



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs A Safjanowska

**Respondent:** Elior UK Plc

**Heard at:** Manchester

**On:** 9 September 2019

**Before:** Employment Judge Hill  
Ms M T Dowling  
Dr H Vahramian

## JUDGMENT ON COSTS

The judgment of the Employment Tribunal is that there be no order for costs. The respondent's application fails and is dismissed.

## REASONS

### Application

1. The respondent made an application for a costs order on 3 December 2018 following the Reserved Judgment dismissing the claimant's claims for race, sex and disability discrimination sent to the parties on 7 November 2018.
2. The respondent made their cost application under both limbs of Rule 76(1) Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 which provides:

*Rule 76(1) a Tribunal may make a costs award or preparation time 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 in part) or the way that the proceedings (or in part) have been conducted; or*

*(b) Any claim or response had no reasonable prospects of success;*

3. In particular, the respondent argued that:-
  - (a) The claimant's claim had no reasonable prospect of success from the outset and
  - (b) That the claimant unreasonably refused two reasonable settlement offers made by the respondent prior to the hearing and that amounted to unreasonable conduct of the proceedings.
4. The claimant resisted the application by way of letter dated 16 April 2019 and submitted that she had insufficient means to pay any costs award.
5. Both parties consented to the hearing being dealt with by way of written representations.

### **The Law**

6. Rule 76 sets out when a costs order or preparation time order may be made. Rule 76(1) provides:-

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*(a) A party (or that parties' representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or in part) or the way that the proceedings (or in part) have been conducted; or*

*(b) Any claim or response had no reasonable prospects of success;*

7. The Tribunal is required to follow a three stage test when considering applications for a cost award:-

(a) Has the threshold been met (the threshold test);

(b) Is it appropriate to make the order (the discretionary test);

(c) How much will the order be (the amount)?

8. Whilst the Tribunal has the power to make costs orders it has a wide discretion when deciding whether or not to make such an award. Costs awards in the Employment Tribunal are the exception rather than the rule and the starting point is generally that each party will bear their own costs.

### **The Evidence**

9. The Tribunal was provided with the respondent's cost application consisting of six pages, copies of two letters dated 1 March 2018 and 26 July 2018 setting out settlement offers to the claimant.

10. The claimant provided a response to the application dated 16 April 2019 and a small bundle of documents which included medical evidence/sick notes and bank statements.

### **Consideration**

11. The Tribunal considered the two limbs of the respondent's application separately and applied the above test to both.

### **No reasonable prospect of success Rule 76 1(a)**

12. The respondent argued that the claimant had made a number of allegations (in total 28) in respect of her claims for sex, race, harassment and failure to make reasonable adjustments. The respondent's case was that the Tribunal had found the majority of the allegations had not been made out, that this meant that the claimant would have been aware that she had no reasonable prospect of success.

13. The Tribunal accepts that the claimant did make a number of allegations and that the Tribunal found that the majority of these allegations did not amount to facts from which it could conclude the Claimant had been discriminated against. However, the Tribunal found, and the respondent accepted, that the claimant did suffer discrimination whilst working for the respondents at the hands of Mr Lee Edmondson, the respondent accepted that the comments were made by Mr Edmondson and that they were such comments that had Mr Edmondson not left the respondents employment he would have been disciplined.

14. Indeed, the respondent's letters dated 1 March 2018 and 26 July 2018 both state "the respondent accepts the claimant is entitled to be compensated in respect of this specific allegation and the three comments to which she was subject".

15. The Tribunal finds therefore that the respondent also considered that the claimant's substantive claim of race discrimination did have reasonable prospects of success.

16. The Tribunal finds the claimant's further allegations were set against a background of bone fide racial comments that had been made to her and that it cannot be said that the claim had no reasonable prospect of success.

17. The Tribunal took time to consider each allegation made by the claimant and it was a difficult process. Once the Tribunal accepted the respondent's defence that it took all the reasonable steps to prevent such discrimination occurring it was clear that neither the claimant nor the respondent considered prior to the hearing that that aspect of her claim would fail.

18. The Tribunal notes that at no time during the proceedings had the respondent sought to strike out any aspects of the claimant's claim or asked the Tribunal to make a Deposit Order. Further, the offer to the claimant was not an economic offer but was a genuine acceptance that the claimant may be successful at Tribunal and the offer was therefore made in order to avoid proceeding to Tribunal. However, whilst the offer may have been a reasonable offer the Claimant was entitled to pursue her claim.

19. Turning to the second limb of the respondent's application that the claimant unreasonably refused an offer of settlement and that that amounted to unreasonable conduct of the proceedings the Tribunal again finds that the threshold has not been met.

20. The Tribunal was provided with the copies of the two letters, the first offer being for £1,500 and the second for £3,500. The Tribunal was not provided with any evidence of the claimant's rejections and/or counter proposals (if any) however the respondent states in its application that the claimant rejected these offers. The Tribunal finds that the offers made by the respondent in respect of the racial comments appear to be reasonable offers based on Vento guidelines and the Tribunal also finds that the respondent acknowledged the seriousness of Mr Edmondson's actions and stated that he would have been disciplined. However, the Tribunal finds that it cannot be said that the claimant's refusal to accept the offers was an unreasonable refusal in the circumstances and it does not amount in any event to having acted unreasonably, either in the bringing of or in the conducting of the proceedings.

21. The Tribunal finds that the threshold in both limbs has not been met and therefore makes no award.

22. Whilst the Tribunal has not gone on further to consider the means of the claimant, the Tribunal has noted that the claimant is of limited income, lives in rented accommodation and that there is no evidence that the claimant has any assets or disposable income in order to meet the costs of any award.

23. Further, the Tribunal also noted that the respondent failed to provide any evidence for the costs sought, no certificate of cost was provided or copies of Counsel's fee, notes and/or expenses. The Tribunal considers that had the threshold been met that in the absence of evidence in support of the costs incurred the Tribunal would not have made an award in any event.

Employment Judge Hill

Date: 14 October 2019

JUDGMENT SENT TO THE PARTIES ON  
17 October 2019

FOR THE TRIBUNAL OFFICE

**Note**

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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