EMPLOYMENT TRIBUNALS

Claimant: John Corbett

Respondent: Applus RTD UK Ltd

JUDGMENT ON COSTS

Heard: On paper **On: 13 May 2021**

Before: Employment Judge Sweeney

Members: Sharon Mee and Grahame Barker

The unanimous Judgment of the Tribunal is as follows:

1. **The Claimant's application for costs is well-founded.**
2. **The Respondent is ordered to pay costs of £5,411.61 to the Claimant**

REASONS

Background

1. These proceedings have a long history having been first heard by an employment tribunal in 2018, then again by a differently constituted tribunal in 2020 (this tribunal) via an appeal by the Respondent to the Employment Appeal Tribunal.

2. Judgment by this tribunal was promulgated on 26 November 2020 and sent to the parties on 27 November.

3. In paragraph 242 of the judgment on liability the Tribunal strongly urged the parties to resolve the issue of remedy without the need for a remedies hearing. This was made in light of the long history of the proceedings which had, no doubt incurred significant cost, time and stress to all concerned.

4. The parties did not resolve the issue of remedy. Therefore, a remedy hearing was held on 12 March 2021. The Tribunal gave judgment on remedy on the day. A total amount of £34,431.87 was ordered to be paid to the Claimant. At the end of the proceedings, the Claimant made an application for costs.

5. The application for costs had in fact been sent to the Tribunal and copied to the Respondent in the evening of 11 March 2021, although the tribunal panel was unaware of this until the end of proceedings on 12 March 2021 and had not read the application. It was agreed that the Respondent's solicitors should respond in writing, which they did by email on 26 March 2021. The Claimant's solicitors then sent a brief response to that email on the same day.

6. It was agreed that the Tribunal would determine the application for costs on paper and the full tribunal reconvened for that purpose, in chambers, on 13 May 2021.

Relevant law

7. The tribunal's power is considered the 2013 rules of procedure and in particular within rules 75 to 84.

8. Under rule 76 (one) "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 reasonably either bringing of the proceedings (or part) for the way that the proceedings (or part) has been conducted;

9. It is well established that 76 (one) imposes a two-stage test: first of all the tribunal must ask itself whether the party's conduct falls within the grounds identified in rule 76 (one) ("the threshold"). Secondly, and if it does, the tribunal must ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party.

10. In the decision of **Yerrakalva v Barnsley Metropolitan Council** [2012] I.C.R.420, the Court of Appeal emphasised that it was important not to lose sight of the totality of the circumstances. The tribunal must look at the whole picture when exercising the discretion to award costs or not. It must ask whether there has been unreasonable conduct in the bringing, defending or conducting the proceedings or part thereof and, in doing so, identify the conduct, what was unreasonable about it and what was its effect. Reasonableness is a matter of fact for the tribunal which requires an exercise of judgement.

Submissions

11. The Claimant submitted that the Respondent's conduct in refusing to engage in settlement negotiations following receipt of the liability judgment was reasonable conduct in respect of part of the proceedings. A number of appendices were

attached to his application for costs. The Claimant contended that the correspondence demonstrated unreasonable refusal to engage particularly bearing in mind the tribunal's remarks in paragraph 242 of the liability judgment. This refusal to engage was not only reasonable but its effect was to force the claimant to incur further legal costs.

12. The Respondent submitted that:

12.1 There had been a judicial mediation at which the Claimant and the Respondent were miles apart and which rendered that process a waste of time;

12.2 Any offer it would have put forward after the liability judgment would have been rejected;

12.3 The Claimant is funded by insurers and thus an application for costs is entirely without merit;

12.4 looking at the history of the proceedings overall, the Claimant advanced a number of claims which were without merit and which put the Respondent to cost;

12.5 The Respondent presented arguments of failure to mitigate and contributory conduct at the remedy hearing.

Discussion and Conclusions

13. We have considered carefully both sets of submissions and have read the correspondence between the parties. These reasons are proportionate to the issues raised in the application.

14. The first question we have had to ask ourselves is whether the Respondent's behaviour met the required threshold: namely, did the Respondent act unreasonably in the way in which it conducted this part of the proceedings – i.e. the part of the proceedings between liability and remedy.

15. We conclude that it did act unreasonably. There was an abject and wilful refusal by the Respondent to engage in settlement discussions - despite the lengthy, costly history of the proceedings and despite the tribunal strongly urging the parties to attempt to resolve matters following promulgation of the liability judgment. Telephone calls and/or messages from ACAS went unanswered or were left with no reply. Solicitor correspondence regarding settlement was not even acknowledged. The Respondent showed no interest in attempting resolution.

16. The offer which the Claimant made to settle the proceedings was not far from that total amount which was in fact ordered to him at the remedy hearing.

Although that is not what has led the Tribunal to conclude that the Respondent's behaviour was unreasonable, it supports the Claimant's position that he was reasonably engaging in the exercise and applying his mind to it. The unreasonable behaviour which we find on the part of the Respondent is the deliberate refusal to engage. The Respondent further acted unreasonably in the way in which it failed to engage with the Claimant's solicitor in preparation for the remedy hearing as is evident from the correspondence in the appendices attached to the costs application

17. We are entirely satisfied, therefore, that in the way in which they conducted this part of the proceedings the Respondent acted unreasonably. Accordingly, rule 76(1) provides that we must ('shall') consider whether to make a costs order within the meaning of rule 75(1)(a). Although we must consider making a costs order, we are not obliged to do so, however. We retain a discretion.

18. We exercise our discretion in favour of making a costs order against the Respondent and in favour of the Claimant. Again, in this respect we have had regard to the Respondent's written submissions and have taken a step back to look at the overall history of these proceedings when considering whether to exercise our discretion.

19. We recognise that many of the Claimant's complaints were dismissed by the Tribunal and some were abandoned by him very late in the day and that this meant that the Respondent was put to cost in preparing for and responding to those complaints. We also recognise that the parties have generated an awful lot of antagonism towards each other over the course of these proceedings. We recognise that, even if the Respondent had genuinely attempted to negotiate after the remedy hearing that they may have failed to resolve it. We further recognise that the Claimant was for most of the proceedings covered by legal expenses. Although the existence of legal insurance is no barrier to an award of costs, nevertheless it is something we believe we are entitled to take into account when exercising our discretion.

20. Nevertheless, there comes a time when the parties must look at events with a fresh view point. The time for doing this was after the judgment on liability, when the Tribunal made clear that there was a finite window of time during which the Claimant's losses would be assessed, and that it would be desirable to attempt to resolve this long-running litigation. The Claimant's solicitors genuinely attempted to do so but were met with 'radio-silence'. That had the inevitable effect of running up costs which could have been avoided and the inevitable effect of prolonging the stress that inevitably accompanies litigation. The Respondent says that, had it made an offer it would have been rejected. However, it does not know this.

21. The Claimant sought an award of costs in the sum of £7,495.80 (inclusive of VAT). We have studied the schedule of costs. We consider the costs incurred to be reasonable and the Respondent has not submitted to the contrary.

22. The costs incurred in December 2020 would probably have been incurred in any event, had the Respondent genuinely responded to the Claimant's solicitors' attempts to settle. Therefore, we have considered only those costs incurred from January 2021, by which time we would have expected the Respondent to reasonably have engaged in the exercise. The total amount of costs – both solicitor and counsel – inclusive of VAT from 04 January 2021 is £7,215.48.

23. We award the Claimant 75% of that amount. That results in an award of £5,411.61. We consider it just to reduce the costs by 25% to reflect the points that the Respondent made in its written submissions, namely that the parties might not have achieved a settlement in any event, had the Respondent genuinely engaged in the exercise and that looking at the proceedings overall, the Respondent faced claims which were abandoned by the Claimant or which were weak claims. Nevertheless, that does not excuse the deliberate refusal to engage at this stage of the proceedings, the effect of which was to drive up costs further.

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Employment Judge Sweeney

Date: 13 May 2021