Case Number: 2201349/2020

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Ms L Hatch-Kiwanuka		**Future Academies**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 21 December 2021 (in chambers)**

BEFORE: Employment Judge A M Snelson **MEMBERS: Ms S Campbell Ms L Jones**

On reading the written representations of the parties, The Tribunal determines that, pursuant to the Employment Tribunals Rules of Procedure 2013, rule 76(1)(a), the Claimant shall pay a contribution towards the Respondents' costs in the proceedings in the sum of £2,500.

REASONS

Introduction

1 The case came before this Tribunal for final hearing on 27-28 September 2021, with five days allocated. The Tribunal sat in public at Victory House. The Respondents attended by CVP, as they had been permitted to do by a prior direction of an Employment Judge. The Claimant had been permitted the option of attending physically or remotely but did neither.

2 On day two of the hearing, following a full examination of the claims, the Tribunal issued its decision, which, in summary, was to this effect:

(1) The unfair dismissal claim succeeded but no remedy was awarded.
(2) The undisputed element of the claim for unauthorised deductions from wages succeeded and the Respondents were ordered to pay to the Claimant the sum of £10.71.
(3) A provisional decision of a differently-constituted Tribunal to make a costs order against the Claimant on the postponement of a prior listing of the final

hearing was confirmed and, pursuant thereto, the Claimant was ordered to pay to the Respondents the sum of £2,500.

(4) All other claims were dismissed.

3 A judgment embodying our decision was promulgated shortly after the hearing. Reasons for that judgment have very recently been supplied, pursuant to a request by the Claimant. Both documents should be read with this.

4 At the end of the hearing on 28 September 2021, Mr Ben Mitchell, counsel for the Respondents, made an application for the costs of the proceedings, limited to £20,000[1]. This was separate and apart from the narrow application already mentioned, which had arisen out of an earlier postponement. We decided that fairness required that the Claimant should have sight of the application in writing and be given a chance to deliver a written response to it. Accordingly we gave directions for the application to be fully formulated in writing by 5 October, with permission to the Claimant to respond by 28 October on the merits and make such representations as she saw fit on her means and her ability to pay any award, and permission to the Respondents to deliver a brief reply by 4 November if so advised.

5 On 4 October 2020 the Respondents duly presented a fully reasoned costs application. By an intemperate email of 28 October the Claimant responded. She denounced the Tribunal's decision to proceed with the hearing and promised that its decisions, procedural and substantive, would be appealed. She also made a number of wholly unsubstantiated allegations against the Respondents and their representatives. On the matter of costs, she limited herself to (a) saying that no order should be made and that if one was to be made, it should be in her favour since she had succeeded in part and (b) referring to her prior correspondence sent in October 2020. We do not know to what correspondence she was there referring but it cannot have concerned the matters addressed in the (subsequent) costs application with which we are concerned. The Respondents did not exercise their right of reply.

6 An application by the Claimant for reconsideration of the judgment of 28 September 2021 was refused by a letter of 15 November 2021.

7 By a letter of 16 November 2021 the Tribunal pointed out to the Claimant that, in her message of 28 October, she had not dealt with the subject of her means and gave her a fresh opportunity to do so. She replied in a short message of 21 November, stating simply that she had "no money" and referring to her email of 6 December 2020, sent in connection with the provisional costs decision of the earlier Tribunal, the gist of which is summarised in our reasons for the judgment given on 28 September 2021. On the subject of her means that message contained little or no information other than to make the same assertion that she had no money.

8 We met in private on 21 December 2021 to determine the costs application. The delay in delivering our decision, which we regret, is attributable to the extreme

[1] The highest sum that can be awarded without assessment. They put their total costs of defending the claims, after deducting the overall costs of the postponement (over £10,000), at more than £55,000.

pressure of work in the Employment Tribunal and the need to give priority to parties awaiting the outcomes of substantive claims.

The applicable law

9 The power to make costs awards is contained in rule 76 of the Employment Tribunals Rules of Procedure 2013, the material part of which is the following:

> **(1) A Tribunal may make a costs order … , and shall consider whether to do so, where it considers that –**
>
> **(a) a party … 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.**

As the case-law explains, the rule poses two questions: first, whether the Tribunal has power to make an order; second, if so, whether the discretion should be exercised.

10 By rule 84 it is provided that, when considering whether to make a costs order and, if so, in what amount, the Tribunal "may" have regard to the putative paying party's ability to pay any award.

11 We are mindful of the fact that orders for costs in this jurisdiction are, and always have been, exceptional. Employment Tribunals exist to provide informal, accessible justice for all in employment disputes. We recognise that, if Tribunals resorted to making costs orders with undue liberality, the effect might well be to put aggrieved persons, particularly those of modest means, in fear of invoking the important statutory protections which the law affords them. It would be contrary to the purpose of the Tribunals if parties to disputes declined to exercise their right to bring (or contest) proceedings as a result of unfair economic pressure. On the other hand, we also bear in mind that, when our rules of procedure were revised in 2001, the Tribunal was for the first time not merely permitted, but obliged, to consider making a costs order where any of the prescribed conditions (vexatiousness, abusiveness etc) was fulfilled, and a new and wider criterion of unreasonableness was added. It seems to us that these innovations, preserved in subsequent revisions of the rules, indicate a policy on the part of the legislature to encourage Tribunals to exercise their costs powers more freely than they did in the past, where unmeritorious claims or defences are pursued or where the manner in which litigation is conducted is improper or unreasonable.

The costs application

12 The main elements of the Respondents' application were as follows (costs bundle references and similar excluded):

> **<u>Application for Costs (Rule 76(1)(a)) – Unreasonable Conduct</u>**
>
> **We are making a request for costs against the Claimant pursuant to Rule 76(1)(a) on the grounds that the Claimant has acted unreasonably in the way that these proceedings have been conducted by:**

(i) rejecting the Respondent's settlement offer of £15,000 dated 20 July 2020 …
(ii) rejecting the Respondent's settlement offer of £25,000 dated 25 September 2020 …
(iii) refusing to engage in settlement discussions with the Respondent …
(iv) failing to comply with case management orders … and general poor management of her claim, for example, repeatedly trying to add irrelevant documentation to the bundles and making repeated requests to the Respondent to disclose irrelevant documentation, applying to strike out the Respondent's defence, all which caused the Respondent to incur additional unnecessary costs …
(v) continuing to pursue claims under the Equality Act (EqA) 2010 against the Respondent which were ultimately unsuccessful.

We recognise that the Claimant has been successful in respect of her unfair dismissal claim. However, the simple fact of being successful cannot immunise a litigant from costs consequences, as otherwise a claimant with a good claim could reject any settlement offer made and needlessly put the other party to the costs of going through litigation. Moreover, while the Claimant has succeeded in respect of her dismissal being procedurally unfair, she has not been awarded any compensation beyond the £10.71 that the Respondent has unconditionally tried to pay to her on several occasions and which has nothing to do with her unfair dismissal claim. The Claimant's continuation of the claim beyond 20 July 2020 was unreasonable as a result.

<u>Application for Costs (Rule 76(1)(b)) – No Prospects of Success</u>

We are also making a request for costs pursuant to Rule 76(1)(b) on the grounds that the Claimant continued to pursue claims against the Respondent under the EqA which had no reasonable prospects of success. On Tuesday 28 September 2021 the Tribunal ruled that all of the Claimant's claims pursued under the EqA, which included discrimination on the grounds of race and sex, harassment on the grounds of race and sex, and victimisation, had no merit, and therefore failed ... We note the Claimant's claim for unfair dismissal (the Claimant was awarded a nil award for this claim), and the unlawful deduction from wages claim (the Claimant was awarded £10.71 for this claim) were successful, however, it is clear from the evidence … and the Claimant's correspondence with the Respondent and the Tribunal throughout these proceedings that her sole focus was the EqA claims, particularly her race discrimination claims ... We submit that pursuing these EqA claims has had the impact of significantly increasing the Respondent's legal costs for several reasons, including:

(i) the Respondent had to increase the number of witnesses it needed to call to ensure the historical allegations of discrimination were addressed;
(ii) the Trial Bundle increased by almost 100 pages to address the historical allegations of discrimination;
(iii) the Respondent had to carry out multiple searches for additional documents requested by the Claimant which related to her EqA claims and disclose further documents to the Claimant, which resulted in the Respondent having to prepare a supplementary bundle for the Claimant amounting to almost 200 pages;
(iv) various correspondence with the Claimant and the Tribunal dealing with and responding to the Claimant's repeated requests for documentation relating to her EqA claims, including applications from the Claimant for specific disclosure; and
(v) the claim was listed for 5 days largely because of the discrimination, harassment and victimisation claims. The evidence relating to the dismissal and wages was straightforward and could have been dealt with in a 2-day hearing. The anticipated extra 3 days increased the Respondent's trial preparation and trial costs.

> **We have been under the impression throughout these proceedings that the Claimant has not had the benefit of legal advice. In light of this, we sent the Claimant a legal assessment of her claims, explaining the legal principles in relation to her claims and the associated compensation available, highlighting what her 'best case scenario' would be if she were successful in her claims ... We have also repeatedly recommended that the Claimant obtain legal advice throughout these proceedings in open and without prejudice correspondence ...**

Analysis and conclusions

13 It is convenient to take the rule 76(1)(b) application first. In our judgment, this ground is not made out. It is certainly true that parts of the Claimant's case faced considerable challenges, but we cannot say that any was so weak as to have no reasonable prospect of success. And two claims, including the substantial complaint of unfair dismissal, were upheld.

14 Turning to rule 76(1)(a), we start by discounting discount paras (iii) to (v) of the application. Taking them in reverse order, the fact that the claims under the Equality Act 2010 ('the 2010 Act') did not succeed does not warrant the conclusion that it was unreasonable to bring or persist with them. On the limited material prayed in support, the allegations of repeated breaches of case management orders and "poor management" of the claim are not made good – at least to the extent necessary to demonstrate unreasonableness sufficiently serious to warrant considering the severe sanction of a costs order. And the complaint of "refusing to engage in settlement discussions" is either impermissible as an attempt to rely on communications protected by 'without-prejudice privilege' (if it seeks to rely on overtures by the Respondents other than those referred to in paras (i) and (ii)) or superfluous (if it relies only on those overtures).

15 But the Respondents clearly establish unreasonable conduct by the Claimant in rejecting the notably generous offers referred to in paras (i) and (ii). The only sustainable money claim was trifling and should not have been litigated at all (the sum owed was offered, apparently more than once, pre-trial). The wrongful dismissal claim was doomed on her own case, given that she had no answer to the allegation of gross misconduct. The unfair dismissal claim had obvious merit on liability given the mishandling of the disciplinary process (see the reasons for the liability judgment) but was worth nothing or next to nothing in view of the inevitability of any compensation being extinguished or massively discounted on *Polkey* grounds[2] and on account of her conduct. And the 2020 Act claims were mostly on their face out of time, were confronted by rational and plausible defences on their merits and in any event had at best, collectively, a very modest value since any compensation would have been confined to a minor injury to feelings award. In these circumstances, the contemptuous rejection of *Calderbank* offers[3] of £15,000 and then £25,000 in July and September 2020 can only be seen as perverse and utterly unreasonable, particularly given the fact that those offers were accompanied

[2] In short, because of the fact that the procedural unfairness of the dismissal occasioned little or no loss: but for the procedural flaw, it was inevitable or at least overwhelmingly likely that the same result (dismissal) would have followed within a short space of time.

[3] An offer made 'without prejudice save as to costs'. So presented, it is open to the offeror to show it to a court of tribunal in support of a post-trial costs application notwithstanding the general rule that any communication aimed at settling a dispute is 'privileged' and cannot be referred to.

by a full and fair summary of the obstacles which she faced in the litigation, the costs to which the Respondents were exposed and the risk on costs which rejection would entail.

16 For these reasons we are satisfied that the condition of unreasonable conduct of the proceedings is met and we have jurisdiction to make a costs order. Should we exercise our discretion to do so? In our judgment, this is a proper case in which to award costs. It is a bad case of unreasonable conduct. The Claimant is an educated and intelligent person of mature years. She can reasonably be expected to have understood that exercising her right to bring her claims brought with it the duty to do so responsibly. Faced with the offers of settlement she had an obligation to weigh the benefits and risks which acceptance and rejection would entail. There is no sign of her having done so. If she was in doubt as to her rights or if she mistrusted the Respondents' solicitors' remarks about her prospects of success, she was on inquiry and should have sought advice. Again, there is no sign of her having done so. Her imperious rejection of the second offer, signalling that it came nowhere near to the remedy to which she claimed (without explanation) that she was entitled, killed off the Respondents' attempts to find a negotiated solution to the dispute and caused them to incur additional costs running to many thousands of pounds.[4]

17 What is the proper award? But for the question of the Claimant's ability to pay, there would, in our view, be much to be said for awarding the sum claimed, £20,000. But we do think it right to have regard to the Claimant's means. Although (again contemptuously) she has passed up the opportunity to provide detail on that matter, she has stated that she is without funds and we know that she was earning at a rate below the national average salary and has two dependant children to care for. Proceeding on the basis that she is a person of narrow means, we consider it right to discount what would otherwise be a substantial award to £2,500. If she has difficulty in meeting this liability (which increases her total indebtedness to the Respondents to £5,000), and if the costs judgments are enforced, she will have the opportunity to make representations in the county court, on the basis of evidence, as to appropriate arrangements to pay it by instalments. She should be aware that a bald assertion that she has "no money" is unlikely to be seen as persuasive.

EMPLOYMENT JUDGE – Snelson
18th March 2022

Reasons entered in the Register and copies sent to the parties on : 18.03.2022

For Office of the Tribunals

[4] In the second offer letter they estimated their likely further costs up to trial at £35,000 to £54,000.