**Case Number: 2202339/2020**

# THE EMPLOYMENT TRIBUNAL

**SITTING AT:** **LONDON CENTRAL**
**BEFORE:** **EMPLOYMENT JUDGE ELLIOTT (sitting alone)**
**BETWEEN:**

**Mr R Sanguiliano**

**Claimant**

**AND**

**JCI Capital Ltd (1)**
**Mr D Pinci (2)**
**Mr D Clasadonte (3)**
**Mr M Bernardeschi (4)**
**Mr G Torzi (5)**

**Respondents**

## JUDGMENT ON COSTS

The Judgment of the Tribunal is that the claimant's costs application is refused.

## REASONS

1. The liability Judgment in this case was delivered orally on 14 December 2022. It was a Rule 21 Judgment and the respondents did not have leave to participate.

2. The remedy judgment was reserved following a remedy hearing which took place over 2 days, on 11 April and 8 July 2022.

3. There were costs applications made on both sides. The respondents' application was settled. This decision is to deal with the claimant's application dated 8 August 2022.

**Decision on the papers**

4. By consent this application was dealt with on the papers and without a hearing. It appeared very difficult to find a mutually convenient hearing date and the claimant decided to limit the amount of the claim for costs to

£20,000 to avoid the need for a detailed assessment (application paragraph 21).

## The issues

5. The issue for consideration was whether to make an award of costs to the claimant against the first and fifth respondents (R1 and R5) and if so in what amount. References below to the respondents are to R1 and R5 unless it is made clear otherwise. R1, R2 and R3 did not participate in these proceedings.

## Documents and statements

6. There was a costs bundle of 129 pages prepared by the claimant. It included copies of without prejudice correspondence, the parties' submissions, case law authorities and evidence as to means from the first and fifth respondents.

7. There were written submissions from both counsel. All submissions and any authorities referred to were fully considered, whether or not expressly referred to below.

## Submissions on costs

8. The claimant says that the respondents acted unreasonably by failing to engage reasonably with settlement negotiations and adopting and maintaining an unreasonable stance on various issues relating to remedy.

9. The claimant relies upon the overriding objective set out in Rule 2 of the Employment Tribunal Rules of Procedures 2013 which requires parties to *"assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal".*

10. The claimant relies upon case law in the civil courts to support his argument that it is well established that a failure or refusal to engage in reasonable settlement negotiations may amount to unreasonable conduct which should be sanctioned in costs. The claimant accepts that the cases cited are in the civil courts where costs are the norm rather than in the ET where costs are not the norm and there is a discretion to be exercised.

11. The cases relied upon by the claimant were ***OMV Petrom SA v Glencore International AG 2017 1 WLR 3465***; ***Jordan v MGN Ltd 2017 EWHC 1937 Ch***; ***Dickinson v Cassillas 2017 EWCA Civ 1254*** and ***Pallett v MGN Ltd 2021 EWHC 76 Ch.*** The cases concern parties not engaging properly with settlement offers.

12. The case law covers unreasonable conduct in specific circumstances such as indemnity costs, additional interest or departing from a usual order. The claimant submits that the principles derive from the overriding objective and submits that it is materially common to jurisdiction of the Employment

Tribunal.

13. The claimant relied on the fact that on 27 July 2021 prior to a preliminary hearing to deal with the respondents' application for an extension of time to file the ET3, he made an offer to settle for £280,000. The amount awarded at the Remedy hearing was £255,103.28. The claimant says this was a reasonable attempt to settle at an early stage without the need for lengthy and costly hearings. The claimant says the respondent did not acknowledge the letter or a chase up.

14. After the claimant succeeded under Rule 21 on liability and on 14 March 2022 he offered to settle for £442,477.88 plus costs of £80,000 (costs bundle page 5). The claimant says that the respondents failed to acknowledge the offer.

15. On 1 April 2022, prior to the relisted remedy hearing, the claimant offered to settle for £350,000 plus a contribution towards costs (bundle page 3). He says this was not acknowledged. Both offers were for sums substantially more than the claimant ultimately recovered.

16. The claimant submitted that there was no reasonable explanation for this and suggests that the respondents were "*in denial*" which the claimant says is supported by attempts to go behind the liability findings.

17. There was an oral settlement offer between counsel on 4 April 2022 which was to be the date of the remedy hearing. The hearing had to be postponed because the Judge was unwell. The offer was in Euros, in the approximate sum of £125,000 which was substantially less than the sum set out in the respondents' counter schedule of loss at €259,577.79. The claimant counter-offered at £335,000.

18. The claimant says that the respondents further acted unreasonably in the following ways:

    a. Attempting to re-open liability findings by seeking to argue in relation to the pre-employment period.
    b. They initially sought to argue that there should be no award at all for injury to feelings.
    c. They argued unsuccessfully that the respondents should not be jointly and severally liable.
    d. Their arguments on mitigation in respect of the post-termination period led to a reduction of only 6.5%.
    e. They wasted time cross-examining on matters that had already been conceded, in particular the basis of calculating the profit share.

19. The respondents (referring to R1 and R5) submit that it was unreasonable for the claimant to expect them to settle the case on behalf of all five respondents and therefore the claimant's approach was unrealistic.

20. The respondents also drew attention to the fact that the claimant sought far more than he was ultimately awarded and it was not a gap which could have been bridged by negotiation. They say that the claimant's approach to his profit share was "*fundamentally flawed*" and this precluded any realistic prospect of settlement. The respondents (R1 and R5) say that their offer on 4 April 2022 of €150,000 was a proportionate offer in respect of themselves and the value of the claim. They were offering to settle on behalf of only two out of five respondents. They submitted that the high threshold of unreasonable conduct was not met by their inability settle the claim on behalf of others.

21. The participating respondents also relied on their respective financial positions in support of their submission that they lack the ability to pay an award of costs.

22. The respondents questioned whether the claimant's costs were actually incurred and paid by him. They said that they sought confirmation which they did not receive. They said that the tribunal should be satisfied that the costs claimed were paid by the claimant such that he would be the beneficiary of any award of costs. The respondents queried whether there was a damage-based agreement by which the solicitors would benefit rather than the claimant.

23. The respondents also submitted that their position on remedy had merit as the quantum claimed was significantly reduced.

The respondents' financial positions

24. I saw a witness statement from a director of the R1 stating that the company was in "*serious financial hardship and on the edge of bankruptcy*." As was found in the main proceedings, R1 had its FCA authorisation revoked on 21 April 2021 and had not been able to trade since then. There was a compulsory strike off warning in January 2022, which was suspended on 26 July 2022. The reason for the suspension was not given.

25. I saw a witness statement from R5 who is a sole provider for his family. He is in employment. The evidence I saw showed that there was difficulty in covering his monthly expenditure.

26. There was no cross-examination on the evidence as to ability to pay an award of costs, the parties having consented to the costs application being dealt with on the papers.

**The relevant law on costs**

27. Costs do not follow the event in employment tribunal proceedings and an award of costs is the exception and not the rule (Lord Justice Mummery in ***Barnsley Metropolitan Borough Council v Yerrakalva 2012 IRLR 78***).

28. The power to award costs is contained in Rule 76 of the Employment Tribunal Rules of Procedure 2013 which provides that:

> *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 the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;*

29. The Court of Appeal held in ***Yerrakalva*** (above) that 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 was unreasonable conduct in bringing and conducting the case and in doing so, to identify the conduct, what was unreasonable about it and what effects it had. There does not have to be a precise causal link between the unreasonable conduct in question and the specific costs being claimed.

30. "Unreasonable" has its ordinary English meaning and is not to be interpreted as if it means something similar to vexatious: ***Dyer v Secretary of State for Employment EAT/183/83****.*

31. The rule in *Calderbank v Calderbank* does not apply to Employment Tribunal proceedings – ***Kopel v Safeway Stores plc 2003 IRLR 753 (EAT)***. It is nevertheless a factor which the tribunal can take into account in deciding whether to make a costs order Failure to achieve an award in excess of that offered should not by itself lead to an order for costs. The tribunal must first conclude that the conduct of the claimant in rejecting the offer was unreasonable. In the present case this requires consideration of the respondents' approach to the claimant's settlement proposals.

32. Rule 76(2) provides that a Tribunal may also make an order for costs where a party has been in breach of any order or practice direction.

33. Rule 84 says that in deciding whether to make a costs or a wasted costs order and if so, in what amount, the tribunal may have regard to the paying party's, or in the case of wasted costs, the representative's, ability to pay.

34. Affordability is not the sole criterion for the exercise of the discretion – ***Vaughan v London Borough of Lewisham (No. 2) 2013 IRLR 713.***

35. The EAT in ***Raggett v John Lewis plc 2012 IRLR 906*** said that where a party is registered for VAT and able to recover VAT on its counsel's fees and solicitors' costs as input tax, to award costs including VAT would represent a bonus to that party compensating over and above the costs incurred and would represent a penalty to the paying party.

**Conclusions**

36. The claimant's position was that the respondents acted unreasonably and in breach of the duty to further the overriding objective by failing to engage reasonably with settlement negotiations and by adopting and maintaining and unreasonable stance on various issues relating to remedy.

37. To the extent that the claimant relied on non-engagement by the respondents in terms of their failure to submit an ET3 (submissions paragraph 2), I find that this did not generate additional costs to the claimant who had the benefit of a Rule 21 Judgement without the need to incur the cost of a liability hearing.

38. Where the claimant complains (submissions paragraph 2) that respondents "*failed to engage…even on narrowing the issues*" except when explicitly told to do so, eg by agreeing calculations. I find that it was not unreasonable conduct for the respondents not to agree to narrow the issues when the points were genuinely in issue for them. Agreeing calculations is a matter of mathematics. This is not the same as legal or factual points of dispute which require a determination from the tribunal. The respondents were entitled to their findings of fact on the remedy issues and it was not unreasonable conduct not to concede points which were significantly in issue.

39. By way of example, in terms of the case law relied upon by the claimant ***OMV Petrom*** is a case in which the defendant did not respond to or accept a Part 36 offer and instead "*defended the claim up hill and down dale"* at a lengthy trial where witnesses were found to be "*liars".* The Court of Appeal, quoting the judge below (at paragraph 2), said that the defendant in that case put the claimant "*through the hoops of having to establish liability in a very flagrant case of fraud, in a manner which was wholly unreasonable"*. This is not on point with the present case.

40. In terms of the claimant's offer made in July 2021, I find that it was not unreasonable of the respondents to fail to engage with this offer when they were in a position of seeking to contest liability and seeking permission to file an ET3 out of time. Whilst I find that the offer should have been acknowledged, I find in those circumstances it did not meet the threshold of unreasonable conduct when they were in a position of seeking leave to defend the claim. The offer made in July 2021 was withdrawn on 24 August 2021.

41. The next offer of settlement came on 14 March 2022 after the claimant had succeeded on liability on an undefended claim. This was an offer for a very substantial sum in excess of £0.5million, including the amount of costs claimed, to be paid within 14 days of entering into a Settlement Agreement. This was reduced on 1 April 2022 to £350,000 plus a reasonable contribution towards costs.

42. The respondents did not reply to the 14 March offer until oral discussions took place between counsel on 4 April 2022. This meant that this offer

went unacknowledged for 3 weeks. Again whilst it is not good practice for the respondents to fail to acknowledge this offer, I find in circumstances of an offer of over £0.5m and with such a range of points in issue for determination, it did not meet the threshold of unreasonable conduct to fail to engage with it.

43. The lower offer made on 1 April 2022 was sent on a Friday. Inevitably parties and solicitors need a period of time for instructions to be taken and for advice to be given. The without prejudice discussions between counsel took place on Monday 4 April 2022, the date on which the remedy hearing was originally due to commence. Whilst it would have been good practice for the respondents' solicitors to have sent an acknowledgement of the offer on Friday 1 April, given the time frame involved I can find no unreasonable conduct on the part of the respondents in needing the weekend to consider the reduced offer.

44. On 4 April 2022 an offer was made of €150,000 on behalf of two out of five respondents. This was not a failure to engage with negotiations.

45. This is not a case in which the respondents failed to beat any offer made by the claimant. They succeeded on a number of points. A counter-schedule of loss is not an offer.

46. This was not a straightforward remedy hearing. It contained disputed issues of substance. There were 7 such issues in the list of issues for that hearing, including the basis of assessment of the claimant's entitlement to profit share over different periods and whether or not he had taken proper steps to mitigate his loss. I also accept the respondents' submission that it was difficult for them, based on the liability decision alone – in respect of which they did not participate – to be clear as to how the calculation of profit share was to be approached, certainly for period 3.

47. The claimant relied on unreasonable conduct in attempting to re-open liability findings on the pre-employment period and the argument that the respondents should not be jointly and severably liable. I find on a balance of probabilities that these arguments did not appreciably affect the amount of costs incurred by the claimant. There was no quantification as to this.

48. So far as the respondents initially sought to argue that there should be no award for injury to feelings, again it was not clear how this made any material difference to the costs incurred and it was a position that the respondents changed in updated written submissions.

49. The claimant relied on a calculation that on mitigation of loss, the respondents secured a reduction "*of only 6.5%".* Nevertheless, the respondents secured a reduction and the claimant did not succeed on the full period of loss claimed.

50. The claimant said that the respondents "*wasted time cross-examining on matters that had already been conceded, in particular the basis of*

*calculating the profit share*". I did not recall this taking an appreciable amount of time and the respondents were brought back on track on this during the hearing.

51. I agree with the claimant that the failure to acknowledge a settlement offer is not something to be condoned, especially when parties are legally represented. In terms of the July 2021 offer, the respondents were seeking to defend the proceedings and did not have a determination on this. I find that it did not meet the threshold of unreasonable conduct for them to fail to engage with that offer when they had a prospect of defending liability. This offer was withdrawn in August 2021. No further offer was made for 7 months.

52. The respondents failed to acknowledge for 3 weeks an offer made on 14 March 2022 of over £0.5million. On my finding they should at least have acknowledged that offer but their failure to do so does not meet the threshold of unreasonable conduct. I find no unreasonable conduct with the failure to discuss an offer made on Friday 1 April until Monday 4 April.

53. I find that the respondents did not unreasonably fail to engage with settlement negotiations. When the first offer was made they were seeking to defend liability. The offer was withdrawn a month later. For a period of 3 weeks there was a failure to acknowledge an offer made on 14 March 2022. It was revised on 1 April and responded to after the weekend on 4 April. The 14 March offer should have been acknowledged. However, due to the size of that offer I agree with the respondents that it was unlikely to result in settlement. There was engagement within a reasonable period with the 1 April offer.

54. I also find that the respondents did not take an overall unreasonable stance on issues relating to remedy. The award was ultimately less than the amount sought by the claimant. There were points in dispute which it was reasonable for the respondents to contest. There was no quantification by the claimant of specific areas in which he says costs were unreasonably increased.

55. I have considered whether, on the basis of the without prejudice offers made, there was a culpably lost opportunity to arrive at a settlement which the respondents should have at least tried to reach. I find that there was not.

56. Rule 84 provides that in deciding whether to make a costs order the tribunal may have regard to the paying party ability to pay. I was able to reach this decision without taking into account the ability of R1 or R5 to pay an award of costs.

57. Costs are not the norm in Employment Tribunal proceedings. I find that the threshold of unreasonable conduct is not met by the respondents and I decline to depart from the norm to make an award of costs to the claimant. The claimant's application for costs is refused.

58. The tribunal was grateful to the parties for the well prepared submissions and papers for this costs application.

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**Employment Judge Elliott**
**Date: 12 September 2022**

Judgment sent to the parties and entered in the Register on: 12/09/2022.

For the Tribunal