EMPLOYMENT TRIBUNALS

Claimant: **Ms S. Omooba**

Respondents: **(1) Michael Garrett Associates Ltd (t/a Global Artists)**
(2) Leicester Theatre Trust Ltd

London Central Remote Hearing (CVP) **On: 18 March 2021**

Before: **Employment Judge Goodman**
Ms L. Moreton
Ms S. Went

Representation
Claimant: Mr. P. Stroilov, Christian Legal Centre, lay representative
Respondents: (1) Mr. C. Milsom, counsel
(2) Mr. T. Coghlin Q.C.

COSTS JUDGMENT

The claimant is ordered to pay the first and second respondents' costs of responding to the claim, such costs to be subject to a detailed assessment.

REASONS

1. In a decision sent to the parties on 15 February, the tribunal found that the claims of discrimination and harassment on grounds of religious belief did not succeed. Nor did the claim of breach of contract against the second respondent.

2. The two respondents have both now applied for orders that the claimant pay their costs.

3. The claimant and both respondents had prepared written submissions setting out their arguments on these applications, and we also heard oral submissions which occupied most of the hearing day. The decision was then reserved.

Rules on Costs

4. Unlike civil courts, where generally costs follow the event, and the loser pays the winner, in employment tribunals the normal position is that each side bears its own costs. An order that one side pay the other's costs can only be made in circumstances prescribed by rule.

5. The Employment Tribunal Rules of Procedure 2013 provide at rule 76:

> a tribunal may make a costs order 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 vexatious the, abusively, destructively or otherwise unreasonably in either the big bream of the proceedings (or part) all the way that the proceedings (part) have been conducted; or
>
> **(**b) any claim or response had no reasonable prospect of success.

6. By rule 77, an application for a costs order must be made no later than 28 days after the judgement is sent to the parties (it has), and no order may be made unless the paying party has had a reasonable opportunity to make representations in writing or at a hearing.

7. If the tribunal decides to make an order, it can award payment of a specific sum not exceeding £20,000, or it can order that the receiving party's bill is the subject of detailed assessment, in which case there is no cap on the amount.

8. The way that rule 76 is worded shows that the tribunal must first consider whether the threshold test in (a) or (b) has been crossed, and then exercise its discretion to consider whether some order should be made.

9. In exercising discretion, one of the factors tribunal can take into account is the ability to pay. Rule 84 states:

> In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the tribunal may have regard to the paying party's (or where a wasted costs order is made, the representative's) ability to pay.

10. Wasted costs orders are made against representatives (rather than parties) under rule 80. Neither respondent is asking the tribunal to make an order for wasted costs.

11. If the tribunal decides to exercise its discretion to make a costs order, it then has to decide the amount. Both respondents expect their costs to well exceed £20,000, and ask the tribunal to make an order for detailed assessment of their bills. The first respondent has provided a schedule of costs in the sum of £53,839. The second respondent's costs schedule is for £259,356.60 ex VAT.

Do these applications meet the threshold? Parties' Submissions

<u>Second Respondent</u>

12. The second respondent took the lead. It argues that the claims against it

had no reasonable prospect of success because the claimant had a red line that she would not play a lesbian character, which should have been obvious to her both before the litigation and during it, while the fact that the respondent regarded Celie's lesbian sexuality as central and non-negotiable should have been clear to her or her advisers from the time of the dismissal letter, or if not then, by the time they read the detailed grounds of resistance filed in September 2019. Knowing her red line was in play, she had brought and maintained a case which was fundamentally inconsistent with that red line. Therefore she was pursuing a claim that never had a reasonable prospect of success. Unknown to the respondent, but known to her if she had given it clear thought, she did not want the part and would never have played it.

13. It is also argued that her conduct in pursuing the claim was unreasonable. Although the claimant's red line was only discovered by the respondent on the exchange of witness statements three weeks before the hearing, it will of course have been known to the claimant long before, or if not, it should have been. As for the character of the production, and whether playing Celie as a lesbian relationship was only one interpretation of many, the second respondent relies on the dismissal letter asserting that the lesbian relationship, with its intimate scenes, is intrinsic to the production, and that: "the play and production are seeking to promote freedom and independence and the challenge views, including the view that homosexuality is a sin". They say therefore that from the outset the claimant's advisers, even if the claimant herself did not read the letter, knew the respondent's position about interpretation of the role. They go on to say that respondents position was made very clear in the detailed grounds of resistance on 25 September 2019 which contained quotations of remarks from the play's director, from Alice Walker, the author of the book, and from the authors of the musical production. They add that had she read the script, as she should have done , she would agreed that it was a lesbian role, as she admitted in the witness statement and hearing it was. Instead, the claimant ran the case on the basis that she *would* have played the part, as she claimed damages for fees and loss of enhancement of reputation, claims only abandoned in the course of the trial. In summary, her complaint was that she has been dismissed from a job she did not want, and would have refused to play. They go on to say too that the indirect discrimination was hopeless in various respects, but in relation to being misconceived she knew she could not establish disadvantage in lack of opportunities to play homosexual roles, because she had a general rule not to play these roles, nor had she proposed alternatives to dismissal as proportionate means of achieving undisputed legitimate aims.

14. The Respondent gives particular examples of unreasonable conduct of the litigation, such as the failure to appreciate that it was misconceived to base a claim on a part she would not have played, and the claimant's application to adduce expert evidence from a theatre critic (the Evans report). The report asserted that an actress did not need to be lesbian to play a lesbian part convincingly, as if this was the reason for dropping her, when in fact the claimant's red line meant would not have played a lesbian part at all.

15. They also point to the claimant's change of case, following cross-examination, as to the nature of her religious belief (whether homosexual desire, as well as practice, was sinful). The tribunal was invited to conclude that it was unreasonable conduct to plead her case as it was, whether that resulted from inattention or lack of thought on the part of the claimant, or failure on the part of her representatives. The pleaded case relied on the claimant being willing to play the role, and on her belief being that homosexual practice was wrong but desire not, and this was the premise on which the expert the claimant wanted to rely on had been instructed (the Parsons report on Christian belief). The entire opinions of both were based on fundamental errors about the claimant's evidence.

16. On harassment, the second respondent argues that even if the claimant felt hurt, what happened did not amount to a violation of dignity, and that she must have appreciated that hostile social media had nothing to do with either respondent. They go on to point out that the conduct was not unwanted, because the claimant had the option of resigning, a point not discussed by the tribunal.

17. Next they say that the direct discrimination had no reasonable prospect of success because it relied on "but for" causation, with hostility to the claimant's belief is the context decision, rather than considering the respondent's reasons for acting as it did, fully expressed, they say, in the dismissal letter. Had the claimant's representative thought to construct a hypothetical comparator, he would have appreciated the difficulty.

18. In respect of the breach of contract claim, the second respondent argues that it was not just misconceived and unreasonably conducted, but also vexatious. From the moment of dismissal the theatre had sought to pay her the entire performance fees when they could have lawfully given her two weeks' notice. She had withdrawn the claim for fees in the course of the hearing, in the light of the witness statement that she would not have played the part, but as she knew that all along, it was not a proper claim to make. "The hallmark of a vexatious proceeding is… 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 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 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" – **AG v Barker (2000) 1FLR 759**, approved in **Scott v Russell (2013) EWCA Civ1432.** The respondent says that she would not invoice for fees in the contract claim because she wanted the publicity of the hearing.

19. The final aspect of the unreasonable conduct argument concerns correspondence sent without prejudice save as to costs. The second respondent sent a closely argued letter on 6 November 2019 with a drop-hands offer on the discrimination claims and an unconditional offer to pay the performance fees. The claimant did not reply. Instead, Christian Concern and Christian Legal Centre stated on their website that:

"the theatre had attempted to avert this lawsuit by offering to pay her the full wages

she would have received for playing in the performance. However, Miss Omooba rejected that offer, and requested a formal public hearing that the theatre has acted unlawfully and discriminated against her because of her Christian beliefs".

The respondent said this was seriously misleading, because it suggested the payment of the contract fee was conditional on abandoning other claims. There was a further drop-hands offer at the conclusion of the claimant's cross examination. The claimant did not reply to this either. Had the claimant paid attention to the arguments advanced in either offer they would have been saved a great deal of cost.

First Respondent

20. The first respondent largely adopts the arguments of the second respondent. It is argued in addition that any breach of contract claim against the first respondent was without value, as was belatedly recognised in the cutting of her schedule of loss during the hearing. Objection is also taken to the claimant's case that Ms Chatt had in fact sent earlier versions of her statement and told her they were rejected to the theatre, when she had not, and to the lack of any evidence for the allegation that the agency had publicised her removal from their books. The acts alleged as harassment were plainly not. As for the termination, Michael Garrett was not challenged on his reasons for terminating the agency agreement; the agency already knew of her religious belief and not hitherto found it an impediment, so it was implausible as a reason for the treatment. It was unreasonable too to argue that he should keep her and let his other clients go. There was no attempt to establish a hypothetical comparator who would have been better treated, and the direct discrimination case had no reasonable prospect of success. The indirect discrimination was hopeless because of the circular provision alleged, there was no argument of group disadvantage, and the particular disadvantage relied on was termination of a contract which she had breached (by taking a part she had no intention of performing, and not having read the script), and on justification, the only means suggested by the claimant was that the first respondent should lose all its other clients, which was hard to show as proportionate.

21. The first respondent did not send costs warnings, but relies on the claimant's conduct in failing to respond to either of the second respondent's offers or warnings as evidence of the unreasonable conduct of litigation.

Claimant

22. The claimant argues that the threshold tests are not met. It is argued that the claim raised important issues of principle, attracted significant public interest, and was brought in good faith. It was not foreseeable from the start that the case had no reasonable prospect of success, such that it should have been struck out summarily.

23. In the light of the discussion in **Yerrakalva v Barnsley MBC (2012) ICR 420,** the tribunal should not engage in piecemeal analysis but look at the case as a whole. For example, it is said not to be difficult to bring

alternative claims for direct and indirect discrimination and harassment based on same facts. They may be mutually exclusive, but that is not unreasonable. The case must be taken as a whole. On developments in the schedule of loss, the claimant points out that such developments on quantum are typical in employment cases. In deciding whether conduct of litigation was reasonable, tribunals should keep in mind that in many (though not all) circumstances there may be more than one reasonable course to take, and on this, the tribunal must not substitute its own view but review the decision taken by the litigant - **Solomon v Hertfordshire County Council UKEAT/0258/18.**

24. On the primary direct discrimination claim, it was not known to the claimant how or whether her beliefs were a significant influence on respondents' decisions, which can only be explored in cross-examination at a hearing. On the claimant's red line (that she would not have played the part anyway), the witness statement was the "natural medium" to address this, and was not relevant for pleading. It was significant only on quantum. In any case, it did not enter into respondent's decision-making, because they did not know about it. The respondents were at fault for postponing exchange of witness statements from April 2020 to January 2021. Had the exchange taken place when ordered they would have understood earlier. On the Evans report, it is denied that trying to adduce it was unreasonable conduct, this expert evidence was "either relevant to the issues or not", and if not relevant it does not show the claimant had no reasonable prospects. Objection is also taken to the respondent seeking to reintroduce it at this stage.

25. In particular, in relation to the claimant's expression of belief, the amendment was "purely semantic in nature", and caused no other costs, or prejudice; the change was irrelevant to the outcome, as it was found that the beliefs are protected, and only arose in cross examination which was, in light of Williamson, wholly inappropriate. Objection is taken to the respondent trying to have the Parsons report (on belief) reintroduced after the claimant had given evidence.

26. On harassment, the respondent is said to overlook that the real claim was that "the adverse effects of the unwanted conduct were amplified and aggravated by the publicity and context of it".

27. The direct discrimination case did not fail to engage with the second respondents decision-making because the claimant's case focused on that being a "motive" rather than a "reason why" she had been dropped from the production. That was a reasonable case to run and did not become unreasonable because she had failed, or because (interestingly) "it has failed on the facts of certain other cases". The claimant argues that the need for comparators has been superseded by **Eweida.**

28. As for breach of contract, the claimant relies on the second respondent actually admitting that claim, and that it always offered to pay the fees, until it sought to amend the first day of hearing. It cannot therefore be said that it never had a reasonable prospect of success. It was not unreasonable not to take the offer and prefer to litigate. The contract dispute raised an important issue of principle. There was also reputational

damage, as well as the performance fees. Her decision to abandon the claim for financial loss was "honest and conscientious" in light of the second respondent's case about its intended lesbian interpretation of the role.

Submissions on Discretion

29. The second respondent asked the tribunal to take into account that this is not a case of an isolated incident, or a minor part of the case was lacking in merit, but that these factors run through the entirety of the claimant's case. The tribunal is asked to consider that the claimant had specialist legal representation through the Christian Legal Centre throughout, and should not be treated with the same leniency in matters of legal complexity as a litigant in person might have been - **AQ v Holden (2012) IRLR 648**. The tribunal is also asked to take account of the resources of Christian Legal Centre when it considers ability to pay.

30. The first respondent adopted these arguments.

31. The claimant argues that the same points made about the threshold test should also be taken into account in exercising discretion. It is argued that any unreasonableness was slight, nor did it result in additional costs. The claimant also points to the respondents having acted unreasonably from time to time, naming as instances their opposition the previous year to a remote hearing, creating a risk of delay, the first respondent's witness having given false evidence about its intention to represent the claimant during a notice period, and in the conduct of the hearing, that both respondents unreasonably attacked the claimant beliefs in an aggressive and unnecessary way, both in cross-examination and in submissions. Finally, the respondents had made an "unreasonably wide" application for costs.

Is the threshold test met? Discussion and Conclusion

32. It is of course common for claimants to plead particular events as discriminatory acts or acts of harassment in the alternative. It is less common to plead the same facts as direct and indirect discrimination in the alternative, because the factual scenarios rarely overlap. Often, pleading the case as both suggests a misunderstanding. But it is not unreasonable conduct to bring alternative claims. As for looking at the case as a whole, of course we must stand back after making findings on particular matters, but when we stand back to get the general picture we must look at particular events or conduct, whether they were reasonable at the time, and what effect they will have had on costs incurred.

33. This tribunal does not know when the claimant herself appreciated on reflection that the musical production was in fact a lesbian role, and did not bear another interpretation. In her evidence she did not read the script until a few weeks before the hearing, but whenever it was she must have reached that conclusion by the time she filed her witness statement in early January. She mentioned in her witness statement as an influence on her conclusion that it was a lesbian role an open letter written to her by Alice Walker in the autumn of 2019, from reading which she conceded it

was a lesbian sexual relationship**.** The tribunal does not know what discussions took place between the claimant and those advising her, and they are privileged, but it has to be said that more probing discussion between her advisers and herself in the autumn of 2019, could and should have revealed that this part was a red line which she had already decided she could not cross as a Christian actor. In September 2019 she had the detailed grounds of resistance which quoted the opinions of the director and Ms Walker. At the beginning of November 2019 she had the drop-hands offer. In any litigation the combination of the two could and should have prompted careful re-evaluation of what was known about the case from each side's perspective and the likely success of the claimant's view. If there was a discussion, it does not seem to have included considering whether a non-sexual interpretation of the relationship between Celie and Shug was possible. At this point most advisers would have recognised that complaining of discrimination where the treatment complained of (dropping out of the production) was something that would happen anyway a few weeks on, and on the claimant's initiative, was going to be difficult. It would certainly massively alter the value of the claim. There would be no financial loss, and even if belief was held to be the reason for being dropped rather than dropping out, less for injury to feelings.

34. We can speculate whether the claimant's side carried on because they did not re-think the case at that point, or because whatever the merits they wanted a hearing so as to focus public attention on what they saw as the persecution of Christians for their belief on homosexuality. If it was the first, not re-evaluating at this point, in the face of so much detail of the respondents' case, and an offer to get out before costs mounted, is unreasonable. Some thought about whether it *was* a lesbian role would have led to realization that the claim was very difficult. If the reason for deciding to press ahead regardless so as to campaign on it would be vexatious – an improper purpose.

35. In the direct and indirect discrimination claims, we prefer the former. The claimant did not reevaluate, when she should have. On the comparator point, a claimant does not have to construct a hypothetical comparator though it is helpful, to elucidate whether the protected characteristic was the reason for differential treatment, but **Eweida** does not overrule domestic law. There is more legal confusion on the claimant's part when in her representative spoke of "motive" rather than reasons why, and seemed to confuse it with 'but for' causation, that is, the context in which the respondents' decisions were made. Her representative argued in paragraph 18 of his submission that the argument on direct discrimination was reasonable and did "not become unreasonable because it has failed on the facts of certain other cases, or indeed because it failed in this case". There may always be a degree of uncertainty whether a witness will come up to proof, but the relevant facts in this case, known to the claimant and which ought to have been known to her representative, was the claimant's understanding of the role and her red line that would have prevented her from playing it. (Here, we can distinguish **Lake v Arco Grating (UK) Ltd UKEAT 18/0511/04**, on which the claimant relies. That was a case in which the claimant's evidence was not accepted at the hearing). Success almost always depends on showing how the legal principles apply to the facts of the particular case.

36. On harassment, we hold the claim had no reasonable prospect of success. The real harassment of the claimant was in the social media campaign. In oral submissions on this and costs, the claimant's representative said that both respondents made their decisions in the context of the social media campaign, and therefore were "parties to what went on… more than a bystander", when what was going on was a campaign to cancel her. We do not accept that by making their decisions in the context of the social media campaign they became parties to it. To reiterate, they neither participated in the social media campaign nor encouraged it. They just had to make decisions about what to do now it was happening. The claimant herself may have felt that they were all part of it, but an adviser must have a measure of objectivity to give useful advice, and objectively there was no evidence that either respondent engaged in behaviour which created a hostile environment for her. That environment was already there. Had there been objective analysis, either by the claimant when things had calmed down, or on reading the grounds of resistance, it would have been appreciated that a harassment claim against either respondent was unlikely to succeed. We also reject as misconceived the specific argument advanced for the claimant that violation of her human right of freedom of expression meant there was the violation of dignity required to show harassment. The short answer is that while "violation" is used in both contexts, they are not both about dignity. A violation (meaning interference with) a human right may be an act of discrimination, which cannot, by statute, be harassment.

37. We have little to say about the indirect discrimination claim save that more thought at the time it was brought or pleaded on the list of issues would have led to a realisation that as pleaded it was unlikely to succeed.

38. A litigant in person might be forgiven for not appreciating the complexities of equality law, but the claimant's advisers have considerable experience in bringing discrimination cases and some have reached the higher courts. In some cases it is not until a late stage that facts come into the possession of a claimant that make him realise that he cannot succeed, but this is not one of them, because the respondent's reasons were always set out in detail in the dismissal letter and backed up by detail of their evidence in the grounds of resistance. In this case the missing fact was that the claimant was not going to play the part, something she knew and the respondents did not.

39. The claimant's argument that the claim was not so weak that it would be struck out at an early stage does not hold water. Had the respondent known that the claimant would not have played the part anyway, they might well have applied to strike it out, or at least ask for a deposit order. The argument that success in a discrimination claim depends on close examination of the respondent's reasons can be met generally with the argument that a litigant must have confidence in his own case, not hope that something will turn up in disclosure or cross-examination. The fatal flaw was known to the claimant, and not known to the respondent. Tribunals are reluctant to strike out before any disputes of fact have been resolved. The respondent pressed on believing the claimant had some facts to support the case as she pleaded it, not knowing that the claimant

was going to detonate her own case on exchange of witness statements.

40. On the breach of contract claim, the claimant's representative appears not to have appreciated that the contract claim is about the terms of the contract and whether they were broken, not whether a protected characteristic was the reason why the contract was terminated. Payment of money is the remedy for breach, and if the money is offered in full there is nothing to gain from going to a hearing. She could still have a hearing of the other claims to obtain a declaration. On the claimant's case, she had lost not just performance fees, but also the opportunity of enhancing reputation by performing; the claimant's representative was unable to explain why even if he thought from March 2019 or in November 2019 that she would have performed the part, he should not have gone back to the second respondent to invite an increase in the offer to reflect this. This indicates the claimant's objective was not to get a remedy for breach of contract, but have a trial for its own sake, with the attendant publicity. By the time the claim reached a hearing, the fact that she now recognized she would not have played the part meant the contract claim was without value.

41. The claimant's muddle on the contract claim is also clear in the argument advanced that it could not have had no prospect of success because, until the start of the hearing, the second respondent had always admitted it. That completely overlooks that the admission was because the second respondent did not know that she would not have played it. The claimant knew the relevant fact, and should have known that it had no prospect of success as a contract claim.

42. The additional and disturbing feature on this part of the claim is the public pronouncement just before the hearing by Christian Legal Centre that the theatre was trying to stifle a finding on unlawful discrimination by offering to pay (it also said she had turned it down when in fact she had not replied). Legal advisers, though perhaps not a publicist, will have known that settling the contract claim would not compromise the discrimination claim, and that the offer expressly did not compromise anything but the contract claim. They must have had some input into or control of the publicity. Turning down the offer to settle in full so as to have days in court, when a hearing could achieve no more (in fact less) than the offer is vexatious if it was done not to get redress for the claimant for a broken contract but as part of a campaign. The reason is not known, but the result, with respect to the contract claim, is vexatious - bringing "a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive" – **ET Marler Ltd v Robertson (1974) ICR 72**.

43. We concluded that the threshold tests were met as to the claims having no reasonable prospect of success in the light of the facts known to the claimant (but possibly not always fully understood or communicated by her or her advisers).

44. In addition we concluded even if the claim had some prospect of success when it started, the conduct of the case was unreasonable, in not re-evaluating the case properly when the respondent's grounds of resistance

were available. The claimant says it was reasonable to wait for disclosure, but there were many extracts from the contemporary documents to illustrate the respondents' thinking in the grounds of resistance. Nor do we think it within the range of reasonable decision-making to fail to review the case in the light of the grounds of the resistance and then a settlement proposal, and to postpone any detailed examination of its own case until preparing the witness statement at some later date (we do not know if it was prepared in April 2020 or not until January 2021, but the claimant's evidence suggested the latter). Even then the claimant's team appear not to have recognised their difficulty.

45. Having decided it crossed the threshold we considered it was right to exercise discretion to make a costs order.

46. We need to deal with the arguments about the claimant's belief and the fact that the statement of what it was changed from the pleaded case. The pleaded case that it is the practice, not the desire, that is sinful, is an argument leading to the classic Christian teaching that homosexuals should remain celibate. The claimant's Facebook statement, which said that she did not believe people were born homosexual, makes this less clear, and she was explicit in evidence that desire was also sinful, whatever the practice. The claimant criticises the respondent for seeking to reintroduce the expert report on Christian belief. The expert report discussed the pleaded case. It was evidently not based on the claimant's view expressed in evidence. Reintroducing the report would make it clear how the claimant had changed her position. That is not unreasonable conduct by the respondent, even though the tribunal decided not to readmit the evidence. In the event, the tribunal decided that the belief is expressed in evidence was also deserving of protection, so it made little difference to the outcome. Nevertheless, it is an additional sign of the lack of communication between the claimant and her advisers. It is worrying that they did not discuss her belief with her when drafting the pleading. It adds to the picture that they had a preconceived notion of what discrimination had occurred without considering the detail very carefully.

47. As for the criticism of the respondents' cross examination of the claimant on her belief, it is of course the case that belief is not always rational or fully thought through, and the court should not be drawn into matters of theology, but given that the respondent did not accept that even the pleaded belief was worthy of protection, and this was a point the tribunal would have to decide, it was legitimate to ask the claimant questions so as to explore its limits. A tribunal finding on whether the belief was or was not protected could have far reaching implications. Some of the cross-examination was exasperated in tone, perhaps unsurprising in the circumstances. Many people experience cross-examination as a hostile experience, because in ordinary life it is socially unacceptable to be so closely and sceptically questioned, and because, like all protected characteristics it concerns a deeply personal matter. This cross-examination was robust, not least because the claimant was unforthcoming, but it did not overstep the limit and become bullying.

48. Other criticisms of the respondent's conduct did not persuade us that it would be just and equitable not to make an order on that account. They

initially opposed a remote hearing, but very few people in April 2020 expected lockdown to last as long as it has; the tribunal resumed full panel hearings, in person and on line in September 2020, and it is hard to see that much delay occurred; in any event if there had been an earlier hearing the same preparation work would have been done, but sooner. As for the first respondent's evidence on notice, this was not a matter on which the tribunal had to make a finding, nor did we reject Mr Garrett's evidence on the reasons for his decisions, and it is a slender point in context which has had no impact on costs.

49. The claimant dismisses criticism of the sudden cut in the schedule of loss during the hearing as being something that often occurs. The respondent points out that her average earnings were overstated, her expectation of work ignored the reality that she had not found another agent, and she had neglected to consider the effect of Covid on theatres and actors. Only Covid was a factor that developed after the schedule was drafted. Many schedules are 'best foot forward'; sometimes, rarely, they cross from ambition to dishonesty. This is not a case where we find that a knowingly overstated or untruthful schedule was maintained in the expectation of a good offer of settlement – the claimant wanted a public hearing and judgement rather than a settlement. It is however another sign of the lack of attention to the merit of the case being put. This was not a liability only hearing.

50. The claimant's approach to offers is a factor leading us to exercise discretion to make a costs order. The costs letter discusses the merit of the claim, the lack of financial value, and whether taking the claim to hearing was likely to vindicate her position or have the opposite effect on her reputation, while still maintaining the unconditional offer to pay the performance fees. Had she re-evaluated the case properly at the beginning of November 2019 she should have recognised the weakness of the case, and she had the opportunity then to get out at no cost. This is particularly important if we find that the claim never had reasonable prospects of success. At that point the respondent was prepared not to seek costs if she withdrew, but the claimant pressed on. Even if she thought it was reasonable (despite the discussion of merits and the reference to Alice Walker's view) to go to a hearing to obtain a declaration of discrimination, it was not reasonable to refuse the offer of her fees, which had been on offer ever since her contract with the second respondent was broken. We do not know if the claimant read the letter, and we wonder if her adviser did. It is another illustration of the rigidity of thinking in the conduct of the claimant's case.

Ability to Pay

51. The tribunal does not have before it any information about the claimant's ability to pay a costs award. When making the application the respondents did in fact remind the claimant of the need for evidence and sent her the County Court debtor's examination form to complete as a way of providing it (there is no requirement to complete this form to provide evidence to the employment tribunal, but it was recommended as a useful way of doing it in **Oni v NHS Leicester City UKEAT/0144/12**). The claimant has not provided any information, and did not attend this costs hearing. Our

recollection from the substantive hearing is that she has not pursued a claim in theatre and has done some work in retail, but that is all. We could assume that a woman in her 20s without qualifications outside theatre is likely to less than average earnings. We have no information at all about the claimant's savings or expectations. In his written submission the claimant's representative stated that the tribunal was aware in general terms of the claimant's impecuniosity and that if we concluded the issue was relevant, give further directions for evidence on this. In the hearing he argued that it was not necessary to adduce evidence at this stage, because it was not known what the costs assessment would be. There was no application to all all all all all adjourn this hearing.

52. Our understanding of rule 84 is that the tribunal is not required to take account of ability to pay, but it may do so. We can only take into account ability to pay if the proposed paying party provides some evidence. The tribunal cannot assume that a party is impecunious because they have not supplied any evidence, indeed, if that were the case, no one would provide evidence. Experience suggests that some claimants facing costs orders seem to assume that if they do not provide any information they cannot be required to pay. This claimant however it has always been represented by the Christian Legal Centre, which has significant experience of litigation in the employment tribunal, the courts, and several courts of appellate jurisdiction. It is inconceivable that they are unfamiliar with the procedure for making costs orders in the employment tribunal, but even if they were, the respondents' letters will have put them on enquiry, and should have led them to realise that if they wanted to rely on the claimant being of slender means, they would have to do give some evidence on that. It is not reasonable to expect the tribunal to adjourn pending the provision of evidence and then reconvene, possibly some weeks later, to remind themselves of today's submissions and then make a decision, probably with further written submissions on the additional evidence. There is nothing in the rules that could have led the claimant to believe this was the process.

53. Even if we assume that the claimant is without substantial means, we are permitted to take into account that her prospects may change for the better in the future – **Arrowsmith v Nottingham Trent University (2012) ICR 159, Vaughan v London Borough of Lewisham (2013) IRR 713**. As **Vaughan** reminds us, if the respondents seek to enforce any costs award, the County Court can consider the paying party's means when considering whether to order payment by instalments, or suspend the order. She is still young, and it cannot be said that she always be without funds.

54. The respondents urged us to take into account not just the claimant's personal means, but also the ability of Christian Concern and Christian Legal Centre to pay. They asked us to heed the commentary and media pronouncements on this case as it proceeded, and represented that the case was being promoted as far as the hearing, despite its difficulties, as part of a campaign to assert Christian belief that homosexuality was sinful and to combat the recognition of homosexuality in the state. Even after the claimant's witness statement and trial evidence about realising that Celie was a lesbian role, it was said, Christian Legal Centre continued to "caricature" the facts and continue to do so after the decision, stating that

she was required to go lesbian to play the part (The Talk Radio interview, see below). We are directed to **Beynon v Scadden (1999) IRLR 700**. That case concerned a claim for failure to consult about a relevant transfer, which was held to be misconceived in law, because there was only a sale of shares, which could not be a transfer of an undertaking. The claim was found to be vexatious, because the trade union representing the claimants wanted to achieve employer recognition of the union for collective bargaining, and suggested this would be the price of abandoning the litigation. A litigant in person may not have appreciated the subtleties of what was a relevant transfer, but a trade union should. There was: "nothing wrong in (the trade union) seeking recognition, but if it chose to use hopeless proceedings as a vehicle to that end then it could not expect to do so with total impunity as far as costs were concerned". The costs rule concerned the actions of the representative as well as those of a party. There was no need for an explicit indemnity of the individuals' costs by the organisation for the organisation's ability to pay to be taken into account.

55. An earlier case, **Carr v Allen Bradley Electronics Ltd (1980) IRLR 263**, made it clear that for an ordinary lay representative of the union could assist a member in a case without making the union liable, but left the relevance of trade union support open to the discretion of the tribunal in other cases.

56. The claimant argued that **Beynon** was no longer good law because at the time there was no wasted costs jurisdiction, and now there is. Christian Concern and Christian Legal Centre had commented on the case while it was going forward, and after the judgement, but people were allowed to comment on current cases. Christian Legal Centre offered its services pro bono, and could not be viewed as a funder of individual litigants. To target Christian Legal Centre for an award of costs would be opening a dangerous floodgate and risk the extinction of their principled readiness to supply legal services for nothing in cases of public interest.

57. How involved was the claimant's representative, the Christian Legal Centre? They were closely involved from the beginning. As recorded in our judgement of 16 February, the claimant's father was a director and promoter of the campaign group Christian Concern and its associated organisation, Christian Legal Centre. Neither is registered as a charity. (An associated charity is mentioned on the website, inviting donations, while making it clear that they will not be used for campaigning or for the provision of legal services). Christian Legal Centre provided legal advice on the day the claimant learned from Bobbie Chatt that the theatre was concerned about the Facebook post being tweeted. Christian Legal Centre lawyers drafted the particulars of claim in the employment tribunal and in the County Court, advised the claimant throughout, and represented her at the hearing. They offered to hold the substantive hearing on their website, at a date (April 2020) when it was not clear that the tribunal would be able to hold public hearings remotely, and hosted both hardcopy and electronic material for public access during the hearing. The latter actions were helpful and do not of themselves make a representative liable for costs, but they show the close involvement of Christian Legal Centre with the conduct of this claim.

58. Christian Legal Centre's website states: "we speak and influence. We communicate God's truth in public debate, especially in the media, politics and law". A press release on this case said:

> "the case, supported by the Christian Legal Centre, raises the question of whether Bible believing Christians have the freedom to hold and maintain biblical views in public, without fear of losing their livelihoods of society, allowed to hold and express opinions and interpretations of art, literature and drama in ways that are contrary to LGBT they ideology", and
>
> "this is another in a string of cases involving Christians being hounded out of their careers because they love Jesus.. If you express and hold mainstream biblical views, you will be punished and will lose your career if you do not immediately renounce your beliefs", and:
>
> "the theatre industry and how any dissenting views against LGBT ideology, especially Christian beliefs, are currently incompatible with a theatrical career" (September 2019).

A CLC press release issued just before trial (28 January 2021) said:

> "the case will expose the mechanisms of censorship at the heart of the theatre industry, and how any dissenting views against LGBT ideology, especially Christian beliefs, are currently incompatible with a theatrical career", and went on "the theatre had attempted to avert Ms Omooba's lawsuit by offering to pay her the full wages she would have received for playing the performance. However, Ms Omooba rejected that offer and requested a formal and public ruling that the theatre has acted unlawfully and discriminated against her because of her Christian beliefs".

The same press release, issued some weeks after the claimant had conceded it was a lesbian interpretation in her witness statement, said the claimant disagreed with the interpretation of Celie as a lesbian character.

59. In a Talk Radio YouTube podcast after the judgment and reasons were sent to the parties, Michael Phillips of Christian Legal Centre said: "it's very easy to dress up discrimination as a commercial reason and say that this is all about the comments and all about the money whereas in fact the real reason something has happened is because of the protected religious belief". Challenged by the presenter that the audience saw this as a production with "gay undertones", the answer was that history was being rewritten, and when Steven Spielberg made the movie there was no belief that she was a lesbian character, but "all of a sudden the way in which the narrative developed after this post came to light, it is all of a sudden this is a LGBT issue and we are going to be promoting LGBT rights". He went on to say that the lesbian aspect of the production had been a nuance before, but now took on a life of its own "in order to justify the decision", going on to say the claimant could have acted a murderer without being a murderer. This overlooks that the interpretation of the part as a lesbian sexual relationship was in the text, and that the claimant would have acted a

murderer, but not a lesbian. There is nothing wrong with public comment disputing a judgment; the respondent argues however that this shows that the Christian Legal Centre *caricatured* the facts both before and after the production to promote their narrative of an anti-Christian campaign by gays which had to be contested.

60. In England, employment rights have to be enforced by individual employees bringing claims, and there is certainly a public interest in organisations promoting the enforcement of the law on employment rights by assisting litigants by providing advice, support and representation. There is nothing wrong in that.

61. In our finding Christian Legal Centre was deeply invested in both bringing the claim and in continuing it. There is nothing wrong in publicising cases: publicity has a useful public function in making workers aware of their rights, and the public and legislators aware of social issues requiring action. It is however wrong to promote and use a weak case, especially when, as in the publicity just before and after the hearing, overlooking or misstating the facts in the claimant's own evidence, to use the case to get publicity for a cause when bringing the claim on mistaken facts involves other people (here, the two respondents) having to spend very considerable sums of money defending a claim, valued by the claimant in November 2019 at £95,000 against the first respondent and £35,000 against the second respondent. The theatre and the agency, in facing allegations of unlawful discrimination, risked their good reputations in the theatre world, and the second respondent was especially at risk when dependent on public funds. Using the case as a publicity opportunity, rather than fighting it on its merits to redress wrong, transferred Christian Concern's public relations budget to the respondents.

62. We stated earlier that we had to speculate whether there was a simple failure to reevaluate and appreciate the weakness of the case, or a decision to press on for the sake of a public hearing. Christian Legal Centre has collectively substantial experience of equality law. They have supported such well-known cases in this field as **Eweida, Johns, McFarlane, Chaplin, Wasteney** and **Page**. When Mr Stroilov referred to other cases failing on their facts, we understood these were the cases he meant. We can all err, but there must be a suspicion that Christian Legal Centre did not want to engage in close study of the respondents' case and revaluation of the merit of its own because of the campaigning opportunity. The tone of the January 2021 public statement about the open fees offer certainly suggests this. We concluded that this did mean we should take their resources into account when exercising discretion to make a costs order. On a scale between **Carr** and **Beynon**, it was very close to the latter. We do not accept the argument that the introduction of rule 80 on wasted costs makes a difference. Rule 76 clearly covers the actions of representatives as well as parties. We well understand the claimant's point on the chilling effect of costs orders on an organisation's willingness to support cases in the public interest, but there has to be some restraint on the support of weak claims as a vehicle to promote a cause.

63. We do not have evidence of the financial resources of Christian Concern or Christian Legal Centre. We judge from the number of cases that they

have supported, and the range of services offered, that there are substantial resources or access to them. Mr Stroilov volunteered (when he said the claimant's representative was acting pro bono) that he provided his services for remuneration as a self-employed contractor, and we know there are a number of different people at Christian Legal Centre, whom we assume, in the absence of evidence, are paid on some basis. It seems he meant there was no charge to the claimant for legal services. Mr Stroilov also suggested that if there was an order against the claimant one or both organisations would initiate a campaign for donations for her.

64. We were not invited by other side to consider awarding a proportion of the costs, or costs from a particular date, but clearly in the light of **Yerrakalva** and similar cases we can consider that when we stand back and decide whether to make an order, and what order, and we did.

65. The claimant put the respondent to specific expense in the two expert reports, in the preliminary hearing of their application, and their unsuccessful appeal. Both reports were based on false understandings of the claimant's evidence. We did not find that a costs award should be limited to that. When the claimant started proceedings she may have viewed the case subjectively, and, stunned by events, failed to read the second respondent's letter, and felt injured by the rejection of her agent, the first respondent, and the imputation she had told a lie about Y Naija. But with the November 2019 offer she had the chance to end the litigation without cost, and independently of that, be paid the performance fees if she invoiced. By then she had a very detailed response from each, setting out large parts of the evidence relied on, as well as legal argument, and a letter inviting her to consider what she stood to gain from a hearing. She did not take that offer. She did not even reply to it. Nothing else in the litigation changed until the claimant prepared her witness statement, and nothing had 'evolved', as her representative put it, save that the claimant at last stated her understanding that the respondent was right about it being a lesbian role. If she, young, stunned and knowing little of the law, did not think about it, a responsible adviser would discuss what case looked like when viewed objectively. That it was a lesbian role, as she eventually conceded, she and her advisers could have known if they had thought about the case properly in November 2019.

66. For that reason we concluded she should bear the whole cost of the respondents' defence, subject to detailed assessment by a costs trained judge of the amounts claimed.

Employment Judge - Goodman

Date: 26th March 2021

JUDGMENT and REASONS SENT to the PARTIES ON

29th March 2021.

FOR THE TRIBUNAL OFFICE