# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Jinnette Arthurs

**Respondent:** Balanced Financial Services Ltd

# RECORD OF A PRELIMINARY HEARING

**Heard at:** by CVP **On:** 14 July 2022

**Before:** Employment Judge Tuck QC (sitting alone)

**Appearances**
For the claimant: Ms Cargill, solicitor
For the respondent: Mrs Baker, Director of Respondent.

**JUDGMENT**

1. The Respondent's application for costs succeeds.

2. The Claimant is ordered to pay costs to the Defendant in the sum of £6000.

**REASONS**

1. By an ET1 presented on 29 December 2020, following a period of early conciliation between 12 and 30 November 2020, the claimant brought complaints of disability discrimination and breach of contract. The Claimant gave her dates of employment as a "senior mortgage and protection advisor" as being from 21 May 2018 and 19 July 2020. Her claim form did not give details of a representative but had clearly be drafted by lawyers. It is not clear to me on what date Ms Cargill of Andrews & Monroe solicitors was instructed.

2. The ET1 clearly accepted that there would be a 'status dispute' and asserted that the claimant "was a worker as well as a self-employed consultant" and had accepted a post with the Respondent on condition of "retaining her customer base". The breach of contract claim was said to be for unpaid commission of £6000.The Claimant is disabled having been diagnosed with breast cancer in March 2020. The disability discrimination claims were for direct discrimination, discrimination because of something arising from disability and failure to make reasonable adjustments; there was also a claim for harassment. At paragraph 13 of the ET1 the Claimant alleged that the

"respondent did not consider reasonable adjustments for the Claimant. Nor did the respondent show the Claimant any care whatsoever after her operation… the sole concern of the company and its director was the claimant should continue to work, so that money was earnt."

3. The Claimant in her ET1 says that in July 2020 an agreement was reached between Mrs Baker of the Respondent and a Mr Adam Baker (no relation) of an organisation called "Loveday" as to referrals; the claimant had previously received referrals from Loveday and she would then receive 70% of the fees and the Respondent 30% - under the new agreement if a referral was direct to the respondent they would get all the fees. The claimant describes in her ET1 that this "arrangement" was made whilst she was "finishing offer her cancer treatment" and would result in her being "significantly out of pocket".

4. On 19 July 2020 the Claimant tendered her resignation – both in her ET1 and orally before me, she said that the relationship had broken down over the Loveday issue. It is not disputed between the parties that on Sunday 19 July 2020 the claimant deleted approximately 4000 emails from her system which related to work she had undertaken whilst working at / with the Respondent. On Monday 20 July the claimant attended work and on 21 July she was suspended. Whilst the ET1 says the employment ended on 19 July 2020, the parties said that one month's notice had been given on that date, such that the EDT was "around 14 August 2020".

5. On 14 August the Respondent instructed solicitors who alleged that the claimant was responsible for a number of contractual, regulatory and data protection breaches. I understand that a letter was sent from the Respondent's solicitor on 14 August 2020, but I have not been provided with a copy of this. The allegations were denied by the claimant. There was also a dispute arising from the fact that the claimant had told Mrs Baker that she intended to work from The David Hewson Practice, and Mrs Baker told that practice of the Claimant's alleged breaches of contract, and refused to provide a regulatory reference.

6. On 2 October 2020 the Respondent had her solicitors send a letter before action to the Claimant; the Claimant in her ET1 says she had a response sent via her solicitors on 15 October 2020. The parties referred to this exchange of correspondence as being "the civil claim", by which I understood them to be referring to threatened litigation in the county court. Neither of these letters were before me at this hearing.

7. I understand that the Respondent made reports about the Claimant (without naming her) to the ICO - and having "discovered numerous breaches and acts of dishonesty" in the retrieved emails, to the FCA. In November 2020 the claimant raised a grievance.

8. The allegations of discrimination contrary to sections 13 and 15 EqA were, (i) the 1 July 2020 deal with Loveday "during the time she had just finished her cancer treatment", (ii) falsely accusing the claimant of regulatory and GDPR breaches to prevent her from being able to carry out a regulated activity with a

new employer, (iii) not providing a regulatory reference between 21 July and 1 September 2020, (iv) the solicitors letter of 14 August, (v) the letter before claim of 2 October 2020 and (vi) failing to investigate her grievance. The harassment claim relied on the letters of 14 August and 2 October.

9. Ms Cargill in answer to my questions was not able to set out even an allegation to explain why any of the matters alleged to be contrary to sections 13 or 15 EqA were because of disability, or something arising from disability.

10. In its ET3 the Respondent denied the claims; it said the claimant was not a "worker", that while her disability was admitted, she was not treated unfavourably or less favourably, and that any allegation relating to reasonable adjustments was out of time as the claimant did not attend work after 20 July 2020 and ACAS Early conciliation was not started until 12 November. The Respondent's case was that it was duty bound to report to the FCA and ICO the deletion of over 4000 emails and the misconduct it said was discovered when the 4000 emails (or some of them) were retrieved. Alongside the ET3, the Respondent's solicitor wrote a letter asking for a preliminary hearing to consider (i) lack of requisite status, (ii) the reasonable adjustments claim was out of time, (iii) what was said to be the matter arising from disability, and (iv) to seek a deposit as a condition of proceeding. They alleged that the claimant had no basis in fact to suggest that any of the actions the claimant complained of were connected to her disability.

11. A preliminary hearing was scheduled to take place on 18 November 2021. This was adjourned due to the non-availability of Mrs Baker. The matter was relisted, but before that relisted hearing the claimant's solicitor wrote on 30 July 2021 withdrawing her claim. She said that pursuing the claim was having an adverse impact on her health, causing her to suffer stress cluster headaches. Mrs Baker said that the Respondent had complied with the order for disclosure of documents on 18 June 2021, whereas the Claimant had not made any effort to comply and was in breach of the order.

12. Prior to the Claimant's withdrawal, the parties had engaged in without prejudice save as to costs negotiations. The claimant offered to make a contribution to the Respondent's costs and to withdraw her claim, on condition that the Respondent undertook not to pursue any civil litigation. The Respondent was not willing to give such an undertaking. The Claimant told me in evidence today that she had been advised that the civil litigation threatened by the Respondent had no prospects of success, but that she wanted a 'clean break'.

13. By a detailed letter dated 24 September 2021 the Respondent – by this date acting in person – applied for costs. Mrs Baker essentially submitted that the presentation of the ET1 was vexatious and abusive, because the Claimant had no basis for her allegations of discrimination but was seeking to pressurise Mrs Baker into withdrawing the FCO / ICO notifications and abandoning the threatened civil claim. Mrs Baker said she had explained to ACAS that she was not able to withdraw her FCO/ ICO reports because she had been duty bound to make the reports. Mrs Baker that she had faced a

blackmail attempt from the claimant which she had reported to the police (a threat to make a report of mortgage fraud on the part of Mrs Baker for 'settling the dispute'). Complaint was also said to have been made to the Solicitor Regulation Authority about the Claimant's solicitor setting out this "offer" in circumstances where there was no basis for alleging fraud and it was improper amounting to a threat of blackmail.

14. As to the allegation of failure to make reasonable adjustments, in the ET1 this is framed as the Respondent "show[ing] the Claimant [no] care whatsoever after her operation". Mrs Baker referred to numerous text exchanges between her and the Claimant, which included photographs of the flowers she had sent to the Claimant. She also drew my attention to emails, including, by way of example, one on 3 July 2020 which Mrs Baker sent to the Claimant in the following terms:

> "YOU are important… You need to take the time that you and your body needs to sort this, whether it's a month, week or year. I don't want you worrying about Balanced at the minute, that's not fair you you….. I need you back at your finest, happiest, bounciest and problem solving wizardiest, and time is the best way to achieve that"

Mrs Baker said that the Claimant was quite simply lying in her claims to the tribunal.

15. Further or alternatively, Mrs Baker relied on the letter her solicitors had sent with the ET3 as to why the claims never had any reasonable prospects of success.

16. Mrs Baker cross examined the Claimant. The Claimant denied that the ET1 had been presented to pressurise Mrs Baker to abandon the civil action, but said that she did seek to negotiate a global settlement to "put an end to it as I didn't want it hanging over me". The claimant referred me to, and I read, her submissions made to the FCA as to why she had not committed any regulatory breaches. As the text messages and email of 3 July 2020, the claimant said that the sentiment was not genuine "had I taken it [time off] my life would have been a misery". Mrs Baker said that the alleged £6000 claim for outstanding commission was without any foundation and took the claimant to documents showing that the Claimant's pipeline commission was £1300; the Claimant answered that she had no documents to show her commission claim.

17. Ms Cargill provided written submissions which she supplemented orally. She said that the ET claim was withdrawn because it was having a negative impact on the Claimant's health, and took me to hospital correspondence confirming that the claimant reported cluster headaches which she was suffering due to stress. I asked what the response was to the key issue as to whether the ET1 had been presented abusively because the Respondent had made FCA / ICO report and to seek to compromise any civil claim; Ms Cargill told me that was "emphatically refuted". She said that no authorities – the FCO, ICO, police or SRA had taken action on Mrs Baker's complaints. The

ICO said that it factored in the claimant's cancer and treatment in deciding not to pursue the matter. When I asked Ms Cargill what the allegation was connecting any of the less favourable /unfavourable treatment to the Claimant's disability or something arising from the disability, she could not identify anything. The only allegation predating resignation was the alleged failure to make reasonable adjustments – a claim on its face which was out of time. As to the reason for resignation, during Ms Cargill's submissions the claimant asked if she could make a point; she said "the reason I resigned was because Mrs Baker renegotiated the deal with Loveday and was protecting her other advisors".

18. As to the claim made by Mrs Baker, I clarified that she was not able to apply for costs and a preparation time order in the same case. She pursued the costs order and had included the invoices from her solicitors. Ms Cargill did not accept that all of the £9000 had been incurred in the tribunal claim but rather some were in the civil claim. As to means, the claimant gave evidence that her monthly household income was £2883 and her outgoings were £2588. She did not mention any savings; when Mrs Baker cross examined on the claimant's savings bond of £60,000 the claimant said savings had been used during her period of not being able to work as a financial advisor (the claimant said she had volunteered as a mentor in the mortgage advisory company she now works for until she was able to work in a regulated role).

**The Law**

19. The Employment Tribunal's power to award costs is contained in rule 76 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, Schedule 1: -

> 76(1) 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 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 prospects of success.

20. In deciding whether to make a costs order the Tribunal may have regard to the paying party's ability to pay in accordance with rule 84.

21. The Court of Appeal stated in ***Yerrakalva v Barnsley Metropolitan Borough Council*** 2012 ICR 420, CA, that costs in the Employment Tribunal are the exception rather than the rule.

22. In ***Oni v UNISON*** UKEAT/0370/14/LA the Employment Appeal Tribunal confirmed that rule 76 imposes a two-stage test on the Tribunal. The first stage being whether the circumstances of Rule 76 are engaged and if so

secondly, the Tribunal must determine whether to exercise its discretion to make the award of costs.

23. There is also Presidential Guidance on costs (Presidential Guidance; General Case management – Guidance Note 7 Costs) which I have taken into account.

24. In her written submissions, Ms Cargill included the following which I am satisfied accurately summarises the cases cited:

> "Attempts to settle failed because the Respondent was not prepared to settle all claims.
>
> 26. Thus, any suggestion that the Claimant acted unreasonably, frivolous or vexatiously in respect of her claim is refuted. Likewise ,it is not accepted that the Claimant's case had no real prospects of success.
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> 27. In Scott v Russell [2013] EWCA Civ 1432; [2014] 1 Costs L.O. 95 (12 November 2013) Beatson LJ, giving the judgment of the Court of Appeal, cited with approval the definition of "vexatious" given by Lord Bingham in Attorney General v Barker [2000] 1 F.L.R. 759 (16 February 2000). That definition is as follows: "The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding 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."
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> 28. It is the Claimant's case that there was a legal basis for the claim issued against the respondent. The disability discrimination claim and the breach of contract claims were valid and there was a reasonable prospect that these may have succeeded.
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> 29. The Respondent states that the Claimant has be dishonest about her claim and in her withdrawal of that claim. Lies may be the basis of an allegation of vexatious or unreasonable conduct. In this regard, in the case of Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797; [2012] I.C.R. 159 (10 June 2011) the Court of Appeal Case Number: 3220044/2020 V 7 approved of the following passage in HCA International Ltd v May-Bheemul EAT 0477/10 (23 March 2011): " Thus, a lie on its own will not necessarily be sufficient to found an award of costs. It will always be necessary for the tribunal to examine the context and to look at the nature, gravity and effect of the lie in determining the unreasonableness of the alleged conduct. Notwithstanding this statement, it is the Claimant's case that she had

been honest, there were statements that were wrong in the civil case. However, the Claimant apologised for those errors and she refutes any suggestion that she was dishonesty."

## Conclusions

25. The first issue is whether the circumstances of Rule 76 are engaged. I am satisfied they are for the following reasons:
    a. I am satisfied that the Claimant presented a claim which had no reasonable prospects of success.
        i. I express no view as to the 'status issue' and assume in the Claimant's favour she would have been able to show she was within section 83 EqA.
        ii. Nevertheless, the claims for discrimination contrary to section s13 and 15 did not suggest any causative link to the Claimant's disability or anything arising from her disability.
        iii. As to the claim for reasonable adjustments, the factual basis of the Respondent showing no concern was at odds with the contemporaneous correspondence between Mrs Baker and the Claimant. It was also in any event out of time, despite the Claimant having engaged solicitors during the primary limitation period.
        iv. The claimant said of her claim for breach of contract that she had retained no documents to evidence this – presumably because she had deleted so many records on the day of her resignation.
    b. I accept the submission of Mrs Baker that these proceedings were vexatious or an abuse of process because they were presented with the aim of pressurising the Respondent to withdraw or amend FCA / ICO complaints and abandon threatened civil proceedings. I reach this conclusion in circumstances where:
        i. As set out above, nothing on the face of the ET1 shows any alleged link between the behaviour complained of and disability / something arising, and neither the Claimant nor Ms Cargill could set out even a prima facie allegation.
        ii. The Respondent has explained why she made the report to the ICO – the claimant had deleted over 4000 emails, and to the FCA – having sought their advice. It is apparent that Mrs Baker did not name the Claimant in either report and offered the Claimant's name to the FCA only when required to do so. The fact of the deletions was agreed; there is nothing to suggest Mrs Baker's actions were without foundation – or as the claimant alleged in her written submission to the FCA, were "malicious".
        iii. The Claimant did not comply with the case management directions to disclose her documents in the case. This does seem to indicate that she never had any intention of pursuing her litigation.
        iv. The claimant offered to pay a significant proportion of what she understood to be the Respondents costs in the ET proceedings

– but only on condition of also compromising the Respondent's proposed civil proceedings.

26. Having found that the circumstances of rule 76 are met, I have considered whether it is appropriate to exercise my discretion to award costs. I bear in mind that costs are the exception not the rule in tribunal proceedings. I also accept that the Claimant was suffering from cluster headaches and found both the ET proceedings and threat of other (civil) proceedings to be stressful. Nevertheless, I do not accept that the Claimant ever had a real grievance that she had been discriminated against because of her disability or anything arising. She had a commercial disagreement with Mrs Baker about the terms on which referral fees from Loveday were to be earned which led to her choosing to leave the Respondent. She did delete a very large quantity of data which led to the Respondent being compelled to make regulatory referrals. ET proceedings were used as a pawn in that dispute. In these circumstances I consider it appropriate to exercise my discretion to award costs.

27. As to the amount of costs, I have had careful regard to the Claimant's evidence as to what she says are her means – and note that she did not volunteer any evidence about her savings or assets. I also note that she has been able to pay her own solicitor £3787 in relation to the ET proceedings (in addition to £3600 in relation to the civil claim). I have also been through the invoices sent to the Respondent to ensure that only costs incurred in the tribunal proceedings are under consideration. In all the circumstances, I consider that an award of £6000 is appropriate.

**EJ Rebecca Tuck QC**

Signed 18 July 2022

Sent to the parties on:
25 July 2022
For the Tribunal Office