## REASONS

*Introduction*

1 This case has something of a history, but for present purposes a brief sketch of the background will suffice. In a claim form presented on 4 March the Claimant brought complaints under the Equality Act 2010, together with claims under the Agency Worker Regulations 2010 ('AWR') and the Employment Rights Act 1996, Part II (unauthorised deductions from wages). Those claims were all dismissed in July 2017 following a five-day hearing before a full Employment Tribunal ('ET'). Following an appeal to the EAT, certain claims under AWR were remitted to the ET for rehearing. They came before me on 25 June this year. By an oral decision given that day I dismissed them. My judgment was issued the following day.

2 Having heard my adjudication on liability, Mr Ross, counsel for the Respondents, made an application for costs. I directed that it must be presented in writing so that the Claimant would have the opportunity to consider it fully and, if so desired, take advice before responding. It was agreed that the matter would then be determined on the papers without a further hearing.

3 Before the adjournment the Claimant accepted the opportunity to give evidence about his means.

*The law on costs*

4 The power to make costs or preparation time awards is contained in rule 76 of the Employment Tribunals Rules of Procedure 2013, the material part of which is the following:

> **(1) A Tribunal may make a costs order … , and shall consider whether to do so, where it considers that –**
>
> **(a) a party … 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.**

As the authorities explain, the rule poses two questions: first, whether the Tribunal has power to make an order; second, if so, whether the discretion should be exercised.

5 Orders for costs in this jurisdiction are, and always have been, exceptional. That said, I remind myself that, when our rules of procedure were revised in 2001, the Tribunal was for the first time not merely permitted, but obliged, to consider making a costs order where any of the prescribed conditions (vexatiousness, abusiveness etc) was fulfilled, and a new and wider criterion of unreasonableness was added. It seems to me that these innovations, preserved in both subsequent revisions of the rules, indicate a desire on the part of the legislature to encourage Tribunals to exercise their costs powers more freely than they did in the past, where unmeritorious cases are pursued or where the manner in which litigation is conducted is improper or unreasonable.

*The application*

6 The nub of the application was that the Claimant acted unreasonably in the conduct of the proceedings in that he unreasonably rejected an offer of settlement in the sum of £1,100 made in a letter from the Respondents' solicitors dated 12 April 2019. It was contended that the claim, taken at its highest, had an exceedingly modest value and that it was quite unreasonable for the Claimant not to accept what was proposed.

7 The Claimant resisted the application on a number of grounds.

*Discussion and conclusion*

8 In my view, the application as put is unsustainable. The letter of 12 April 2019 is not marked "Without prejudice save as to costs". That being so, it does not come within the narrow exception to the general rule, applicable in the ET as in the courts and across the civil justice system generally, that communications seeking to achieve a settlement of litigation are privileged and cannot be referred to. In *Kopel v Safeway Stores plc* [2003] IRLR 753, the EAT (Mitting J and members) held that the *Calderbank* principle did not operate in the ET but that the Tribunal could nonetheless take account of a *Calderbank* offer when considering whether or not to make a costs order, although a failure to beat the offer would not of itself

justify an order, since the key question was whether the party to whom the offer had been made had acted unreasonably.

9 The letter of 12 April was not a *Calderbank* letter. Absent the "Without prejudice save as to costs" marking, the unqualified privilege ordinarily attaching to communications seeking to achieve a settlement applied. That privilege could not be waived unilaterally: see *e.g. Brunel University & Another v Webster & Another* [2007] EWCA Civ 482. The Claimant has not been invited to consent to the waiver, much less granted such consent.

10 The application depended entirely on the letter of 12 April and the Claimant's response (or non-response) to it. If the Tribunal cannot have regard to the letter, the application necessarily falls. Moreover, even if this were not so, the Claimant would have powerful grounds for saying that I was tainted by having been shown the letter and so precluded from entertaining the application in any event.

11 For all of these reasons the application is refused.

EMPLOYMENT JUDGE Snelson

28/08/2019

**Sent to the parties on - 28/08/2019**

**For Office of the Tribunals**