Case No: 2203613/2019

EMPLOYMENT TRIBUNALS

Claimant: **Ms S. Messi**
Respondent: **Prêt-a-Manger (Europe) Ltd**

London Central **28 June 2021**

Employment Judge Goodman
Mr. D. Carter
Mr. P. de Chaumont-Rambert

RULE 70 RECONSIDERATION

The order whose text appears below was sent to the parties on 29 June. It has been brought to my attention that the order itself has an error of arithmetic in the calculation of the balance payable by the claimant after allowing for the deposit she paid. I have reconsidered the decision on my own initiative under rule. It is in the interest of justice to vary it to correct the error. The variation is made by striking through the wrong figure. The correct figure has been added and underlined.

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Employment Judge Goodman
30th June 2021

ORDER VARIED AFTER RECONSIDERATION
SENT TO THE PARTIES ON

.
. 01/07/2021

.....
FOR THE TRIBUNAL OFFICE

COSTS ORDER

1. The claimant conducted the claim unreasonably, and is ordered to pay the respondent's costs in the sum of £15,000.

2. The deposit of £250 is to be paid to the respondent's solicitor in part

payment, and the claimant is to pay the balance of ~~£12,500~~ £14, 750 to the respondent's solicitors in 28 days.

REASONS

1. Following a hearing on 4 March 2021 the tribunal dismissed the claim of race discrimination in relation to a job application. The judgement with written reasons was sent to the parties on 5 March 2021.

2. On 25 March 2021 the respondent applied for an order that the claimant pay the costs of the case. They do so on two grounds, first that the claimant conducted the claimant unreasonably, including the making of a deposit order in May 2020, second that the claim had no reasonable prospect of success.

3. By rule 77, a tribunal can make a costs order either at a hearing, or based on written representations. Neither party has asked for a hearing, and the panel has reconvened today to discuss the parties' written representations. As before, the claimant is not represented, and the respondent is represented by solicitors.

4.Unlike in the courts, costs in the employment tribunal do not follow the event. Instead, one of the conditions in rule 76 has to be fulfilled, and then the tribunal has to exercise discretion whether to make an order. Rule 76 says:

> **When a costs order or a preparation time order may or shall be made**
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> **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—
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> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
>
> (b) any claim or response had no reasonable prospect of success..

The Parties' Submissions

5. The respondent relies on both (a) and (b), and says the claimant both acted unreasonably, and brought a claim that had no reasonable prospect of success.

6. The respondent's application dated 25 March 2021 sets out the chronology and in essence argues that conduct was unreasonable in relation to rule 76(1)(a) in a number of ways. First, the claimant has always stated that she had a recording of the contested job interview, but has never disclosed it, although ordered to do so. Second, she did not file a witness statement, contrary to order. Third, she was twice made a drop hands offer, that if she withdrew the claim the respondent would not seek costs, on 25 February 2020 and 22 June 2020. Fourth, by failing to engage with the orders made, and in her behaviour over delivery of the hearing bundle, she increased the costs the respondent's solicitors had to incur. Lastly, she engaged in accusatory and threatening correspondence.

7. In relation to rule 76 (1) (a) the respondent also relies on the deposit order made 27 May 2020, and argues that the claimant's claim failed for substantially as the same reasons as those anticipated by Employment Judge James in his reasons for finding then that the claimant had little reasonable prospect of success.

8. Responding to the application, the claimant states (email 13 April 2021) that she relies on the EAT decision in **Cox v Adecco UKEAT/0339/19**, judgement 9 April 2021, which overturned a preliminary decision to strike out a claim because the judge who did so had not been able to properly identify what the issues were, in particular in relation to a number of protected disclosures. The case concerns a strike out, and it was suggested that a deposit order may have been an alternative, but in paragraph 34 adds that similar issues may apply where deposit orders are made.

9. The claimant does not go into detail on the alleged unreasonable conduct, but asserts that the respondent acted unreasonably in failing to engage in conciliation (email 25 March 2021). She also says that she is on universal credit (UC), and has no savings, and would not be able to pay any order made (email 6 April 2021). A statement of UC payments from December 2020 to April 2021 was attached.

Relevant Facts

11. The claim is about a job interview in June 2019. The claimant did not get the job. She asked for feedback, and was sent several pages of information on the reasons for her lack of success. In her claim presented 24 September 2019 she alleged this was by reason of race discrimination. A response was filed 4 December 2019 asserting the reasons for selecting another candidate out of the three people interviewed, namely a more reliable employment record, and interview answers suggesting she would not be a "good fit" with the respondent's office culture. There was a preliminary hearing on 4 March 2020 to decide an application by the respondent for an order striking out the claim on grounds that it had no reasonable prospect of success, which she did not attend because she said she had another hearing that day. By letter the claimant was given permission to use a covert recording she had made of the job interview, provided it was disclosed to the respondent by a particular date. Having given preliminary reasons for making a deposit order, Employment Judge James adjourned a final decision so that the claimant could provide evidence of ability to pay (though she did not) before making a deposit order, dated 27 May 2020, that the claimant had little reasonable prospect of success, and should pay £250 as a condition of proceeding. There was a further case management hearing on 24 July 2020, which the claimant did attend (but for Covid it would have been the final hearing) , when a revised timetable of orders was made, and the final hearing was fixed for three days starting 4 March 2021. The claimant did not then send a witness statement in October 2020, as ordered, and Employment Judge Burns directed on 3 November that the respondent disclose theirs, with a password so the claimant could open them when she had served hers. Later that month the claimant said in her first fit note saying that she was unfit for work by reason of depression, anxiety and panic attack. She has sent similar notes since then. On 26 February Employment Judge James refused an application to postpone the final hearing. The claimant attended the hearing on 4 March 2021 to renew her application, but left the hearing when it was refused, and the evidence was heard without her. Further details of this are set out in the judgement and written reasons of 5 March 2021. In occasional emails to the tribunal and the respondent the claimant had suggested that disclosure of the witness statement and recording would only be made nearer the hearing, despite the orders made, but in fact she has never disclosed either a witness statement or the recording. On 4 March 2021 the tribunal offered to hear her evidence without a witness statement, as the claim form was reasonably detailed, but the claimant left the hearing before her evidence could be taken.

12. Employment Judge James's record of the reasons for making a deposit order shows additional evidence of the claimant's uncooperative approach to tribunal orders. Discussing the fact that as late as the end of May 2020 she had not provided information about her ability to pay, as requested in March, and the claimant's objection to the respondent's analysis of her ability to pay without giving any information herself, the judge commented: "the claimant appears … to be assuming that she can avoid the deposit order being made by being uncooperative. If that is the case, she is mistaken".

12. The tribunal has seen emails the claimant sent from time to time during the course of the case, which the respondent says are accusatory and unreasonable conduct. In March 2020 she said that the respondent's statement about salary expectation and working in New York was libellous, quoting the Defamation Act. In June 2020 she threatened the respondent with the SRA, the police and the legal ombudsman, in relation to their correspondence, and we can see that she did in fact she did copy to the Metropolitan Police an allegation that the respondents were engaged in harassment victimisation and bullying and causing anxiety by their correspondence. Later she said she was going to block the respondent's emails, and respondent replied that they would continue to email in relation to compliance with orders and blocking was unreasonable conduct. Sometimes tribunals read emails from solicitors to another party which are high-handed and intemperate, but this respondent's emails seems to us to be reasonable in tone and factual in content. They could not be described as bullying, even if what they said from time to time (for example, that her claim had little reasonable prospect of success) may not have been what she wanted to hear.

13. An unexpected feature that has come to light since the decision of 4 March 2021 is that the claimant did not in fact pay the deposit when the order was made. She was ordered to do this by 8 July 2020. When she appeared at the hearing on 24 July it must have been assumed that she had paid, otherwise she would not have attended. But it does not seem that any check was made with the Bristol payments office on this, perhaps because of the administrative difficulties caused by Covid. After the final (March 2021) decision was sent to the parties, which mentioned that it was not in fact known if the claimant had paid the deposit, the claimant then dispatched a payment of £250 to Bristol, and there was then some frantic, and from the claimant's side, unpleasant correspondence, resulting in confirmation that the deposit had been received and paid in on 7 April 2021. If she did not pay until 7 April 21, her claim had been dismissed in July 2020. There is a possibility that she did make a payment before 7 July 2020 and it was misdirected; the respondent's bill of costs records emails from the claimant of 8, 13 and 29 July saying she had paid the deposit, but the claimant has not said so in the recent post-hearing correspondence, and if she had made a payment she must have known it had not been cashed or acknowledged. It probably does not matter. She has always behaved as if it had been paid on time. When attending the hearings on 24 July 2020, and 4 March 2021, she never expressed surprise that the claim was going ahead because she had not paid the deposit, and she has never mentioned this in the correspondence. By not stating she was not paying, or had not paid, the respondent has assumed she had paid, and so has incurred costs defending the claim.

14. As recorded in the reasons dated 4 March 2021, the information available to the employment tribunal, now backed by disclosure of the relevant emails, indicates the claimant has deliberately avoided and obstructed service of the hearing bundle. She has not explained why the signature in the name of Messi acknowledging receipt of the bundle delivered, which she said she did not receive, is not authentic. A further bundle was returned by Royal Mail because, it was said, a redirect had been put on that address. The claimant told the tribunal she still lived at the same address, while at the same time as saying she was not going to reveal her address, which is of course on the claim form. She has had the bundle in electronic form, indeed she requested it in this form, and it was the tribunal that wanted her to have a hard copy because she lacked a second screen for a remote hearing. To this tribunal it looks very much as if the claimant was being difficult for the sake of it and to obstruct or prevent a hearing.

Discussion - Was the claimant's conduct unreasonable?

16. In our view, it was. She deliberately postponed writing a witness statement, saying she would do so nearer the hearing, but never wrote one, despite reminders. She obtained permission to rely on the covert recording, but has not disclosed it, whether before or after the deadline set for doing so. She has caused the respondent added cost and difficulty in their attempts to send her a hardcopy bundle. In these respects she has been uncooperative in the respondent's reasonable attempts to prepare for a hearing, while doing nothing herself, to the extent that the tribunal strongly suspects that she may

never have intended to go to a final adjudication of her claim. As for the correspondence, we could overlook aggression and threats as an expression of nerves on the part of a nervous and unrepresented litigant, but knowing that she has brought a number (at least six) claims in this employment tribunal and in other tribunal regions from time to time, we are less inclined to be sympathetic, as she must have acquired some knowledge of the steps necessary to bring a claim to hearing. The aggressive tone however is not what weighs with us in finding her conduct unreasonable. It is the complete lack of cooperation, whether before or after she obtained doctor's notes saying she was not fit for work. Parties to Employment Tribunal litigation are required by rule 2 "to assist the tribunal to further the overriding objective and in particular to cooperate generally with the other parties and with the tribunal", and the claimant was specifically reminded of this in Employment Judge James's order of March 2020. It seems that it fell on deaf ears.

The deposit order

17. The order was made under rule 39, which provides:

> (5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—
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> > (a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and
> >
> > (b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),
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> otherwise the deposit shall be refunded.

18. The reasons for the making the deposit order were (1) that the claimant had not said in her claim form what the "irrelevant questions" indicating race was the reason for not selecting her were, (2) that if they were about sickness absence they did not relate to race, (3) that the respondent's case that when they said she did not fit with their culture it did not appear to amount to negative stereotyping but to a reasonable concern, in the light of her answer to the question about how she would interact with colleagues, lastly,(4) that the successful candidate seemed better qualified. In the light of those reasons he found she had little reasonable prospect of establishing that race was the reason she was not appointed.

19. These are strikingly similar to the reasons given by this tribunal a year later. We had the interview notes and the application forms. We were able to question the witnesses with a view to seeing if their ostensible reasons were backed up in fact. We did not of course have anything more from the claimant to contradict their evidence, but that was because she had not made a witness statement or disclosed the recording.

20. In **Cox** the Employment Appeal Tribunal overturned a strike out order on the basis that the issues had not been clearly defined at the stage that it was made. That claim concerned a public interest disclosure where there are a number of legal issues to be defined and established before a claim can succeed, and the judge making the deposit order had not grappled with the complexity. In this case however, the single issue – was race the reason why did the claimant did not succeed at interview - had a narrow compass of fact, and concerned only why the respondent chose SC and not the claimant; the tribunal had only to consider what facts had been proved, whether inferences could be drawn from those facts, and whether race played any part in that decision. The issue was clear from the pleadings, and from the case management order of 4 March 2020. In any case, if the claimant had thought the deposit order had been made wrongly, without clearly identifying the issues to be decided, her proper course was to appeal it at the time, not to wait another year, until after the final hearing and after the respondent had applied for costs. The order sent to the parties on 27 May 2020 makes clear (paragraph 5) that it provides "a warning to the claimant as to costs".

21. As the claimant failed for the same reasons as the deposit order was made, but chose to continue her claim without providing evidence that might improve her prospects of success, it follows that she has conducted the claim unreasonably.

22. In view of this conclusion we do not need to consider the alternative ground that the claim had no reasonable prospect of success. In the absence of the recording, or the claimant's account of why she says the respondent's witnesses are wrong, it does look as if there was no reasonable prospect.

Discretion

23. Having concluded the claimant has met the threshold in rule 76(1) for making an order, we have to consider whether in all the circumstances we *should* make one.

24. Obviously, we must consider her ability to pay. She has no dependants. She has not said whether she loves in rented accommodation or her own, but the bill of costs itself shows that the respondent made a search of the Land Registry and could not find her registered as owner of the address where she lives. She has not said whether she is earning or not, only that she is in receipt of Universal Credit. The DWP letter she had supplied shows that she was being paid £ 725 per month on 4 December and 4 January, and £ 648 on 4 February 2021. There was no payment on 4 March, and only £175 on 4 April. We understand that Universal Credit is likely to be adjusted in arrears. This suggests that the claimant was earning in February or March 2021, which is why her benefit payment sharply dropped. This is in a period when she was, on her account, unfit for work and too ill to attend the hearing. It appears from the recent online interim relief judgment of Bristol Employment Tribunal, sitting at Southampton, (1401285/21) that the claimant was an agency worker supplied to Serco in March 2021, and was dismissed from that job on 1 April 2021. This suggests that if unemployed now, she has been working recently, and has some earning capacity.

24. The claimant is now aged 41. She may not have much income to spare now, whether in or out of work, but she has the ability to earn in coming years, and may come into money too. The respondent can enforce judgment and have that suspended until her circumstances change, or the claimant can pay by instalments.

25. We have already concluded from the claimant's conduct of the claim that in all probability she did not want to bring it to a hearing. In so doing, she kept this hanging over the respondent. The evidence was growing stale. The respondent's witnesses had both left the respondent's employment and had had to get time off to appear. She has complained that the respondent acted unreasonably in failing to negotiate, so she hoped to settle the claim while it was undecided. A claimant may hope for a settlement, but if proceedings are brought, they must be heard if it is not settled. The tribunal has considered, though without being able to give the conclusion, that the claimant's conduct at least suggests that the recording of the interview she says she made does not in fact contain anything contradicting the respondent's account, as she had everything to gain by disclosing it, and it was a bluff. Making a claim to obtain a settlement, without any intention of taking it to a final hearing, is an improper use of the tribunal process, and to be discouraged.

26. The claimant understood from the making of the deposit order that by continuing the claim she was running the risk of costs. The respondent had made her two proposals to walk away without making application for costs on 25 February 2020 (before incurring the costs of the preliminary hearing) and on 2 June 2020 -significantly, after the deposit order was made -and she rejected both. She was therefore well aware of the risk. Nothing in her submissions shows she did not understand, or had any good reason for continuing.

27. Last, this is not the only claim she has made. There are five, past and present, recorded in London Central. One of these has recently been transferred to London East, where there are pending claims against two other respondents. One London Central was dismissed in June 2018 after she did not attend a preliminary hearing. One other was struck out. There have been unsuccessful appeals to the Employment Appeal Tribunal. Another claim was withdrawn. A group of claims against 9 claimants was struck out in London South in 2020, and, as noted, there is current claim in Bristol. The claimant should by now have acquired some knowledge of the rules and of how parties are expected to conduct their claims. That is a factor suggesting that making a costs order in this case

may deter her from bringing claims of little merit, as it will bring home to her that while tribunals are generally costs neutral, that does not apply where a party is unreasonable or uncooperative. Making a costs order does not discourage her from bringing claims of substance, and it may encourage her to comply with orders in those claims, and cooperate in preparing cases for hearing. It is an added reason for exercising discretion to make an order.

28. The tribunal considers she has in this case wasted tribunal time and respondent's costs by the way she has conducted the claim, and when she knew she ran the risk of a costs order. There is no good reason not to make an order, and some features suggesting we should. An order should be made.

Amount of Costs

29. The respondent's bill of costs totals £27,294.61. This is without VAT, which has properly been excluded given that the respondent itself is registered for VAT. They have caped the claim at £20,000, to bring it within the limit for summary assessment.

30. Within that total are counsel's fees of 4,068.75, of which £3,000 is for the brief delivered for what was expected to be a three-day hearing, although in the event the case concluded in one day. That is hard to reduce when counsel will have had to prepare on the assumption that the claim was going ahead. The rest is for one preliminary hearing and an advice.

31. There is some duplication, or else very slow working. For example, drafting the costs application comes out at £1,300 for a fee earner charged out at £200- £275 per hour. It also took, apparently, 1 hour 36 minutes to draft a chronology and cast list in a case about one job interview, which is improbable or unreasonable. There is 11 hours 36 minutes claimed for drafting 2 witness statements and making some changes after meetings, which does not include meeting the witnesses, and another 7 hours for travel to see them. They are comprehensive statements, but the time recorded is excessive for the task.

32. Of course time can be wasted when events occur piecemeal and the file has to be revisited, which might account for 4 charges of 6 minutes just to read and file the early conciliation certificate, but overall the tribunal decided to allow £15,000 in total. Taken in the round, that is fair to the respondent as between the parties, and within range of an amount the claimant can pay, later if not now.

33. The deposit the claimant paid under rule 39 will be paid to the respondent, and the claimant must pay the rest to the respondent's solicitors direct.