EMPLOYMENT TRIBUNALS

Claimant: **Mr M Choudhury**

Respondent: **Castleplus Limited**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **11th May 2021**

Before: **Employment Judge McLaren**
Members: **Mrs P Alford**
Mrs G McLaughlin

JUDGMENT having been sent to the parties on **17 May 2021** and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Procedure

1. This has been a remote hearing on the papers which was not objected to by the parties. The form of remote hearing was by CVP. A face to face hearing was not held because it was not practicable. Both parties were able to take an active part in the proceedings and had a full opportunity to put their case.

2. The hearing was listed to consider an application by the respondent for costs.

Background

3. The tribunal heard this matter on 19th and 20th November 2020 and its unanimous decsion was that the claim for harrasment on the grounds of race and/or religion did not suceed . The main conclusions we reached on this head are set out below .

"*Harrassment*

The claimant has identified three incidents which he says amount to harassment on the basis of his race or religion.We have found that he was

provided with the information he requested in January 2019 about his contract.That is how the issue is put and on that basis there is no failure by the respondent. If the claimant intended the complaint to be wider and encompass other questions that are not related to his contract, we find that there is no evidence that any such failure was connected to his race or religion.The claimant has not provided anything more than his suspicion that this is the case.We conclude that it was not the case.

We have found that the new contract did not properly reflect the date of continous employment as it should have done, but we have also accepted the respondent's account that they make the same error for all.This was not because of the claimant's characteristics.

We have concluded that there was a genuine redundancy and the claimant was the holder of a unique role.His dismissal arose because he was not prepared to consider the only alternative role available.All the claims for harrasment are therefore dismissed."

4. For all of these reasons we dismissed all the claimant's complaints of discrimination having no merit. The claimant had not provided any facts from which inferences could be drawn, there was no discriminatory treatment and the claimant's race and/or religion played no part in any of the matters about which he complained.

Costs application /submissions

5. The respondent made an application for costs and this hearing was listed to consider that application. The grounds of the application are that the Claimant's conduct was unreasonable,and that the Claimant's harassment claim had no reasonable prospect of success

6. The respondent provided us with written submissions which were expanded in front of us today. We also heard submissions from the claimant to supplement his 22 page defence to the appication and were provided with a bundle of documents of 93 pages.We were also directed to our judgment and the deposit order made in this case. We have considered all the submissions made and the documents to which we were directed and have taken these into account in reaching our decision.

Unreasonable conduct

7. The respondent submitted that there was unreasonable conduct in number of respects.

- Failure to concede the employer's contract claim until cross-examination.

8. The respondent's representative set out the relevant dates. The respondent brought a counterclaim in November 2019 the claimant filed a defence

to it in January 2020. For the next 11 months he continued to deny that he had deleted the respondent's email servers. We were directed to an email sent by the claimant on 3 June 2020 in which he suggested that there had been some intervention from either the respondent's own IT department or a third party contractor. The respondent had set out its position in detail in witness statements of Mr Bruzas and Mr Weisberger which were served on the claimant at the beginning of November 2020. The claimant did not concede that he had breached his contract of employment and permanently deleted the respondent's email accounts until the last day of the final hearing during cross examination.

9. It was submitted by the respondent that the unreasonable conduct was twofold. First, the Claimant committed a deceit before the Tribunal at the preliminary hearing of 17 December 2019 when he denied that he had deleted the email servers. He committed the same deceit again at the beginning of the final hearing by maintaining a defence of the counter-claim which was based on a denial that he deleted the email servers. On both occasions the Claimant knew that his position was false. Second, the Claimant maintained that false position unnecessarily and put the Respondent to the cost of preparing documentary evidence, witness evidence and cross-examination to advance its counterclaim. That was unreasonable because the Claimant put the Respondent to pointless extra cost, and took up the Tribunal's time, dealing with a contested issue which he knew to be untrue.

10. The claimant confirmed in his submissions that he stood by the admission he had made at the final hearing. He explained, however, that things were not as clear-cut as that admission suggested because he had been unable to get a response to a request he made for information about the server issue from the respondent. The claimant explained that at the preliminary hearing in December 2019 counsel had told him that the email account had been deleted in April 2019. He therefore asked in an email of 7th June about the involvement of IT.

11. We accept the repondent's submissions on this point and find that the claimant did not take any earlier opportunity to make this admission. We find that he could and should have admitted this earlier. The possibilty of something having happened before he made the deletion is not a sufficent reason not to make the admission about his own conduct at an earlier point. This amounts to unreasonabe conduct.

- <u>Acting unreasonably in refusing to accept generous offers of settlement.</u>

12. We were reminded that deposit orders had been made in respect of a number of the claimant's other contentions of discrimination which were not matters be considered at the final hearing as he had failed to pay the deposit and therefore there were not pursued.

13. We now have sight of the without prejudice correspondence which is included in the bundle prepared for this hearing. We can see that on 3 April 2019 the claim was offered £500 which he rejected. He was made an offer on 20 May 2020 of £20,000 which he also rejected via ACAS.

14. The claimant then offered to settle for £7,500. This was rejected on 21 Ocober but the respondent counter offered £5,500. The claimant told us he did not accept the offer because ACAS told him they also didn't understand the words in the settlement document but the respondent refused to explain it or to amend it. We have reviewed the terms of the offer and find it is standard wording and are suprised that ACAS did not understand it. The offer was expressed to be time limited and the claimant also told us that the time limit expired before he could accept it.

15. In submissions the respondent said that the claimant could have asked the respondent to re instate the offer at any time but he did not do so.This was not expressed to the claimant and we do not find the refusal of a time barred offer unreasonable.We find that it is likely the respondent could indeed have settled the case for the £5,500 it had offered if it had re extended the offer for more than 2 days. The claimant was in full time work when the offer was made which would make compliance with the deadline difficult.

16. The claimant prepared three schedules of loss, the first on 15 September 2020 claiming £119,902.91, the second in October 2020 putting his loss at £93,476.20 and a final one in October 2020 setting out his loss as £100,818.24. The schedule of loss also referred to the claimant having taken legal advice relating to unfair dismissal/redundancy claim and it is submitted by the respondent he would have known what the maximum compensation claim and losses he could recover for these heads were.The claimant said he did not take legal advice, even though the schedules say that, because ACAS advised him to put in the schedule as much as possible. He did not want to miss out on any claim, he is not a lawyer and ACAS told him he would not lose out by putting this reference to legal advice in.We accept that the claimant had not taken legal advice.

17. We have concluded that, despite these schedules of loss, the claim could have been settled for £5,500 had the respondent extended the offer period.

- Continuing the harassment claim having been warned it had no prospects of success

18. The respondent submitted that the claimant was told about a year before that claim of harassment was very unlikely to succeed. We were directed to the deposit order decision of 17 December 2019 in which the Employment Judge suggested that he had little prospect of success in establishing his discrimination claim. The respondent set out in detail why it also considered the claimant had no prospect of success on this claim in the letters of 9 October and 18 November 2020 which we have referred to above. It was submitted that the claimant should have withdraw this part of his claim by the end of October 2020 but he ignored these warnings.

19. The respondent put the claimant on notice as to costs on 20 May, 9 October and 18 November 2020. The letter of 9 October sets out in detail the history of the settlement negotiations between the parties and gives a clear

statement of the respondent's view on merits and the consequences of potentially pursuing the claim.

20. We find the letters are clear and the claimant should have understod the merits of his case. He told us that ACAS had told him that respondent's often make such statements.Nonetheless, the claimant had also had the benefit of EJ Moore's judgement on the merits of his claim at the deposit hearing with her very clearly expressed view on the merits of his discrimination claim.We consider that the claimant was acting unreasonably in pursuing at least his discrimination claim in the light of these warnings.

- <u>The pursuit of the harassment claim was abusive</u>

21. It was put that the claimant's unreasonable conduct was aggravated by the fact that he was pursuing the harassment claim not to seek legal redress but disrupt the respondent. It was submitted that the claimant's email to the respondent solicitor 3 June 2020 evidenced this. The claimant said in it that even if the court awarded him nil, but he received a verdict in favour of his case that will be worth the time and effort he put into this.

22. We were also told that during the judicial mediation the claimant told Employment Judge Jones that he was pursuing the case for a personal reason rather than one based on a legal position. It was submitted that this was an attempt to drag the respondent to court to defend a hopeless discrimination claim and that this was evidenced by the claimant's attitude on the day he gave evidence when he said that if we were to find the reason was not his race or religion he was fine with that. The respondent submitted that no person who genuinely believed they were discriminated against would be content to appear in court with no evidence and declare themselves "fine" with the purported discrimintor's evidence to the contrary.

23. Our judgment found he had pursued the discrimination on a suspicion and no evidence.Nonetheless, we do not accept that his motive was an abuse of process.

<u>No reasonable prospect of success – harrasment claim</u>

24. In addition to relying on the claimant's conduct,the respondent also made its application on the grounds that the claims had no reasonable prospect of success. It relied on the reasons set out above to submit that the claim had no reasonable prospect of success at any point.We were reminded that a key question was not whether a party thought they were in the right,but whether they had reasonable grounds for thinking this. We were referred to 2 authorities (Jonathan Hamilton Jones v Angus Black and Scott the Inland Revenue) both of which are addressed below.

25. The respondent submitted that the claimant did not have reasonable grounds to think he was right for the reasons set out already.The respondent also relied on the tribunal's own finding that there was no evidence that the events of

which the claimant complained related his race or religion, the most he could provide was suspicion.

26. The claimant told us today that he did not realise he had continued to pursue a discrimination claim because he had believed that all his harassment claims had been withdrawn because he had not paid the deposit. He also said that the judge at the judicial mediation had told him that the claim would now be with a judge alone and would be shorter. The claimant told us he altered his witness statement to take out all references to discrimination and was suprised that he was asked about this at the main hearing.

27. The issues list which was explained at the outset of the hearing clearly had harrasment on grounds of race and religion set out as a claim being brought by the claiamnt. There was a panel of 3 hearing his case, not a judge alone as the claimant said he had been advised would happen if there was no discrimination claim .Contrary to his submission,his witness statement does contain some brief references to race and religion in it (paras 6.6.3/6.6.9 .)The claimant expressed no surprise at the issues list, the presence of 3 panel members or his being cross examined on the point at any time during the full hearing .

28. During the hearing I asked the claimant if he was going to ask questions about discrimination. I gave him time to think about this and he did not question why I was asking. We do not find this explanation credible and conclude the claimant did know he was still pursuing a discrimination claim. At no point did he fomally withdraw it and the panel and the respondent understood that it was still pursued.

Exercise of discretion

29. The respondent asked us to exercise our discretion because it submitted that threshold to make a costs order had been met. It would be just and equitable to do so because the claimant was sent three costs warnings by the respondent and it is said knowingly maintained positions he knew were false or weak. It was further submitted that because the respondent's tenants must pay for this conduct of the service charge it would further be just and equitable to make an order for costs against the claimant.

30. The claimant submits that we should not do so because the respondnet could have settled the case at £7,500.

Amount of costs/means to pay

31. The respondent has asked for its costs on a summary basis. It set out that it has incurred £38,000 including VAT in total. In the alternative it asks for costs associated with the final hearing, dealing with written submissions, the last costs warning letter in summer 2020, and this cost application which is £14,022. There would also be an additional sum of around £3,000 plus VAT for the cost of today's hearing.

32. The claimant is employed and earns £50,000 per annum. He has a share portfolio of £125,000 but lives in a family home and is planning to rent shortly. He has 2 dependents.

Relevant Law

33. As the Court of Appeal reiterated in Yerrakalva v Barnsley Metropolitan Borough Council and anor 2012 ICR 420, CA, costs in the employment tribunal are still the exception rather than the rule. It commented that the tribunal's power to order costs is more sparingly exercised and is more circumscribed than that of the ordinary courts, where the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In most cases the employment tribunal does not make any order for costs. If it does, it must act within rules that expressly confine the tribunals power to specified circumstances.

34. The grounds for making a costs order under rule 76(1) of the Tribunal Rules are:

- a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing or conducting of proceedings (or part thereof) ,or

- the claim or response had no reasonable prospect of success —

35. Both of the above grounds are discretionary — i.e. the tribunal may make a costs (or preparation time) order if the ground is made out but is not obliged to do so, although the tribunal is under a duty to consider making an order when they are made out — rule 76(1).

36. On the question of no reasonable prospect of success , we considered two cases, Jonathan Hamilton-Jones v Angus Black EATS/0047/04 and Scott v Inland Revenue Commissioners Development Agency 2004 ICR 1410, CA . A key question in determining whether a claim had no reasonable prospect of success is not whether a party thought he or she was in the right, but whether he or she had reasonable grounds for doing so.

37. On the question of unreasonable conduct it is appropriate for a litigant in person to be judged less harshly in terms of his or her conduct than a litigant who is professionally represented and tribunals must bear this in mind when assessing the threshold tests In assessing whether a party's conduct was unreasonable, the tribunal should adopt a "range of reasonable responses" approach rather than substituting its own view (Solomon v University of Hertfordshire UKEAT/0258/18).

38. Even if the threshold tests for an order for costs are met, the tribunal still has discretion whether to make an order. That discretion should be exercised having regard to all the circumstances. In this respect, it was not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice.

39. Costs are compensatory not punitive. A tribunal is not obliged by rule 84 to have regard to ability to pay — it is merely permitted to do so.Where a tribunal has been asked to consider a party's means, it should state in its reasons whether it has in fact done so and, if it has, how this has been done, it should say why. If it does decide to take into account ability to pay, it should set out its findings on the matter, say what impact these have had on its decision whether to award costs or on the amount of costs, and explain why.

40. Any assessment of a party's means must be based upon the evidence before the tribunal .The assessment does not need to be solely based upon a party's means as at the date the order falls to be made. The fact that a party's ability to pay is limited as at that date does not preclude a costs order being made against him or her, provided that there is a 'realistic prospect that [he or she] might at some point in the future be able to afford to do so"

41. The amount of a costs order where the amount costs is determined by the tribunal under its basic jurisdiction is limited to £20,000. However, the tribunal can order that the amount of costs be determined by way of detailed assessment at the County Court, or by an Employment Judge applying the same principles, in which case there is no cap on the costs awardable.

Conclusion

42. Having considered the submisions made we do not accept that the claimant unreasonably refused generous offers or that the initial pursuit of the complaint was abusive in that it was for the "wrong " motives. We do conclude that the claimant could and should have admitted the counter claim earlier.In failing to do so he was continuing, at best ,to mislead the tribunal.

43. We also conclude that, adopting the range of reasonable responses, the claimant acted unreasonably in continuing to pursue the discrimination claims having had the merits set out clearly in 3 letters from the respondent and by an employment judge.He had no reasonable grounds for considering that his discrimination claim had reasonable prospects of success, based as it was on suspicion and no evidence. It appears that the claimant now recognises that this was the case as he has attempted to persuade us today that he had not pursued these claims, a point that we reject.

44. Having found that on these two grounds the claimant acted unreasonably we must consider under rule 76(1) whether to make a costs order. We have then gone on to consider whether we should exercise our discretion to make a costs order. In doing so we have considered the nature,gravity and effect of the claimant's conduct. We accept that the effect of the claimant's conduct has been to put the respondent to significant cost and trouble to defend the claim of discrimination which the claimant now seems to accept he did not wish to pursue and a counter claim which should never have been brought.

45. We conclude that in these circumstances it would be just and reasonable to exercise our discretion and award some of the costs incurred.The respondet has

aked for either £38,000 or £17,000.We have debated the level of costs to award, we therefore award £8,000 which is some part of the respondent's costs incurred.This takes into account the fact that some parts of the claim succeeded.

46. In making this award we have taken into account the claimant's ability to pay and concluded that he has the means to do so. The cost ordered is a comparitively small amount of his savings.

47. For these reasons we have made a costs order in favour of the respondent of £8,000.

Employment Judge McLaren
Date: 15 June 2021