EMPLOYMENT TRIBUNALS

Claimant:	Mr A E Madu
Respondent:	Loughborough College
Heard at:	Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE
	Hybrid hearing
On:	27 February 2023
Before:	Employment Judge Adkinson sitting with
	Ms B Tidd
	Mr C Bhogaita
Appearances	
For the claimant:	Mr K Shoye, Solicitor
For the respondent:	Mr C Crow, Counsel

JUDGMENT

After hearing from the parties, the Tribunal unanimously ORDERS the claimant to pay the respondent's costs in the specified amount of £20,000.

REASONS

Background and hearing

1. After hearing the evidence and submissions of the parties, we dismissed Mr Madu's claims for race discrimination in a reserved judgment signed by the judge on 25 June 2022 ("the substantive judgment"). It was sent to the parties on 27 June 2022. We refer to the judgment in full.

2. In response to that judgment, the respondent applied on 22 July 2022 for an order that the claimant pay the respondent's costs, relying on **rules 76(1)(a) and (b)** of the ET Rules of Procedure. The total claimed was £28,052.93 before VAT.

3. The claimant wrote to the Tribunal objecting to the application the same day.

4. On 25 July 2022, the Employment Judge sitting alone made case management orders listing the application for a hearing by video link. He

also directed the respondent to confirm whether they claimed more than £20,000 (they confirmed they did not, which means we can determine the amount without the need for a detailed assessment) and also directed as follows:

"3. If the claimant wants the Tribunal to consider his ability to pay when deciding whether to make a costs order and, if so, the amount of that order, then he must by no later than 4 weeks from when the Tribunal sends this order to the parties send to the respondent

"3.1 a written statement that sets out details:

"3.1.1 of his current financial circumstances (which must include his income, expenses, any savings or other assets like a house or shares, any debt like a loan or mortgage), and

"3.1.2 any anticipated change in the foreseeable future (e.g. pay increase, inheritance, redundancy, large expense or the like)

"3.2 any documents in support of his financial circumstances

5. The claimant submitted a schedule of income, expenses, assets and liabilities. He did not submit any documents in support of the figures set out in the schedule.

6. The hearing of the application for costs itself took place on 27 February 2023 by video link. Mr Crow, Counsel, represented the respondent and Mr Shoye, solicitor, represented the claimant.

7. At the start, the respondent queried if the schedule complied with the ordered. The Tribunal ruled that it was sufficient to amount to a written statement, since no particular format had been directed.

8. The claimant gave evidence on oath confirming that his schedule was true. He was cross-examined by the respondent and asked some questions by the Tribunal. We have taken that into account.

9. There was an agreed bundle of 68 pages. We have taken those into account. We have also had regard to the Tribunal's file.

10. Each party made oral submissions, and the respondent also presented a brief skeleton argument on the law. We have taken all of those into account.

11. We know the original decision has been appealed to the Employment Appeal Tribunal, though we understand that no decision has yet been taken in relation to it, and there is no timescale for when it may proceed further. We therefore felt that this application should proceed to avoid delay. No party sought its stay pending the appeal. In the circumstances of an appeal against the substantive decision, we anticipated this decision may also be required in writing by at least one side. Therefore, we reserved our decision. This is that decision. It is unanimous.

Background

The substantive decision

12. We refer to the substantive judgment and the reasons we gave in that judgment, particularly about our view of the case. We have the whole of those findings and conclusions in our mind. For brevity, we do not repeat

all relevant paragraphs because it can be read for itself. We believe the following points give a flavour of our findings:

12.1. In relation to interview slots, we noted at [54] that:

> "Mr Madu's complaint ignores the fact that he never asked for a change in the date of the interview but of the time only. To change the time was not possible because of commitments to students. That was the reason that DW's interview still had to take place in the morning, and did so. We are fortified in that conclusion because one of the date's DW suggested was rejected outright because of timetable commitments meant it could not be accommodated at all. Even if Mr Madu were interviewed on the same date as DW, then he would have still had the issue of the very early start and expensive rail fare."

12.2. In relation to the failure to appoint him to the post, the following findings are worthy of note:

> "68.1.3 Moreover though, this has nothing to do with race discrimination. Not asking the preferred questions cannot sensibly be linked to his race, any more than to any other characteristic. Plainly anyone with his qualifications but not of the same race would suffer the same disadvantage.
>
> "…
>
> "68.3 As noted above, he alleges that the whole process was designed for the appointment of AB as the "special candidate the Respondent had in mind".
>
> "68.3.1 There is absolutely no evidence to justify that conclusion at all. We are quite satisfied on the evidence and find as a fact that the interview was genuine and open, and that Mr Madu had a real chance of being appointed.
>
> "68.3.2 However, as we have already noted, if the college set out to appoint AB from the start, then clearly race played no part since anyone in Mr Madu's position and background and performing as he did but of a different race would still fail because they are not AB. We note that there is of course no requirement to interview a number of people for a particular role.
>
> "…
>
> "76 We conclude that these scores undermine any suggestion that there is any racial discrimination. If Mr Madu were correct, then it would be counterintuitive that he came second and not third. Mr Madu suggested that this had been orchestrated to try and make it look more credible. There is not one iota of evidence that even begins to suggest that is the case and we unhesitatingly reject that allegation."

12.3. In relation to the failure to respond adequately to his requests for feedback or concerns, we concluded:

> "90 Mr Madu has not shown us circumstantial evidence anywhere in this case that points to the suggestion that Ms Clarke acted as she did for a reason related to race, or that she would have acted differently if he were of a different race. Mr Madu has not shown us any circumstantial evidence that Ms Barker's failure to provide feedback initially was in any way connected to his race."
>
> "121.9 The explanations of why there was a delay giving feedback are credible and again, there is not one iota of evidence his race played a part;
>
> "121.10 The grievance process has not one iota of evidence of racism;
>
> "121.11 Taking a step back, there is no evidence anywhere that his race played a part in anything that happened."

13. We would also repeat that we found that there was "no single piece of evidence" of a conspiracy that he alluded to (at [24.1]), he was unwilling to accept that he may not have been the best candidate (at [24.3]), and in fact was not (at [131]), and there was nothing to suggest that race played any part (at [121]).

14. In summary the Tribunal concluded there was no evidence at all that race played any part in what happened.

Claimant's approach at the final hearing

15. We also note the approach he took at the final hearing. When assessing his credibility we found at [22]-[25]:

> "22. [Mr Madu] came across to us as fixed in his views that the only explanation for the things he complained of was racism. He was unable to concede obvious points.
>
> "23. He was also combative and argumentative in cross-examination. This also came across in his witness statement which he adopted as his evidence-in-chief. For example in paragraph 2 of his witness statement he says
>
> ""It has been stated that those who preside over cases of race discrimination are more likely to recognise it if they had undergone race discrimination training. This is because those who are discriminated are becoming more and more sophisticated and smart in covering up their tracts. They rather pour mud on the Claimant and make him look like an evil person.
>
> ""I state this for 2 reasons:
>
> ""As stated earlier those who perpetrate racial discrimination do not admit it you will see it in their actions towards you, they treat you different compared to comparator(s) or their ideal person and mostly hide in the shadows and when challenged become obstructive, combative, defence and evasive.

““In the eyes and lens of privileged and educated Caucasian professionals including Judges, racism is whitewashed as unconscious bias or camouflaged as error of judgment; bigotry as seen as being ignorant and private racist views are protected and defended as mischief.”

“24 We pause there and observe that

“24.1 He is alluding to a conspiracy of which there is no single piece of evidence adduced,

“24.2 He has not addressed the more obvious point that he was interviewed which somewhat undermines the allegation the college was against him,

“24.3 He has not addressed the most obvious explanation that he simply was not the best candidate,

“24.4 It appears he is setting the groundwork to explain that if the Tribunal finds against him it is either because of a lack of training on race discrimination or because it is racist, which we cannot help but feel is combative.

“24.5 The words “obstructive, completive, defence and evasive” better describe Mr Madu than the college or its witnesses.

“25. This sets the theme for the witness statement and the theme for the way in which Mr Madu gave his evidence.”

16. He was unable to explain why the college would interview him if it were the case that they did not want to employ him because of his race (see [27]). This was clearly a relevant question and it demonstrates his refusal to consider other obvious explanations.

Other matters

17. We note the respondent is a public college. Resources used to pay for this case had to come for resources that otherwise would have been available for education.

18. We note also that Mr Madu is a highly qualified and plainly intelligent man whose past achievements show he is capable of objectively evaluating material.

19. We also noted that:

19.1. The allegation of racism came later and was not immediate (at [130]),

19.2. He threatened to pursue the respondent for costs when the case had to be adjourned because respondent’s Counsel fell ill (see the case management order of 3 November 2021 at [19] and [25] though this was not pursued).

19.3. He intimated an application for costs when the hearing was postponed because of the claimant’s non-availability, though no such application was pursued (see case management order of Employment Judge Hutchinson dated 17 May 2021 at [4]);

19.4. He represented himself when he began his claim. However on 23 September 2020 and for the remainder of the case he was represented by solicitors. There is no evidence to suggest they gave him anything except competent advice. He has not waived privilege. We assume therefore that he was advised that his claim had no reasonable prospect of success. It follows he chose to continue his claim despite that competent advice from solicitors.

19.5. On 17 January 2020 he made an application for specific disclosure that, ultimately, was not pursued. It can only be properly described as fishing for information to support his case. He sought documents that the original line manager was absent, documents that were sent to the candidates about their absence and the unredacted scores for other candidates and the ethnic background of those who had applied in 2018. They would shed no light on the issues.

19.6. On 13 November 2019 Employment Judge Butler advised the claimant might benefit from legal advice (order dated 2 January 2020, at [11]). This is clearly a remark that the claimant should think carefully about the pursuit of his claim.

No applications for strike out or deposit orders

20. The respondent did not warn the claimant they might seeks costs. The respondent never applied for the claim to be struck out or that the claimant pay a deposit if he wanted to pursue it.

21. We conclude that a deposit would have made no difference in this case. It is quite apparent from the way the claimant presented and pursued his claim (particularly his comments recorded in [23]-[25] of the judgment) he would have pursued this case in any event. A deposit would have not stopped him or made him think twice. This is evidenced by the fact that once he had solicitors, who we assume advised him competently, he continued with his claim. It is also evidenced by his failure in the substantive hearing to be able to concede obvious points or accept there may be other explanations.

22. We find as a fact that the respondent cannot be criticised for not giving “a costs warning” or for not seeking a deposit since they would incur more expense but not save any money since they would have no effect on the claimant.

23. In light of the strict test to be satisfied before a claim for discrimination can be struck out for having no reasonable prospect of success (see **Anyanwu v South Bank Students Union [2001] UKHL 14**), the respondent cannot in our view be criticised for not incurring the expense to pursue that possibility when the chance of success would be limited.

The claimant’s means

24. We make the following finding of fact about the claimant’s means. We conclude we cannot rely on the claimant’s statement of means as

representing a true illustration of his financial situation. Our reasons are as follows:

24.1. In spite of our order allowing him to produce documents in support, he has produced none to support any alleged expenditure or debts.

24.2. We noted that Mr Madu provided a monthly expenditure. This included pocket money for children (£40 per month), church or charity donations (£20 per month) and support for family (£50 per month). He calculated a total expenditure as £1,215 per month.

24.3. However he described his income as “variable” (no figures) and did not give a figure for total income. He told us today that his employment had ended that day. He provided no documentary evidence about this. He also did not disclose any evidence about when he became aware of his loss of employment, or future prospects.

24.4. He also identified “universal credit” as income, saying it “depends on monthly wage”. We accept this – it accords with our knowledge of universal credit. The Tribunal enquired about the actual amount, however. We consider he was evasive in his reply. The first two replies involved in him explaining only that the amount varied depending on income. On the third reply he said it could range between £0 and £800-odd, even though the question was clear in seeking an amount. However despite being asked 3 times, he did not give a figure of what might be typical income for universal credit.

24.5. As for his debts, we noted he claimed to be £41,804 in debt. However two of those debts were labelled “chasing the exact figure” which has not been updated. He had agreed to monthly payments of £55 in respect of 3 debts.

24.6. He also said he owed a sum pursuant to an order under the **Proceeds of Crime Act 2002** (described as a “criminal fine”). He was paying however only £20 per month and there is no suggestion that the immediate sum has to be paid imminently.

24.7. In relation to these debts however Mr Madu had declined to provide any documentary evidence to support these figures. The Tribunal finds that surprising. Some documentary evidence would have been available. The debts are significant. He was afforded the opportunity to provide documents and given plenty of time. He could have sought more but did not. Given the significant debts alleged, we would expect to see something in support.

24.8. Overall the Tribunal is struck how the claimant can appear to provide precise figures for many debts and outgoings but is vague both in his schedule about income and in answer to questions about his universal credit. We also note that the above expenses continue despite his apparent debts, and do not

appear to vary with amount earned. We do not criticise the payment of pocket money, charity, or supporting family. However if his financial circumstances as precarious as he says, we thought that their continued payment and level of payment did not tally with the disclosed debts and outgoings.

Law

25. The rules on costs in the Employment Tribunal provide (so far as relevant):

"When a costs order or a preparation time order may or shall be made

"76.— (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

"(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

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

"…

"The amount of a costs order

"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;

"…

"Ability to pay

"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 (or, where a wasted costs order is made, the representative's) ability to pay."

26. The parties appeared to agree the guidance from the case law. There was one dispute, however. We deal with that at the end.

26.1. The approach is as follows:

26.1.1. Has the threshold has been met to make a costs order? If so, should we exercise our discretion to make a costs order: **Robinson v Hall Gregory Recruitment [2014] IRLR 761**.

26.1.2. The amount to award arises only for consideration if we have decided to exercise our discretion: **Hayder v Pennine Acute NHS Trust UKEAT/0141/17**.

26.2. There is no 'special rule' in relation to unreasonably pursued/misconceived discrimination claims. The rules contain no such provision and we have not been referred to any case that suggests a different approach is to be taken.

26.3. The paying party cannot hide behind their assertion that their belief they had been discriminated against is sincere to suggest

it is reasonable to pursue them, or to show that a costs order would be inappropriate in relation to them (particularly where a tribunal has found that there was "virtually nothing to support them"): **Keskar v Governors of All Saints School [1991] ICR 493**;

26.4. We are well placed to decide whether there had been any reasonable grounds for the allegations made, and the extent to which a claimant might have unreasonably refused to accept non-discriminatory explanations for the acts complained of – **Vaughan v London Borough of Lewisham [2013] IRLR 713**;

26.5. A failure to seek a deposit order, or otherwise issue any form of costs warning in relation to hopeless claims, is not cogent evidence that those claims in fact had any reasonable prospect of success: **Vaughan**;

26.6. A costs order is compensatory not punitive. Where there is unreasonable conduct the award of costs need not be limited to those costs which can be shown to be causally linked to that conduct – **McPherson v. BNP Paribas [2004] ICR 1398**[1]; **Salinas v. Bear Stearns International Holdings [2005] ICR 1117**. In **McPherson** the Court of Appeal said the Tribunal should have regard to the "nature, gravity and effect of conduct".

In **Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78**, the Court of Appeal said:

"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 if had."

26.7. We ought to consider the extent to which a claimant was in fact 'unrepresented'. Those representing themselves cannot be judged by the same standard as those who are represented: **AQ Ltd v Holden [2012] IRLR 648**. However the Tribunal should go on to consider whether the lack of representation caused or contributed to the misconduct in question. In **Vaughan** however, the Court said that where a litigant's conduct was not such which could readily be attributed to [his] lack of experience as a litigant, his unrepresented status may be of little relevance or weight

26.8. While we 'may' have regard to ability to pay, it is not a requirement. Either way, reasons must be given: **Jilley v. Birmingham & Solihull Mental Health NHS Trust UKEAT/0584/06**. Even if he has an inability to pay, it does limit costs to those that can be afforded (particularly where circumstances may improve): **Arrowsmith v. Nottingham Trent University [2012] ICR 159**. So it follows that a realistic prospect of a future ability to pay may justify an award significantly higher than current affordability: **Vaughan**

26.9. A generous benefit of doubt may be afforded to the receiving party in relation to what might be afforded over a reasonable period of time: **Vaughan**.

27. The parties could not agree about the meaning of unreasonableness in **r.76(1)(a)**. Both relied on **Dyer v. Secretary of State for Employment UKEAT/183/83**.

28. We conclude that "unreasonableness" should be given its ordinary meaning and is not the equivalent of "vexatiousness". This is because in **Dyer**, the Employment Appeal Tribunal said as follows:

> "Finally, Mr Mitchell submitted that in Rule 11 [which allowed a Tribunal to make a costs order if the paying party "has in bringing or conducting the proceedings acted frivolously, vexatiously or otherwise unreasonably"] the reference to a party having acted frivolously, vexatiously or otherwise unreasonably meant that the word "unreasonably" had to be construed as unreasonable conduct of the same kind as frivolous or vexatious conduct: that is to say, using technical phrases, he asked us to construe it applying the ejusdem generis rule. The basis of that submission is the inclusion of the word "otherwise" in the passage we have quoted. We are unwilling to do that. We can see no reason forcing us to the conclusion that the word "unreasonably" is to be read in a particularly narrow or anything other than its ordinary sense. The word "otherwise" is perfectly explicable without requiring the construction of a special genus. Frivolous or vexatious conduct is undoubtedly unreasonable (though it is more); therefore the draftsman can understandably have referred to conduct being "frivolous, vexatious or otherwise unreasonable".
>
> "Accordingly the word "unreasonable" in Rule 11 seems to us to have its ordinary meaning, being the meaning attributed to it by the industrial tribunal, and no error of law is shown."

29. The wording between **rule 11** and **rule 76(1)(a)** are not identical. However both rules are clearly driving at the same conduct and both end "or otherwise unreasonably". They are structured in the same way. We can see nothing in the current rules that suggested that the draftsman was seeking to change the meaning of "or otherwise unreasonably" or to make them take effect as ejusdem generis as opposed to disjunctive. Therefore we prefer the respondent's submission that "unreasonably" is a separate criterion and the word is to be given its normal meaning.

30. The claimant referred to the definition of "vexatious". The respondent does not rely on vexatiousness at today's hearing. Therefore, we consider it no further.

Conclusions

Has the respondent persuaded us that the criteria are satisfied for making a costs order?

31. Yes. Our reasons are as follows.

31.1. We deal with **rule 76(1)(b)** first. We conclude that if the claimant were acting reasonably, he would have realised that his claims had no reasonable prospects of success from the start. He had

sufficient information in his possession to know there was no evidence that supported his case that race played any part in what happened. He did not think it racism initially – he just linked to it later for no reason. As we said in our judgment, there was not an iota of evidence. If he had acted reasonably he would have spotted the incongruity of his case with the points that he was interviewed, came second and, if there a conspiracy to appoint AB, then by definition it was clearly not connected to his race. He was either unwilling or unable to take the step back and look at his case sensibly.

Even if he did sincerely believe that he were the victim of racism (and we do not need to decide if he sincerely held that belief one way or the other), it does not excuse him from taking a rational view. He could not reasonably conclude that his claim had any reasonable prospect of success based on his own knowledge of the circumstances.

31.2. We conclude that **rule 76(1)(a)** is also satisfied. Taking the word "unreasonable" as its ordinary everyday meaning, we think the following things taken together are evidence of unreasonableness:

31.2.1. Bringing the claim that had no reasonable prospect of success. We acknowledge he represented himself to start. We do not see that it contributed in any way to the case so as to excuse his conduct. He is clearly capable of evaluating the case but decided not to do so. When he became represented however, he chose to continue with the claim in any event. We are not persuaded anything that happened is attributable to his lack of experience as a litigant.

31.2.2. Continuing the claim when it had no reasonable prospect of success. We note that there is no evidence he ever stepped back, while representing himself, to consider the merits of the claim. However once he became represented by a solicitor, we are certain that he would have been aware that his case lacked merit since we infer he would have been competently advised about the merits of his claim and that it had no reasonable prospect of success (and no evidence has been adduced to suggest that either he was badly advised or he refused to receive advice). It is also apparent he did not re-evaluate the claim on disclosure or when in receipt of the bundle or witness statements;

31.2.3. Pursuing the claim when there was a complete lack of evidence (as we set out the reasons for our judgment) and alleging in essence a conspiracy (for which likewise there was no evidence);

31.2.4. Implying he would apply for costs when he required an adjournment when he was unavailable for the hearing that was being adjourned in any event;

31.2.5. Applying for costs (albeit not pursuing the application) when the hearing was adjourned because of the respondent Counsel's sudden illness;

31.2.6. Pursing an application for specific disclosure as a fishing expedition;

31.2.7. Being fixed in his views and argumentative in cross-examination,

31.2.8. In evidence-in-chief, making the allegations set out in [23] of the judgment (see [15 above) for the reasons set out in [24] and [25] of the judgment .

Should we make a costs order?

32. Yes. The threshold is significantly crossed. This is not a borderline case in our view. The claimant's conduct has put the respondent unreasonably to incurring legal expenses.

33. There is no special rule for discrimination claims. We think that the claimant should face liability for his decision to bring and pursue a claim so lacking in merit and for his other unreasonable conduct. Those who bring meritless discrimination claims have the effect of cheapening the allegation of discrimination because meritless claims undermine the respect for the law and the proper sympathy due to those claims with merit.

34. They also take up resources of the respondent and the Tribunal. While costs are not punitive, we believe that there is no public policy reason that points against making an order for costs in this case when the threshold is crossed.

35. We also believe that the fact that the case caused depletion of resources otherwise available to education justifies an award of costs. The nature, gravity and effect all point to the making of an order.

36. For the reasons set out above, we do not consider the failure to issue a costs warning or to apply for a deposit order or strike out order make any difference in this case. Therefore this does not point against making a costs order.

What is the amount of costs that should be considered?

37. We conclude that the amount of costs that we should consider is £20,000.

38. We have set out the nature of the conduct above: the bringing and pursuing the claim has incurred the respondent to incur costs defending the case from the start. This is not a claim where some of the case could be considered to have merit, and so separated out, or where there was a change part-way through the case. Instead all costs flow from presenting and pursuing the claim.

39. We acknowledge that not all costs may be attributable to the claimant because they may not be reasonably incurred or may not be reasonable in

amount. Those cannot be said to be attributable to the claimant's behaviour. Likewise it seems us that if costs are disproportionate they should not properly be recoverable. We appreciate this may appear to reflect the test under the Civil Procedure Rules that does not expressly apply to the assessment of costs under **rule 78(1)(a)**. However we do not see how logically those are factors for a detailed assessment but not for what is in effect a summary assessment. That may be academic, however, because in this case we are satisfied that the whole of the costs was attributable to the nature, gravity and effect of the claimant's conduct, and that £20,000 is a reasonable and proportionate amount for the respondent to expend on the claim given the issues, conduct and length of hearing.

How much should the claimant pay?

40. We conclude that the claimant should pay £20,000. For the reasons set out above we do not accept the claimant's assertions about his means. The evidence is so unreliable that we do not accept it.

41. We also note that there appears to be no reason why the claimant is not capable of continuing to earn. He is a clever and qualified individual, as we noted in the original case, and there is no reason why he would remain out of work. Therefore it is the case that he is likely to regain an income in the near future. We can also see no reason why he cannot work full time. No explanation was provided to show it was not possible.

42. We also think that even if the claimant's means were capable of acceptance, we would not have regard to them. The respondent is a college that had to divert public money away from teaching to defending this claim. We do not accept that the claimant should be protected from his folly pursuing this claim or conduct by expecting teaching resources to bear the brunt of that decision.

43. Finally it is of course possible for the respondent and claimant to agree a schedule of regular payments to cover the debt, like the claimant avers he has done with other debts.

Employment Judge Adkinson

Date: 28 February 2023

Notes

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