Case No. 2303053/2019

EMPLOYMENT TRIBUNALS

Claimant: **Mrs S M Pearson**

Respondent: **AWP Assistance UK Ltd (T/a Allianz Partners)**

In the London South Employment Tribunal

On: 30 April 2021

Before: **Employment Judge L Burge (sitting alone)**

JUDGMENT ON COSTS

The judgment of the Tribunal is that the Respondent's application for costs is unsuccessful.

REASONS

1. Following a final hearing on 10 and 11 November 2020, the Tribunal's decision that the Claimant had been unfairly dismissed by the Respondent was sent to the parties on 25 February 2021.

2. On 24 March 2021, on behalf of the Respondent, Mark Stephens (Counsel) made an application for costs pursuant to rule 76 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. The Respondent asserted that on 14 October 2020 the Respondent had offered to pay the Claimant the total amount detailed in her Schedule of Loss and that she had rejected that offer despite the fact that she had already secured higher paid employment and that "proceeding to trial would deliver her nothing of real value but would put both parties to considerable costs".

3. The Respondent contended that the Claimant's response to the offer was to ask for a contribution of £15,000 towards her legal costs, despite having no legitimate expectation of any additional award.

4. The Respondent asserted that it made the offer for two reasons:

a. Its senior management team was facing unprecedented demands on their time. The offer was made to release the time that would otherwise need to be allocated to preparing for and attending trial.

b. It was also made for a sound commercial purpose: to avoid the costs of a trial.

5. The Respondent said that the rejection of the offer frustrated both of those purposes. It forced the Respondent to divert financial and human resources to a trial even though the Claimant had no prospect of achieving a better financial outcome and a real prospect of achieving a worse one.

6. The Respondent concluded that "no Claimant, acting reasonably, would have conducted proceedings in this way".

7. The Respondent asked that the application be decided on the papers and the Claimant did not object to this proposal.

8. TWM Solicitors provided submissions detailing the Claimant's Response to the Respondent's application for costs dated 30 March 2021. The Claimant took issue with the Respondent's contention that pursuing the claim achieved nothing of value and asserted that the finding of unfair dismissal is an outcome which has a value of itself. Further, the Claimant noted that the Respondent's offer was not unconditional - it was made without an admission of liability and required mutual obligations of confidentiality regarding the fact and terms of the settlement arrangement and a mutual non-denigration obligation.

9. The Claimant asserted that proceeding to trial would not involve the Claimant being subject to those conditions. Having been dismissed (unfairly as it was found by the Tribunal), the Claimant should not be prevented from freely discussing the circumstances of her dismissal, its (un)fairness and her views as to the Respondent without fear of being in breach of a settlement agreement possibly requiring the return of any settlement monies.

10. The Claimant also pointed out that it was open to the Respondent not to contest the case but that it had chosen to arrange representation at the final hearing, an indication that it also saw merit in avoiding a finding of unfair dismissal.

11. The Claimant contended that the Respondent had not engaged in any constructive attempt to resolve the matter by negotiation and compromise. Having made an offer at a very late stage in the proceedings and at a point in which the Claimant had incurred substantial costs, it was not unreasonable for the Claimant to seek recompense of those costs as a price for conceding a claim for unfair dismissal and agreeing to be bound by the restrictions.

12. The Claimant concluded that she did not act unreasonably in rejecting the offer and continuing with the proceedings to trial.

13. The Respondent referred the Tribunal to Lady Smith's judgment in the case of *Nicholson Highlandwear and Nicholson [2010] IRLR 859:*

"The question to be addressed is not whether or not the paying party succeeded in any aspect of his claim. Such success would not, of itself, mean that he had not

acted unreasonably. A party could have acted unreasonably, and an award of expenses be justified even if there has been partial (or whole) success."

14. The Respondent also referred to the judgment of Eady J in the case of *Evans v London Borough of Brent UKEAT/0290/ l9/RN* but submitted that it does not concern the Tribunal's jurisdiction to award costs under Rule 76.

15. The Respondent accepted that the failure to beat an offer of settlement will not result in a costs award per se but a Tribunal may conclude that the rejection of an offer to settle was unreasonable conduct for the purposes of Rule 76 (for example, *Monaghan v Close Thornton; Kapel v Safeways Stores plc*).

16. The Respondent quoted Mummery LJ in *Barnsley MBC v Yerrakalva [2012] IRLR 78*:

"*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 .. in conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had*".

17. The Claimant noted the reference to Lady Smith's judgment in *Nicolson v Highlandwear and Nicolson* and stated that the preferred authority runs from *Telephone Information Services Limited v Wilkinson [1991] IRLR 148* through to *Evans v London Borough of Brent*. In *Evans* (at para 47) Lady Eady comments of *Nicolson* in the following terms,

"*I would respectfully disagree with Lady Smith in Nicolson- a decision reached without reference to the earlier authority of Telephone Information Services and apparently giving no weight to the possible finding that an ET might make upon determining a complaint of unfair dismissal.*"

18. The Claimant contended that, whilst accepting that it was a case which reviewed a Tribunal's decision to strike out a claim, in *Telephone Information Systems Limited* Tucker J explained the Employment Appeal Tribunal's reasoning as follows:

"*in our judgment the Respondent has a right to have his claim decided by the Industrial Tribunal. His claim is not simply for a monetary award; it is a claim that he was unfairly dismissed. He is entitled to have a finding on that matter, and to maintain his claim to the Tribunal for that purpose. He cannot be prevented from exercising this right by an offer to meet only the monetary part of the claim. If he could be so prevented, any employer would be able to evade the provision of the Act by offering to pay the maximum amount of compensation. If the appellants in this the instance case wish to compromise the claim, it is open for them to do so by admitting it in full — they cannot do so by conceding only part of it.*"

19. The Claimant submitted that the decision received approval by the Court of Appeal in *Gibb v Maidstone and Tunbridge NHS Trust 2010 EWCA CW 67*. In that case Laws J observed at paragraph 19:

"*an unfair dismissal claim is not in all respects to be equated with a common law action which a defendant can simply choose to settle by a monetary offer."*

20. In *Evans v The London Borough of Brent* at para 54 Eady J stated:

"*Ultimately, I do not know what the value of a pure finding of unfair dismissal on the basis postulated by this ET would be for this Claimant ..... It cannot be said that such a finding would be of no value, or that the interests of justice cannot require a Respondent to be held to account for a procedural unfairness in reaching a decision to dismiss an employee of some 12 years' service, even if that account cannot lead to any financial award for the employee concerned*."

21. Following these authorities, it was the Claimant's position that there was a value in pursuing the claim to trial, namely a finding of unfair dismissal.

Relevant Law

22. The Employment Tribunal is different to the County Court or High Court, where the normal principle is that the loser pays the winner's costs. The Employment Tribunal is a creature of statute, whose procedure is governed by the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the "Rules"). Any application for costs must be made pursuant to those rules.

23. Rule 76(1) provides for when a costs order or a preparation time order may be made:

"76(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

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

[**Tribunal's emphasis**]

24. The discretion afforded to an Employment Tribunal to make an award of costs must be exercised judicially. (*Doyle v North West London Hospitals NHS Trust UKEAT/0271/11/RN*. The Employment Tribunal must take into account all of the relevant matters and circumstances.

25. When considering an application for costs the Tribunal should have regard to the two-stage process outlined in *Monaghan v Close Thornton* by Lindsay J at paragraph 22:

"Is the cost threshold triggered, e.g. was the conduct of the party against whom costs is sought unreasonable? And if so, ought the Tribunal to exercise its discretion in favour of the receiving party, having regard to all the circumstances?"

26. In *Kopel v Safeway Stores plc 2003 IRLR 753* the Employment Appeal Tribunal confirmed that there is no automatic *Calderbank* rule in the Employment Tribunal and that while a claimant will not necessarily be liable for costs where he/she rejects a *Calderbank* offer and is eventually awarded less than that offer, the refusal of the offer was a factor that a tribunal *could* take into account in deciding whether to award costs.

Conclusions

27. The facts of *Kopel* are very different to the current case. In *Kopel* the tribunal found that the claimant not only unreasonably rejected an offer but had also concluded that her claims were 'frankly ludicrous' and 'seriously misconceived'.

28. In the current case the Respondent is not seeking to argue that there was any other unreasonable conduct during the entirety of the litigation, it was only the rejection of an offer shortly before the final hearing that constituted unreasonable conduct.

29. The Tribunal disagrees with the Respondent's submission that the case of *Evans v London Borough of Brent UKEAT/0290/ l9/RN* does not concern the Tribunal's jurisdiction to award costs under Rule 76. Eady J's view in *Evans* - that it cannot be said that a finding of unfair dismissal would be of no value, or that the interests of justice cannot require a Respondent to be held to account for an unfair dismissal even where there is no financial award – is very relevant when determining the value of the Respondent's offer. The authorities running from *Telephone Information Services Limited v Wilkinson [1991] IRLR 148* through to *Evans v London Borough of Brent* are clear that there is a value to a finding of unfair dismissal and the Tribunal concludes that there was a value to a finding of unfair dismissal in this case also.

30. The Respondent's offer of settlement came late in the process and had qualifications to it. Most importantly, there was no concession of liability. If there was no value to a finding of unfair dismissal, then why not concede that the Respondent unfairly dismissed the Claimant as part of the offer? There were also the conditions of confidentiality and non-denigration attached to the offer. Following *Telephone Information Systems Limited* the offer did not offer to settle the entirety of the matters at hand – it only settled the financial award, not the finding of unfair dismissal and imposed conditions.

31. Given the above factors and looking at the whole picture of what happened in the case in accordance with *Barnsley MBC*, it was not unreasonable for the Claimant to reject the Respondent's offer and to revert with a counter offer which included a proportion of her legal costs. The first part of the test set out at *Monaghan* therefore fails – the Claimant's conduct did not fall within rule 76(1)(a).

32. For the above reasons the Respondent's application for costs is refused.

Dated: 30 April 2021

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Employment Judge L Burge