EMPLOYMENT TRIBUNALS

Claimant **Respondent**

v

Mr Toby Dabell OCNR (EMEA) Ltd,

Ellis Recruitment Group Limited

Heard at: **London South Employment Tribunal**

On: **23 June 2022**

Before: **EJ Webster**
Ms J Jerram
Mr M Cann

Appearances
For the Claimant: **Mr S Rahman (Counsel)**
For the Respondent: **Mr Walker (Counsel)**

RESERVED COSTS APPLICATION JUDGMENT

1. The Claimant's application for costs is refused.

REASONS

2. At the conclusion of the substantive hearing, on 21 June 2022, the claimant applied for his costs. Such an application was made orally with written documents to substantiate it. Although the respondent had been on notice that the claimant was likely to make a costs application, the paperwork accompanying the application had not been sent to the Tribunal or the

respondent until just before the end of the substantive hearing. Both parties made oral submissions before the Tribunal. However, before it could deliberate the Tribunal needed to review the documents accompanying the application and took the view that it was in the interests of the overriding objective to defer its decision and allow the parties to submit additional written submissions (limited to one page) should they wish to do so on or before the close of business on 22 June 2022.

3. Both parties submitted short additional submissions which the Tribunal considered when it reconvened on 23 June 2022.

4. Also submitted was the without prejudice save as to costs correspondence between the parties prior to the hearing.

5. The Claimant's application consisted of requesting his entire costs for the case and in the alternative, his counsel's costs for attending the hearing. He provided invoices for his solicitor's costs but simply confirmed that his fees for Mr Rahman's appearance was £14,500 including VAT. It was not clear how that was broken down in terms of a brief fee and a daily refresher rate.

6. In summary, Mr Rahman's application was on the basis that the respondent had behaved unreasonably in the manner in which it had conducted the proceedings and that the respondent's response had no reasonable prospects of success (Rules 76(1)(a) and (b) respectively.

7. The grounds were not well separated in either the oral or written submissions put by Mr Rahman but in summary, we understood that the unreasonable conduct relied upon by the claimant was;

   (i) the respondent not conceding knowledge of the disability,
   (ii) the decision to defend the s15 Equality Act claims and failure to make reasonable adjustments claims at all,
   (iii) not carrying out a proper disclosure exercise,
   (iv) changing key evidence at the last minute such as whether there were two calls with Mr Dwyer
   (v) documents and witness statements being disclosed late thus taking tribunal time with applications.
   (vi) Witness statements failing to deal with the issues at hand
   (vii) Failing to engage in without prejudice negotiations at all despite offers being made by the claimant
   (viii) Not engaging legal advice earlier

8. The claimant also stated that it was unreasonable for the respondent to defend the case as its defense had no reasonable prospects of defending various aspects of the case, yet refused to engage in any sort of settlement negotiations.

9. We were sent various authorities by the claimant including Yerrakalva v Barnsley Metropolitan Borough Council and nor 2012 ICR 420, CA, Kopel v Safeway Stores plc, Arrowsmith v Nottingham Trent University and Ms I Opalkova v Acquire Care Ltd.

10. The respondent objected to the application saying that the fact that the claimant had also alluded to incidents of sexual and racist harassment which were not related to his claim, meant that it felt obliged to defend the claims in open court and not engage in settlement discussions. In addition, they objected to several aspects of the claimant's assertions that, for example, they had not conceded knowledge. They said that they had conceded knowledge of disability and made that clear. Further they argue that their actions during the hearing did not put the claimant to any additional cost because the hearing lasted the 7 days that it had been listed for.

The law

11. Rule 76(1)(a) of the Tribunal Rules give the Tribunal the power to make a costs award . The relevant grounds relied upon by the Claimant are where the Tribunal considers that:
    a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing or conducting of proceedings (or part thereof) — rule 76(1)(a)
    b) the claim or response has no reasonable prospect of success — rule 76(1)(b)

12. If an application is made under s 76(1)(a) or (b) then the Tribunal must apply a two stage process. All costs awards are discretionary but if the ground is made out the is under a duty to consider making an order even if it does not decide to make one.

13. As the Court of Appeal reiterated in *Yerrakalva v Barnsley Metropolitan Borough Council and nor 2012 ICR 420, CA*, costs in the employment tribunal are still the exception rather than the rule.

14. Costs are compensatory not punitive. Therefore we must consider what loss has been caused to the claimant in bringing this case. *Yerrakalva* held that costs should be limited to those 'reasonably and necessarily incurred'. The amount of loss will not necessarily be determinative since a tribunal may take into account other factors, such as the means and the conduct of the parties.

15. A party's ability to pay is also a factor to consider as set out in *Howman v Queen Elizabeth Hospital Kings Lynn EAT 0509/12*, though it is to be weighed against the need to compensate the other party who has unreasonably been put to expense.

Conclusions

16. We accept that the respondent did not carry out its preparation for this hearing well. The witness statements barely addressed the issues and its clear that disclosure was not properly done. We found in our Judgment that the respondent directors appeared to have contempt for the proceedings and had approached preparation for the hearing accordingly. Time was spent by the Tribunal dealing with the respondent's applications for late production of documents and witness statements coupled with the need to give the claimant additional time to then consider those documents.

17. We accept that the Respondent's understanding of the implications of 'knowledge' for the purposes of the Equality Act were muddled. However they had clearly conceded knowledge of the disability as was set out in the agreed List of Issues. We accept that many of the individual witnesses disputed knowledge but that is not the same thing. We accept that they disputed the timing of that knowledge and of its impact on the claimant. However, both those matters were question of fact for the Tribunal and one that we had to deliberate over. The outcome was not certain.

18. Despite these issues, the Tribunal was able to hear the evidence from 10 witnesses, deliberate and deal with remedy within the time allocated. The claimant had at no point indicated that it felt that 7 days was excessive and ought to or could have been reduced.

19. It appears from the without prejudice correspondence that we have seen that the claimant's offer to settle was not responded to. Both parties threatened the other with costs applications. There is no obligation on a party to engage in settlement negotiations. The case of Kopel makes it clear that 'Calderbank' style letters do not have a place in the Employment Tribunal forum. That said, refusal to engage in negotiations or the manner of without prejudice negotiations could be considered towards unreasonable conduct of the proceedings. On this occasion whilst it is regrettable for all concerned that negotiations were not entered into, it is not, in our view unreasonable, vexatious, abusive or disruptive conduct. The respondents were entitled to defend the proceedings in the tribunal if they wanted to do so.

20. In short, whilst we accept that some aspects of the respondent's preparation for and execution of this claim were poor we do not think that the behaviour we have been pointed towards amounts to vexatious, abusive, or otherwise unreasonable conduct of these proceedings. At most, some of the matters that occurred were disruptive. If that is the case then we have to consider whether to make an order according to the two stage test. We have considered that carefully and have declined to do so. We understand the claimant's upset but we do not consider that the respondent's behaviour during the proceedings sufficiently disruptive to warrant exercising our discretion and awarding costs. The claim was finished within the time allocated for the case and any disruption was therefore minimal in terms of the cost to the claimant.

21. We do not accept Mr Rahman's assertions that the respondent had no basis on which to defend the cases that it ended up losing. Had this been an unfair dismissal claim under the Employment Rights Act, we may have agreed with him given the contradictory evidence we heard regarding the reason for dismissal and the lack of a process. However this was a multi-faceted disability discrimination claim where most if not all of the questions of fact remained in dispute. Even if a reason for dismissal had been clear from the outset, that would not have resulted in an indefensible disability discrimination claim. The claimant did not win all of his claims and it was therefore reasonable for the respondent to defend the case brought against them even if ultimately we decided their response to be ill founded and based on a misconception of their obligations under the Equality Act 2010.

22. For all these reasons the Claimant's application for costs is refused.

Employment Judge Webster

Date: 23 June 2022