Case Number: 2204865/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Barnett	v	Maltwillow Limited Trading as Paul Edmonds

Heard at: London Central (in chambers) **On**: 22 May 2022

Before: Employment Judge A James
Ms S Campbell
Mr J Carroll

Representation (in writing)

For the Claimant: Mr M Egan, counsel

For the Respondent: Mr B Uduje, counsel

JUDGMENT

(1) Although some of the conduct of the respondent amounted to unreasonable conduct of the proceedings, as set out below, the Tribunal has concluded that this is not a case where it should exercise its discretion to award a sum of costs to the claimant (Rules 76 and 78 Employment Tribunal Rules of Procedure 2013).

REASONS

The issue

1. In a reserved Liability Judgment dated 14 December 2021, amended on 14 February 2022, the Tribunal upheld a number of the claimant's claims. They are, first, the section 15 Equality Act 2010 claim, in relation to the dismissal; second, five acts of victimisation (although we noted that two of those overlapped, regarding the deduction from wages); third, five reasonable adjustments claims, although we noted that two of those claims were closely

related; further, a claim for unauthorised deduction of wages; fifth, failure to provide a statement of changes to salary; and sixth, the wrongful dismissal claim.

2. In a reserved Remedy Judgment dated 18 February 2022 following a hearing on 7 February, the tribunal awarded the claimant the sum of £160 tax free for expenses looking for other employment, £2,274.72 less tax and NI for unpaid wages and £37,883.94 for the other claim, less tax at 20% on the sum of £7,883.94 only (the first £30,000 being tax free) a total of £40,318.66 before tax. The claimant indicated his intention to make an application for costs at the close of the remedy hearing and case management orders were made, to assist with the determination of that application. A date was set for today's hearing.

3. The parties indicated that they were content, in principle, for the application to be dealt with by the tribunal on the papers. That remains their position. This decision has been made by the tribunal at a virtual private hearing, on the basis of the written submissions and supporting information received.

The application

4. The basis of the respondent's application is that:

   4.1 the respondent or the respondent's representative has acted vexatiously, abusively, disruptively or otherwise unreasonably in …. the conducting of proceedings - Rule 76(1)(a);

   4.2 parts of the response had no reasonable prospect of success - Rule 76(1)(b);

   4.3 the respondent has breached several orders in these proceedings - Rule 76(2).

Findings of fact

5. Mr Egan has referred the tribunal to the following paragraphs of the liability and remedy judgements:

   15. Further, by way of general introductory comments, cross-examination was put to the claimant by the respondent's representative on the basis that he was overstating his needs in relation to his disability. However, the victimisation claims had not been defended in the pleadings or the agreed list of issues on the basis that they were made in bad faith. …

   27. The claimant alleges that he spoke to Paul Edmonds and Mr Rasekh on two separate occasions towards the end of February 2019 to highlight his concerns about a possible salary reduction at the end of the month. The conversations were alleged to have taken place in the Knightsbridge salon. It is the claimant's case that the agreement was that his salary guarantee of £28,000 would remain indefinitely. Mr Rasekh and Mr Edmonds denied that any such conversation took place. There is a straight conflict in relation to the witness evidence on this point.

   28. We have taken note of the following documents in resolving this evidential issue. First, we note that the claimant's pay slips show that up to May 2019, his basic salary was £1,750; from May 2019, it appears as £2,333. Second, we note the contents of the email from the claimant to Mr Raskeh of 28 April 2019 (see below) in which the claimant made express

reference to a salary of £28,000 in relation to his pension. Following receipt of the email, Mr Nath increased the pension contributions for the claimant. Neither he nor Mr Rasekh questioned the £28,000 salary figure. Third, we refer to the email (again, see below for the full content of the email) between the claimant and Charlton Fox Associates, to the effect that Mr Rasekh was responsible for payroll.

29. On the basis of these documents, we find on the balance of probabilities that there was an agreement between the claimant and the respondent, that was reflected in the email sent by the claimant on 28 April 2019 to Mr Rasekh, that the claimant would continue to receive a minimum salary of £28,000 per annum (including commission and sale of products), from February 2019 onwards until further notice. We accept that when in May 2019 the salary was increased to £2333.33 that this was a mistake but it does beg the question as to why such a mistake would be made if there wasn't an agreement to continue to guarantee the claimant a salary of £28,000 including commission and product sales. Those arrangements were never questioned by the respondent until 26 September 2019, when they alleged for the first time that there had been an overpayment. We find on the balance of probabilities, that the absence of any questioning by Mr Nath or Mr Rasekh about the claimant's assertion in relation to the £28,000 salary, and that he continued to be paid on that basis, point towards there being an agreement to that effect. …

146. On 26 September 2019 the respondent sent a letter to the claimant regarding an alleged overpayment of salary, due to him remaining on a guaranteed salary of £28,000 after February 2019. The claimant was informed that the respondent would recover the sum of £2,274.72 from him. …

167. On 29 September 2019 the claimant submitted a fifth grievance (the fifth protected act), setting out three areas of concern, namely:

- *3.1 Salary changes/demotion,*
- *3.2 Change of workplace location to the Battersea salon as a new permanent base,*
- *3.3 Reduced number of clients that the receptionists were assigning to his daily appointment column. …*

169. A further letter was emailed by the claimant on 29 September 2019 regarding the proposed deduction from the claimant's wages of the alleged overpayment. This is the sixth protected act. The claimant asserted that the real reason for the attempted recovery of the alleged overpayment was his grievances and his request for reasonable adjustments. He stated:

> I re-enforce my assertion that it is only now that because I have raised a number grievances, coupled with the fact that company has failed with its spurious disciplinary allegations against me and that further reasonable accommodating adjustment have been sought for my disability that this agreement has apparently been reneged.

170. We were not shown a response to that letter. We were shown the detailed calculations but there was no covering letter with it. …

246. It was submitted on behalf of the respondent that the claimant is a serial litigant, having made ET claims alleging disability discrimination against four of his five previous employers. The tribunal did not find that submission helpful. The fact that the claimant has taken previous Employment Tribunal proceedings does not assist us, particularly where we do not have any other details of those legal proceedings before us. From the information which is before us, it appears that at least some of those proceedings were settled. Again, we have no information before us in relation to the details of any such settlements (which is unsurprising, given the likelihood of confidentiality issues). We have therefore approached the issues in this case by reference solely to findings of fact below. …

268. We have found as a fact that there was an agreement that the respondent would continue to protect the claimant's salary. We have also noted above that the respondent did not challenge or correct the claimant's assertion in April/May that his salary for pension purposes was £28,000 per annum. The respondent only questioned that at a much later stage, resulting in the respondent sending the claimant a letter on 26 September 2019, alleging an overpayment. When the claimant challenged that, in a letter dated 29 September 2019, he received no response. We conclude therefore that the 26 September letter was sent was because of the protected acts carried out by the claimant up to that date. …

270 Mr Rasekh stated during cross-examination that he felt the claimant's first grievance was 'heavy-handed' (fact findings #43).

270.1 The tribunal was not provided with copies of any emails between the respondent and Mr Jukes [#182].

270.2 The disciplinary process followed was grossly unfair in that the same person, Mr Jukes held the investigation and disciplinary meetings. Further, there was only a gap of 10 minutes between the meetings. The hearings were conducted in a confrontational and aggressive manner. No transcript of the hearing was provided and the notes themselves were only sent with the dismissal hearing outcome letter. There was no independent checking of any of the matters raised by the claimant in his defence – for example, in relation to the hair washing incident, that other colleagues also washed their own hair in the salon; whether the area the claimant washed his hair in was actually in public view; and whether any members of the pubic were present when the claimant washed his hair.

270.3 In relation to the incident with Mr Nath, on the face of it, this is a further example of the claimant not following a management instruction. However, the context of that meeting is important. The claimant had, during a previous meeting with Mr Nath a month earlier, collapsed and been taken to A&E. He had submitted a grievance in relation to that incident, and requested that Mr Nath was not involved in future. Whilst that request was in all the circumstances unrealistic, with an employer of this size, we consider that the attempt by Mr Nath to hold a meeting with the claimant without anyone else present, on 28 September was naïve and ill-advised, in the light of what had happened at the earlier meeting and the ongoing grievance.

270.4 It is in our judgment important to judge any wrongdoing by the claimant in that context. When questioned about the decision to dismiss

the claimant, Mr Rasekh told us he had perhaps just 'checked out', which we take to mean he just rubber stamped the decision of Mr Jukes that the claimant should be dismissed without any independent consideration of the process involved, the reasons given, or the notes of the hearing.

271. We also take note of the fact findings which show to the panel that the respondent did not take the claimant's disability seriously. For example, we note:

271.1 the apparent change in tone between the constructive meeting on 24 May and the content of the letter of 28 May.

271.2 the assertion that it was not the obligation of the respondent to suggest adjustments (fact findings #56).

271.3 there were concerns that if a mentor was provided for the claimant, it would set a precedent for other staff (a view the panel considers to be unreasonable);

271.4 similarly, that it would not be commercially viable to do so, when in fact assistance from Access to Work was potentially available, if such an adjustment was judged to be required (fact findings, #63 and #64).

271.5 Mr Rasekh discussed confidential issues regarding the claimant with other staff, which indicates that an adverse view had been taken about the claimant by that stage and which was unprofessional (fact findings, #90).

271.6 Mr Jukes was not told that the claimant had a disability (#182).

271.7 the email from Mr Lawson of 1 October 2019 to the claimant in which he refers to Mr Edmonds having dyslexia but needing less adjustments than the claimant and suggesting that the reason the claimant raised the need for adjustments was that he had been challenged about the poaching of clients. This indicates that the respondent had failed to recognise that dyslexia affects different people to differing degrees.

272. All of this strongly suggests to the panel that the respondent's senior management considered that the claimant was exaggerating his disability and the adjustments he needed.

6. Mr Egan also relies on paragraphs 34 and 35 of the Remedy Judgment:

34. Where subsequent conduct adds to the injury - for example, where the employer conducts tribunal proceedings in an unnecessarily offensive manner, or 'rubs salt in the wound' by plainly showing that it does not take the claimant's complaint of discrimination seriously. *The tribunal has found the way that the respondent, via its representatives, have conducted their defence of the claim indicates that it has not taken the claimant's claims seriously. For example:*

6.1 the suggestion that the claimant is a serial litigant;

6.2 the suggestion that the claimant was exaggerating his disability, a perception which appears to have been shared by some of the claimant's colleagues, and which appears to have been encouraged by senior management.

See the liability judgment for example, at paragraphs 15, 270, 271 and 272.

35. The suggestion by the respondent's representative that the injury to feelings award should be limited to £900 in total, further suggests that the respondent still does not take the claim seriously. Such an amount is the minimum amount to be awarded for injury to feelings in a successful discrimination case. The tribunal has upheld the claimant's claims in a number of respects, as outlined above. The minimum award is clearly not appropriate in such a case.

7. Attempts were made at various stages to settle the claim. Judicial Mediation was arranged but the respondent pulled out of that before the hearing. Prior to the Liability Hearing, the claimant made a without prejudice save as to costs offer to settle in the sum of £25,000. Following the Liability Hearing, further attempts were made to settle the claim. The respondent's best offer was £15,000; the claimant's lowest offer was £60,000. It therefore fell to the Tribunal to decide the appropriate level of compensation.

The Law

8. The application is made under Rule 76 of the Employment Tribunal Rules of Procedure 2013 ("the 2013 Rules"), which provides, in so far as relevant here:

> *(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;*
>
> *(b) any claim or response had no reasonable prospects of success*
>
> *(2) A Tribunal may also make such an order where a party has been in breach of any order …*

9. Rule 76 requires the Tribunal to adopt a two-stage approach:

> *the tribunal must first consider the threshold question of whether any of the circumstances identified in [what is now Rule 76] applies, and, if so, must then consider separately as a matter of discretion whether to make an award and in what amount."* (Vaughan v London Borough of Lewisham *(No. 2) [2013] IRLR 713* at [5])

10. In Barnsley Metropolitan Borough Council v Yerrakalva *[2012] IRLR 78* it was stated:

> *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." (Paragraph 41)*

11. It remains a fundamental principle that the purpose of an award of costs is to compensate the receiving party, not to punish the paying party (Lodwick v London Borough of Southwark *[2004] IRLR 554 CA*).

12. Pursuing a claim on the basis of a lie may constitute unreasonable conduct under Rule 76. In Nicolson Highlander Ltd v Nicolson *[2010] IRLR 859*, Lady Smith referred to a number of earlier authorities, before concluding at #21:

> *As these cases demonstrate, an employment tribunal can be expected to conclude that there has been unreasonableness on the part of a party where he/she is shown to have been dishonest in relation to his/her claim and then to exercise its discretion so as to make an award of expenses in favour of the other party subject, of course, to the requirements for it to take account of the provisions of [what are now Rules 78 and 84 of the 2013 Rules] regarding the fixing of the amount of any such award.*

13. Those earlier cases included Her Ladyship's own judgment in *Dunedin Canmore Housing Association Ltd v Donaldson (unreported, UKEATS/0014/09/BI, 8 July 2009*), where she held at #24 and #25:

> *She [the claimant], in short, had no business seeking to make the respondents pay her in these circumstances. Even less was it appropriate or reasonable of her to seek to do so on a basis which she must have known to be a false one.*
>
> *There is a flavour, in the Tribunal's second judgment, of sympathy for the claimant as a lay person and for the difficulty she might have in paying any award. With all due respect to the Tribunal, these matters are beside the point. The issue was not whether a lay person could reasonably have been expected to understand the law. It was whether she had or had not, in simple human terms, approached the essential factual matters that lay at the heart of her case honestly and reasonably. She had not done so and these are exactly the sort of circumstances where a Tribunal has a responsibility to make clear that it is quite unacceptable to cause expense to another party by bringing proceedings on that basis. …*

14. There is no hard and fast rule in this respect however. In *Kapoor v Barnhill Community High School Governors (UKEAT/0352/13/RN)*, unreported, 12 December 2013 at #13 the EAT held]:

> *a lie on its own will not necessarily be sufficient to found an award of costs.*

The test remains that set out in Rule 76, and the Tribunal must:

> *look at the whole picture of what happened in a case and ask whether there has been unreasonable conduct by the Claimant* (Kapoor at #15).

15. The tribunal notes that the respondent's counsel also refers to *Topic v Hollyland Pitta Bakery UKEAT/0523/11, [2012] All ER (D) 250 (Nov)* at para 27 and *Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797, [2012] ICR 159*, at para 33, in support of the contention that there is no principle of general application that lying, even in respect of a central allegation in the case will necessarily, of itself, be sufficient to found an order for costs

16. If the Tribunal is satisfied that the claimant acted vexatiously or unreasonably, it must then consider separately whether to make an award and, if so, in what amount. At this stage:

> *the Tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of its discretion …*

although the respondent is not required:

> *to prove that specific unreasonable conduct by the [claimant] caused particular costs to be incurred*". (Kapoor at #15)

17. Rule 78 provides, in so far as relevant here:

(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 ["the CPR"], or by an Employment Judge applying the same principles…

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000."

18. The relevant parts of Rule 84 provide:

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.

Conclusions

19. Mr Egan has provided a note of his fees. The fees claimed amount to £30,537.50, plus VAT of £6,107.50, which totals £36,645.00.

20. We set out our conclusions below under the following headings. The claimant's alleged unreasonable conduct; discretion whether to make an award; failure to follow tribunal orders; and the amount of the award.

The Respondent's alleged unreasonable conduct

21. The Tribunal has already found that the respondent did fail to take the claimant's claim seriously – see paragraphs 34 and 35 of the Remedy Judgment, set out above. Further, that the respondent, did unreasonably allege that the claimant was a serial litigant. That was a bad point to make in these proceedings. The Tribunal awarded aggravated damages to the claimant partly because of that. The Tribunal concludes that this did amount to unreasonable conduct of proceedings.

22. We were urged by Mr Uduje not to award costs in respect of these matters since the claimant has already benefitted twice already. First, these were partly why the claimant succeeded in relation to liability, and second, they led to an award of aggravated damages. Those points are noted.

23. It is alleged that Mr Rasekh and Mr Edmonds gave false evidence. The Tribunal has not so far made such a finding, and decline to do so at this stage. The Tribunal is aware know how easy it is for people to convince themselves as to the truth of a matter in retrospect. It is not inevitable that we come to the conclusion that Mr Rasekh and Mr Edmonds lied to the Tribunal - we reach no such conclusion. Rather, the Tribunal concludes that by the time of the liability hearing, they had convinced themselves that there had not been an agreement to extend the payment of the claimant's wage at the higher level. The Tribunal rejected that evidence and the claimant's wages claim was upheld. As was his victimisation claim because the Tribunal concluded that by asking for the alleged overpayment back when they did, this was more than just a coincidence

of timing – rather it but was because of his complaints of disability discrimination.

24. As for the respondent's approach to settlement, the tribunal does not consider that amounted to unreasonable conduct of the proceedings. It may be that, with the benefit of hindsight, the respondent now regrets not entering into Judicial Mediation prior to the liability hearing, and/or not settling for the offer the claimant made prior to that hearing to settle for the sum of £25,000. We also note that the claimant did not achieve or exceed his lowest offer, following the Liability Hearing. The tribunal also notes that Judicial Mediation is voluntary, and makes no finding of unreasonable conduct because of the respondent's withdrawal from it.

25. The alleged unreasonable conduct arising out of breaches of the case management direct actions are considered under that heading below.

Parts of the response had no reasonable prospects of success

26. Mr Egan argues that the victimisation claims were overwhelming. In arriving at its conclusions in relation to liability however, the Tribunal did not consider the evidence to be over-whelming. Following detailed deliberations, the Tribunal did find the evidence convincing, which is why the claimant succeeded in a number of them. Some of the victimisation claims did not succeed however. The claims were defended and it took the Tribunal some time to determine those issues. It should not, in the Tribunal's judgment, have been obvious to the respondent at the outset that all of the claims that did succeed, were bound to succeed.

27. It is the case that the respondent's representative failed to address the victimisation claims in his final submissions. That was a notable oversight - but one which worked to the claimant's advantage, rather than to his disadvantage. The Tribunal concludes that it was not unreasonable conduct of the proceedings.

28. The points made at the remedy hearing by the respondent, namely (a) the assertion that loss of earnings cannot be recovered in a discrimination claim and (b) the ACAS Code of Conduct for Disciplinary and Grievance Proceedings did not apply to the claims were surprising points to make and plain wrong. As was the suggestion that the injury to feelings award should be limited to a single payment of £900. Again however, those points worked to the claimant's advantage, not to his disadvantage and did not in the Tribunal's judgement, amount to unreasonable conduct of the proceedings. They also meant that the remedy hearing concluded more quickly.

29. We note Mr Uduje's argument that if the defence of the claim was so bad, it is surprising that a costs warning letter was not sent. The Tribunal considers that to be a reasonable argument. Further, the Tribunal agrees that the defence was not manifestly futile. The respondent's defence was not unmeritorious, judged as to what the respondent could have reasonably known at the time, rather than on what we know now after a lengthy hearing.

The Respondent breached several orders in the proceedings

30. Mr Egan sets out a number of breaches of case management orders by the respondent. The Case Management Order (CMO) of 27 July 2020 of employment Judge Burns, required an amended response by 10 August. For

reasons which are not at all clear, that was not provided until 20 November 2020. Witness statements were due to be exchanged under the same CMO on 24 February 2021. The respondent asked to delay that until 26 March 2021. But then witness statements were exchanged in a piecemeal fashion between 6 and 23 April 2021, shortly before the first day of the hearing on 5 May. The tribunal accepts that the latter issue would have been particularly frustrating, and made preparation for the final hearing more difficult, particularly in circumstances where the claimant has a disability of dyslexia. The tribunal concludes that these breaches amounted to unreasonable conduct of the proceedings.

31. Complaint is also made that the respondent's witness statements did not deal fully with the issues. For example, Mr Nath told the tribunal that he thought he would be able to expand on his statement at the hearing. That strongly suggests that EJ Burns' CMO was not brought to his attention. The CMO in relation to witness evidence made it clear that the witness statements should contain all the evidence the witness intends to give. Again however, those matters worked to the claimant's advantage.

32. The respondent's closing submissions on liability were submitted later, on 6 August, but the hearing did not recommence until 31 August. The counter schedule of loss was served late on 1 February, not on 17 January as ordered, after the claimant's witness statement had been served. The respondent's representative made an application to admit witness evidence, without serving any such evidence; but in the end no such witness evidence was submitted. Again, the tribunal concludes that this amounted to unreasonable conduct of the proceedings.

33. The tribunal also takes on board the submissions of Mr Uduje, which in summary are that despite these issues, the Employment Tribunal was still able to exercise its judicial functions, a fair trial was still possible, and there appear to be no costs, identifiable from the fee note, which are attributable to these breaches.

Discretion whether to make an award

34. Bearing in mind the above, the tribunal notes that one of the threshold requirements have been met, in that the respondent did conduct the proceedings under reasonably, and in particular, by alleging that the claimant was a serial litigant; failing to take his claims seriously enough; and by breaching tribunal orders, particularly in relation to the provision of witness evidence, and a counter schedule of loss.

35. Having concluded that a threshold requirement has been met however the tribunal concludes that this is not a case where the discretion to award costs should be exercised in the claimant's favour. As counsel for the respondent argues, the unreasonable conduct did not prevent the tribunal exercising its judicial functions as expeditiously as possible, and did not ultimately delay or add to the length of either the liability or remedy hearings. Further, the tribunal notes that it is not necessary for a party claiming costs to demonstrate that any particular breaches have led to specific extra costs being incurred. However, the fact that no extra costs appear to have been incurred as a result of the breaches found to amount to unreasonable conduct of the proceedings, is a further factor which persuades the tribunal that the discretion to award costs should not be exercised in the circumstances of this case. Finally, the tribunal

also notes that most of the unreasonable conduct identified benefitted the claimant when it came to the judgment on Liability and the judgment on Remedy. That does not of course preclude an order for costs in respect of those matters – but it is a further factor which persuades the tribunal, on the facts of this case, that discretion to make an award of costs should not be exercised.

Employment Judge A James
London Central Region

Dated 27 May 2022

Sent to the parties on:

27/05/2022.

For the Tribunals Office