Case No: 2302079/17

EMPLOYMENT TRIBUNALS

Claimant: **Ms Tracy Robinson**

Respondent: **Amazon UK Services Ltd**

Heard by Cloud Video Platform (CVP) **On:** **13 October 2020**

Before: **Employment Judge Martin**
Ms O'Hare
Ms Blake

Representation
Claimant: **Did not attend**
Respondent: **Ms Ahmad - Counsel**

RESERVED JUDGMENT

The Respondent's application for costs succeeds and the Claimant shall pay to the Respondent £20,000 contribution towards its costs

RESERVED REASONS

1. This hearing was conducted by CVP due to the ongoing Covid-19 pandemic. This hearing was to hear the Respondent's application for costs following the judgment promulgated on 27 April 2019. The Respondent made an application for costs on 23 May 2019 which appended amongst other matters, its schedule of costs. The Tribunal made an order which was sent to both parties on 5 June 2019 stating that the application was made in time and will be listed for a hearing to determine the application. Orders are made that on the before 26 July 2019 the parties should set out in writing and serve upon the other party in the Tribunal full submissions as to why costs should or should not be awarded pursuant to the employment Tribunal Rules of Procedure 2013 rules 74 to 84.

2. Orders were made that: on or before 23 August 2019 the parties should set out in writing and serve upon the other and the Tribunal any response to the other parties full submissions and an request for the parties views as to

whether the costs hearing could be dealt with on the papers to avoid having to attend a hearing in person.

3. On 25 July 2019, the Respondent sent to the Tribunal and the Claimant its submissions in relation to costs. No submissions were received from the Claimant. On 14 October 2019, the Claimant emailed a document headed "Claimant's response to submission on costs" which simply attached three documents showing universal credit payments for July, August and September 2019. The document in relation to the assessment for 3 August to 2 September showed that payment for that month was zero. No submissions were received from the Claimant as to why costs should not be awarded and there was no evidence provided by the Claimant of savings, income, expenditure, or any capital assets as ordered.

4. On 26 November 2019, the Claimant appealed the Tribunal's judgment the Employment Appeal Tribunal.

5. On 8 November 2019, the Respondent wrote to the Tribunal providing a response to the Claimant's submissions.

6. Due to the volume of cases in the London South Employment Tribunal there was a delay in listing this matter for a hearing to consider the Respondent's application for costs and it was listed for 6 May 2020 to be held in person. After this matter was listed, the Covid-19 pandemic meant that no substantive hearings could be held, and all hearings were converted into preliminary hearings by telephone. Notice of this hearing was sent to the parties on 12 February 2020 and the parties were notified on 4 May 2020 that the hearing had been converted into a telephone preliminary hearing.

7. The Claimant did not participate in this hearing. Therefore, a one-day hearing was listed as the Claimant was not available to give consent to it being considered on the papers as requested by the Respondent. The order sent to the parties on 19 May 2020 gave the Claimant the option of confirming consent to the Respondent's application of the matter being dealt with on papers. It was noted in the order that the Claimant's information about her income was incomplete as it did not detail any employment she had, what salary she earns, savings, capital, outgoings and so on which would be required in order to take her means into account.

8. As a consequence, the Claimant was ordered no later than 26 June 2020 to confirm if she was willing for the matter to be dealt with on the papers, by telephone or by videoconferencing and for the Claimant to provide up-to-date information of her financial situation to the Tribunal and to the Respondent. It was specifically mentioned that if the Claimant did not comply with the order, the Respondent's application would be determined at a hearing based on the information the Tribunal had at that time.

9. As at the date of this hearing, the Claimant has provided no further information regarding her means or any submissions in answer to the points made by the Respondent. The scant information she provided is now very out of date and as a result the Tribunal were unable to take her means into account. The Tribunal is satisfied that the Claimant was aware of the

implications of not providing this information as it was clearly spelt out in the order.

10. At the start of this hearing, the Tribunal, noting that the Claimant was not in attendance, delayed the start of the hearing for 15 minutes to see if she would attend. She did not. Notice had been sent to the Claimant setting out the login details required for the hearing at 17:07 on 12 October 2020 and the Tribunal is satisfied she had notice of the hearing arrangements. In any event if the Claimant had attended in person as originally planned, then the hearing could have been conducted as a hybrid hearing with the Claimant and Judge at the hearing and the members and representative for the Respondent by CVP.

11. Counsel for the Respondent was invited to make submissions in support of its application for costs. The Respondent relied on the application for costs, the written submission on costs, its reply to the Claimant submission on costs, the judgment and referred to previous preliminary hearings.

12. Rule 76 of the ET (Constitution and Rules of Procedure) Regulations 2013 sets out when a Tribunal has the power to make a costs order:

> 76 (1) A Tribunal may make a costs 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 has no reasonable prospect of success.

13. Rule 78 sets out the amount of a costs order:

> 78 (1) a costs order may –
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> (a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000 in respect of the costs of the receiving party;
>
> (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; ...
> ....
>
> (e) if the paying party and the receiving party agree as to the amount payable, be made in that amount
>
> (3) for the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

14. Rule 84 covers ability to pay:

> 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.

15. In its submissions the Respondent said that:

> *"The Tribunal is reminded of the general principles applicable: that costs are the exception, not the rule; that they are designed to compensate the receiving party for costs unreasonably incurred, not to punish the paying party for bringing an unreasonable case, or for conducting it unreasonably. The Tribunal should follow a 3-stage process: first, to decide whether the threshold in Rule 76 had been crossed, that is, whether a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing or conducting of all or part of the case. The threshold has clearly been crossed in this case.* (Paragraph 7 Respondent's submissions).
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> *Secondly, the Tribunal should then consider as an exercise of discretion whether that conduct merits a costs order. It is not automatic i.e. because the Tribunal has the power, it should exercise it. Thirdly, if the ET decided to make a costs order, they should consider the appropriate amount of costs incurred by the Respondent in defending the unreasonable claims. If this was less than £20,000, they could make a summary award, making the assessment themselves in broad terms and ordering the Claimant to pay it; in any case, they could if appropriate order a detailed costs assessment to be made, in either the County Court or by an Employment Judge; in that event the Tribunal should indicate what the assessment should cover; for example, by indicating an overall percentage, or by identifying the issues or claims where the unreasonable conduct had occurred, and ordering an assessment of all costs incurred in defending those claims or issues. In fixing the amount of an order, the Tribunal could, but are not obliged to, consider the Claimant's ability to pay*". (Paragraph 8 Respondent's submissions).

16. The Respondent's submissions went on to set out the following case law:

    a. **Yerrakelva v Barnsley MBC [2012] ICR 420,** which held: *"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*". The case went on to hold that there was no need to determine whether there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed.

    b. Keskar v Governors of All Saints Church England School and Another [1991] ICR held: *"The question whether a person against whom an order for costs is being proposed to be made ought to have known that the claims he was making had no substance, is plainly something which is, at the lowest capable of being relevant, and we are quite satisfied from the decision itself, in the paragraph which I have read and need not repeat, that the industrial Tribunal did have before it the relevant material, namely that there was virtually nothing to support the allegations that the applicant made, from which they drew the conclusion that he had acted unreasonably in bringing the complaint"*.

17. The Respondent referred to the Claimant's claims which were of sex discrimination and harassment and to the 21 individual claims that the Claimant made and pointed out that none of these had been found to be made out.

18. The Respondent referred to the judgment generally and particularly to paragraphs 4 – 9. These are not set out verbatim here as reference can be made to the written judgment. In summary these paragraphs set out that the Claimant did not provide a written witness statement for the hearing as ordered by the Tribunal on 15 August 2018 ('the order'). That the Claimant did not comply with the order requiring her to disclose all documents relating to remedy. That at the hearing the Claimant was asked about her documents relating to remedy and was asked to bring these documents to the Tribunal which the Claimant agreed to do but she subsequently refused to disclose them after the Tribunal rejected a small bundle she presented which included without prejudice correspondence between the parties (the Respondent says it told the Claimant on the first day of the hearing that without prejudice correspondence should not be placed before the Tribunal). The Claimant's continued refusal to provide these documents despite having been ordered to provide them. This, the Respondent submitted showed a "*blatant disregard and disrespect for the Tribunal and left the Respondent over a three day final hearing not knowing what amounts of money the Claimant was seeking which it was submitted was deliberate, completely intentional and vexatious*".

19. The Respondent referred the Tribunal to paragraphs 18-21 of the judgment which again are not set out here. In summary they refer to the Claimant not linking the acts she complains of with her gender either explicitly or implicitly and that the Claimant's case on music in the workplace was about cultural appropriation, reference to drugs and making fun of the Jamaican way of dancing which is not relevant to a claim for sex discrimination.

20. The Respondent then referred to paragraphs 22 – 55 in which each of the Claimant's 21 allegations were dismissed on the basis that there was either no evidence at all, or the Respondent's witnesses were found to be more credible, or the events did not take place. The Respondent's application for costs sets out a synopsis of the Tribunal's findings of fact in relation to the 21 allegations.

21. The Respondent submitted that the threshold test for making a costs award had been met.

22. The Respondent then provided submissions on the amount of the award, pointing out that the Tribunal had broad discretion. The Respondent referred to Liddington v 2gether NHS Foundation Trust, UKEATPA/0287/16/DA which provided guidance on costs awards against litigants in person. The Respondent submitted that in its guidance, the EAT stated that whilst the standard of pleading expected of a legal representative did not apply to lay persons, Claimants should still be able to articulate in simple terms what was said or done, by whom and on what dates in order to clearly specify their claim. It was submitted that the EAT were keen to stress in this specific scenario that they had not found that the Claimant's inability to articulate her claim was unreasonable conduct in itself, however they did find that her lack of preparation for the hearings contributed to her inability to provide the

relevant information. An award for costs against the Claimant was therefore upheld.

23. The Respondent referred to the judgment dated 5 March 2018 of Employment Judge Martin in an earlier preliminary hearing where the Respondent applied to strike out the Claimant's claim or alternatively that a deposit order was made. That judgment recorded at paragraph 16 that the Claimant's claims were hard to discern as she had not provided information that the matters cited happened because of her gender and there were no particulars of the dates and time she alleged the matters happened or how she says any matters happened because of her gender. The Judgment declined to strike out the Claimant's claims noting that the bar to striking out a discrimination claim was very high, and this application was refused. The application for a deposit was refused even though many of the allegations were considered to have little reasonable prospect of success on the basis that the Claimant said she had limited means.

24. On 27 February 2019, the Respondent wrote to the Claimant on a *"without prejudice save as to costs basis*". In this letter, the Respondent set out in detail its reasons why it would be successful in defending the claims. The Respondent went into detail about why it said the Claimant's claims would fail and referred to the judgment of 5 March 2018 referred to above. The Respondent offered to settle the Claimant's claim for £5,000. This letter clearly set out the consequences if the Claimant chose not to accept this offer namely that the letter would be produced to the Tribunal in an application for costs if the Claimant was awarded less than this amount. The Claimant did not accept this offer.

25. The Respondent made a further attempt to settle proceedings by way of a second letter dated 28 March 2019 in which the offer to settle increased to £10,000. The consequences of not accepting this were set out in this letter. The Claimant did not accept this offer.

26. The total costs incurred by the Respondent in defending this claim amounted to £33,077.02 in respect of fees and £15,415 plus VAT in respect of disbursements. The Respondent's schedule shows that it was after their offers were rejected that it embarked in the main preparation for hearing. The Respondent limited its application for costs to the maximum amount that the Tribunal can award on a summary basis (£20,000). The Respondent, in response to a question from the Tribunal, said that the total costs incurred after the 27 February 2019 amounted to £19,909.39 but that this did not include the Respondent's costs of attending this hearing.

27. The Tribunal fist considered whether the threshold in Rule 76 had been crossed, that is, whether the Claimant has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing or conducting of all or part of the case. The findings set out above show that from an early stage (at least from 5 March 2018) the Claimant had been on notice from the Tribunal that it considered that parts of her claim had little reasonable prospect of success. This is clearly set out in the judgment. This coupled with the two detailed without prejudice save as to costs letters sent by the Respondent in February and March 2019 should have given the Claimant pause for thought about the veracity of her claims. As pointed out by the

Respondent, the Claimant refused to provide details of her income for remedy purposes, and that the absence of this information would mean that the only remedy the Claimant could have if she was successful was for injury to feelings. Notwithstanding this the Claimant proceeded with all 21 individual allegations necessitating the Respondent in defending them.

28. The Claimant acted unreasonably in not providing a witness statement for the hearing despite being ordered to do so. This meant that the Respondent did not have advance notice of her evidence resulting in a further witness having to be called to rebut allegations which only came to light during the hearing. The Claimant acted unreasonably in not complying with the Tribunal's orders to provide documentation relating to remedy. The Claimant had found alternative employment by the time of the full merits hearing. The Claimant produced a small bundle containing without prejudice communications despite the Respondent informing her on day one that these communications should not be put before the Tribunal, this is unreasonable conduct. Further examples of the Claimant's conduct are found in the judgment at paragraphs 18-21.

29. The Tribunal has compared the reasons set out in the judgment from paragraph 22 – 55 with the details of the costs letters sent by the Respondent. The Reasons put forward by the Respondent as to why the Claimant's claim would fail are remarkably similar to the findings made by the Tribunal.

30. Secondly, the Tribunal finds that the Claimant has acted unreasonably in a manner that merits a costs award being made. The Claimant has shown a blatant disregard of the Tribunal process by not complying with normal case management orders. However, the most unreasonable conduct of the Claimant was her refusal to accept the without prejudice offers made by the Respondent. The second offer of £10,000 would if this were expressed as an injury to feelings award put it in the middle Vento band. These letters were very clear as to the weaknesses in the Claimant's claims and the consequences of continuing with them.

31. Thirdly, having made these findings, the Tribunal went on to consider the appropriate amount of costs incurred by the Respondent in defending claims. The Tribunal considers that the Claimant acted particularly unreasonably in rejecting the offers of settlement and continuing with her claim. Therefore, it has awarded the Respondent's costs from the date of the first costs letter namely 27 February 2019. It notes that the costs incurred from that day forward (excluding attendance at this hearing) amounts to £19,909.39.

32. As set out above, the Tribunal has not been able to take account of the Claimant's ability to pay any award as the Claimant has not provided up to date financial information as ordered by the Tribunal. The Tribunal has shown that it does take ability to pay into account when such information is provided as shown by the decision on the application for a deposit order where it was declined as the Claimant gave some information of her financial situation at that time.

33. The Claimant has not participated in the cost's application save for some very scant financial information over a year ago. This application could easily have

been decided on the papers had the Claimant participated and provided submissions. This would have reduced the Respondent's costs and is unreasonable conduct. The Tribunal has therefore awarded £20,000 to take account of the Respondent's costs in part of having to attend this hearing.

Employment Judge Martin

Date: 13 October 2020