EMPLOYMENT TRIBUNALS

Claimant: **Mr Ernest Nii Larbi**

Respondents: **Thurrock Council**

Heard: **East London Hearing Centre**

On: **18 May 2022**

Before: **Employment Judge G Tobin**

Members: **Mr T Brown**
Mr P Quinn

Representation

Claimant: **In person**
Respondent: **Ms G Rezaie (counsel)**

RESERVED JUDGMENT ON COSTS

It is the unanimous judgment of the Employment Tribunal that the claimant do pay the respondent a contribution of £15,300 towards their costs.

REASONS

The Hearing

1. This has been a remote hearing which has not been objected to by the claimant and the respondent. The form of remote hearing was a video hearing through HM Courts & Tribunal Service Cloud Video Platform ("CVP"). All the

participants were remote (i.e. no-one was physically at the hearing centre). A face-to-face hearing was not held because all of the outstanding issues in this case could be determined in this remote hearing.

2. The respondent made an application to reimburse part of their legal costs on 18 December 2020. The application was detailed and enclosed copies of: (1) the respondent's costs schedule (with billing guide and barristers' invoices); and (2) various correspondence between the parties and the Tribunal in respect of costs.

3. The respondent's original application was declined by Employment Judge Tobin. The respondent's requested that that decision be reviewed by the full Tribunal that heard the case and this is the outcome of that full review.

4. We (i.e. the Tribunal) were presented with an agreed hearing bundle of 122 pages. Neither party had prepared witness statements. The claimant was asked at the hearing if he wanted to give evidence and he chose to provide oral submissions only. Ms Rezaie, on behalf of the respondent, confirmed that she had no oral evidence to adduce and said she would rely on the written submissions contained in the respondent's original application augmented by oral submissions.

The Case

5. By a Reserved Judgment promulgated on 23 November 2020, the claimant's following claims were rejected and dismissed:

a. direct race discrimination, in breach of s13 Equality Act 2010 ("EqA");

b. direct sex discrimination, in breach of s13 EqA;

c. victimisation, in breach of s27 EqA;

d. Non-payment of overtime, contrary to s13 Employment Rights Act 1996 ("ERA"); and

e. Harassment on the grounds of the claimant's race, in breach of s26 EqA.

In addition,

f. 8 of 15 substantive complaints of various discrimination, were found to be out of time and the Tribunal determined that if there was any merit to those claims, it would not have exercised its discretion (on just and equitable principles) to allow those complaints to proceed.

6. Full Reasons were provided with the Judgement of 23 November 2020 and these ran to 24 pages. This decision should be read in conjunction with that Judgment and Reasons.

7. The case concerned 2 sets of proceedings, in respect of allegations of various types of prohibited conduct based originally on 3 different protected characteristics, race, sex and disability discrimination and non-payment of wages. There were 6 preliminary hearings before the final hearing, which was heard over 5 days. The parties presented a hearing bundle and additional documents of around 1,000 pages and the claimant called 2 witnesses and relied upon the statements of 2 more

colleagues. The respondent needed to call 3 witnesses to deal with the claimant allegations.

8. Our decision was clear and robust; indeed, such was the claimant's poor behaviour both during the events under scrutiny and in the pursuit of these proceedings, that it would not have done justice to the situation by minifying our findings. The disability cases were dismissed by a Judge prior to the final hearing despite the claimant repeated challenges to that determination. At the final hearing, allegations of race discrimination and sex discrimination were made against 3 of the claimant's colleagues and/or managers which were very serious, potentially job-threating and possibly career-threatening. The allegation that white members of staff were provided with stab vests and black staff were not, was shocking in its implications.

9. Our decision said that during the course of his employment the claimant was negative, challenging and badly behaved and that he had a history of making complaints when thing did not go his way. We did not believe his story that he had substantial memory loss. The claimant pursued claims that we regarded as without merit or proper foundation. The evidential basis for his complaints was not there and indeed he often misrepresented the situation. We spend some time dealing with the claimant's "skive" day, in which he deliberately and dishonestly absented himself from duties and we found his allegations of his purported mistreatment arising from this event to be trivial and ludicrous. We found the claimant to be both unreliable and untruthful.

The Relevant Law

10. Rule 75(1)(a) of the Employment Tribunal Rules of Procedure[1] – coupled with Rule 76 – gives the Employment Tribunal's power to make a cost award against one party to the proceedings ("the paying party") to pay the costs incurred by another party ("the receiving party") on a number of different grounds. These grounds include circumstances where:

a. A party has acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing or conducting of proceedings (or part thereof) – Rule 76(1)(a).

b. A claim had no reasonable prospects of success – Rule 76(1)(b).

11. Costs" for these purposes mean "fees, charges, disbursements and expenses incurred by or on behalf of the receiving party "including expenses that witnesses incurred for the purposes of, or in connection with, attendance at the tribunal hearing" – see Rule 74(1).

12. The respondent pursued its application on the basis of both Rule 76(1)(a) and Rule 76(1)(b).

[1]Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (SI 2013/1237)

13. Rule 78(1) of the Tribunal Rules provides that a cost order can be made for:

a. costs assessed by the Tribunal, which cannot exceed £20,000; or

b. a detailed assessment of costs in accordance with the Civil Procedure Rules of the County Court (for award that may exceed £20,000); or

c. an amount of cost which has been agreed between the parties.

14. Rule 84 provides that we (i.e. the Tribunal) *may* have regard to the paying party's ability to pay.

Our Determination

15. We accept that the respondent has incurred substantial costs in responding to these proceedings. Whilst the amounts quoted in the Costs to Date Summary may represent an accurate picture of the costs actually incurred for all claims, we note that this does necessarily record cost which might be deemed potentially recoverable from the other party should the claim be subject to detailed assessment. That said, the respondent has been clear, they do not seek to recover all of their legal costs from the claimant. The total legal costs were £39,395.50. Of this amount £15,300 represents counsel's fees (£9,900 for the final hearing and £5,400 for the preliminary hearings). The respondent's in-house legal costs were modest at £24,095.50 and do not over-state the amount of work we assess was required, which was extensive. We have see a brief billing guide for the internal costs recorded and we have scrutinised the fee notes for counsel, which we also regard as modest and sustainable.

Costs in Principle

16. The respondent provided a detailed application and Ms Rezaie make a compelling submission. We will not rehearse the respondent's arguments in detail, but these were relevant and persuasive. Ms Rezaie drew our attention to paragraphs 26, 61, 64, 70, 72, 76, 81, 82, 87, 91, 96, 99, 101, 105, and 108 in our original Judgment. Mr Rezaie said that of the claimant's 27 various allegations all but 1 fell at the first hurdle, without transferring the burden of proof to the respondent. The allegation that the respondent's might have had a case to answer was the delay in providing the claimant with his grievance outcome and, she contended – which we accept – the respondent's relevant witness explained the circumstances such that this less favourable treatment was in no way tainted by discrimination on the grounds of the claimant's race.

17. She referred us to correspondence where the claimant was warned of a likely cost application, see for example 10 August 2020. He was given every opportunity to seek independent legal advice. Indeed, he was explicitly advised to do so by the respondent's solicitor on 29 May 2020 and 22 July 2020. As well as pursuing claims which he knew, or ought to have known, was unmeritorious, Ms Rezaie contended that the claimant escalated costs unnecessarily. She referred to correspondence in the hearing bundle and contended that the claimant was disruptive in proceedings, particularly over: repeatedly challenging the Tribunal's determination that he was not a disabled person under s6 EqA; disputing the list of issues; disclosing documents

which were both irrelevant and late; and agreeing a hearing bundle. It required a number of separate judges to sort out these matters which could and should have been capable of agreement. Indeed 6 hearings were necessary prior to the full merits hearing, where only 1 or 2 at most might have been appropriate. Ms Rezaie referred to correspondence and time required to deal with these preparatory steps which was excessive, arising from the claimant's disruptive approach which bordered on vexatious. The respondent contended that its costs were either deliberately or carelessly driven up from the claimant's unreasonable conduct.

18. The claimant opposed the application in correspondence and his arguments were very brief. In essence he stated that the respondent had the opportunity to settle the case, which misses the point that he chose to make a substantially unmeritorious claim against his employer. The claimant reiterated the criticism of Judge Tobin that he was poorly managed as if this somehow absolved his from his poor behaviour. He said that bringing proceedings was not vexatious or unreasonable and was not brought in bad faith. At the costs hearing, the claimant said that he was not fully prepared for the substantive hearing because of the delay in the respondent providing a finalised hearing bundle. We prefer Ms Rezaie's account as being the more accurate, i.e. that delays in preparatory steps were entirely of the claimant's making and that his lack of preparedness was his entirely responsibility.

19. Although the claimant said that he accepted the outcome, it was disappointing that he revisited many aspects of the decision to indicate that he clearly did not accept the outcome.

20. Whilst it is not necessary that a party give a prior warning about costs before it can pursue a cost application, we accept that the claimant was warned by the respondent's representatives about the consequences of pursuing such unmeritorious proceedings.

21. Having heard the claim in its entirety, we were convinced that the claimant was dishonest in giving evidence and we had significant difficulties in believing anything he said. We regret such a blunt expression but feel compelled to state the obvious, as the claimant displayed little insight into his behaviour. He wanted to work in the back office, and he would say anything, attack anyone or hurl undeserved allegations at anyone who stood in his way.

22. The claimant may put some emphasis upon his contention that he was up against a solicitor, counsel and a large public sector employer and that he did not obtain legal support. As the claimant was a litigant in person it is appropriate for him to be judged less harshly in terms of his conduct than a litigant who was professionally represented. Justice requires that Tribunals do not apply professional standards to laypeople who may well be embroiled in legal proceedings for the first time in their lives – see *AQ Limited v Holden*[2]. Laypeople are likely to lack the objectivity and knowledge of the law and practice, which a professional legal adviser can bring. However, the claimant was dysfunctional. It appears that anyone who

[2] [*2012] IRLR 648*

would not agree to what he wanted was treated as an enemy and he went to extraordinary lengths to attack or undermine work colleagues, such as making fanciful and malicious claims against both Mr Carver and Ms Daly.

23. "If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harasses his employers or for some other improper motive, he acts vexatiously"; see *ET Marler Limited v Robertson*[3]. Simply being "misguided" is not sufficient to establish vexatious conduct: *AQ Limited v Holden.* We are satisfied that the claimant brough his claim against his former managers out of spite in order to harass them. The claimant conducted these in a vexatious manner. The wages claim, was particular egregious, as set out above. In any event, in addition, the claimant's claims and conduct in advancing those claims in these proceedings exceeded the threshold such that we regard this as "unreasonable".

24. Even where the threshold tests are met, to Tribunal still has a discretion whether or not to make an order. That discretion should be exercised having regard to all the circumstances. We note that, in the Employment Tribunal's jurisdiction, cost orders are very much the exception and not the rule: see *Gee v Shell UK Limited*[4] and *McPherson v BMP Paribas*[5].

25. As Sedley LJ said in *Gee v Shell UK Limited*:

> It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to ordinary people without the need of lawyers and that in sharp distinction for ordinary litigation in the United Kingdom losing does not ordinarily mean paying the other site's costs.

26. What this means is that people are entitled to come to an Employment Tribunal to say, without fear of punishment in the form of a costs order, "*this is what has happened to me, I think it is unfair, I think it is unreasonable, I think it amounts to discrimination, what do you think?*" Costs remain the exception rather than the rule in such proceedings. That said, in contrast, employers should not be subject to expensive, time-consuming, resource draining claims that are without merit. The Employment Tribunal Rules say that we may order costs in the circumstances set out in Rule 76 and if the conduct of a litigant meets that definition, then we have a discretion to order costs.

27. The Employment Appeals Tribunal has reminded us, in the aftermath of a number of cases (including *Daleside Nursing Home Limited v Matthews*[6] and *Dunedin Campbell Housing Association v Donaldson*[7]) which appeared to indicate the contrary, that the mere fact that the claimant may have given false evidence is not reason on its own to automatically order costs against him. We should look at the case as a whole: see *Kapoor v Governing Body of Barnhill School*[8].

[3] 1974 ICR 72 NIRC
[4] [2003] IRLR 82
[5] [2004] IRLR 558
[6] UKEAT20519/08
[7] UKEAT0014/09
[8] UKEAT/0352/2013

28. *Yerrakalva v Barnsley Metropolitan Borough Council*[9] emphasised that the Tribunal has a broad discretion, and we should avoid adopting an over analytical approach, for instance by dissecting the case in detail or attempting to compartmentalise the relevant conduct under separate headings.

29. In this respect, it was not irrelevant that a layperson may have brought proceedings with little or no access to specialist help and advice. Laypeople are, of course, not immune from orders for costs as many litigants in person are found to have behaved vexatiously or unreasonably even with proper allowances made for their inexperience and lack of objectivity. However, the claimant's pursuit of this matter was cynical and his behaviour opportunistic as our determination makes this clear. The non-legal members in particular, although indeed the whole Tribunal, regarded the claimant's pursuit of this case as being so unmeritorious as to bring the anti-discrimination legislation into disrepute. The claimant used the EqA as a stick to try to beat his employers and he was wholly unreasonable to do so. We regard it was appropriate in the circumstances to make a cost award against the claimant.

The amount of our Costs Award

30. The aim of an order for cost is to compensate the party which has incurred expense in winning the case and not to punish the losing party: see *Lodwick v London Borough of Southwark*[10]. We have a wide discretion which should not be fettered by the case law: the proper test is for us to exercise our powers under the Employment Tribunal Rules "justly": see *Benyon & Others v Scadden & Others*[11]. Proportionality may be a feature, although there could be a substantial disproportionality between the costs incurred and the award given: see *Brash-Hall v Getty Images Limited*[12]. The respondent incurred total cost of £39,395.50 – which we determine was reasonable and properly incurred. It sought reimbursement of 38.84% of these costs – which we regard as modest.

31. At the cost hearings, the claimant raised his impecuniosity. At various stages, the Judge explained in detail to the claimant the financial information that should be produced. The Judge explained to the claimant the consequence of not giving evidence, which precluded the Tribunal from making findings of fact. If the claimant wanted to give evidence, then it was explained to him that the respondent would have the opportunity to cross-examine him, and the claimant thereupon declined to be questioned about his financial means. The claimant has not provided any clear financial details that we might consider, so we are in a position that there is only limited information available to us to take into account. Both sides agree that the claimant is still employed by the respondent; he is married with a family. We do not know if his wife works or if he has savings.

32. Where a party was relying upon limited financial means, we expected to see a detailed breakdown of their finances, supported by bank statements, budget forecasts, copies of bills, etc. So given the absence of corroborative evidence we

[9] [2012] ICR 420
[10] [2004] IRLR 554
[11] [1999] IRLR 700
[12] [2006] EWCA Civ. 531

were reluctant to accept that the claimant's finances were limited. That said, the respondent has not produced any evidence of the claimants means, other than indicating that he remains in employment.

33. We regard it as just to order the claimant to repay the amount sought by the respondent. This is a proportion of their total legal bill. A cost order is exceptional, and the claimant's behaviour was exceptional - at points vexatious and, at least, manifestly unreasonable. We have made this clear in our decisions and as these are public records, the respondent and their witnesses can feel suitably vindicated.

34. We are mindful that the Employment Tribunal operates in a largely no-cost regime, and we do not wish to deter genuine complainants to the Employment Tribunal. That said, we do feel that a clear message is required and one that will have a significant effect upon the claimant.

35. We have no evidence to support any adverse effect that a high cost order would adversely affect the claimant. Therefore, we determine that £15,300 is a just amount to order the claimant to pay as a contribution towards the respondent's legal costs. We have no information that the claimant would be unable to meet this sum, either through savings or through a loan. Thereby our costs award should be enforceable, which is important to the Tribunal. In all of the circumstances we regard this award as just and should be paid.

Employment Judge Tobin
Date: 7 August 2022