EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Ms S Yedu	Telecom Service Centres Ltd t/a Webhelp UK

Heard at: **By CVP** **On: 21 October 2021**

Before: **Employment Judge Davies**
Mr W Roberts
Mr K Smith

Appearances
For the Claimant: **Did not attend**
For the Respondent: **Did not attend**

COSTS JUDGMENT

1. The Claimant is ordered to pay the Respondent costs of **£2000**.

REASONS

Introduction

1. In a judgment dated 18 February 2021, the Tribunal dismissed all of the Claimant's complaints of direct race discrimination, harassment related to race and victimisation. The harassment complaints were dismissed on withdrawal by her, the remainder on their merits. The Respondent made an application for costs. Both parties requested that the application be dealt with on the papers and the Tribunal agreed. The Respondent provided a written application, supporting documents and file of authorities. The Claimant provided a written response with supporting documents. The Tribunal met on 21 October 2021 to consider the documents and determine the application.

Issues

2. The issues for the Tribunal were:
   2.1 Did the Claimant act vexatiously or unreasonably in her conduct of the proceedings by continuing with her claim after a costs warning letter was sent on 6 October 2020?

2.2 Did the Claimant act vexatiously or unreasonably in her conduct of the proceedings by giving untruthful or unreliable evidence?
2.3 Did the Claimant act vexatiously or unreasonably in her conduct of the proceedings by withdrawing her complaints of harassment during her closing submissions?
2.4 Did the claims have no reasonable prospect of success?
2.5 If yes to any of the above, should the Tribunal make a costs order?
2.6 If so, in what amount?

Legal principles

3. Rules 76 and 84 of the Employment Tribunal Rules of Procedure 2013 provide, so far as material, as follows:

> **76 When a costs order or a preparation time order may or shall be made**
> (1) A Tribunal may make a costs 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
> (b) any claim or response had no reasonable prospect of success.
> …
>
> **84 Ability to pay**
> In deciding whether to make a costs … order, and if so in what amount, the Tribunal may have regard to the paying party's … ability to pay.

4. The Tribunal had regard to the following principles:
4.1 There is a two-stage process. The Tribunal must first consider whether one of the tests for making a costs order is met, and, if so, go on to consider whether to exercise its discretion to make a costs order.
4.2 If it decides to make an order, the Tribunal must decide the amount. In deciding whether to make an order and, if so, for how much, it may take into account the party's ability to pay.
4.3 Litigants in person are not to be judged by the standards of a professional representative - the Tribunal must make an allowance for inexperience and lack of objectivity, both in assessing reasonableness and in exercising their discretion whether to award costs: see *AQ Limited v Holden* [2012] IRLR 648 EAT.
4.4 The fact that a Respondent has not made an application to strike out the claim on the basis that it has no reasonable prospect of success or asked for a deposit order may be a relevant factor but it is certainly not decisive: see *AQ Limited v Holden* [2012] IRLR 648 EAT.
4.5 The Tribunal must identify the unreasonable conduct, say what was unreasonable about it and say what its effect was: see *Yerrakalva v Barnsley MBC* [2012] ICR 420 CA;
4.6 The mere fact that a party has lied in the course of its evidence is not necessarily sufficient to found an award of costs. The Tribunal has to have regard to the context, and the nature, gravity and effect of the untruthful evidence in determining the question of unreasonableness: see *Arrowsmith v Nottingham Trent University* [2012] ICR 159 CA;

4.7 A tension arises when claims are withdrawn late. On the one hand the Tribunal must not operate the costs regime so as to deter litigants from withdrawing their claims for fear of being pursued for costs but on the other hand the Tribunal must not operate it so as to encourage speculative claims. What the Tribunal has to consider is whether the conduct of the claim has been unreasonable not whether the withdrawal was unreasonable: see *Macpherson v BNP Paribas* [2004] ICR 1398 CA.

4.8 In assessing whether the claim had no reasonable prospects of success, the Tribunal must consider not whether the party genuinely or sincerely believed that the claim was well-founded, but whether they had reasonable grounds for believing that. Put another way, did the claim, objectively, have reasonable prospects of success: see *Scott v Inland Revenue Commissioners* [2004] ICT 1410.

Factual background relevant to costs application

5. The Tribunal reminded itself of the detailed findings of fact in its liability judgment dated 18 February 2021. We do not repeat those findings here. A substantial part of the Claimant's response to the costs application comprised questions about or criticisms of that judgment. It is not appropriate for us to answer or address those in dealing with this application. We have determined the application on the basis of the findings and reasoning in the liability judgment.

6. In addition we noted the following procedural background. The Claimant has been represented throughout these proceedings by Dr Ibakakombo. He is not a qualified lawyer, but evidently operates as a lay representative in Employment Tribunal proceedings more generally. The Respondent has referred to other cases in which he has represented claimants. His correspondence and submissions refer extensively to relevant employment legislation and case law. The footnote to much of his correspondence refers to a book he is apparently writing about "Black Phobia at Workplace and lack of Remedies" or "Black Phobia at Workplace and the role played by certain Employment Judges." He evidently has significant knowledge and experience of discrimination complaints and Employment Tribunals.

7. The claim was presented in April 2020. There was a preliminary hearing for case management on 1 July 2020. The Employment Judge expressed concern about the extensive nature of the factual complaints, in the context of proportionality, but Dr Ibakakombo did not express any willingness to reduce their scope. No application for the claims to be struck out or for the Claimant to be ordered to pay a deposit was made. A judicial assessment took place on 5 August 2020. The Tribunal has not been told what happened in that assessment.

8. The parties prepared for the Tribunal hearing in accordance with EJ Evans's case management orders. On 6 October 2020, after disclosure of documents had taken place, the Respondent wrote a without prejudice letter to the Claimant. It included a costs warning. The Respondent's representative, Mr Byrom, noted that the Claimant's grievance and grievance appeal had been rejected and that the Respondent had found that none of the conduct about which the Claimant complained was because of race. The Claimant had not provided any evidence of that, nor provided the names of any individuals who

could substantiate her allegations. Mr Byrom wrote that this was important. He pointed out that it was for the Claimant to prove facts from which the Tribunal could infer, in the absence of an adequate explanation, that the Respondent had committed an act of discrimination. He said that the Claimant needed to show that there was a causal link between the conduct she alleged and her race. Mr Byrom identified the main matters in dispute and explained why the Respondent said there was no causal link. In outline:

8.1 Not being allocated a locker: there was a shortage of lockers, the evidence would show that employees of different races were not allocated lockers, and on the balance of probabilities the shortage of lockers was the reason the Claimant was not allocated a locker.
8.2 No investigation into/failed overtime payment: there was no evidence of a causal link with the Claimant's race. On a balance of probabilities any failure or delay in investigating would be indicative simply of a procedural error.
8.3 The Claimant's treatment by Ms Platts: the evidence would show a VIP visit and an appearance policy that applied to all employees and was enforced on the relevant day. On a balance of probabilities Ms Platts's conduct was simply reasonable management instructions of a policy that applied to all.
8.4 The disciplinary investigation into the Claimant: this was reasonable management action. There was no investigation into Ms Platts because she was the manager raising the issue (and the grievance investigation found no cause for a disciplinary investigation into her conduct). On a balance of probabilities, the disciplinary investigation was due to legitimate management concerns as to conduct.
8.5 The grievance hearing and appeal: any failings would most likely be because of procedural errors.

9. Mr Byrom said that the Claimant had not shown any evidence of a causal link between the Respondent's conduct and her race, and the Respondent had an adequate explanation for all the events. He suggested that the claim had no reasonable prospect of success. He warned the Claimant that the Respondent would make an application for costs if the Claimant continued, and that those costs were likely to be in the region of £16,500 in total. He invited the Claimant to withdraw her claim on the basis that no application for costs would be made.

10. Dr Ibakakombo replied the next day. He simply asserted, without explanation, that the Claimant had reasonable prospects of success. He said that she would continue with her claim until justice was done, "particularly, that the Tribunal's Outcome or Judgment related to her Claim including all documents related to the Case will be used for the purpose of my book titled, "Black Phobia at Workplace and lack of Remedies." The letter then asserted that the Claimant would make an application for costs if she succeeded in her claims and went on to ask questions about whether there was an outstanding disciplinary process against the Claimant.

11. Mr Byrom replied on 19 October 2020. He expressed concern that Dr Ibakakombo appeared to be putting the interests of his book above that of his client. He indicated that the Respondent's offer remained open.

12. On 20 October 2020 Dr Ibakakombo replied. As with much of his correspondence during the Claimant's employment and these proceedings, the response principally set out a series of complex questions, rather than explaining why the Claimant said that her claim had reasonable prospects of success. Those included questions about the applicable legal principles, why the 5 named comparators had been allocated lockers, how the Claimant's complaints of discrimination had been investigated, why the Claimant was not paid for her overtime until January 2020, and why Ms Platt had treated the Claimant and Mr Pierce in the ways she had on 19 November 2019. Dr Ibakakombo said that the Claimant had rejected the Respondent's "insulting" settlement offer.

13. Mr Byrom replied on 14 December 2020, by which time witness statements had been exchanged. He said that the questions posed by Dr Ibakakombo were matters to be addressed by evidence and submissions at the final hearing and noted the Claimant's position. He said that the offer to settle remained open if the Claimant wished to reconsider, having reviewed the witness statements. Dr Ibakakombo replied the same day to say that they would meet in Tribunal.

14. The hearing took place in January 2021. Both parties provided written closing submissions on the fifth day. After the evidence had concluded, the Tribunal drew attention to the fact that Dr Ibakakombo's submissions did not address the Claimant's complaints of harassment at all. It was agreed that he could address them orally, whilst noting that this had not been the focus of the way the case was put to the witnesses. The Tribunal took a break before hearing oral closing submissions. In his closing submissions Dr Ibakakombo addressed the Claimant's harassment complaints by saying that he relied on the same submissions as he made in relation to direct discrimination. The Tribunal asked him questions, reminding him that conduct could not be both direct discrimination and harassment, and asking him whether there were particular complaints he identified as harassment, and what it was about the conduct that related to race. Dr Ibakakombo referred to the way Ms Platts had approached the Claimant on 19 November 2019 and said that this was done to humiliate her. He was asked what it was about Ms Platts's conduct that related to race, and he said that the Claimant pointed to white people who were wearing a coat. The Tribunal indicated that that sounded a bit more like direct discrimination, if the Claimant was pointing to white people who were wearing coats. Dr Ibakakombo then said that the Claimant would invite the Tribunal to consider only race discrimination and victimisation. Dr Ibakakombo clarified that the Claimant was withdrawing her harassment claims, and the Tribunal therefore took a break to make sure that Dr Ibakakombo had instructions to withdraw those claims. After the break, he confirmed that the Claimant did wish to withdraw them.

15. The Respondent's written costs application included a detailed breakdown of costs incurred, totalling £21,583 (excluding VAT) on 19 March 2021 when the costs application was made and £23,212,50 (excluding VAT) on 6 July 2021 when the full written application was provided. The Tribunal has not carried out a detailed consideration of those costs. The hourly rates charged are at a very reasonable commercial rate. On a detailed assessment certain elements might be excluded, but there is no doubt that a very significant part of those costs were reasonably and necessarily incurred. Costs of around £20,000 for a complex discrimination claim including numerous individual complaints as articulated by

the Claimant and Dr Ibakakombo, and involving a preliminary hearing, judicial assessment and five day Tribunal hearing are well within the expected range for a legally represented party. Indeed, they are at the lower end of that range. The Tribunal had no hesitation in concluding that the Respondent has reasonably and necessarily incurred costs of around £20,000.

16. The Respondent's written costs application indicated that the Claimant would no doubt make submissions on affordability and referred to authority, and the fact that the Tribunal can take means into account. In her response, the Claimant provided no evidence or information about her means or ability to pay. The final line of Dr Ibakakombo's written submission said, "The Claimant has no ability to pay them as recognised by the Respondent that she is doing part time."

17. Therefore, the only information the Tribunal has about the Claimant's means is that she remains employed by the Respondent. As we understand it she works 24 hours per week. There was one payslip in the original hearing file, for January 2020. That included the additional overtime payment. Apart from that, the Claimant was paid £588.33 salary, £191.46 bonus and £41.25 incentive that month. Her income from the Respondent is clearly modest. The Tribunal does not have any information about her outgoings, or about whether she has any other employment or source of income.

No reasonable prospect of success

18. Having carefully considered the written representations, the Tribunal concluded that the claims had no reasonable prospect of success from the outset of these proceedings. The question is not whether the Claimant genuinely believed that she was right, but whether, objectively, that was reasonable.

19. The fundamental difficulty with all of the claims is that the Claimant had no reasonable prospect of showing that the cause of any of the conduct of which she complained was her race, or the fact that she had complained of discrimination. Allowing for the fact that there is rarely overt evidence of discrimination, and that Tribunals need to hear evidence and draw inferences, there must still be some basis for inferring that the conduct was caused by race or a protected act. The mere fact that something happened and that the Claimant is black (or had done a protected act) is not enough. Even if the same thing did not happen to a white person, there still has to be some basis for the Tribunal inferring that the reason for the difference is race. Where there is an obvious, non-discriminatory explanation, there must be some basis for inferring that the reason was, in fact, race.

20. The Claimant did identify some comparators, but as the Tribunal found, they did not, in fact, help the Claimant. It was objectively clear from the outset that they did not:

    20.1 As far as locker allocation was concerned, all the Claimant had really done was identify five white people who had lockers. She could equally have identified five white people who did not have lockers or five black people who did. She did not know how those comparators came to have lockers – whether they had followed the policy and asked at reception, been given

keys by colleagues who left, or been given keys by their managers. The Claimant also knew that she had not asked for a locker at reception when she started and had not raised any concern about not having a locker with a manager until November 2019. She knew that there was a shortage of lockers. She knew that her sister had been given a key by a departing colleague. Objectively, there were no reasonable grounds for believing that her race had anything to do with the fact that she did not have a locker.

20.2 As far as the overtime issue was concerned, the Claimant did not identify any actual comparator. There was clearly a repeated failure to resolve her queries about the overtime issue but the Claimant did not identify any evidence to suggest that any of the four managers who failed to deal with her complaint did so because of her race. The fact that she had four managers in the time period was an obvious explanation for the issue. Objectively, there were no reasonable grounds for believing that her race had anything to do with it.

20.3 As far as Ms Platts's conduct on 19 November 2019 was concerned, the Claimant identified Mr Pierce as a comparator. That was on the basis that he was not asked to remove his gilet, when the Claimant was asked to remove her knee length outdoor coat. As the Tribunal found, the policy prohibited coats at desks, and the two garments were clearly and obviously different. One was a coat and one was not. Objectively, the Claimant must have known that. The fact that Ms Platts may have confused two policies makes no difference: the context was that managers were going round the whole floor making sure that everybody removed their coats and put their bags away and the Claimant was well aware of this and well aware that coats were not permitted on the floor. The Claimant was also well aware that she had refused to remove her coat and then left without permission to go home and change. That was the obvious reason she was marked as AWOL. The Claimant was also well aware that she had sat in technical when she discovered she had been marked as AWOL and had tapped the screen and told Ms Platts that she would not take calls until it was removed, and then flicked her hand at Ms Platts and told her to get lost. Objectively, there were no reasonable grounds for believing that her race had anything to do with Ms Platts asking her to remove her coat, marking her as AWOL and then asking her why she was in technical. Inconsistencies in Ms Platts's statements would not have become clear until disclosure and then the exchange of statements and the oral evidence. In any event, none of them changed what the Claimant must have known about her own conduct and Ms Platts's response to it. The Claimant was there at the time.

20.4 In respect of her remaining complaints, the Claimant identified as comparators first Ms Platts, then Mr Ghulam, then Mr Semley. Each of these was on the basis that Ms Platts's complaint about the Claimant had been investigated, but the Claimants complaints and grievances about race discrimination by first Ms Platts, then Mr Ghulam, then Mr Semley, were not investigated. Of those, only Ms Platts was even potentially a comparator – she was the only one who had made any form of "complaint." But the Claimant knew that (a) Ms Platts was a line manager raising a conduct concern about the Claimant; (b) the Claimant had indeed refused a reasonable management instruction, left work without authorisation, signed herself in technical without authorisation, and then

flicked her hand at Ms Platts and told her to get lost; and (c) the Respondent had investigated the Claimant's complaints of discrimination but the Claimant had refused to provide Mr Semley with any more detailed information or explanation and had refused to meet with Mr Barquero at all. Objectively there were no reasonable grounds for believing that race had anything to do with the way the Claimant's conduct on 19 November 2019 was investigated, or the way her grievance and grievance appeal were investigated.

21. As the findings in our liability judgment indicate, the Claimant may genuinely have believed that she was being discriminated against or victimised, but that belief was, in many respects, unreasonable and in many respects indicated a failure to reflect upon her own conduct and behaviour and how that impacted events. As we found, she was prepared to attribute a discriminatory motive where there was no possible foundation for doing so.

22. Dealing with particular points made by Dr Ibakakombo (which also apply to the question of unreasonable conduct below):
    22.1 The fact that the Claimant had a genuine sense of grievance is not the test.
    22.2 The fact that the Respondent did not instigate disciplinary proceedings against the Claimant for making the complaints of race discrimination that were not upheld is of no relevance to whether the claims in these proceedings had reasonable prospects of success. The Tribunal would not expect an employer to instigate disciplinary proceedings merely because it had rejected an employee's complaints of discrimination.
    22.3 The Claimant was aware of the facts relating to the comparators she had identified that meant they did not help her establish discrimination or less favourable treatment. She did not need the Respondent to comment on them to tell her that. The Respondent's account of events was set out in its pleadings. Likewise, the fact that the Respondent did not answer the questions in Dr Ibakakombo's letter of 20 October 2020 is not relevant. In any event, the Respondent had clearly and succinctly explained its position in its original letter of 6 October 2020.
    22.4 It is irrelevant that the Tribunal did not find in its liability judgment that the Claimant acted vexatiously or unreasonably in continuing with her claim. That was not an issue for the Tribunal at the liability stage. It would have been inappropriate for the Tribunal to make such a finding.
    22.5 As noted, the Tribunal has approached the costs application on the basis of the findings as set out in the liability judgment. A costs application is not an opportunity to re-open the Tribunal's liability judgment.

Unreasonable conduct

23. The Tribunal concluded that the Claimant did act unreasonably in continuing with the claims after receiving the costs warning letter dated 6 October 2020. The starting point is our finding that the claims had no reasonable prospect of success all along. As explained above, the Claimant ought, reasonably, to have realised that. However, the costs warning letter provided a particular opportunity for reflection once the documentary evidence had been disclosed. It also made absolutely clear the basis upon which it was being suggested that the claims had

no reasonable prospect of success – the lack of any evidence of a causal link between race or a protected act and conduct. Further, it made clear the significant costs already incurred by the Respondent and likely to be incurred if the claim continued.

24. Dr Ibakakombo's initial response did not indicate any real reflection about how the Claimant was going to prove facts from which the Tribunal could infer the causal link. It did, as the Respondent suggested, indicate that Dr Ibakakombo's book played a part in the decision. The second response came after witness statements had been exchanged too. The Respondent's position on the factual questions asked by Dr Ibakakombo was entirely clear by that stage. Dr Ibakakombo did not need the Respondent to set out its understanding of relevant legal principles (which he clearly understood) for the Claimant properly to be able to assess her prospects of success. Even allowing for the lack of experience and objectivity of the Claimant, continuing with the claim was unreasonable because the Claimant (and Dr Ibakakombo) ought to have known that it had no reasonable prospect of success and that it would cause significant cost to the Respondent in defending it. The effect of that conduct was that the Respondent did indeed have to attend at the 5 day hearing to defend the claim, and incur significant expense in doing so.

25. The Tribunal also concluded that the Claimant acted unreasonably by giving untruthful or unreliable evidence. In a number of respects this went beyond forgetfulness, misunderstanding or misremembering and can only be described as deliberately inventing things in an attempt to bolster her case. We refer by way of example to paragraphs 7.3, 7.4, 7.5 and 13 of the liability judgment. This did not apply to the whole of the Claimant's evidence, and its effect must be seen in the context of our finding that the claim had no reasonable prospect of success from the outset.

26. The Tribunal concluded that the Claimant did not act unreasonably by withdrawing her complaints of harassment during the closing submissions. This was one of those not uncommon cases in which the same factual allegations had been pursued as both direct discrimination and harassment in the alternative. There was no real difference in the evidence required from the Respondent, and Dr Ibakakombo did not in fact put the harassment case in cross-examination of the witnesses. Once the evidence had been concluded and in view of the discussion with the Tribunal it became clear that the Claimant was really complaining about direct discrimination. It was not unreasonable to withdraw the alternative harassment complaints in those circumstances.

Should a costs order be made?

27. The Tribunal decided that it was appropriate to make a costs order in this case. We had limited evidence about the Claimant's means. To the extent that we had information, we could take that into account in determining the amount of the order and it was not a reason for making no order at all.

28. We reminded ourselves that costs are the exception in Employment Tribunals, and that they are compensatory not punitive. By the same token, the Claimant's pursuit of claims that had no reasonable prospect of success has caused the

Respondent significant legal costs. The Claimant is not a lawyer and is not to be judged by the standards of a lawyer. She does not have the experience or objectivity of a lawyer and we make an allowance for that. Further, we acknowledge that she was not represented by a qualified lawyer, although Dr Ibakakombo has knowledge and experience of employment law and she had his assistance throughout. He should be expected to provide some of the objectivity the Claimant lacks. But fundamentally, as explained above, the absence of any objectively reasonable basis for concluding that any of the Claimant's treatment related to race or doing a protected act was, or should have been, obvious to her even as a lay person, all along. It is right that no application for a strike out or deposit order was made, but that is not determinative. Tribunals are discouraged from striking out discrimination claims in all but the very clearest case and Respondents may well take the view that it is not sensible to make an application in those circumstances. An application for a deposit order in this case would have called for a relatively lengthy preliminary hearing, and there was to be a judicial assessment. Weighing all these factors, the Tribunal concluded that it was appropriate to make a costs order.

29. The position was even more clear cut after the costs warning letter. By the conclusion of that correspondence the Claimant had the hearing file and the witness statements. She had been told in the clearest terms that the initial burden of demonstrating a causal link between race and conduct rested on her and she had been told why the Respondent considered she had no reasonable prospect of doing so. She knew that if she continued the Respondent would incur very substantial costs. That tips the balance more strongly in favour of making a costs order from that point onwards.

Amount

30. As explained above, the Tribunal accepted that the Respondent had reasonably and necessarily incurred costs of around £20,000 in defending these claims. We noted that it seeks to recover £20,000.

31. We considered it appropriate to take into account the Claimant's ability to pay in determining the amount of the award, so far as we had information about that. We did not think it was in the interests of justice to order her to pay a sum that she had no realistic prospect of repaying, by instalments if necessary, within a reasonable timeframe. A costs award is not to made to punish the Claimant, it is to compensate the Respondent. The Respondent will only be compensated to the extent that it actually recovers some of its costs as a result of any costs award.

32. On the information available to the Tribunal we approached the matter on the basis that the Claimant is of modest means. We did not consider it realistically likely that she had the ability to pay a costs award of anything like £20,000. We therefore decided that she should be ordered to pay costs of £2000. That was a sum the Tribunal considered the Claimant was likely to be able to pay, by instalments if necessary, within a reasonable timescale.

Employment Judge Davies