EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: **Dr Edward Okosun**

Respondent: **Salisbury NHS Foundation Trust**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held in Chambers at Bristol **On 15 November 2022**

Before Employment Judge Gibb

ORDER

The Claimant is ordered to pay a contribution towards the Respondent's costs in the sum of £20,000.

BACKGROUND REASONS

1. In this case the Respondent seeks its costs of defending this action against the Claimant.

   Chronology of the Claim

2. The Claimant issued a claim against the Respondent on 25.09.19. He stated that he had been employed between the dates of 10.09.18 – 15.08.19 as trust grade doctor in Obstetrics and Gynaecology. In his ET1 he claimed that he had been discriminated against on the grounds of direct race discrimination, direct disability discrimination and discrimination arising from a disability. In relation to the race discrimination claim, he identified 5 specific allegations and in relation to the disability discrimination he identified 8 specific allegations. At this point he appears to have been represented by a solicitor.

3. The Respondent filed an ET3 with grounds of defence dated 14.11.19 and denied that it had discriminated against the Claimant as alleged.

July 21 CMO

4. Case management preliminary hearings ("CMPH") were held on 05.05.20, 20.11.20 and 10.12.20. On 05.07.21, a further CMPH was held which the Claimant attended and a case management order was made dated 06.07.21 ("the July 21 CMO"). The July 21 CMO listed the final hearing for 7 days between 3-10.05.22 to determine liability only.

5. At that CMPH, the Claimant confirmed that he wished to make an amendment application to add new complaints that were not referred to in his existing ET1. However, he had not fully formulated these amendments at the date of the July CMPH. The tribunal ordered that he must write to the tribunal and the other side by 02.08.21 setting out further specified details of his amendments. The tribunal also made consequential orders including provision for the Respondent to file an amended response and for further disclosure.

6. The July 21 CMO contained the directions required to list the matter to trial including an order that the parties agree the final hearing bundle which the Respondent was to compile by 06.01.22 and exchange of witness statements on 15.03.22.

7. In a letter dated 16.08.21, the Claimant wrote to the tribunal to request an extension of time to file his amended ET1 to 18.08.21. The tribunal agreed to grant him a further extension to 06.09.21.

8. In a letter dated 15.09.21, the Claimant requested a further extension to 8am on Monday 20.09.21. The Claimant asked the tribunal to take his dyslexia into account and included as evidence of the progress he had made, 38 additional allegations in support.

9. The Claimant did not file his amended ET1 by 20.09.21. In an email dated 23 September 2021, the Claimant stated that due to working long shifts he had been unable to complete the ET1 and asked for a further extension.

10. By a letter dated 11.11.21, the tribunal noted that the Claimant had not submitted an amended ET1. It ordered that the Respondent had leave to submit an amended response within 7 days of the date of the letter. The Respondent submitted its amended ET3 on 25.11.21. Ultimately, the Claimant did not file or serve an amended ET1.

11. On 16.12.21, the Respondent sent the draft hearing bundle to the Claimant for agreement. Between 16.12.21 and 18.03.22, the Respondent sent the Claimant 10 emails in relation to preparing his claim for trial. The Claimant did not reply to any of these emails.

12. From around 27.01.22, the Respondent started preparing the witness statements required for its 7 witnesses.

Additional Disclosure

13. In addition, on 17.02.22, the Respondent identified a document dated March 2019 authored by the Claimant which potentially raised new relevant allegations. On 25.02.22, the Respondent made an application for an extension of time for the exchange of witness statements and to increase the word count in order to deal with the new allegations identified. On 01.03.22, the Tribunal granted a two-week extension and an additional small increase in word count. The Respondent filed and served its witness statements two days late on 31.03.22. The Claimant did not file or serve any witness evidence.

14. The Claimant also failed to engage or otherwise co-operate to agree the chronology, cast list and reading list.

Unless Order

15. A pre-trial preliminary hearing was listed for 04.05.22. On 04.04.22, the Respondent applied for an unless order. The Claimant was copied into that letter and it notified him that failure to engage further would put him at risk of a cost order being made against him.

16. The Claimant failed to attend the preliminary hearing and failed to notify the tribunal of any reason for his non-attendance. At the hearing, the tribunal made an unless order in the following terms:

"Unless Order

5. The Claimant is ordered to:

1. *a) Write to the Respondent and the Tribunal explaining why he has not attended the hearing today and indicating that he still wishes to actively pursue his Claims;*
2. *b) Write to the Respondent and the Tribunal confirming that he is content with the draft bundle sent to him on 28 March 2022 or alternatively specifying precisely what changes to the bundle he wishes to make.*

3. *c) Send to the Respondent and the Tribunal an email attaching the witness statements upon which he seeks to rely.*

6. If the Claimant fails to comply with the requirements set out at paragraphs 5 (a) (b) and (c) by 4 pm on 13 April 2022 his Claims shall be dismissed without further order."

("the Unless Order")

17. No response was received from the Claimant. On 19.04.22, the tribunal struck out the Claimant's case for failure to comply with the Unless Order.

Settlement Offers including Costs Warnings

18. During the course of the claim, the Respondent made the following offers of settlement:

a. 12.03.21: The Respondent made a Caldebank offer of £10,000 save as to costs via ACAS. The offer included the following statement:

> *"This means that if you reject this offer and fight the case to Tribunal and either lose or obtain an award which is less than £10,000, the Trust reserves the right to apply for its costs against you and show this letter to the Tribunal to support that application, being evidence that we tried to settle the case and you were being unreasonable in refusing to accept the generous amount that we offered."*

The Claimant declined and made no counter-offer.

b. 22.03.21: The Respondent offered £12,000 in the same terms as set out above. The Claimant declined and made no counter-offer.

c. 07.06.21: The Respondent offered £15,000 in the same terms as the previous offers made. The Claimant declined and made no counter-offer.

d. On 25.11.21: The Respondent offered £35,000 in the same terms as the previous offers made. The Claimant declined and made no counter-offer.

e. On 05.01.22: The Respondent offered £50,000 in the same terms as the previous offers made. The Claimant did not respond to this offer.

19. On 26.04.222, the Respondent made an application for costs against the Claimant pursuant to the Employment Tribunals Rules of Procedure 2013 ("the ET Rules").

The Respondent's Application for Costs

20. The Respondent makes an application for its costs on the basis that the Claimant has:

    a. acted disruptively and / or unreasonably in the way that he has conducted proceedings demonstrated by his complete lack of cooperation [Rule 76(1)(a)]; and / or

    b. breached the July 21 CMO and the Unless Order [Rule 76(2)].

21. Pursuant to Rule 75(1)(a), the Respondent seeks:

    a. All of its costs to the date of the application being £94,454.63; or

    b. The costs incurred since the Claimant's last known correspondence with the Tribunal and Respondent dated 23.09.21 to the date of this application being £40,533.60.

    The Respondent has provided two costs schedules in respect of the two alternative sums sought.

Claimant's Submissions in Response

22. In an email dated 01.06.22, the Claimant resisted the option of the costs application being considered on the papers. He stated that he had suffered a major depressive illness since being employed by the Respondent. He asked for 21 days to submit a further response. The tribunal permitted him until 29.06.22 to submit his evidence.

23. On 08.07.22, the Claimant submitted evidence of Covid-19 which he said evidenced his inability to meet deadlines in 2022. He submitted documents which appeared to show that he had tested positive for covid from 12.04.22 to 18.04.22.

24. In an email dated 11.08.22, the Claimant requested further time to submit evidence in relation to the Respondent's dyslexia expert, whom the Claimant alleged had breached expert witness guidelines.

Further Submissions

25. The hearing of the Respondent's costs application was listed on VHS at 10:00am on 28.09.22. Ms George represented the Respondent and the Claimant did not attend. Ms George made oral submissions to supplement the Respondent's written arguments.

26. After the Respondent's submissions but before judgment, I was notified of an email sent in by the Claimant timed 10:11am on 28.09.22 in which the Claimant stated:

> *"The Claimant regretfully informs the Employment Tribunal he is unable to attend today's hearing due to his Mental Health as he is struggling to balance cognitive load. These are a result of the Respondents treatment of the Claimant and the way the Employment Tribunal initially handled this case.*
>
> *The Claimant requests mre* (sic) *time.*
>
> *The Claimant means no disrespect to any parties in the Employment Tribunal."*

There were no supporting documents provided by the Claimant with this email.

27. As a result of this email and in light of the fact that the Claimant had referred to mental health difficulties on two previous occasions, the tribunal adjourned the hearing and directed him to send to the Respondent and to the tribunal:

    a. an explanation of the Mental Health difficulties that he is experiencing and medical evidence in support. The Claimant must set out when he started to experience these Mental Health difficulties and whether or not these difficulties impacted upon his ability to conduct the claim and if so, in what specific ways.

    b. A statement of means, being information about his current household income and expenditure.

28. The Claimant was given until the 28.10.22 to comply, following which it was ordered that the relisted application would be dealt with on the papers only. The Claimant has not submitted any evidence as directed and has had no further contact with the tribunal. Accordingly, I have considered this application based upon the documents already submitted and the helpful submissions made by Ms George at the original listed hearing.

29. I note that the means of communicating with the Claimant throughout has been via his email address which has used to communicate with the tribunal as recently as 28.09.22.

The Rules

30. Rule 76(1) provides: "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." Rule 76(2) states that "a Tribunal may also make such an order where a party has been in breach of any order…".

31. Under Rule 77 a party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

32. Under Rule 78(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, or by an Employment Judge applying the same principles …"

33. Under Rule 79(1) the Tribunal shall decide the number of hours in respect of which a preparation time order should be made, on the basis of – (a) information provided by the receiving party on time spent falling within rule 75(2) above; and (b) the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required. Under Rule 79(2) the maximum hourly rate for preparation time costs is currently £41.00 per hour. Under rule 79(3) the amount of a preparation time order shall be the product of the number of hours assessed under paragraph (1) and the rate under paragraph (2).

34. Under Rule 84, in deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the tribunal may have regard to the paying party's ability to pay.

Legal Principles: Case Law

35. The correct starting position is that an award of costs in the employment tribunal is the exception rather than the rule. As Sedley LJ stated at para 35 of his judgment in Gee v Shell Ltd [2003] [2003] IRLR 82 CA "It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to people without the need of lawyers, and that in sharp distinction from ordinary litigation in the UK, losing does not ordinarily mean paying the other side's costs …" Nonetheless, an Employment Tribunal must consider, after the claims were brought, whether they were properly pursued, see for instance NPower Yorkshire Ltd v Daley EAT/0842/04. If not, then that may amount to unreasonable conduct.

36. In addition, the Employment Tribunal has a wide discretion where an application for costs is made under Rule 76(1)(a). As per Mummery LJ at para 41 in Barnsley BC v Yerrakalva [2012] IRLR 78 CA:

> *"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."*

However, the Tribunal should look at the matter in the round rather that dissecting various parts of the claim and the costs application and compartmentalising it. It commented that the power to order costs is more sparingly exercised and is more circumscribed than that of the ordinary courts, where the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation.

37. There is no need for the tribunal to find a causative link between the costs incurred by the party making the application for costs and the event or events that are found to be unreasonable, see McPherson v BNP Paribas [2004] ICR 1398 CA, and also Kapoor v Governing Body of Barnhill Community High School UKEAT/0352/13 in which Singh J held that the receiving party does not have to prove that any specific unreasonable conduct by the paying party caused any particular costs to be incurred. it is unnecessary to show a direct causal connection, (*McPherson-v-BNP Paribas* [2004] ICR 1398 and *Raggett-v-John Lewis* [2012] IRLR 911, paragraph 43), but there nevertheless has to have been some broad correlation between the unreasonable conduct alleged and the loss (*Yerraklava-v-Barnsley MBC* [2010] UKEAT/231/10). Regard had to be taken of the '*nature, gravity and effect*' of the conduct alleged in the round (both *McPherson* and *Yerraklava* above).

38. When considering an application for costs the Tribunal should have regard to the two-stage process outlined in Monaghan v Close Thornton [2002] EAT/0003/01 by Lindsay J at paragraph 22:

> *"Is the cost threshold triggered, e.g. was the conduct of the party against whom costs is sought unreasonable? And if so, ought the Tribunal to exercise its discretion in favour of the receiving party, having regard to all the circumstances?"*

39. The threshold to trigger costs is the same whether a litigant is or is not professionally represented, although in applying those tests, the EAT has held that the status of a litigant is a matter which the tribunal must take into account – see AQ Ltd v Holden [2012] IRLR 648 EAT in which Richardson J commented:

> *"Justice requires the tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. As [counsel] submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought about by a professional adviser. Tribunals must bear this in mind when assessing the threshold tests in [rule 76(1)(a)]. Further, even if the threshold tests for an order of costs are met, the tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice."*

However, Richardson J also acknowledged that it does not follow from this:

> *"that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity".*

These statements were approved by Underhill P in Vaughan v London Borough of Newham [2013] IRLR 713.

Unreasonable conduct

40. 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). When considering making an order under this ground, account should be taken of the 'nature, gravity and effect' of a party's unreasonable conduct (McPherson v BNP Paribas [2004] ICR 1398 CA). It is important not to lose sight of the totality of the circumstances and when exercising the discretion, it is necessary to look at the whole picture.

41. Unreasonable conduct can also include the approach taken to settlement negotiations. In *Kopel v Safeway Stores plc* 2003 IRLR 753 a tribunal's decision to award costs of £5,000 against the claimant had been influenced by the fact that she had earlier rejected a settlement offer made 'without prejudice save as to costs' (known as a '*Calderbank* offer') during the proceedings. The Employment Appeal Tribunal held that the rule in *Calderbank* has no place in employment tribunal jurisdiction, however, a claimant's refusal of such an offer was a factor that a tribunal could take into account in deciding whether to award costs.

Costs warnings

42. The fact that a costs warning has been given is a factor that may be taken into account by a tribunal when considering whether to exercise its discretion to make a costs order, however a warning is not precondition to the making of an order: Raveneau v London Borough of Brent EAT 1175/96.

Ability to Pay

43. Rule 84 allows the tribunal to have regard to the paying party's ability to pay, but it does not have to: Jilley v Birmingham and Solihull Mental Health NHS Trust [2008] UKEAT/0584/06 and Single Homeless Project v Abu [2013] UKEAT/0519/12. The fact that a party's ability to pay is limited, does not, however, require the tribunal to assess a sum that is confined to an amount that he or she could pay see Arrowsmith v Nottingham Trent University [2011] ICR 159 CA which upheld a costs order against a claimant of very limited means and per Rimer LJ "her circumstances may well improve and no doubt she hopes that they will." One reason for not taking means into account is the failure of the paying party to provide sufficient and/or credible evidence of his or her means. The authorities also make it clear that the amount which the paying party might be ordered to pay after assessment does not need to be a sum which he or she could pay outright from savings or current earnings.

Amount of Award

44. Under Rule 78(1)(a), a costs order may state that the paying party must pay the receiving party a specified amount not exceeding £20,000. Under Rule 78(1)(b) a costs order may order the paying party to pay an amount to be determined by way of detailed assessment, carried out either by the County Court or by an Employment Judge applying the principles of the Civil Procedure Rules 1998. Where the receiving party does not regard the limit of £20,000 to be sufficient an order for summary assessment should not be made in those circumstances, see Kovacs v Queen Mary and Westfield College [2002] IRLR 414 CA.

Assessing the Amount

45. The purpose of the award is to compensate the party in whose favour the order is made and not to punish the paying party (Lodwick v Southwark London Borough Council [2004] ICR 884). It is necessary to determine what the loss is to the receiving party and the costs should be limited to what is reasonably and necessarily incurred (see Yerrakalva). In the case of a preparation time order it is necessary to assess what is a reasonable and proportionate amount of time for the party to have spent.

46. The tribunal is permitted to take into account the paying party's ability to pay, but if it does not it should say why. The Tribunal is not limited to what the payer can afford to pay.

47. The tribunal does not have to determine whether there is a precise causal link between the unreasonable conduct in question and the specific costs being claimed, but that is not to say causation is irrelevant. It is necessary to look at the whole picture of what happened and consider the conduct, what was unreasonable about and what effects it had (see Yerrakalva).

The Claimant's Means

48. The Claimant has not provided any evidence regarding his means to pay to any costs award which might be made against him.

FINDINGS

Was the Claimant's Conduct Unreasonable?

49. A decision to make an order for costs involves a two-stage process. I first must decide whether the Claimant had behaved unreasonably in his conduct of the proceedings. If I am satisfied that there has been unreasonable conduct, I must then decide whether I should exercise my discretion to make a costs order. If I do, I should decide how much to order.

50. The conduct relied upon by the Respondent and said to amount to unreasonable conduct is:

    a. Rejection of the numerous settlement offers made including an offer very close to the amount claimed in the Schedule of Loss with no explanation given for the reason for rejection and no counter-offer.

    b. A total failure to respond to any correspondence from the Respondent after 23.09.21 and therefore a failure to provide information and / or progress the claim after that date. This meant

that the Claimant played no further role in the preparation of his case to trial.

c. A failure to comply with the orders contained in the July 21 CMO. The Claimant failed to comply with the directions to trial therein set out.

d. A failure to comply with the Unless Order.

51. I am satisfied that the Claimant behaved unreasonably in issuing proceedings and then failing to progress his claim at all after 23.09.21. Despite requesting the opportunity to amend his claim at the July CMPH, he failed to do so formally and failed to assist in any way with the preparation of his case to trial. Despite that, he put forward in email correspondence an additional 38 paragraphs of factual allegations. He did not co-operate with the preparation of the bundle, did not reply to correspondence and did not file and serve witness statements as directed. He was therefore in breach of all of the directions to facilitate preparation to trial set out in the July 21 CMO and he was in breach of the Unless Order which led to his claim being struck out.

52. I also find that the Claimant's wholesale rejection of the Respondent's offers to settle without any attempt to make a counter-offer or otherwise to engage in negotiations was also unreasonable. I am mindful of the fact that the 'Calderbank' principle does not apply in full in the employment tribunal as it does in respect of litigation in the civil courts, it is nevertheless something that I am entitled to take into account. In my view, the Respondent was genuinely attempting to settle this matter and was trying to engage with the Claimant. It is particularly striking that even when the Respondent offered £50,000 in respect of a Schedule of Loss pleaded in the sum of £58,585.95, the Claimant did not even respond to the offer despite ACAS' involvement. This approach was unrealistic, uncooperative and unreasonable. I find that this behaviour taken as a whole amounts to unreasonable conduct.

Exercise of Discretion

53. Having found that the costs jurisdiction under Rule 76(1)(a) is engaged, I must go on to decide whether in the circumstances it would be just and proper for me to exercise my discretion and make a cost order against the Claimant. In doing so, I must look at the whole picture considering the nature, gravity and effect of the Claimant's conduct.

54. I am satisfied that it would be just and proper for me to exercise my discretion and make an award of costs in this case. The sequence of events following the issue of the claim that are outlined above amount to the sort of unreasonable conduct where an order of costs is appropriate. The

Claimant has stated that he tested positive for Covid-19 on 12.04.22, post-dating the strike out judgment, and has also referred to suffering from mental health issues but has provided no further explanation or evidence despite being granted an adjournment to do so during the final hearing. In the circumstances, he has failed to give a credible explanation for his failure to pursue his claim and / or the breaches.

55. The Claimant was the party who commenced proceedings yet after the 23.09.21, he made no contact with the Respondent or the tribunal about his claim until after strike out. He ignored the Respondent's correspondence and as a consequence, the Respondent was required to prepare the matter for trial incurring unnecessary cost. The Claimant's conduct has also led to waste of the tribunal's time and resources which could have been applied to other parties. The Claimant has made sporadic contact since strike out including resisting this application being determined on the papers which has increased the Respondent's costs yet further. The Claimant was warned by the Respondent on at least two occasions that there would be potential cost consequences arising out of his conduct. There was a clear cost warning set out in the Unless Order.

56. Overall, taking all these factors into consideration, I consider that it is just and proper for me to exercise my discretion to make an award of costs in this case. The Claimant has failed, despite numerous opportunities, to put forward any mitigating circumstances or offer any explanation for his conduct.

Breach of an Order

57. On the basis of the above findings, I am also of the view that the Claimant is in breach of Rule 76(2) and was guilty of serious and repeated breaches of the July 21 CMO and the Unless Order. The Claimant has not put forward any relevant or credible explanation to justify these multiple and wholesale breaches.

Amount of the Award

58. The Claimant failed to submit any evidence regarding means and ability to pay and absent any such evidence, I am unable to include it as part of my decision-making process.

59. Realistically, whilst the Respondent's primary position was to seek all its costs from the date of issue of ET1, it recognised that the unreasonable conduct and / or breaches relied upon started after 23.09.21 and focussed its submissions on events after that date.

60. I find that the breaches relied upon can be identified as occurring after 23.09.21 when the Claimant ceased entirely to engage with the tribunal process. The Respondent's schedule from that date is still substantial. I appreciate that this was listed for a seven-day trial with seven witnesses and costs are claimed in the sum of £40,533.60 but as I do not have access to the full set of orders, pleadings, witness statements or trial bundles, it is difficult to assess whether all of these costs are reasonable or not.

61. Taking all the circumstances into account and exercising my discretion, relying specifically on the extent of the failures and breaches, the rejection of a significant settlement offer, the failure to explain or otherwise offer grounds for mitigation, requiring this application to listed for a hearing and then not attending and subsequently failing to comply with the CMO dated 28.09.22, I consider it reasonable and proportionate to order the Claimant to pay the Respondent the sum of £20,000 in respect of its costs.

Employment Judge Gibb
Dated 17 November 2022

Judgment sent to Parties: 25 November 2022

FOR THE TRIBUNAL OFFICE