EMPLOYMENT TRIBUNALS

Claimant: **Ms P Douglas**

Respondent: **Bespoke Law Services (UK) Limited**

Heard at: **Bristol (In Chambers)** **On:** **4 October 2021**

Before: Employment Judge Midgley
Mrs J Le Vaillant
Ms R Clarke

Appearances (by written submission)
For the Claimant: Mx O Davies, Counsel
For the Respondent: Mr M Withers, Counsel

JUDGMENT

The unanimous decision of the Tribunal is that the respondent acted unreasonably and is ordered to pay the claimant the sum of £225.00

REASONS

The application for costs

1. By an application made at the end of the liability hearing on 9 July 2021 and set out in writing in an email dated 23 July 2021 the claimant applies for her costs of two discrete aspects of the proceedings in respect of her claims of unfair dismissal and disability discrimination: Counsel's costs for the hearing on 5 March 20021 and for a judicial mediation which was aborted by the respondent on 4 June 2021.

2. The respondent objected to the application in written submissions dated 30 July 2021.

3. I am grateful for the helpful written submissions on behalf of the respective parties.

General Background

4. The relevant background may be relatively shortly stated. The claimant presented a claim on 20 February 2020 alleging unfair dismissal and disability discrimination. The claim form included allegations of harassment, discrimination by association and victimisation and, by implication, breach of contract in respect of notice pay.

5. On 4 March 2020 the claimant confirmed she was content to limit her claim to disability discrimination, as she lacked the continuity of employment to proceed with a claim for unfair dismissal. On 24 March 2020 the respondent entered a response, which was prepared by a Director, Andrew Palmer. A telephone case management hearing was listed to discuss the claims on 1 October 2020.

6. On 30 September 2020, the claimant applied to amend her claim. Whilst the application was drafted by counsel, it did not include draft amended particulars of claim.

7. The telephone case management hearing took place on 1 October 2020. The claimant was directed to provide further information in relation to her claims of harassment, victimization, discrimination arising from disability and breach of contract by 15 October 2020 and the respondent was permitted to file an amended response. EJ Salter, who conducted the hearing, directed that the further and better particulars should refer to the facts in the ET1 so as to enable the parties to identify whether the claimant merely sought to re-label existing facts, limiting them to the allegations made in her claim, or whether she was adding new claims or new facts. A further case management hearing was listed on 5 March 2021 to consider the claimant's application to amend (if it were deemed necessary) and to make directions for the final hearing once the nature of the claimant's clams had been identified. In relation to that proposed hearing the following directions were made:

   7.1. A bundle was to be agreed and produced for 29 January 2021,

   7.2. Witness statements were to be exchanged on 5 February 2021, and

   7.3. Skeleton arguments were to be exchanged by 17 February 2021.

8. On 15 October 2020 the claimant, though her counsel, filed and served further and better particulars of her claim. The claims pursued were those identified in the application to amend (detailed in paragraph 4 above) and in addition two misconceived claims: first, a claim for breach of the implied term of mutual trust and confidence. Secondly, a claim for breach of contract alleging breach of the said implied term of mutual trust and confidence. Neither claim could sensibly be pursued given that the claimant had withdrawn her complaint of unfair dismissal.

9. On 6 November 2020 the respondent filed and served an amended response, prepared by its solicitors. In that document it pleaded that the claimant required permission to amend her claim but did not identify the grounds on which it made that argument.

10. On 27 November 2020 the claimant filed and served a 7-page skeleton argument which had been prepared by counsel, limited to the issue of amendment.

11. On 3 March 2021 the respondent consented to the application to amend on the grounds that the further and better particulars merely applied new labels to existing facts.

12. Consequently, at the case management hearing on 5 March 2021 before EJ Christensen the respondent confirmed that it no longer argued that the claimant required permission to amend her claim (see paragraphs 31 and 31 of the case management summary). The Judge therefore made directions to ensure readiness the existing listing of the final hearing. The respondent and the claimant indicated that they were interested in Judicial Mediation. Thus, on 22 March 2021 REJ Pirani directed that the claimant should provide a without prejudice schedule of loss.

The parties' schedules and counter schedules of loss

13. In accordance with the directions of EJ Salter the claimant had submitted a schedule of loss on 3 November 2020 by which she claimed £21,000 loss of earnings, £28,000 injury to feelings, £5,000 aggravated damages and £8,000 for personal injury. She also claimed an uplift of 25% for failure to follow the ACAS Code of Practice in relation to disciplinaries amounting to £15,574,97.

14. The sums claimed were, putting it mildly, ambitious. The claimant sought an injury to feelings award in the very upper regions of the middle bracket of the updated *Vento* guidelines. Whilst such an award was conceivably possible, it was not realistically likely on the facts of this case. The claim for aggravated damages was misconceived in the sense of being claimed as an individual head, rather than an inflation of the injury to feelings award. Further it was unclear how claims for aggravated damages or personal injury were made at all, given the former was not pleaded in the claim form or further information, and the later did not appear save for in the claim for remedy in the Further and Better Particulars, but nowhere was the injury or its cause identified. The claim for an uplift was wildly optimistic given that the claimant accepted that she was notified of the disciplinary allegations, attended a hearing at which they were discussed and was offered a right of appeal.

15. The total sum claimed in the 3 November 2020 schedule ("the First Schedule") was £77,739.87 before grossing up.

16. The respondent submitted a without prejudice counter schedule on 11 March 2021. The respondent offered 3 months loss of earnings (£3,610.00) on the grounds that the claimant had failed to mitigate her losses by obtaining an alternative role after 3 months, and £4,000 for injury to feelings.

17. On 24 March 2021 the claimant submitted a without prejudice schedule of loss. That schedule claimed financial losses from the date of her dismissal (11 October 2019) until December 2021, amounting to over 2 years and 3 months. Given that the claimant is a qualified solicitor, that claim was also wildly optimistic. Otherwise, the claims for injury to feelings, aggravated damages and personal injury were maintained.

The respondent's withdrawal from the JM

18. On 12 April 2021 the Regional Employment Judge listed the case for judicial mediation on 4 June 2021.

19. On 26 May 2021 the respondent withdrew from the Judicial Mediation process, advising the claimant's solicitor of that fact on the same day by copying her into the email to the Tribunal.

20. On 3 June 2021 the Regional Employment Judge notified the parties that the Judicial Mediation hearing would be vacated and the claimant's solicitor notified counsel that the judicial mediation would not proceed.

<u>The Application for Costs</u>

21. The claimant makes an application for its costs, it is assumed (because it is nowhere specified in the application) on the basis that the respondent acted vexatiously or otherwise unreasonably in the way in which the proceedings have been conducted in the two instances above.

22. The respondent resists the application. In relation to the case management hearing on 5 March 2021, the respondent argues that the hearing was listed not only to consider whether the claimant required permission to amend its claims, but also to consider case management of the claims following their clarification, including but not limited to the question of whether judicial mediation should be offered, the number of witnesses that would be required and the length of the hearing. The respondent further argues that by serving the further particulars of her claim at 730pm on the evening before the preliminary hearing, the claimant effectively prevented the respondent from considering whether amendment was necessary prior to the hearing itself. The respondent asserts that its decision to withdraw its objection to the claims as particularised in the further and better particulars was reasonable, rather than unreasonable or vexatious conduct.

23. In relation to the respondent's decision to withdraw from judicial mediation, the respondent argues that it notified the claimant eight days prior to the judicial mediation itself that it was not willing to participate in the process, and the claimant, being professionally represented, should have recognised in accordance with the Presidential Guidance, that in those circumstances the judicial mediation could not proceed. It should therefore have de-warned counsel on 26 May 2021. Further the respondent argues that its decision to withdraw from judicial mediation in the circumstances of the claimant's schedule of loss was not of itself unreasonable.

The Law

<u>The Rules</u>

24. The relevant rules are the Employment Tribunals Rules of Procedure 2013 ("the Rules").

25. Rule 76(1) provides: "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 (b) any claim or response had no reasonable prospect of success.

26. Under Rule 77 a party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

27. Under Rule 78(1) a costs order may – (a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party; (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles …"

28. Under Rule 84, in deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay..

<u>The Relevant Legal Principles</u>

29. The correct starting position is that an award of costs is the exception rather than the rule. As Sedley LJ stated at para 35 of his judgment in Gee v Shell Ltd [2003] IRLR 82 CA "It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to people without the need of lawyers, and that in sharp distinction from ordinary litigation in the UK, losing does not ordinarily mean paying the other side's costs …"

30. Rule 76(1) imposes a two-stage test: first, a Tribunal must ask itself whether a party's conduct falls within rule 76(1)(a); if so, it must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party.

31. Vexatious conduct was defined in Attorney General v Barker [2000] 1 FLR 759, QBD (a decision which was affirmed with approval in Scott v Russell [2013] EWCA Civ 1432, CA) as follows:

> 'the hallmark of a vexatious proceeding is… that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process'.

32. 'Unreasonable' has its ordinary English meaning and is not to be interpreted as if it means something similar to 'vexatious' — Dyer v Secretary of State for Employment EAT 183/83.

33. In determining whether to make an order under this ground, a Tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct — McPherson v BNP Paribas (London Branch) [2004] ICR 1398, CA. There must be some causal link between the unreasonable conduct and the costs claimed, in the sense the causation is not irrelevant, but there does not need to be a precise causal link between the unreasonable conduct in question and the specific costs being claimed.

34. It is not unreasonable conduct per se for a claimant to withdraw a claim before it proceeds to a final hearing; the critical question in this regard is whether the claimant withdrawing the claim has conducted the proceedings unreasonably, not whether the withdrawal of the claim is in itself unreasonable (see McPherson above).

35. 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 by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had (Yerrakalva v Barnsley Metropolitan Borough Council and anor [2012] ICR 420, CA.) This process does not entail a detailed or minute assessment. Instead, the Tribunal should adopt a broad-brush approach, assessing the conduct against the background of all the relevant circumstances (Sud v Ealing London Borough Council 2013 ICR D39, CA).

Discussions and Conclusion

36. We consider each of the separate elements of the application in turn

Late withdrawal of objection to amendment

37. The essential facts relevant to the application are as follows; on 15 October 2020 the

claimant filed and served her amended particulars. The respondent entered an amended response on 6 November 2020 in which it asserted that the claimant required permission to amend her claim to pursue the claims in the amended particulars. That was some three weeks after the further particulars had been received, and therefore allowed ample time for consideration and cross-reference. The consequence of the stance adopted by the respondent in its amended response was that the claimant had to prepare for a case management hearing at which the application was to be considered. Consequently, the claimant instructed counsel to prepare a skeleton argument. That skeleton argument was served on the respondent on 27th November 2020. The respondent did not withdraw its objection to the claimant's amendment application until 3 March 2021, which was two days before the hearing. At that point the costs of preparation for the application had already been incurred.

38. In our judgement the delay by the respondent between October 2020 and the 31 March 2021 was unreasonable. The respondent has not offered any explanation for it. Even allowing a reasonable period of 2 to 3 weeks for the respondent to consider the further particulars, the respondent was able to withdraw its objection in November which would have avoided the need for the claimant to incur the costs of the skeleton argument and/or the costs of preparing for the amendment application. In reaching that conclusion we recognise that the claimant shot the gun in preparing a skeleton in November 2020, some 4 months prior to the date for exchange.

39. However, there is force in the respondent's argument that the hearing on 5 March was still required. It is the practice within the region for case management hearings to be conducted by telephone, even in circumstances where directions may have been agreed in principle between the parties. In the circumstances where the precise allegations had not been discussed at the preliminary hearing before EJ Salter, it is inevitable that a telephone case management hearing would have taken place to finalise the issues, make the directions necessary for the final hearing, and to review the listing for the hearing itself. Counsel's attendance for the claimant at that hearing would, it seems to us, have been inevitable.

40. A single fee of £400 was charged for preparation and attendance the hearing, evidenced by the fee notes. The lion's share of the work, as it seems to us, was incurred in the preparation of amendment application and the detailed seven-page skeleton argument. We are supported in that assumption because counsel's fee for their preparation for the judicial mediation (which is a three-hour hearing) was £250. The case management hearing was listed for one day. If it were limited to the usual case management, without the need to consider any application to amend, it would have been listed for one hour.

41. Dealing with matters in the round, and doing the best we can, it seems to us that the likely discrete cost of preparing the skeleton argument would have been in the region of £225.

42. The respondent argues that we should consider that the claimant's claims failed in their entirety, and that of itself should lead us to the conclusion that it would not be appropriate to exercise our discretion in the circumstances of this case to make an order for costs. Whilst the claims were unsuccessful, that does not of itself preclude the Tribunal from exercising its discretion in favour of the claimant in circumstances where she was unreasonably forced to incur unnecessary cost. In our view, it would be in the interests of justice for us to exercise our discretion in the circumstances of the case to make a limited costs order in favour of the claimant in respect of this element of the application.

43. We therefore award the claimant costs in the sum of £225.

44. We turn then to consider the claimant's application in respect of the respondent withdrawal from judicial mediation. In our view, the respondent's decision to withdraw from judicial mediation was not unreasonable. The claimant's claims were significantly exaggerated and/or unrealistic. The respondent was entirely within its rights and certainly not acting unreasonably in forming the view that little was to be achieved through judicial mediation. The process is entirely voluntary one.

45. Further, we do not conclude that the respondent acted unreasonably in withdrawing from the process on 26 May 2021. That was eight days prior to the judicial mediation itself, and the respondent acted reasonably and appropriately by notifying the claimant of that decision simultaneously with its communication to the Tribunal. There is little preparation required by counsel for a judicial mediation and we note the fee note is not for Counsel's preparation but rather the lateness of being stood down. There is force in the respondent's argument that the delay between 26 May and 3 June must lie at the claimant's solicitor's feet, not the respondents. Whilst the Tribunal did not confirm that the hearing would be vacated until 3 June, the claimant solicitors must necessarily have understood that in the absence of the respondent's willingness to participate the hearing could not proceed in any event. The safest course would have been to de-warn counsel on 26 May, rather than delaying until 3 June.

46. In any event, for the reasons we have given the respondent's conduct was not unreasonable and therefore we dismiss the application for costs in this respect.

Employment Judge Midgley
Date: 05 October 2021

Judgment and Reasons sent to the parties: 22 October 2021

FOR THE TRIBUNAL OFFICE