EMPLOYMENT TRIBUNALS

Claimant: Miss C Rose

Respondent: Jet2.com Limited

Heard at: Manchester (by CVP) **On:** 6 October 2021

Before: Employment Judge Leach

REPRESENTATION:

Claimant: Mr Broomhead (Professional Representative)
Respondent: Mr Wynne (Counsel)

JUDGMENT
Respondent's application for Costs

The judgment of the Tribunal is that:

1. The respondent's application for a costs order is granted.

2. The claimant is ordered to make a payment to the respondent, of £2500

REASONS

Introduction

1. This hearing follows judgment on liability in this case. The hearing was listed to hear and decide an application for costs made by the respondent. The liability hearing took place on 28-30 June 2021 and the reserved judgment was sent to the parties on 15 September 2021. The claimant did not succeed in her complaint of unfair (constructive) dismissal.

2. Mr Broomhead represented the claimant at that final hearing. Mr Wynne did not represent the respondent (the respondent then having been represented by Ms Davies of counsel). I was not the Employment Judge at that liability hearing. It was before Employment Judge Ainscough.

This Hearing

3. The first part of this costs hearing was taken up with addressing my queries about the basis and terms of the respondent's application for costs and whether I should proceed straightaway with the costs application. I comment on this below.

4. Having decided to proceed I heard Mr Wynne's submissions supporting the application and Mr Broomhead's submissions in response. In hearing those submissions it became clear that the respondent did not accept the claimant's financial position was as she had stated in a financial statement document she had prepared and provided for the purpose of this hearing. Mr Broomhead told me that the claimant was willing to give oral evidence about the information in this statement and I decided therefore to allow that and to allow Mr Wynne to question the claimant.

5. Having heard from the claimant I then allowed both Mr Wynne and Mr Broomhead to make any further and final submissions before ending the hearing and reserving my decision.

6. I was provided with a paginated file of documents prepared for this costs hearing. References below to page numbers are to this file of documents.

7. The hearing was by Cloud Video Platform ("CVP"). Connections were good and I am satisfied that a fair hearing took place.

My decision to proceed in hearing the costs application

8. At the beginning of this hearing I queried when a costs application had been made and what the basis of the application was. I had not seen any written costs application, and I was concerned to ensure that the procedure under rule 77 of the Employment Tribunals Rules of Procedure 2013 ("Rules") was being followed. I was particularly concerned to ensure that the claimant had a reasonable opportunity to make representations in response to the respondent's application.

9. I listened to the parties' representations on this initial issue. Mr Wynne was also provided with some time to take instructions.

10. Mr Wynne (having taken instructions) informed me that the costs application was discussed at the end of the final hearing and this included a discussion about whether the application should be made on paper or orally at a hearing. The decision was made to list the case for a further hearing. That hearing was due to take place on 1 October 2021.

11. I also note from the Tribunal file that the hearing on 1 October 2021 was listed to hear and determine a costs application. That hearing was postponed on application by Mr Broomhead which he made on 7 September 2021. Mr

Broomhead was involved in a different Tribunal case which was being heard on that same date in Liverpool. The postponement application was therefore understandable and granted for those reasons The hearing was postponed until 6 October 2021.

12. It was clear to Mr Broomhead that the I October hearing related to costs. His email of 7 September 2021 notes as follows:

> *"Further to this matter and in particular the costs hearing listed for 1 October 2021, we would be obliged if you would accept this as our application for a postponement."*

13. The only ground provided for the postponement application was that Mr Broomhead was appearing as a representative in another case being heard on 1 October 2021. The application was not on the basis that the claimant was not ready to respond to the costs application and/or did not know why the respondent was applying for costs. Mr Broomhead's application was granted and the costs hearing was moved to 6 October 2021.

14. I asked Mr Wynne what the grounds for the costs application are. Mr Wynne provided the following information:

(1) The application is under rule 76(1)(a) of the Rules, namely on the basis that the claimant has acted *"vexatiously, abusively, disruptively or otherwise unreasonably"* in the conduct of the proceedings;

(2) That the vexatious, abusive, disruptive or otherwise unreasonable conduct is the claimant's decision to reject settlement offers made to her during the course of the proceedings;

(3) The terms of the settlement offers and the correspondence relevant to them are well-known by the claimant and Mr Broomhead and are contained in the bundle of documents prepared for this hearing and provided shortly before the hearing.

15. For the claimant Mr Broomhead stated that no application for costs had been made. He said that the respondent was required to provide a written application and it had not done so. He also noted that the respondent was now out of time to make such an application, although appeared to accept my reference to rule 77 which permits an application for a costs 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"*. The Judgment had only been sent on 15 September 2021.

16. I decided to proceed with the application. These are my reasons:

(1) The claimant and her representative are in attendance knowing that they are here to respond to the respondent's costs application and ready to deal with it. By way of preparation the claimant has provided a statement of means.

(2) I am satisfied that an application for costs was made at the end of the final hearing on 30 June 2021. Although there is no record of that application in the Judgment, the case was listed for a further hearing specifically to hear and determine costs, and I am satisfied therefore that an application was made on 30 June 2021 even though judgment had not by that stage been given.

(3) An application under Rule 76 does not have to be made in writing although of course putting an application in writing makes clear the reasons for an application. In this case, the basis for the respondent's costs application is set out in correspondence between the parties marked as "without prejudice save as to costs" and included in the bundle (at pages 65 to 70). I was satisfied that the claimant and her representative understood well before this hearing, why the application was being made and that they have a reasonable opportunity to make representations in response to the application.

(4) On 7 September 2021, when making his application for a postponement, Mr Broomhead did not raise any concerns about not knowing the basis of the application or needing more information.

17. In these initial discussions Mr Wynne also told the claimant and me that whilst there was a Schedule of Costs (pages 33 and 34 of the bundle) totalling £51,348.13 the respondent's application was limited to £20,000 by way of a summary assessment.

The application for a costs order

18. Two settlement proposals made by Bird and Bird (on behalf of the respondent) are central to the application for costs and I set them out below. The first proposal was sent shortly after a preliminary hearing had taken place and the claimant's complaints of discrimination had been struck out for having no reasonable prospects of success. The remaining complaint was for unfair (constructive) dismissal.

Proposal One- relevant extracts

> *On 7 June 2018, you provided the Claimant's initial Schedule of Loss pursuant to which she sought to claim a sum of £4,558 in economic losses made up of: (i) Notice Pay (£1,288); (ii) Basic Award (£2,340); (iii) Compensatory Award (£330); and (iv) Loss of Statutory Rights (£600). The Schedule of Loss also claimed further sums for injury to feelings, aggravated damages and personal injury and, whilst these were not particularised or quantified, the Schedule confirmed that injury to feelings were placed within the middle "Vento" band.*
>
> *Following a Preliminary Hearing on 15 January 2019, the Claimant's claims of sex discrimination were struck out and the Claimant was Ordered to provide an updated Schedule of Loss. This was attached to your email to this firm on 19 February 2019. As expected, the updated Schedule had deleted all sums contingent on the Claimant succeeding with her claim(s) of sex discrimination; however, we*

> *were extremely confused by the addition of the sum of £7,240.10 made up of alleged unpaid wages between August – December 2017.*
>
> *……..*
>
> *..it is clear that the Claimant's best case is that she succeeds with her claim of constructive unfair dismissal and receives full compensation claimed, i.e. £4,558. This is extremely unlikely (for the reasons articulated in correspondence to date and in the Respondent's Grounds of Resistance); however, on an exceptional basis and without any admission of liability, the Respondent is prepared to resolve matters on a commercial basis and pay the Claimant the sum of £4,558 in full and final settlement of her claims.*
>
> *The Respondent's offer is subject to the Claimant signing a Settlement Agreement in terms satisfactory to the Respondent, a copy of which will be provided to you when we have received the Claimant's in principle acceptance.*
>
> *As the Respondent is offering the Claimant the maximum amount that she could recover in these proceedings, should the Claimant reject the offer the Respondent will contend that this is conduct that is vexatious, abusive, disruptive or otherwise unreasonable and reserves its right to pursue an application for costs irrespective whether the Claimant is ultimately successful with her claim.*
>
> *Should it transpire that the Claimant rejects the offer on your advice, the Respondent reserves its right to pursue an order for wasted costs.*

19. Proposal one was headed *"without prejudice and subject to contract, save as to costs."*

20. Mr Broomhead's response to proposal one noted that the claimant was going to appeal the outcome of the preliminary hearing which had struck out the claimant's discrimination claims. his response included the following:-

> *Whilst we are keen as you are to settle this claim we will not do so at any price, and any settlement would have take into our client's possible success in her appeal in order to bring this matter to finality.*
>
> *We will of course take our client's instructions as to your client's offer, but we hope we have made our position clear and look forward to hearing from you.*

21. Bird and Bird replied. Relevant extracts are below:-

> *Your client has no reasonable or credible basis on which to pursue a claim of sex discrimination, either on the spurious and unparticularised allegations in her form ET1 and subsequent further*

> *pleadings or at all. This is why the claim of sex discrimination was struck out at the Preliminary Hearing. It is, of course, entirely a matter for your client as to whether to appeal but, again, there is no credible basis on which she could do so or that she could have any reasonable expectation of having the decision overturned.*
>
> *The Respondent has made an offer which, on the basis of her updated Schedule of Loss, is for the maximum amount that your client could recover from her unfair dismissal claim (notwithstanding that the Respondent's clear view that such claim also lacks any merit or substance). The Respondent is prepared to settle this matter on a commercial basis but is not prepared to pay your client more than she could recover on her best case and will not be held to ransom by the threat of an appeal.*
>
> *The Respondent is prepared to leave its offer open for acceptance for a further period of time in order that your client can properly consider her position. It will be withdrawn as soon as the Respondent is forced to incur further costs in preparing for the final Hearing in July or for EAT proceedings. Once withdrawn, the offer will not be repeated.*
>
> *As previously advised, in the event that your client does not accept the offer and then fails with her claim(s) and/or fails to recover more than the Respondent has offered (which, the Respondent would aver, is inevitable), the Respondent will proceed with an application for costs/wasted costs on the basis that your client's conduct has been vexatious, abusive, disruptive or otherwise unreasonable and all of its rights in this regard are fully and expressly reserved.*

22. The claimant did not appeal the outcome of the preliminary hearing. I am not aware of any further response to proposal one but in any event, it was not accepted and the unfair dismissal claim continued to hearing.

Proposal 2 – relevant extracts.

23. I have been provided with one email relevant to proposal 2 although it is clear other emails were generated. This email is dated 16 June 2021 and is from Bird and Bird to ACAS. It is headed "without prejudice save as to costs."

> *As we discussed earlier, the Respondent is confused as to the legal and factual basis on which the Claimant can reasonably expect to recover compensation at the level claimed in her Schedule of Loss or at the level in her settlement proposal below. For your benefit (and to explain the Respondent's position), the Claimant's Schedule of Loss compromises the following figures:*
>
> *a. £1,288 (notice pay);*
>
> *b. £2,340 (Basic Award);*
>
> *c. £330 (Compensatory Award);*

d. £600 (loss of statutory rights); and

e. £7,240.10 (unpaid wages between August - December 2017).

Whilst the Respondent does not consider there to be any merit in the Claimant's case, it is clear that the maximum compensation that could be recovered from a successful claim of constructive unfair dismissal is £4,558; this being the sum total of the (a) – (d) above. It was for this reason that the Respondent made an offer, without any admission of liability and on a purely commercial basis, to settle this matter for £4,558 on 1 March 2019 and 8 March 2019.

These offers were not accepted as the Claimant sought a sum on the basis of her Schedule of Loss. However, as explained to Mr Broomhead, the Claimant has not brought a claim of unlawful deduction from wages and, since there has been no application to amend the pleaded case and as any such claim is now (significantly) out of time, there is no reasonable basis on which the Claimant can expect to be awarded the sum at (e) above (or any part thereof). In the interests of completeness, the Respondent disputes the factual basis on which such a claim would be pursued in any event.

It is the Respondent's position that seeking compensation (far) in excess of the Claimant's best case is conduct that is vexatious, abusive, disruptive or otherwise unreasonable and that would justify an award of costs under rule 76(1)(a) of the Employment Tribunal Rules of Procedure. This is separate from the position (which the Respondent also takes) that the claim has no reasonable prospects of success; so as to justify an award of costs under rule 76(1)(b) of the Rules.

The Respondent would, therefore, aver that the Claimant and her representative should be concerned about the prospects of an order for costs/wasted costs. We will provide the Claimant with a detailed Schedule of Costs in due course but she should be aware that they are likely to be substantial if the Hearing goes ahead and the Respondent reserves the right to apply for a formal Court assessment if necessary.

The Respondent is not prepared to pay the Claimant compensation more than double the amount of her best case and so the proposal is rejected.

The Respondent is, however, mindful of its obligations in accordance with the Overriding Objective to try and resolve matters without recourse to the Employment Tribunal. We are, therefore, instructed to put forward an offer of £2,500 in full and final settlement of this matter; subject to completion of a COT3 in a form that is satisfactory to the Respondent. The Respondent will also agree not to pursue an application for costs/wasted costs as a term of settlement.

> *It is acknowledged that this offer is less than the £4,558 that the Claimant could have accepted 2 years' ago but this is to reflect the costs that have been unreasonably and unnecessarily incurred. We can confirm that you are free to share this email with Mr Broomhead.*

24. I am satisfied that the claimant's representative also received this email on or about that date. It was not suggested otherwise and that would be ACAS's standard practice.

25. I have not been provided with any response to proposal 2 but of course it was not accepted and the claim proceeded to final hearing.

Respondent's submissions in support of costs application

26. Mr Wynne referred to the Schedule of Costs at pages 33 and 34 noting that up to 21 March 2019 the respondent had incurred costs of £18,363.45. As at 22 June 2021 further costs had been incurred in preparing for the hearing and drafting witness statements. Following 22 June 2021 a brief fee of £8,250 (for the unfair dismissal claim listed for three days) was incurred, as were "refresher fees" (presumably for days 2 and 3) totalling £5,500.

27. The date of 21 March 2019 is significant as this was at or very shortly after the parties had received the outcome of a preliminary hearing which heard and decided on the respondent's application to strike out discrimination complaints made by the claimant as part of this claim. The respondent's application was successful in that the discrimination claims were struck out (I note that the Judgment and Reasons were sent to the parties on 6 March 2019). It was also at the time when offer one was still available for settlement.

28. 22 June 2021 is significant because proposal 2 was made at this stage and rejected. The costs following then were incurred because the claimant had decided to reject proposal 2.

29. There are three stages to an Employment Tribunal's decision as to whether to award a party costs:

(1) Whether the threshold for making a costs award has been met (i.e. in this case whether the claimant has acted vexatiously, abusively, disruptively or otherwise unreasonably);

(2) If so, whether it is appropriate to make a costs order;

(3) If so, the amount of costs to order.

30. When a Tribunal exercises its discretion under stages (2) or (3) then it may (but is not required to) have regard to the paying party's ability to pay.

31. Mr Wynne referred me to the email of 1 March 2019 which sets out proposal 1.

32. Mr Wynne noted that the background to this email was that the sex discrimination claims had just been struck out. The settlement offer was on an

entirely commercial basis and was on that basis the respondent was prepared to pay all amounts properly due under the unfair dismissal claim.

33. As is apparent from the terms of the email, there was surprise that the claimant had added to her losses a figure of £7,240.10 being claimed for unpaid wages. As no application had been made to amend the claim to include a claim of, for example, an unauthorised deduction from wages, the respondent was at that stage offering the claimant everything that she was sensibly asking to receive in her unfair dismissal claim. Further, in its email the respondent's solicitors explained why the claimant was not entitled to anything more than the amounts being offered

34. The claimant's representative replied by email dated 5 March 2019 noting:

(1) That full reasons for the Employment Judge's decision had not been received; and

(2) The claimant would appeal the order to strike out the discrimination claims;

(3) Once the appeal was lodged there would be an application for a stay of the Tribunal proceedings pending the outcome of that appeal;

(4) Any settlement proposal would have to take into account the claimant's possible success in the appeal.

35. The consequences for the respondent in the claimant refusing to settle for a monetary amount which represented the full amount the claimant could possibly hope to recover in her claim, have been significant for the respondent which then incurred more than £20,000 in additional costs.

36. It must have been apparent to the claimant (who had the benefit of representation) that she would have been unlikely to have received the full sum being offered by the respondent in Offer 1. On this point Mr Wynne referred me to the Judgment in **Frenkel v Topping UKEAT 0106/15** (cited at paragraph 15 of the final hearing Judgment in this case), particularly paragraph 13 of that Judgment which comments on a breach of the implied term of trust and confidence ("implied term"):

> *"Too often we see in this Tribunal a failure to recognise the stringency of the test."*

37. Mr Wynne also referred me to paragraph 83 of the liability hearing Judgment, as follows:

> "*83. There was not a breach of the implied term of trust and confidence. There was a breakdown in the relationship between the claimant and Elizabeth Acker. The respondent attempted to resolve the matter through proper application of the grievance procedure. The claimant did not agree with the suggested resolution, but this does not mean there was a breach of the implied term."*

38. In other words, said Mr Wynne, the respondent undertook the sort of process that an employer is expected to deploy. There was nothing to suggest a breach of the implied term. It must have been apparent to the claimant and her representative that she was very unlikely to meet the hurdle. Mr Wynne told me that he was not making these points in support of an argument (that he was not running) that the claim had no reasonable prospects of success. However, these points do, Mr Wynne submitted, reinforce the fact that the claimant was holding out for more than she might ever get. In rejecting an offer for the full amount that the claimant could possibly hope to achieve, she was unconcerned with the merits of the case. That lack of concern for the merits when rejecting an offer for the full amount that could possibly be recovered in the unlikely event she succeeded, amounts to unreasonable conduct.

39. The lack of concern with the merits of the case is consistent with the earlier position on discrimination. Mr Wynne referred me to various extracts of the full Reasons provided following the preliminary hearing on 15 January 2019 when the claimant's discrimination claims were struck out. In Mr Wynne's submissions, the claimant's conduct of the litigation in the lead-up to the 2019 preliminary hearing illustrates the claimant's failure to engage with properly progressing her claim. As such she progressed the claim without merit, which included her resistance of the strike out application.

40. For no good reason the claimant refused the offer later in 2019 and put the respondent to the inconvenience of unnecessary costs. Such actions are wholly outside of the overriding objective and amount to:

(1) unreasonable conduct;

(2) vexatious conduct;

(3) an abuse of process.

41. Mr Wynne explained what he meant by "abuse of process" – that the claimant had put forward a Schedule of Loss that included a head of loss that was not recoverable in her unfair (constructive) dismissal complaint and refused to engage in settlement discussions which did not take account of this unrecoverable head of loss.

42. Mr Wynne also made raised concerns in relation to the claimant's statement of means. These points of submission were made both before and after Mr Wynne had been provided with an opportunity to question the claimant on her statement of means:

(1) There was no documentation to back up the information received (although I note that the claimant did provide documents in relation to outstanding credit card amounts. These documents were provided during the course of the hearing);

(2) At the preliminary hearing in 2019 the claimant stated her position was that she had £455 per month disposable income and yet it was now down to £209.65;

(3) Looking at the figures provided in the statement of means it is clear that more disposable income than this is available, Mr Wynne noting that there was unexplained household expenditure of £100 a month even though the claimant had already identified household expenditure;

(4) In relation to credit cards, a figure of £550 had been given but Mr Wynne queried whether that would be a monthly cost and may well be a one-off cost.

Mr Broomhead's Submissions

43. The respondent's costs application relies on *"without prejudice"* correspondence. Calderbank principles do not apply in Tribunals. The respondent should not be asking the Tribunal to read without prejudice correspondence.

44. Mr Wynne starts from the premise of what the claimant can reasonably be expected to know and what the claimant could reasonably be expected to recover. Specifically in relation to the £7,240 this is for unpaid wages that the claimant says should have been paid during the period prior to her constructive dismissal. It is not a made-up figure. The claimant has clearly stated what that amount is. The claimant was not unconcerned with the merits of this argument and she had a reasonable expectation that the respondent could have awarded her this amount had she succeeded in her claim. These are monies that she should have been paid.

45. Even if the claimant had been offered £100,000, she would still have been entitled to pursue her claim to a judgment to say that she had been unfairly dismissed.

46. Mr Broomhead rejected the assertion by Mr Wynne that the claimant had failed to advance her case, noting that the case had been postponed due to the coronavirus pandemic.

47. Mr Broomhead submitted in summary that the claimant has not acted vexatiously, abusively or otherwise unreasonably. There is no relevance now in the preliminary hearing Judgment and Mr Wynne should not try to rely on it. Whilst appeal against that Judgment was considered, the decision was taken not to pursue an appeal and just get on with the remaining complaint of constructive unfair dismissal.

48. Turning to the statement of means: this represents a truthful and reasonable account of income and expenditure.

49. The claimant's income has changed from two years previously as she is now not working but instead receiving a pension.

<u>Findings of Fact – Statement of Means</u>

50. I make the following findings in relation to the claimant's statement of means and the evidence provided:

(1) The statement sets out an accurate record of the claimant's household's income and expenditure. I am supported by this in the claimant's information that she volunteered about her credit card bills showing expenditure for September of £550 and also showing that this was not a one-off amount. The credit card debts were much greater than this and the amounts being paid off were more than the minimum amounts required but not significantly more.

(2) The remaining expenditure (including the expenditure on a mobile telephone) appear broadly reasonable, and I accept the figures as accurate.

(3) Whilst the claimant is currently only drawing a small pension, most of the income comes from her partner, although the claimant is actively seeking other employment.

(4) The claimant and her partner have some savings, about £5000 between them.

Applicable Law

51. Unlike the general procedure in Civil Courts, costs do not "follow the event" in Employment Tribunals. Traditionally, Employment Tribunals have allowed employees to challenge the fairness of dismissals (or other matters within the jurisdiction of Employment Tribunals) without a threat of costs in the event that a claim is unsuccessful and employers to respond to claims, without a threat as to costs in the event that a claimant is successful.

52. The Rules provide Tribunals with a power to award costs in the circumstances set out in those Rules.

53. Those Rules which are relevant to the respondent's costs application state as follows:

"*76. <u>When a Costs Order or Preparation Time Order may or shall be made</u>*

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;

……

77. *<u>Procedure</u>*

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.

78. The amount of a Costs Order

(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 a 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."

……..

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."

54. The respondent's application for costs is, in part, made on the basis that the claimant has engaged in vexatious conduct. In the 1974 case of ET Marler v. Robertson the National Industrial Relations Court included the following description of vexatious conduct in Tribunal litigation:

> *"If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously, and likewise abuses the procedure."*

55. In the more recent case of AG v. Barker [2000] 1 FLR 759 (not an employment case but cited by the Court of Appeal in the case of John Scott v. Sir Bob Russell MP [2013] EWCA Civ 1432 – an appeal against a costs order made by an Employment Tribunal) Lord Bingham LCJ stated:

> *"[T]he 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."*

56. When considering whether to make a costs order on the grounds of unreasonable conduct, Employment Tribunals should take into account the nature, gravity and effect of a party's unreasonable conduct.

57. It is not uncommon for an offer of a financial settlement of litigation (including in the Employment Tribunals) to include a notification that an application for costs will be made if the offer is rejected and the case pursued. In the civil courts a "Calderbank" letter can be an effective tactic in ensuring that a party rejecting a financial settlement has some confidence that he or she will recover more at a trial than was offered. It is clear that "Calderbank" letters do not lead to a successful costs application in Employment Tribunals, in the event that the party rejecting the offer does not succeed at a full Tribunal hearing. It is Rule 76 which sets out the circumstances in which costs orders may be made. However, Tribunals can take these types of letters into account in appropriate circumstances when applying Rule 76 (see for example Anderson v. Cheltenham & Gloucester plc UKEAT/0221/13).

58. Mr Broomhead referred me to an earlier decision of the EAT in Monaghan v. Close Thornton Solicitors EAT/3/01 (Monaghan). I note the following extracts from paragraph 25 of this judgment:-

> *"… we confess to some unease about the consequence of the use of what was, in effect, a Calderbank offer in the Employment Tribunal context. We do not doubt that where a party has obstinately pressed for some unreasonably high award despite its excess being pointed out and despite a warning that costs might be asked against that party if it were persisted in, the Tribunal could in appropriate circumstances take the view that that party had conducted the proceedings unreasonably.*
>
> *Whilst we would not want to deter the making and the acceptance of sensible offers, if it became a practice such that an applicant who recovered no more than two thirds of the sum offered in a rejected Calderbank offer was, without more, then to be visited with the costs of the remedies hearing or some part of them, Calderbank offers would be so frequently used that one would soon be in a regime in which costs would not uncommonly be treated as they are in the High Court and other Courts. Yet it is plain that throughout the life of the Employment Tribunals the legislature has never so provided. It can only be that that was deliberate.*

59. When deciding whether a party's conduct was reasonable, a Tribunal should not substitute its own view but should ask whether the conduct of the party was inside or outside the range of reasonable responses in the circumstances (see Solomon v. University of Hertfordshire UKEAT 0066/19, particularly para 107) (Solomon).

60. In the event that a Tribunal decides that the conduct of a party has been "vexatious, abusive, disruptive or otherwise unreasonable" then the Tribunal must then consider whether to make a costs order. It does not automatically follow that a costs order will be made. This consideration requires the Tribunal to exercise

a discretion. There is no finite list of matters that Tribunals must take into account when exercising this discretion, and the relevant importance of various factors will depend on the particular circumstances of the case. In the case of Barnsley MBC v. Yerrakalva [2011] EWCA Civ 1255 the Court of Appeal noted as follows:-.

> (At 41) *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.*
>
> (At 42) *On matters of discretion an earlier case only stands as authority for what are or what are not the principles governing the discretion and serving only as a broad steer on the factors covered by the paramount principle of relevance. A costs decision in one case will not in most cases predetermine the outcome of a costs application in another case: the facts of the cases will be different as will be the interaction of the relevant factors with one another and the varying weight to be attached to them."*

Analysis and Conclusion

61. The first issue I need to decide is whether the conduct of the claimant falls within rule 76 (1); therefore whether I agree with Mr Wynne that the claimant's conduct, in rejecting proposal one and/or 2 was unreasonable, vexatious and/or an abuse of process.

62. I do not find that the conduct in rejecting proposal one amounts to vexatious conduct (having regard to the tests set out in the authorities noted above) but I do find that it amounts to unreasonable conduct in that (applying Solomon) it falls outside of the range of reasonable responses. My reasons are:-

a. That the claimant, with the benefit of professional advice, initially set out sensible heads of loss/compensation for the unfair dismissal claim. Those heads were a distinct part of the schedule of loss which then applied to both the unfair dismissal and discrimination claim.

b. It was only after the discrimination claims had been struck out that additional losses for unpaid wages appeared. Those losses were not recoverable in the unfair dismissal claim.

c. The respondent set out its position clearly when proposing to pay to the claimant the full extent of the unfair dismissal losses/compensation originally stated. The claimant did not explain at the time why the unpaid wages had been added to the losses. The claimant, through her representatives, simply did not engage with the respondent on this important point.

d. The respondent was effectively offering to pay the claimant all that she could reasonably hope to recover in the event that she succeeded in her constructive unfair dismissal claim.

e. Further, the respondent provided a time limit on the settlement proposal to enable the claimant to be able to consider her position including on the issue of appeal.

f. Even though the claimant chose not to appeal the judgment striking out her discrimination claims, she did not accept proposal one.

g. Mr Broomhead has been unable to provide any reasonable explanation about the addition of the claim for unpaid wages; his explanation simply being that the claimant had a reasonable expectation that she would recover these amounts. As the claimant was represented throughout and professional advice will have been provided to her, she cannot have had a reasonable expectation that she would recover these amounts. Further, the correspondence from Bird and Bird (which the claimant will have been able to review at the time that proposal one was made) set out the position clearly.

h. The addition of unpaid wages to the schedule of loss after the claimant was required to remove those elements attributable only to her discrimination complaint (after it had been struck out) is particularly unimpressive. It cannot be categorised as "posturing" in the course of negotiations in the hope that a higher offer might be achieved.

i. There is no indication that the claimant was looking for an outcome of a public judgment on a particularly important issue. Mr Broomhead raised, as a general point in his submissions, that a claimant is entitled to a judgment. A need for determination of a particular issue may mean in some cases that a refusal to engage with a sensible settlement proposal is not unreasonable conduct but there is no evidence that this is such a case. This case is the type described at paragraph 25 of **Monaghan**. The claimant has obstinately pressed for an unreasonably high award despite its excess being pointed out and despite a warning that costs might be asked against that party if persists with the litigation.

63. I do not find that rejecting proposal 2 in itself amounts to unreasonable conduct. At that stage the claimant was being offered less than she could hope to recover in a case which had some reasonable prospects of success.

64. Having decided that the claimant's conduct is unreasonable for the purposes of rule 76 (1) I next need to consider whether I should exercise my discretion and make a costs order.

65. In exercising my discretion I have taken account of the following:-

a. That costs are the exception in Employment Tribunals.

b. The comparative size and resources of the parties

c. The impact of the unreasonable conduct. Although the decision to reject proposal one in 2019 was just one aspect of conduct in litigation which had started in 2018 and ended in 2021, persistently relying on these unachievable amounts meant that this litigation continued for a further 2 years at considerable cost.

d. That costs awards should not be used to punish a party against whom the costs order is made but to compensate the party making the application.

e. That the claimant had the benefit of professional advice to explain the amounts claimed, the offer made and the possible consequences of rejecting the offer.

66. My decision is that a costs order should be made. Whilst factors a and b above, mitigate against a costs order, considerable costs, time and resources could (and should) have been avoided once an offer of payment of all recoverable amounts had been made.

67. The final part of my decision requires me to apply Rule 84, whether I should take in to account the claimant's ability to pay and if so, how much should be awarded by way of costs.

68. My decision is that I should take in to account the claimant's ability to pay. The claimant has a low income, now drawing a pension. It is clear from the details of household and other expenditure that this is greater than the claimant's income. The larger part of expenditure is covered by the claimant's partner. The claimant cannot afford to make any payment towards costs from her income.

69. The claimant also informed me that she and her partner had £5000 in savings. The claimant is able to use her half of these savings as part payment of the respondent's costs.

70. I make a costs order requiring the claimant to pay £2500 to the respondent.

Employment Judge Leach
Date 25 October 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
4 November 2021

FOR THE TRIBUNAL OFFICE

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