Case Number: 2302155/18

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr S Saleem

- and –

Vodafone Limited

HELD AT **London South** **ON** **5 September 2019**

EMPLOYMENT JUDGE PHILLIPS

Appearances
For Claimant: **In person**
For Respondent: **Ms K Moss, of Counsel**

PRELIMINARY HEARING

JUDGMENT

The Judgment of the Tribunal is that

1. the Tribunal has no jurisdiction to consider the Claimant's claims of unfair dismissal and religious discrimination. The Claimant was not an employee and had insufficient continuous employment service to bring an unfair dismissal claim; and the complaint of religious discrimination was presented out of time. Both claims are dismissed.
2. the Respondent's application for costs is dismissed.

REASONS

Procedural history

1. The hearing on 5 September 2019 was listed as an Open Preliminary Hearing to determine whether the Tribunal had jurisdiction to hear the Claimant's claims having regard to issues raised by the Respondent in its ET3, as set out below.

2. The Claimant, by his ET1 dated 8 June 2018, brought claims of unfair dismissal and race discrimination arising out an incident that occurred on 1 September 2011, when he went to work for the Respondent in its Sutton shop as a sales assistant. This was the only day he worked for the Respondent and he went as a contract worker from a recruitment agency. When he arrived the manager told him he could not work there because he had a beard. He returned to the recruitment agency. Mr. Saleem was later invited back and told he could work at the store but chose not to return. Vodafone apologised to the Claimant at the time for what had happened. While not accepting that it was due to his beard, they apparently accepted that he should not have been spoken to as he was.

3. The Claimant now seeks to bring complaints to the employment tribunal of unfair dismissal and religious discrimination. On 24 September 2018, the Respondent issued an application to strike out the claims on the basis (1) they were out of time; (2) the Claimant was not an employee; and (3) the Claimant had no sufficient continuous service to bring an unfair dismissal claim. These are the jurisdictional issues with which I am concerned today.

Claimant's evidence and submissions

4. The Claimant did not have a witness statement but gave oral evidence and was cross-examined by Ms. Moss. I was able to ask him questions of my own. He explained that the reason for his long delay in bringing this claim was a mixture of ignorance of the law and his rights, getting bad advice from professionals and intermittent illness. He said at the time of the incident he consulted various profession advisers, including lawyers, ACAS and the CAB, and has visited the Employment Tribunal Offices at Croydon. He says he was basically told that as a temporary worker he did not have a claim. He said he believed he had exhausted all his options at the time. He also said that the incident had led to a number of medical issues as well as depression. He said he tried but had been unable to get hold of his medical records for today's hearing as he had changed GP and had been told that some of his notes were not immediately available, although he hoped they would be become available. He said the incident in September 2011 had had a deep impact on him and he was still living with the consequences, which had changed him. He said later, in 2017, he spoke to someone who told him he did have grounds for a claim and also that there were time limits. He did more research and discovered he did have grounds for a claim.

Respondent's submissions

5. Ms. Moss makes a number of jurisdictional challenges to the Claimant being allowed to bring this claim. These were that 1) the Claimant was not an employee but a contract worker and in any event had insufficient continuous service to bring an unfair dismissal claim; 2) the failure of the Claimant to include an Early Conciliation [EC] number in his Claim Form was fatal; and in any event 3) his claim was out of time under the just and equitable test for bringing out of time discrimination claims.

6. As far as the first point is concerned, Ms. Moss submitted that there was no dispute that the Claimant only worked one day and in any event was not an employee

- he was a contract worker from a recruitment agency. There was, she submitted, no doubt about the hopelessness of the unfair dismissal claim.

7. As far as the second point on the EC number being omitted from the ET1 was concerned, Ms. Moss referred to the EAT case of *Adams v British Telecommunications plc* [2017] ICR 382, where the EAT considered whether a tribunal was right to reject a claim that was submitted out of time, after being returned to the claimant due to an incorrect EC number having been stated. The ET1 was submitted just in time but the claimant entered an incorrect EC certificate number. By the time a new corrected ET1 with the correct EC Certificate number was lodged, she was 2 days out of time. In this present case, she said no revised claim form had been submitted with the EC number in, and although it would be possible for the Claimant to make an application at this hearing for reconsideration, as things stood, Ms. Moss submitted this was a fatal flaw as there was currently therefore, no extant claim. Even if such an application was made now, the ET1 would be even further out of time.

8. Thirdly, Ms. Moss submitted that under s123 Equality Act 2010, there is a requirement for discrimination complaints to be bought within 3 months of the act complained or such other period as the tribunal thinks just and equitable. Ms. Moss said with regard to the exercise of the just and equitable discretion, the factors mentioned in s 33 Limitation Act 1980 were a useful checklist. With regard to these factors, she submitted that

a. it was now 8 years since the incident;
b. the Claimant said he had sought advice but his explanations were not adequate or reasonable for such a long delay;
c. on 29th March 2012, the Claimant had given an interview to a local paper in which he talked about seeking advice and had said there had been blatant discrimination; this suggested, she said, that he had got advice at this time;
d. as far as the extent to which the cogency of the evidence was affected by the delay, the Respondent had no contemporaneous written records of the incident or contemporaneous documents relating to it; none of the key employees who were involved at the time remain in the Respondent's employment;
e. the Respondent had done all it could to check for records;
f. the Claimant's own evidence (that he started researching again in 2017 and spoke to someone) and the newspaper interview (March 2012) suggested he had not acted with any degree of promptness at all once he knew of the possibility of taking action;
g. while he had, it appeared, taken some professional advice once he knew of the possibility of taking action, there were swathes of time that were unaccounted for and there was a lack of detail or precision in his account as to when he had done what.

9. Ms. Moss concluded that time limits were in place for good reason, the Claimant had not acted promptly and therefore in all the circumstances it was not just and equitable to extend time in this case. Further, as far as prospects of success were concerned, Ms. Moss submitted that the unfair dismissal case was hopeless, as the

Claimant was a contract worker with only 1 day's service; she accepted that there might be a route for the discrimination claim by virtue of s 41 Equality Act 2010.

Conclusions

10. I will deal shortly with the first of the Respondent's submissions on the unfair dismissal claim. Although prior to 6 April 2012, the qualifying period for bring an unfair dismissal claim was 1 year's continuous service, even if the Claimant was an employee, he clearly did not have the requisite length of service to bring a claim of unfair dismissal. he was engaged for less than a day. The unfair dismissal claim was never going to succeed because of this alone. Further, as for whether the Claimant was an employee, there seems no dispute on the facts that he was not an employee but rather was a contract worker. While as a contract worker he still potentially has rights under the Equality Act 2010, unfair dismissal claims can only be brought by employees. The unfair dismissal claim was never going to succeed because of this. For those two reasons the unfair dismissal claim is dismissed.

11. The remaining two points raised by the Respondent namely (1) was the failure by the Claimant to submit a revised ET1 including an EC certificate number fatal; and (2) whether the Tribunal should exercise the discretion it has under s123 Equality Act 2010, to extend the requirement to bring a discrimination claim within 3 months of the act complained period, for such other period as the tribunal thinks just and equitable, require more detailed consideration and I will deal with these two issues in more detail below.

The Law

The absence of an Early Conciliation certificate

12. Rule 10 of the ET Rules of Procedure 2013 provides that: (1) The tribunal shall reject a claim if... (c) it does not contain all of the following information _ (i) an early conciliation number.... Rule 12(1)(f) states that in such a case, a claim should be rejected and provides for a mechanism for reconsideration by resubmitting a new claim with the error corrected.

13. In *Sterling v United Learning Trust* UK EAT/0439/14, Langstaff P stated that it is implicit in Rule 10(1)(c)(i) that the EC number should be an accurate number. In Sterling, the tribunal had rejected the claim form on the basis that the claimant had not fully entered the EC number. Mr. Justice Langstaff went on to say that once it appeared to be the case that the EC number recorded on the claim form was not accurate, the tribunal was obliged to reject the claim form and that rejection would stand subject only to reconsideration.

14. In *Adams v British Telecommunications Plc*, Simler P considered Rule 10 in the context of an unfair dismissal claim. In *Adams*, two digits from the ACAS EC number had been omitted so that the number was incomplete and therefore inaccurate. Simler P referred to Rule 10(1)(c)(i) as a mandatory rule requiring a tribunal to reject a claim. In contrast to the position where a name of a claimant or a respondent was not the same as the name of the claimant or respondent on the EC Certificate, where rule 12(2A) provided an 'escape route' in case of minor error where

it was not in the interests of justice to reject the claim, there was no escape route where the number was in error. In cases where an ET1 is rejected because of an error in the EC number recorded, a claimant may apply for reconsideration under Rule 13(1) on the basis that the notified defect can be rectified. However, as noted in *Adams*, pursuant to Rule 13(4) of the rules, where a defect is rectified, the date of presentation of the claim is deemed to be the date on which the defect is rectified and not the date when the claim was first presented. In *Adams*, the effect of this was to render the claim outside the usual 3-month time limit. The Tribunal's decision that in those circumstances, it had not been reasonably practicable to submit the ET1 in time and that the resubmitted claim was submitted within a reasonable further period was upheld by the EAT.

15. Rule 6 of the ET Rules 2013 provides that, "A failure to comply with any provision of these rules [excepting certain rules which do not include Rule 10] does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include all or any of the following – (a) waiving or varying the requirement ...".

The just and equitable extension under the Equality Act

16. Under s123 Equality Act 2010, discrimination complaints may not be brought after the end of the period of 3 months, starting with the date of the act to which the complaint relates or "such other period as the employment tribunal thinks just and equitable". The "just and equitable" test for allowing time to be extended in a discrimination case is accepted to be wider and more flexible than the "reasonably practicable" test for unfair dismissal cases. There is no prescribed list of factors for the tribunal to consider, but there is a useful checklist of factors to consider set out in s 33 Limitation Act 1980, namely

a. the length of and reasons for the delay
b. the extent to which the cogency of the evidence is likely to be affected by the delay
c. the extent to which the party sued had co-operated with any requests for information
d. the promptness with which the Claimant acted once he knew of the possibility of taking action
e. the steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking action

17. In *Robertson v Bexley Community Centre* [2003] IRLR 434, the Court of Appeal reviewed the law and principles which should guide Tribunals in deciding whether to exercise their discretion to extend time. The Tribunal has a wide discretion. On the other hand, time limits are jurisdictional, and it is for a Claimant to persuade a Tribunal to accept a late Claim. A tribunal does not need to be satisfied that there is a good reason for the delay before finding it just and equitable to extend time. In *Abertawe Bro Morgannwg University v Morgan* (2018) ICR 1194, the Court of Appeal explored the principles behind extending time limits. Ms Morgan suffered from a depressive illness which caused her to be absent from work for all but two days in the last 17 months of her employment. She issued out of time claims for harassment

related to disability and failure to make reasonable adjustments. The tribunal extended her time to bring the claims. The Court of Appeal held that the "such other period as the employment tribunal thinks just and equitable" extension, indicates that Parliament chose to give the tribunal the widest possible discretion with limited scope to challenge on appeal. The test is not however one of exceptional circumstances, it is a just and equitable one (*Pathan v South London Islamic Centre* UKEAT/0312/132).

Discussion and Conclusions on remaining issues

18. As far as the failure to include an Early Conciliation (EC) number is concerned, as stated above Rules 10 and 12 of the Employment Tribunal Rules 2013 deal with this. These state that a tribunal should reject a claim if there is no EC number. Rule 12(1)(f) states that in such a case, a claim should be rejected and a mechanism for reconsideration is provided for which involves resubmitting a new claim with the error corrected.

19. In this case, the Claimant submitted his ET1 on 8 June 2018. He had not however included an EC number – and indeed had ticked, incorrectly, a box that an exemption applied. The claim was properly rejected by the tribunal, who notified the Claimant of this on 12 July 2018. On 11 July, the Claimant obtained an EC Certificate. On 12 July 2018, the Claimant was told of the omission to include an EC number. He sent in to the Tribunal his EC number. At this point, the Tribunal accepted, on 19 July, his claim and it was allowed to proceed. No amended claim was submitted.

20. In contrast to the cases of *Stirling* and *Adams,* the claim here was rejected but once the number was provided, it was allowed to proceed without an amended ET1 being submitted. Here it appears that once the EC number was supplied, the Tribunal decided that the defect had been rectified and accepted the claim in full. The Claim proceeded on the basis that the defect had been rectified and the claim had been accepted. As the claim was accepted, the Claimant could not apply for reconsideration. There is no provision in the rules that enables a Respondent to apply for reconsideration of an acceptance. In this respect this case is distinguishable from the cases of *Stirling* and *Adams*. Further, there is nothing in the Rules that specifically requires a new or amended ET1 form to be submitted, as long as a Judge decides that the defect is rectified.

21. I also considered Rule 6 of the E Rules. Rule 6 can it appear apply to Rule 10. It is not expressly excluded, although a mandatory procedure is provided for in Rules 13, which is also not expressly excluded from Rule 6. If there was any failure to follow the relevant Rules the Tribunal has power to waive or vary the particular requirement. There is a certain tension if a rule which is mandatory on its face, such as Rule 10, can be avoided by the exercise of a discretion under Rule 6, which is operated on the bases of what is considered to be just. Rule 10(1)(c)(i) does require the submission of an EC number in the ET1, but this was rectified by the sending of the number to the Tribunal. The Tribunal then accepted the ET1. In so far as the analysis in paragraph 20 is erroneous, it appears to me that any failure to comply with Rule 13 can be waived or varied.

22. In these circumstances, I did not consider that I had the power at this point to reject the claim and I do not there accept the Respondent's submission on this point that the absence of the EC number and the failure to submitted a further ET1 is fatal. The Tribunal allowed the claim to proceed and I find therefore that there was an extant claim.

23. As for the question of whether or not to exercise my just and equitable discretion to extend time under s123 Equality Act 2010, I bore in mind the factors mentioned in s 33 Limitation Act 1980, as set out at 16 above. Bearing those in mind, and taking in to account the Claimant's evidence as to why his delay was so long, and the submissions made by Ms. Moss, on balance, I decided this was not a case where I was minded to exercise my discretion.

24. It is now 8 years since the incident that the Claimant relies upon to bring these claims. In the context of a primary time limit of three months, that delay is very significant. Ignorance of time limits is not a defence or excuse, but if there are reasonable grounds for that ignorance, such that it makes it hard to comply with the Rules that can be considered relevant. In this case, the Claimant says he initially sought advice from a number of places but was told, wrongly it appears as far as a discrimination claim was concerned, he did not have a claim. However, on or about 29th March 2012, the Claimant gave an interview to a local paper in which he talked about seeking advice and talked about there being blatant discrimination. The article referred expressly to the Claimant having a beard for religious reasons; it refers to Vodafone having investigated the complaint and sent him an explanation and apology. It quoted the Claimant's MP saying "This was a shocking case of discrimination …" This all suggested to me that he had known at that time, if not some time before, that he did have grounds for a claim. This was still some 6 months after the incident but clearly all the facts and circumstances would have been much fresher then. Further, on the Claimant's own evidence, he had spoken to someone in 2017 and started researching again, and had been made aware that there were grounds for a claim and that there were time limits. In my judgment, the Claimant had not acted promptly once he knew of the possibility of taking action; further, his evidence was lacking detail and precision as to what he had been done and when, with regard to obtaining appropriate professional advice once he knew of the possibility of taking action.

25. I also noted that in regard to extent to which the cogency of the evidence is likely to be affected by the delay, the Respondent said it had no contemporaneous written records of the incident or contemporaneous documents relating to it and none of the key employees who were involved at the time remained. However, there did not appear to me to be much dispute as to the facts that underpinned this claim (and there was a lot of useful information in the newspaper article I had been referred to, which include comment from the Respondent). I was not satisfied this was a determinative point in this case.

26. The Claimant submitted that he had had various mental health issues over the intervening period, including depression. He did not submit, as I understood him that this was what restricted him in the three-month period of the primary time limit – his evidence for this period was that he sought advice and was told he had no claim, as he was a temporary worker. There was no medical evidence about the Claimant's mental health in the intervening years. He said he had tried to get this but there were

problems in his obtaining it. I did not doubt the Claimant's evidence that the incident had had a severe impact on him and his confidence and his health over those years.

27. On balance, however taking into account all the matters set out above, but in particular the two matters pinning down the Claimant's knowledge and awareness, this was not a case where I was minded to exercise my discretion.

Application for costs

28. After I delivered my oral judgment dismissing the Claimant's claim, Ms Moss asked for the Respondent's costs. She submitted a bill for around £6,800 in respect of external solicitors' and Counsel's fees. She submitted that the Claimant had acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing the proceedings (or part), in the way he had conducted the proceedings (or part) and / or the claim had no reasonably prospect of success. Ms Moss submitted that it was unreasonable for the Claimant to continue his claim in the light of his refusal to engage with a number of "drop-hands" offers, and given the weaknesses of his complaint which had been identified by the Respondent in the ET3, and in the four cost warning letters, which had been sent: on 18 December 2018, (if withdrawn by 4 January, the Respondent would not seek any costs); 10 January 2019 (a reminder); and 16 April 2019 – a further opportunity to withdraw on no costs; and 4 September (informing the Claimant that they would be making a costs application).

29. The Claimant's position was, shortly, that he had been caused a lot of stress, health and other problems by what had been done to him by the Respondent in 2011. When he realised he could bring a claim he had done his best. In essence, if I paraphrase what I think he was saying, I understood him to be saying "My claim was in no way vexatious, unreasonable or misconceived; it was initiated in good faith as a way for me to seek justice against the organisation that had caused me stress, illness and upset for a period of over 8 years." As far as costs were concerned, he said he was not really paying attention to these, and he had only just realised what this meant. In an email copied to the Tribunal on 4 September, responding to the Respondent's last offer, the Claimant wrote, inter alia, "stop sending me threatening emails. The judge accepted my claim when s/he was in the position to reject the claim. If there were no grounds for this then the judge would reject this but it has not therefore I am not to pay any of your proposed fees. Within the initial three months time period I sought as much legal advice as possible in which I was told due to temporary employment I have no grounds to do anything. After the 3 months time period I was told in fact I had righst to follow this up so I am exercising my rights. Again I am not to pay any fees whasoever for this. As far as the Claimant's ability to pay was concerned, the Claimant gave short oral evidence about his means. He had just started a new job, in the last week or so, doing 20 hours a week; this paid just over £750 a month. He said had had problems holding down a steady job since the incident in September 2011. He also said he had some debts at the moment.

Law

30. So far as material, the 2013 Employment Tribunal Rules provide as follows:-

> 76(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 the proceedings (or part) had been conducted; or

b. Any claim or response had no reasonably prospect of success.

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."

31. As far as employment tribunals and costs are concerned, the power to make an order containing an award of costs against a party to proceedings is subject to a restriction relating to conduct, as set out in Rule 76. If a Tribunal is able to conclude that the commencement or pursuit of the claim has been vexatious, abusive, disruptive or otherwise unreasonable or had no reasonable prospect of success, then a Tribunal **must** proceed to consider whether to make a costs order. However, while the Tribunal must consider whether to make a costs order, it is not obliged to. That process is discretionary. At this stage a tribunal may, but is not obliged to, take into account both in terms of whether to make an order at all and if so the amount, the paying party's means.

32. In *AQ Ltd v Holden* (UKEAT/0021/12) the EAT said, at para. 41: "The threshold tests in [what was then Rule 40(3)] are the same whether a litigant is or is not professionally represented. The application of those tests should, however, take into account whether a litigant is professionally represented. A tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals; and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent themselves. Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life." As such lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser and this is something tribunals must bear this in mind when assessing the threshold tests.

33. Further, even if the threshold tests for an order for costs are met, the tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. At this stage too, it is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice."

34. Until 2004, there was no express provision about Tribunals taking into account the paying party's means. In *Benyon v Scadden* [1999] IRLR 700, for example, the EAT decided that while it may be desirable to look into means, where possible, before making a costs order, it could not be said that a failure to do so amounted to an improper exercise of discretion, so that employment tribunals were not required to examine a party's means before making an order for costs against them, and means were no bar to the making of a costs order. In *Kovacs v Queen Mary and Westfield College* [2002] ICR 919, in answer to the question "ought tribunals to take account of the respective parties' means when exercising their costs discretion under Rule 12?", Simon Brown LJ, said "In my judgment the clear answer to this

question is “No”: Regulation 12 neither required nor provided any machinery for an inquiry into a party's means. It was not until the 2004 Rules, that there was a specific provision included that gave an express power to take account of means. The current power is now set out in Rule 84 of the 2013 Rules.

35. *In Jilley v Birmingham and Solihull Mental Health NHS Trust* (UKEAT/0584/06)) the EAT considered the exercise by a Tribunal of its discretion under what was then Rule 40(3) of the 2004 Rules, whether to take into account the paying party's ability to pay. It held that if a Tribunal decides not to do so, it should say why. “If it decides to take into account ability to pay, it should set out its findings about ability to pay, say what impact this has had on its decision whether to award costs or on the amount of costs, and explain why. Lengthy reasons are not required. A succinct statement of how the Tribunal has dealt with the matter and why it has done so is generally essential. The Tribunal has no absolute duty to do so. … In many cases it will be desirable to take means into account before making an order; ability to pay may affect the exercise of an overall discretion, and this course will encourage finality and may avoid lengthy enforcement proceedings. But there may be cases where for good reason ability to pay should not be taken into account: for example, if the paying party has not attended or has given unsatisfactory evidence about means. A question for the Tribunal in this case will be whether to take into account means given that in any event it has no power to do so in respect of the first proceedings. It may or may not be desirable to do so; it will depend on the submissions which are made to the Tribunal. If the Tribunal decides not to take means into account, it should express that conclusion, and say why. If the Tribunal decides to take means into account, it will then need to set out its findings about ability to pay, decide whether to make a costs order at all in the light of the paying party's means, and if it does what the order should be; and it give succinct reasons for its conclusions.” In the case of *Arrowsmith v Nottingham Trent University* [2011] EWCA Civ 797, it was held that a costs order need not be confined to sums the party could pay as it may well be that their circumstances improve in the future.

36. The exercise of the Tribunal's discretion is not dependent upon the existence of any causal nexus between the conduct relied upon and the costs incurred (*Macpherson v. BNP Paribas (London Branch)* [2004] IRLR 558.). In *Barnsley Metropolitan Borough Council v Yerrakalva* [2011] EWCA Civ 1255, the Court of Appeal had to look at the relationship between causation and the costs awarded, where a 100% costs order had been made in the Respondent employer’s favour. In *Yerrakalva*, the claimant’s conduct in the proceedings was held to be unreasonable, which gave the employment tribunal jurisdiction to order costs. However, the Court of Appeal said, it did not follow that the claimant should pay all the Council's costs of the entire proceedings. The employment tribunal had rejected some of the Council's criticisms of the claimant. It had also criticised the Council for making more of a meal than was necessary to respond to the claimant's case. Those factors, the Court of Appeal said, are relevant to how the cost’s discretion should be exercised and operated against a 100% order in the Council's favour. Lord Justice Mummery said " 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 has been 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.”

37. *Sud v London Borough of Ealing* [2013] 5 Costs LR 777 (#75 "this is not a process that entails a detailed or minute assessment, but instead the court should adopt a broad brush approach, against the background of the totality of the relevant circumstances"); *Keskar v Governors of All Saints Church of England School* [1991] ICR 493 (in a case under Rule 11 of the 1985 Tribunal Rules, the EAT approved a costs order where the claimant was found to be "motivated by resentment and spite" … and where there was "virtually nothing to support his allegations of race discrimination"; 500F whether or not there is any material to support the allegations that the claimant made is relevant to tribunal's consideration); *Casqueiro v Barclays Bank plc* UKEAT/0085/12 (a case on wasted costs, looking at which costs or what part of the costs had been caused by the unreasonable conduct of the claimant: Slade J at [22]-[23] suggested that if a party wished to rely on limited evidence of their means it should be submitted with some level of formality – "He should make a statement with supporting evidence for such an argument, such statement and documentation should be disclosed to the Respondent three weeks before any hearing and he should tender himself for cross-examination."); *Topic v Hollyland Pitta Bakery* UKEAT/)523/11 HHJ Burke QC [27] (lies do not automatically lead to a finding of unreasonableness but no lies does not mean there cannot be unreasonableness; it is necessary to "Look at the whole picture bearing in mind that costs are rarely awarded in the ET"); *Shields Automotive Ltd v Grieg* UKEATS/0024/10 (where a Tribunal have decided to have regard to a party's means, they are required to look at his whole means and that included his capital resources).

Discussion and conclusion

38. Costs are still very much the exception in the Employment Tribunal, (see *Sud v London of Ealing*) if only because findings of the conduct which triggers the ability to make an award are rare. The Rules are clear and not in dispute, a Tribunal must consider whether to make an award of costs where one of the threshold triggers is met: there can be no award of cost unless one of the trigger conditions is met, but the meeting of a trigger condition is not an automatic route to an award of costs. At this point, the tribunal then moves on to consider, as a matter of its discretion, whether to actually make an order, and if so in what amount. The issues on when that discretion is to be exercised vary from case to case, but can include the paying party's ability to pay.

39. It appears to me that the appropriate route to take in deciding whether to award costs in this case, was as follows:

1. To ask whether the Claimant had acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way the proceedings (or part) had been conducted; or whether his claim had no reasonably prospect of success;

2. If I considered that any one or more of these threshold triggers had been met, then I must go on to consider whether to make a costs order, but I am not obliged to make one;

3. When I am exercising my discretion as whether to make a costs

order, I may, but am not obliged to, have regard to the paying party's ability to pay;

4. If I have decided to make a costs order, I may, but am not obliged to, have regard to the paying party's ability to pay in determining the amount of any award;

40. As to the first stage, asking whether the Claimant acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way the proceedings (or part) have been conducted, or whether her claim had no reasonable prospect of success. Ms Moss's contention is that three of the trigger conditions are satisfied, namely that the Claimant acted (i) vexatiously or (ii) otherwise unreasonably in bringing or conducting the proceedings and/or (iii) that the claim had no reasonable prospect of success. In *Yerrakalva (*as sited in *Sud)* it was emphasised that the Tribunal has a broad discretion and it should avoid adopting an over analytical approach. For example, by dissecting the case in detail or attempting to compartmentalise the relevant conduct under separate headings. The words of the Rule should be followed and the Tribunal needs to "look at the whole picture of what happened in the case and to ask whether there has been 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 it effects it had". There were two claims brought by the Claimant in this case – one of unfair dismissal and one of religious discrimination. They went hand in hand arising out of the same single incident. Both these claims need to be considered here – even if the unfair dismissal claim had not been proceeded with, the religious discrimination claim would still have been extant. It was still in my judgment on the law a runner. The problem was the time delay not the merits or substance of that claim.

41. Further, she referred me to three letters that had been sent to the claimant by the Respondent's lawyers alerting him to their view of his chances on the merits and indicating that if he withdrew his claim they would not look to him for costs, but if he persisted they would be seeking costs against him if they succeeded in their application. These letters are, of course, sensible to send, and these were worded carefully but they are vulnerable to an argument that "they would say that anyway." A litigant should in my opinion be expected to take stock of matters once the weaknesses of a complaint are identified. It was not clear to me that any stocktaking had taken place by the Claimant. I believe that the Claimant did genuinely believe in the merits of his complaint. I bore in mind what the EAT said in *AQ Ltd v Holden* (above) that the threshold tests are the same whether a litigant is or is not professionally represented, but that the application of those tests by the Tribunal should take into account whether a litigant is professionally represented. Lay people may be involved in legal proceedings on only one occasion and are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. Some allowance does need to be made for a layperson's inexperience and lack of objectivity. On balance, I was not satisfied that the Claimant's refusal to engage with these letter's could be said to be unreasonable.

42. While I accept that the unfair dismissal case was a claim for which there really were no reasonable prospects of success, as the Claimant was a contract worker there was always a potential route for the discrimination claim by virtue of s 41

Equality Act, and whether that claim should be allowed to continue was a matter of my discretion, judged by equity and the justice of the circumstances. It is certainly not the case that just because something is out of time by a very considerable amount of time, even years, that it is a dead certainty that the just and equitable discretion will not be exercised. Given that the s 41 would have allowed a claim potentially to be brought, it did not seem unreasonable to me that the Claimant should ask the tribunal to look at the circumstances and see where it thought justice and equity lay in his case.

43. Bearing in mind that a Tribunal has a broad discretion in these cases and should avoid adopting an over analytical approach, I have endeavoured to look at the whole picture of what happened in this case and to ask whether there has been unreasonable conduct by the Claimant in bringing and conducting the case. Employment tribunals were set up to look at fairness and reasonableness of an employer's actions and, overall, in my judgment I was not satisfied that it could be said that in making his claims of unfair dismissal and religious discrimination that the Claimant had acted vexatiously or unreasonably. Even if the unfair dismissal claim was hopeless, looked at together with the religious discrimination claim, I did not accept that this was a "vexatious, unreasonable or misconceived" claim or that the overall claim had no prospects of success. The unfair dismissal aspects of the case took up no material time. Accordingly, I was not satisfied that this case got over the trigger threshold.
44.

45. As I was not satisfied this was a case where in principle a cost order should be made, it was not necessary to go on and consider any other matters, and in particular it was not necessary for me to consider whether to take account of the Claimant's ability to pay. If I had needed to done so, I would have found that given the Claimant's ability to pay was extremely limited and I would not been minded to make nay costs order if that had proved to be a determinative matter.

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Employment Judge Phillips
27 September 2019