EMPLOYMENT TRIBUNALS

Claimant: Ms J Khanam

Respondent: Vistra International Expansion Ltd

Heard at: Watford Employment Tribunal (in public; by video)

On: 25 October 2022

Before: Employment Judge Quill

Members: Ms I Sood

Ms J Hancock

Appearances
For the Claimant: In Person

For the respondent: written representations only

JUDGMENT having been given orally on 25 October 2022 and sent to the parties and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

COSTS REASONS

The law

1. Rule 39 of the Employment Tribunal Rules of Procedure deals with deposit orders and Rule 39(5) states:

> "(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—
>
> (a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded."

2. The Employment Tribunal Rules of Procedures deals with costs, orders, preparation time orders and wasted costs orders, starting at Rules 74 and the definitions are in Rule 75

3. Rule 76(1) states in part.

> "(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;
>
> (b) any claim or response had no reasonable prospect of success;

4. The sub-paragraphs of Rule 76(1) are alternatives not cumulative.

5. Costs are discretionary. They are the exception rather than the rule. The mere fact alone that we find that one or more of the grounds under Rule 76(1) has been satisfied, does not mean it automatically follows that we will make an award of costs. Amongst other things we must take into account the fact that if we do make an award, it is to be compensatory and not punitive.

6. We may take into account the paying party's ability to pay.

7. In terms of the rejection of settlement offers, it is clear that the case of Calderbank v Calderbank, which potentially has some relevance still in Civil Court proceedings, has no direct relevance in employment tribunal proceedings: See for example Kopel v Safeway Stores plc 2003 IRLR 753.

8. In Anderson v Cheltenham and Gloucester plc EAT 0221/13, the EAT reiterated once again that the Calderbank principle does not apply in employment tribunals and that a failure to accept a prior offer might have a bearing on the decision about whether or not the party should be deemed to have conducted the proceedings unreasonably but it does not - in itself - demonstrate that the party has conducted the proceedings unreasonably. It is important to analyse - specifically and closely - what the particular reasons were for rejecting an offer. If the reasons for rejecting the offer are not unreasonable then it is not evidence of unreasonable behaviour.

Analysis and Conclusions

9. In this matter the liability hearing was in January 2022 and this panel gave a reserved judgment dated 8 April 2022. A hearing had been listed for 12 July 2022 in order to deal with any matters arising from the liability decision and, in particular, whether or not the claimant should forfeit her deposit. That hearing was postponed until today.

10. Employment Judge Bedeau had made deposit orders at a hearing on 2 December 2021 and the document containing the details of the deposit orders and the reasons for it was sent to the parties on 3 December 2021. He made three deposit orders. The one that relates to sex discrimination is not relevant because the claimant did not pay that deposit. The other two each related to a protected disclosure detriment claim.

11. One claim was about alleged detriments for an alleged disclosure made in February 2019. Employment Judge Bedeau's reasons for making that particular order are in paragraph 1 of his reasons.

> There is an issue whether the 20 February 2019 alleged protected disclosure is a disclosure of information made in the reasonable belief that the claimant was making it in the public interest, and whether she suffered a detriment. Further, whether the claim is likely to be held to be out of time as the claim form was presented on 27 November 2020, and the alleged detriment suffered being in May 2019.

12. He highlighted three particular issues. He doubted whether the claimant would be able to demonstrate that the 20 February 2019 disclosure was actually a protected disclosure and, in particular, whether or not the claimant could show that in her reasonable belief it had been made in the public interest.

    a. At paragraphs 232, 233 and 234 of our liability decision we decided that it was not a not a protected disclosure and it had not been made in the reasonable belief of the claimant that it was in the public interest.

    b. The second matter raised in paragraph 1 of Employment Judge Bedeau's reasons was whether or not the claimant had suffered a detriment. At paragraphs 245, 246, 247 and 248 of our reasons we decided that the claimant had not suffered a detriment in relation to the February 2019 disclosure.

    c. The third item mentioned in paragraph 1 of the reasons was the issue of whether or not the claims brought were out of time. Our decision was that these detriments claims were indeed out of time.

13. The second protected disclosure alleged by the claimant referred to in the deposit orders was for 3 May 2019. Employment Judge Bedeau's reasons for saying that that had little reasonable prospects of success was set out in paragraph 2.

> In relation the alleged protected disclosure on 3 May 2019, the issue is whether this amount to a qualifying disclosure of information alleging breaches of the GDPR, and whether the disclosure was made in the reasonable belief that the claimant was making it in the public interest. Further, whether any detriments were suffered. In addition, whether the claim is likely to be held to be out of time as the claim form was presented on 27 November 2020, and the alleged detriment suffered being in May 2019.

14. His first item was whether or not it was a protected disclosure and we decided that it was a protected disclosure including that we found that it had been made in the reasonable belief of the claimant that it was in the public interest.

15. In paragraphs 249 and 250 of our liability decision we addressed whether the claimant had been subjected to the alleged detriments. We accepted that Mr Doyle had become very angry on 3 May 2019 but we did not find fully for the claimant on her arguments that she suffered the particular and specific alleged detriments.

16. In any event, the third item that EJ Bedeau mentioned in paragraph 2 was that this claim was likely to be held to be out of time as the claim form was presented on 27 November 2020 and the alleged detriment suffered being in May 2019. That was our decision. Our decision was that the claim was significantly out of time and it had been reasonably practicable for the claimant to have submitted the claim in time and she had not done so.

17. Taking into account the wording of Rule 39(5) our analysis is that in each case for which the claimant paid a deposit the allegations or arguments for which the deposit was paid by the claimant were unsuccessful for substantially the reasons given in the deposit order.

18. For the February 2019 disclosure, all of the weaknesses in the Claimant's arguments which formed part of the reason for making the order also formed part of our reasons for rejecting the claim.

19. In relation to the May 2019 disclosure, discussed at paragraph 2 of EJ Bedeau's reasons, we acknowledge that we did find it was protected disclosure and we did not find that the claimant suffered no detriment whatsoever. However, the claim was substantially out of time and that in itself disposed entirely of the detriment claims for the 3 May 2019 disclosure.

20. For these reasons, the Claimant forfeits her deposit and it will be paid to the Respondent.

21. Another consequence that follows from Rule 39(5) is that unless the contrary is shown then the claimant is to be treated as having acted unreasonably in pursuing the allegations or arguments. It is our decision that the contrary has not been shown in this case.

22. The respondent made an offer to the claimant on 17 December 2021 and this was headed "Without prejudice save as to costs"

23. We were not aware of it at the time of our liability decision. It was sent to the tribunal on 23 May 2022 by the respondent's representative.

24. The offer that was made on 17 December 2021 was made after 7 o clock in the evening and it gave her until 4pm on Christmas Eve to accept the offer stated therein. The offer was £10,000 in return for the claimant waiving all claims.

25. The email stated that there would be a risk of the claimant having to pay costs in relation to the claims for which a deposit order was made if she failed on those claims. The comments made were accurate and fair.

26. As we have just said, that has in fact turned out to be the case.

27. More generally, in the email, the respondent's representatives argued that having exchanged witness statements it was the respondent's position still that the claim had no merit whatsoever. The email did not go into specific detail about why that was believed to be the case. However, it stated that the Respondent had not changed its position from what had been stated previously.

28. The claimant has also chosen to disclose some earlier items. These were about discussions which took place during her employment, after redundancy plans had been announced. The items, attached to the claimant's email of 3 July, show that the respondent as well as being willing to pay statutory redundancy pay (and it had no choice about that, of course), was willing to make a payment in lieu of notice and it was willing to offer ex gratia sums which it described as an enhanced redundancy pay.

29. There was some back and forth negotiations between the parties. By 24 August 2020, the Respondent gave what it said was its best and final offer. That was for an enhanced redundancy component of about £31,600 and a total payment, including statutory redundancy pay and payment in lieu of notice, of about £53,800.

30. We reject the claimant's argument made to us today that the respondent was not willing to negotiate with her.

31. The claimant refers to the fact that the respondent refused to agree to judicial mediation after a preliminary hearing in this litigation. We do not think that that was unreasonable behaviour on the part of the respondent. By that time of course it was too late for the claimant to accept the £53,000 offer which had been withdrawn in August following her rejection of it. The claimant had been holding out for a year's salary at that time and the respondent had made clear that it was not willing to pay anything approaching that. So, although the respondent is not present in this hearing to deal with the point directly, we do not think that the respondent was under any obligation, if acting reasonably, to go to a judicial mediation hearing. We have taken into account the prior dealings of the parties and, in particular, the correspondence and negotiations of August 2020, and the Respondent had already told the Claimant the maximum amount that it was willing to pay. That was considerably in excess of the bare minimum that it was obliged to pay.

32. Furthermore, and in nay event, even after the respondent had made clear it did not wish to attend the judicial mediation, it did make the offer of £10,000 which we have already mentioned. That was made after the respondent had incurred significant

    legal fees and after it had already obtained the deposit orders. Therefore, we are satisfied that the respondent was not acting unreasonably or intransigently in the way it conducted attempts to find an alternative method of settling the dispute other than attending the final hearing. It was not unreasonable for the Respondent to make a lower offer in December 2021 than it had made during the pre-termination negotiations.

33. The claimant's particular reasons for rejecting the December 2021 offer are, as we accept, that she genuinely believed that she had been treated badly by the respondent. The claimant, in her own without prejudice correspondence (which she has voluntarily disclosed to us) discusses that she had spent £3,500 of her own money on legal fees obtaining advice about potential claims against the respondent. She has not revealed the particular contents of that

advice to us in documents. We are not satisfied, based on the available evidence, that the claimant had been given legal advice that she had strong claims against the respondent.

34. As discussed more fully in our liability decision and reasons, we rejected the argument that there should be any extension of time for the Equality Act claims or the other claims that were out of time. In doing so we mentioned that we were satisfied that the claimant knew enough about the possibilities of bringing employment tribunal proceedings to have brought those claims in time but she chose not to bring claims by dates on which they would have been, as of right, in time.

35. The claimant has said to us today that one of her reasons for rejecting the offers made is that she did not believe that they compensated her adequately for the fact that, as she saw it, leaving the respondent would potentially cause a 10 year set back to her career. In fact, the claimant worked for the respondent for a little over 4 years. However in any event the issue of whether the respondent caused any set back to the claimant's career by dismissing her by reason of redundancy would not in itself be grounds for the respondent to have to pay any sum and especially not a high sum to the claimant by way of compensation.

36. As per the liability decision, the claimant's claim for unfair dismissal failed, and so did all of her claims for breaches of the Equality Act, and so did all her claims for protected disclosure detriments.

37. We also mentioned in the liability reasons that while a s.103A claim (in other words, protected disclosure unfair dismissal claim) was not a matter before us, it had, in fact, been our decision that we were satisfied that the Claimant was dismissed by reason of redundancy and not because of the protected disclosure made a year earlier.

38. From an objective point of view, we do not find that there would have been grounds for the claimant to be confident that she would achieve a tribunal award in excess of the £32,000 which the respondent offered to her in August 2020. However, in itself, the claimant's rejection of that offer does not cross the threshold into being a type of unreasonable behaviour for which an award of costs would be made.

39. We do however, and for the avoidance of doubt, reject the claimant's suggestion that the correspondence which she has revealed to us (which was "without prejudice") demonstrates that the respondent was acting unreasonably or unfairly either in its conduct of its dealings with her at that particular time or in its handling of the subsequent litigation.

40. The respondent's overall costs - as per its statement of costs submitted with its 23 May 2022 letter - come to £141,449 plus VAT, so just under £170,000 inclusive.

41. In terms of the breakdown of solicitor's costs, it neither breaks those down into before and after the deposit order was made and nor does it break them down issue by issue.

42. For example, it does not specify how much time was dealt with on dealing with protected disclosure detriment claims in particular, or when.

43. 55.6 hours of partner time are mentioned charged at £495 per hour, we would have been likely to reduce that hourly rate to £300 per hour prior to considering which, if any, of those 55.6 hours should be disallowed entirely.

44. In terms of the solicitor costs (103.1 hours at £300 per hour) and the trainee solicitor costs (23.7 hours at £160 per hour) and the costs lawyer (£165 an hour for 3 hours), those hourly rates were not unreasonable. Although, of course, if performing a detailed assessment, we would have looked more closely at the particular charges to decide which, if any, of those time charges should be disallowed or reduced.

45. However, Rule 78 deals with the orders that we can make. Rule 78(1)(a) allows this panel to make an award of up to £20,000 costs. If we thought a higher amount might be appropriate, Rule 78(1)(b) allows us to refer it for detailed assessment.

46. As we said to the claimant at the outset of her submissions, the fact that the respondent in its 23 May letter has made clear it is not intending to become further involved in cost matters meant that we were not prepared to make an award under 78(1)(b). In other words, we were not prepared to order detailed assessment. So, we considered whether or not we would instead make an award of up to £20,000 under Rule 78(1)(a).

47. The respondent's counsel's fee for the final hearing including refreshers was £23,250 plus VAT. That was not an unreasonable sum, taking into account all the complaints and allegations that needed to be dealt with at the final hearing.

48. Certainly, we are more than satisfied that the respondent has reasonably incurred legal fees which far exceeded £20,000. Furthermore, even just in the period from 21 December 2021 onwards, the respondent has reasonably incurred legal fees which significantly exceeded £20,000.

49. Had the claimant pursued a complaint of unfair dismissal only, and that was the only complaint which was in time, then it is likely that this matter could have been dealt with at a two day hearing and with significantly fewer witnesses from the respondent's side. Furthermore, even those witnesses which did need to appear, potentially including Mr Doyle and Mr Beard, those witnesses could have done much shorter witness statements dealing with fewer issues and having to disclose fewer documents.

50. In our liability decision, in paragraph 5, we included an extract from the claimant's table of allegations. In terms of 1.4 that referred to the 2019 review. The allegation was direct race and/or sex discrimination compared to Danny Beard. The claimant described that other colleagues' performances were recognised with a visible promotion, ie, change in job title, financial reward and announced in companywide emails.

> "This was not applied to my 2018 performance, I was not promoted. My performance score at the end of December 2018 was 5, the highest possible rate I was given 7% pay rise and bonus but no promotion. "

51. For the reasons stated more fully in our liability decision we made findings based on those findings, this claim had no reasonable prospects of success. This included for example that the claimant did not actually get a 5; that was her own opinion of what she should have been awarded. Furthermore, although she itemised some people from this large employer who had been promoted potentially with les service than her, she had not proven any facts from which we could infer that those promotions were not merited. Furthermore, she had not proven any facts from which we could infer that the likelihood of any given person getting promotion was in any way connected to sex or race.

52. At Item 5 from the claimant's allegations dealt with the monthly head of department meeting. As we have already said, following the deposit order having been made, she withdrew the allegation that it was sex discrimination for her not to be invited to those. She continued with the race discrimination allegation which included two men and one woman as her comparator. As discussed more fully in the liability reasons we were satisfied that the claimant was more junior than any of those who attended and had she been invited to attend there would have been a situation where she was attending whereas other people of a comparable seniority to her would have been excluded from these meetings. She was in effect of asking to be treated more favourably than people who would have been more reasonable comparators. Again, we think that this argument had no reasonable prospects of success.

53. There are therefore grounds for us to make an award of costs which is not limited simply to the costs of defending the protected disclosure detriment allegations. In other words, our award of costs does not just cover the specific issues that were the subject of the deposit orders but also for these other allegations as well.

54. In exercising our discretion as to whether we make an award of costs we have taken into account that the claimant was a litigant in person. The claimant mentioned to us that she is concerned that because she was not a lawyer might not have been able to put forward her case as articulately as a lawyer might have done. However, the panel is satisfied that the claimant was able to describe fully the allegations that she was making, and her reasons for making them. She was aware that she was making allegations of race discrimination, sex discrimination and protected disclosure detriments and she was aware of what particular facts she needed to be able to prove in order to demonstrate that such claims should succeed. She failed to do so.

55. We also take into account that the claimant has had some legal advice. As we have mentioned already we have not seen the particular advice that she did receive. We have taken into account that she was unable to use her preferred barrister because she was unable to find a firm of solicitors which was willing to instruct that particular barrister.

56. We have taken into account the costs are the exception rather than the rule even if the grounds for a costs award, as per the rule shave been made out.

57. The claimant had been given clear warnings by the respondents about the possibility of having to pay costs if she was unsuccessful.

58. In terms of the December 2021 offer of £10,000, that was a comparatively small sum and certainly small in comparison to the amounts that the claimant might have been awarded had she been successful in any one of her claims (even just the unfair dismissal). We do not find that it was unreasonable for the claimant to think that her claim was worth more than £10,000, if successful.

59. However, significantly, the communication was a further warning to the claimant that she was at risk of having to pay costs if unsuccessful. It was made at a stage after witness statements had been exchanged and after she had the opportunity to consider the respondent's witness statements as well as the other evidence in the bundle.

60. The Claimant also had the opportunity to consider Employment Judge Bedeau's deposit orders. The claimant did have the opportunity to back out of the litigation in December 2021 if she had wanted to take that £10,000. It was less than she sought, but she did have the opportunity to take that, and to avoid the risk of having to pay costs. She was aware of that, and understood it.

61. We have taken into account the claimant's ability to pay. We accept that her net income was as she described it orally today, so around £3,400 per month from her current employer. In addition to that cash amount she also has the benefit of a company car and private health insurance.

62. The claimant supplied a list of outgoings prior to the 12 July hearing and we accept that what she has written in that document is genuine. It shows her total outgoings of around £3,263. Two loan payments are showing and she has not given us a breakdown as to which parts of those are capital repayments and which parts are interest. However, we accept what she has told us that one payment is due to come to an end in September 2023 and the other is due to end in 2024.

63. We are satisfied that the claimant's income exceeds her outgoings albeit only by a sum of around £100 to £150. We also accept that the claimant does not have any other significant assets other than her pension fund.

64. However, we are satisfied that the claimant would be able to afford to make some payments of costs. We are satisfied that, if necessary, the claimant would be able to rearrange her finances and would have the opportunity either to borrow and repay a lump sum to the respondent or alternatively if she prefers to do so, to pay in accordance with a repayment schedule.

65. Our decision in all the circumstances is that it is appropriate and reasonable for us to exercise our discretion to make an award of costs in this case. The respondent has been put to very significant legal costs which far exceed £20,000. The respondent has not proven to us that its legal costs in relation to the protected disclosure allegation in isolation would necessarily have exceeded £10,000. It is certainly possible that its costs of those allegations alone exceeded £10,000 given the need to deal with both the background matters that led to the disclosures as well as the behaviour which is the alleged detriment because of those disclosures. So, we do not rule out the fact that it might have been £10,000 for those alone; we are simply making the point the respondent has not proven that.

66. However, taking it into account that as well as the allegations and arguments for which there was the deposit order, there were other matters for which we found there were no reasonable prospects of success and taking into account the overall level of the respondent's costs, it is our decision that an award of £10,000 is appropriate in all the circumstances including the claimant's ability to pay.

67. The two deposits of £250 each will be forfeited, so that is £500 of course, and that leaves £9,500 for her to pay.

68. It is our decision that it is just and equitable to set a repayment schedule rather than order the claimant to pay the full amount as a lump sum immediately. It is of course the case that the

claimant is free to chose to repay the full amount as a lump sum immediately should that be her preference. As we have said in the judgment, we are therefore ordering that the claimant makes 23 payments of £400 each and then a one final payment of £300 and each of these payments is to be made on or before the last day of each month so there will be monthly payments starting in January 2023 and finishing in December 2024.

Employment Judge Quill

Date:20 December 2022

REASONS SENT TO THE PARTIES ON

22/12/2022

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FOR EMPLOYMENT TRIBUNALS