EMPLOYMENT TRIBUNALS

Claimant: **Mrs C Daley**

Respondent: **G4S Secure Solutions Limited**

Heard at: **Birmingham** **On: 14 December 2022**

Before: **Employment Judge Flood**
Mrs Shenton
Mr Wilkinson

Appearances:

For the Claimant: **In person (for part of hearing)**

For the Respondent: **Ms Anderson (Counsel)**

JUDGMENT ON COSTS APPLICATION

The respondent's application for costs against the claimant succeeds. The claimant is ordered to pay the sum of **£15,165** towards the legal costs of the respondent.

REASONS

Background and relevant facts

1. By three claim forms the claimant brought complaints of unfair dismissal, direct sex discrimination, direct race discrimination and sexual harassment against the respondent, her former employer and three other respondents who were/are all employees of the respondent.

2. The Tribunal heard the claims during an in person hearing held on 20-22 September 2021 & (following an adjournment caused by the unexpected ill health of the respondent's representative) 14-18 March 2022. The hearing was reconvened on 19 May 2022 when an oral decision was delivered with a written judgment being sent to the parties on 8 June 2022. Written reasons for the decisions were sent to the parties on 30 June 2022 ('Written Reasons'). The respondent made an application for costs under rule 74 (1) (a) and (b) of the Employment Tribunal Rules of Procedure 2013 ('ET Rules') on 20 June 2022. The Tribunal wrote to the parties on 30 June 2022 informing them that the matter would be listed for a hearing. The parties were notified on 5 August 2022 that a hearing to consider the respondent's costs application had been listed for 11 November 2022. The Tribunal made orders requiring the parties to take steps to prepare for that hearing namely that the respondent prepare and serve on the

claimant by 16 September 2022, a schedule of costs and paginated bundle of all relevant documents following which the claimant was required by 30 September to prepare a schedule of her income and outgoings and send this and any additional documents to the respondent. The respondent prepared this schedule and draft bundle but the claimant did not produce a schedule nor did she submit any documents to be included in the bundle.

3. The claimant applied for postponement of the costs hearing by an email sent on 10 November 2022 on the grounds of ill health and pending her appeal to the EAT. The respondent objected to this application contending that insufficient detail of her ill health and no supporting evidence had been provided and a pending EAT appeal was no basis for postponement. Employment Judge Flood then asked the claimant to provide further information and medical evidence, referring her to the Presidential Guidance on seeking a postponement in the Employment Tribunal. Later that day the claimant provided a discharge letter and referral for a GP appointment from the West Midlands Ambulance Service dated 2 November 2022. A further letter was sent to the claimant from the Tribunal asking her to confirm what illness she was suffering from; why it prevented her from attending or participating and whether it was possible to attend by video link. The claimant responded at 16.08 stating that she was suffering from breathing problems was unable to speak. The claimant also referred to previous postponement requests made by the respondent where medical evidence had not been supplied. Employment Judge Flood directed that the hearing would remain listed but would be converted to a CVP video hearing and the claimant could apply for postponement at the start of the hearing. The claimant sent a further e mail at 9.45am on the morning of the hearing, stating:

   "Due to illness I am not able to assist myself. I was unable to get care staff for this time to assist me with preparing for getting me of bed and setting up the computer systems and as such I'm unable to attend the video link and again asked that the hearing be postponed until further time as stated in my original email."

4. The hearing began on 11 November 2022 and Ms Anderson provided further representations on the claimant's application to postpone. The Tribunal then postponed that hearing determining that it would not be in the interests of justice and the overriding objective to continue. It was made clear that a pending EAT appeal (of itself) does not prevent the determination of an application for costs arising out of the original judgment. However the claimant had also applied for postponement on the basis of ill health, and although the medical information was incomplete, the claimant's correspondence suggested severe ill health and that the claimant has or is receiving care in her home, which gave cause for concern.

5. The matter was relisted for 14 December 2022 in hybrid form. The parties were also informed that in addition to the respondent's application for costs already made, it would consider at the next hearing whether to make a further Order for costs under the provisions of rule 76 (1) (c) of the ET Rules namely in circumstances "*where a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins*". The Tribunal also made further directions for the respondent to provide a further schedule of costs; for the claimant to be given a further opportunity to provide information on her ability to pay (and to explain why this was not done by the date required by the previous order); and to explain

what her health issues were and why she was unable to attend the Tribunal either in person or remotely on 11 November 2022 (and to provide medical evidence of the same) in all cases by 25 November 2022. It was also made clear to the parties that no further applications for postponement would be considered other than in in exceptional circumstances.

6. The respondent provided a further costs schedule (relating to postponement of the hearing on 11 November 2022) on 18 November 2022. The claimant wrote to the Tribunal on 28 November 2022 confirming that she was unable to comply with the Tribunal's order due on 25 November 2022 due to illness and asking for the Tribunal to rearrange the costs hearing as she was abroad recovering from illness between 4 December 2022 and 8 March 2023. The claimant once again made reference to her appeal to the EAT. On 9 December 2022 the claimant wrote again stating that her proposed travel had been postponed to facilitate further medical tests and that she was due to be seen by her doctor later that day. On 13 December 2022, the Tribunal informed the parties that the claimant's application to postpone was refused as there was insufficient medical evidence and it was in the interests of justice for the costs application to be determined without delay.

7. The hearing came before the Tribunal on 14 December 2022. Ms Anderson joined initially and the claimant made several attempts to join the hearing initially but was unable to do so. With some assistance from the clerk the claimant was able to join by telephone and the hearing started at 11am. The claimant made a further application for postponement due to ill health. She said that she was currently under the care of the hospital and her GP and had made a request for evidence from then and had been advised that a letter had been prepared. The claimant said she was unable to attend the surgery to collect this letter although she had asked her carers to go and collect it. She stated that her doctors had declared her unfit for travel and when asked to explain what was causing her current ill health the claimant mentioned having had brain surgery and that she had two appointments later that day, one of which was a CT scan and one with the Gynaecology department. The claimant said she did not have any written confirmation for either appointment.

8. The claimant went on to state that she needed to seek legal advice to assist her to defend the application and had spoken to solicitors but had been unable to get any assistance. She further said that she was taken ill when she was abroad and had to be transported back to the UK for further treatment.

9. Ms Anderson asked the Tribunal to consider that it had made findings in its liability decision which had expressed a clear view as to the claimant's reliability and credibility. She pointed out that the claimant's explanation of her situation had changed several times (mentioning for the first time today that she had been taken ill abroad and had to be transported back)and she had been given the opportunity on many occasions to provide information and medical evidence but this had not been provided. She submitted that the Tribunal sent out directions as to the conduct of the costs hearing many months ago, and the claimant was on notice about the matters that needed to be addressed, but had failed to provide sufficient evidence.

10. The claimant again stated that she had not had enough time to get a legal representative and had been too unwell to deal with the matter. The claimant stated that she could provide evidence that she had been taken ill abroad in June

and had to be transported back which would explain why she was unable to comply with the earlier orders. A short adjournment was taken and the claimant was given the final opportunity to send medical evidence explaining the situation by 11.45 that morning.

11. The claimant sent an e mail at 12.04 pm with some photographs of documents dating from around June 2022. These included several invoices in respect of medical treatment from 27-29 June 2022 in Westmorland, Jamaica for $6000, $5600 and $14,000, an envelope and package which appeared to contain prescribed medication and a letter from a doctor dated 29 June 2022 certifying that the claimant was fit to travel and that physical examination disclosed no abnormal findings. This suggested that the claimant had some form of medical treatment whilst abroad in June but does not assist the Tribunal as to the claimant's ability to attend and participate in either the postponed November hearing or today's hearing.

12. The Tribunal decided to refuse the claimant's application for postponement. The medical evidence supplied was insufficient to support the contention that the claimant was unable to participate. This was the second postponement request without sufficient supporting evidence. The parties were advised that no further postponements would be granted other than in exceptional circumstances which do not apply in this case. It is not in the interests of justice or the overriding objective for this matter to be delayed further.

13. The claimant was unhappy with the Tribunal's decision and claimed that the decision was racist, making reference to a previous postponement ordered at the respondent's request. She suggested that the Tribunal telephone the hospital to get the evidence it required and then used abusive language towards the Tribunal namely "Go to hell". The claimant then disconnected. The hearing proceeded in her absence.

14. The Tribunal had the following documents before it:

    14.1. Written submissions prepared by Mrs Anderson on behalf of the respondent; dated 27 October 2022

    14.2. Costs bundle.

15. We refer in full to the Written Reasons. In particular, to paragraphs 14, 17.7, 17.25, 17.28, 17.35, 17.36 and 17.41 We also take note of the matters set out at paragraphs 2- 13 above as regards to the opportunities provided to the claimant to provide details of her means, and her participation in the hearings to date and decisions that were made.

16. As well as the written submissions provided, the Tribunal heard the oral submissions of Ms Anderson.

17. The hearing was adjourned for a reserved decision to be made.

The Issues

18. The issues which needed to be determined were:

    18.1. Has the claimant acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing the proceedings or the way the proceedings have been conducted (within rule 76 (1) (a) of the Employment Tribunal Rules of Procedure 2013 ("ET Rules") ? and/or

18.2. Did the claim have no reasonable prospects of success (within the meaning of rule 76 (1) (b) of the ET Rules)? and/or

18.3. Was a hearing postponed or adjourned on the application of the claimant made less than 7 days before the date on which the relevant hearing began (within the meaning of rule 76 (1) (c) of the ET Rules)?, if so;

18.4. Should, in the Tribunal's discretion, a costs order be made?

18.5. If so, how much should be awarded?

The relevant law

19. References to rules below are to rules under **Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.**

20. Rule 74 provides:

> (*1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.*
>
> *(2) "Legally represented" means having the assistance of a person (including where that person is the receiving party's employee) who—*
>
> *(a) has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates' courts;….*

21. Rule 75 provides:

> *(1) A costs order is an order that a party ("the paying party") make a payment to—*
> *(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative*

22. Rule 76 provides:

> *(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; or*
>
> *(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.*

23. Rule 77 provides:

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.

24. The relevant part of rule 78 provides:

"*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;…."

25. Rule 84 provides:

"*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. A Tribunal must ask whether a party's conduct falls within rule 76(1)(a) or (b) as applicable. If so, the Tribunal must then go onto ask whether it is appropriate to exercise the discretion in favour of awarding costs against that party. It is only when these two stages have been completed that the tribunal may proceed to the third stage, which is to consider the amount of any award payable

27. **Gee v Shell UK Limited [2003] IRLR 82.** The Court of Appeal confirmed that that costs are the exception rather than the rule and that costs do not follow the event in Employment Tribunals.

28. **McPherson v BNP Paribas [2004] ICR 1398**. In determining whether to make an order under the ground of unreasonable conduct, a Tribunal should take into account the "nature, gravity and effect" of a party's unreasonable conduct.

29. **Barnsley Metropolitan Borough Council v Yerrakalva [2012] ICR 420** - "*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.*"

30. **Oliver Salinas v Bear Stearns International Holdings UKEAT/0596/04/ DM.** The question of whether a costs order was exceptional or unusual was not significant, so long as the proper statutory tests were applied.

31. **Vaughan v London Borough of Lewisham & Ors UKEAT/0533/12/SM –** it was not wrong in principle to make a costs order even though no deposit order had been made and the respondents had made a substantial offer of settlement (on an avowedly "commercial" basis). Nor was it wrong in principle to make an award which the claimant could not in her present financial circumstances afford to pay where the Tribunal had formed the view that she might be able to meet it in due

course.

32. **Radia v Jefferies International Limited UKEAT/0007/18/JOJ** The Tribunal may consider, in a given case, under (a), that a complainant acted unreasonably, in bringing, or continuing the proceedings, because they had no reasonable prospect of success, and that was something which they knew; but it may also conclude that the case crosses the threshold under (b) simply because the claims, in fact, in the Tribunal's view, had no reasonable prospect of success, even though the complainant did not realise it at the time. The test is an objective one, and therefore turns not on whether they thought they had a good case, but whether they actually did. What the party actually thought or knew, or could reasonably be expected to have appreciated, about the prospects of success, may, and usually will, be highly relevant at the second stage, of exercise of the discretion.

33. **Scott v Russell 2013 EWCA Civ 1432, CA** - the definition of 'vexatious' in **AG v Barker [2000] 1 FLR 759 at [19]** was approved: 'the hallmark of a vexatious proceeding is… that it has little or no basis in *law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process'.*

34. **Ghosh v Nokia Siemens Networks UK Ltd [2013] 6 WLUK 681** – a Tribunal was entitled to find conduct was unreasonable where were a large number of serious allegations of discriminatory conduct which were rejected (some because what the claimant said had happened had not in fact happened). The claimant's conduct in the proceedings and making these un-sustained allegations was undoubtedly capable of amounting to unreasonable conduct.

35. **Jilley v Birmingham and Solihull Mental Health NHS Trust UKEAT/0584/06/DA,** - if a Tribunal decided not to take account of the paying party's ability to pay, it should say why. If it decides to take into account ability to pay, it should set out its findings about ability to pay, say what impact this has had on its decision to award costs or on the amount of costs, and explain why. There may be cases where for good reasons ability to pay should not be taken into account: for example, if the paying party has not attended or has given unsatisfactory evidence about means. There are also circumstances, for example, where a claimant is completely unrepresented, where, in the face of an application for costs, the tribunal ought to raise the issue of means itself before making an order: **Doyle v North West London Hospitals NHS Trust [2012] All ER (D) 205 (Jun) (UKEAT/0271/110).**

36. **Kopel v Safeway Stores plc 2003 IRLR 753, EAT** - a claimant will not be liable for costs simply because he or she has rejected a 'Calderbank' offer and is eventually awarded less than that offer, or even nothing at all. However, a claimant's refusal of such an offer is a factor that a tribunal can take into account in deciding whether to award costs

37. **Ladak v DRC Locums Ltd 2014 ICR D39, EAT** -the definition of costs is sufficiently wide to include costs in respect of time spent by a qualified in-house legal representative.

Conclusion

38. Ms Anderson submits that the claimant has acted in a vexatious, abusive, disruptive and unreasonable manner by the fact that she has brought this claim at all and also in the way she has conducted the proceedings. She contends that further or alternatively the claim had no reasonable prospects of success. She took the Tribunal through much of the case law above and suggested that the findings of the Tribunal in terms of the claimant's credibility and the way the claimant conducted the proceedings were damning. She points out that a large number of in some cases serious and offensive false allegations were made against various individuals. It is submitted that the claimant either knew these were false from the outset or ought to have known that she would not succeed on a case based on conjecture and speculation. She points out that the claimant did have access to legal advice at various points, that the respondent had made a reasonable offer to settle and the claimant had been given a costs warning in September 2021.

39. The respondent also contended that the Tribunal should exercise its discretion to award costs that were incurred in preparation for and attendance at the previous costs hearing that was postponed on the claimant's application. It was pointed out that the case was postponed on the basis of partial evidence, which has not been supplemented with any further proper evidence as to why she was unable to attend on that occasion. Ms Anderson submitted that the claimant has provided inconsistent information, about her health, making reference to both brain conditions and gynae matters, has made reference to attending two appointments without any letters to confirm such appointments and has singularly failed to provide any valid evidence to support what she says about her health. It is pointed out that the claimant has been found to be an unreliable witness on many matters and so what has been said so far about the claimant's health should also not be relied upon.

40. The respondent sought an order for costs in the sum of £17,880 in respect of its costs up to and including the final liability hearing (breakdown of costs shown at page 15-6 Bundle) plus an additional sum of £1755 (breakdown of costs shown at page 88-89 of the Bundle).

41. The claimant did not provide any submissions on the application of the respondent for costs which was initially made on 20 June 2022 (page 9 Bundle). The initial orders of the Tribunal on listing the costs hearing required the claimant to provide details of her means and any supporting documents by 30 September 2022 and she failed to comply with this order. The orders of the Tribunal made on 11 November 2022 once again required such information to be provided by 25 November 2022 (together with further medical evidence and information about her health). Once again this was not complied with.

Have the tests within Rules 76 (1) (a) or (b) or (c) been met?

42. The initial question we considered is whether the claimant acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings or the way that the proceedings have been conducted under rule 76(1)(a). Firstly we refer to paragraph 14 of the Written Reasons where the

Tribunal set out its concerns as to the claimant's credibility. However given that we could not determine whether the claimant was deliberately lying (or operating under a delusion that what she was saying was the truth) we are unable to conclude that she was acting vexatiously, abusively or disruptively. However given those findings at paragraph 14 in particular, we conclude that the claimant has indeed acted "unreasonably" both in the bringing of the claim and the way she has conducted the claim. In particular the fact that the claims were embellished and expanded upon as the proceedings progressed. The significant number of very serious complaints brought by the claimant, very many of which were found to have not been made out on the facts was unreasonable behaviour. These were in many cases damaging personal allegations directed at the employees of the respondent without any basis. Specifically we concluded that the claimant's behaviour in bringing and pursuing complaints of direct race and sex discrimination and harassment was unreasonable conduct given that none of these complaints were successful and the vast majority of them were found to have not been made out on the bare facts. Many of the allegations related to matters that we found did not happen at all and we found no basis to find that even those allegations that has some relationship to a factual finding had anything to do with the claimant's protected characteristics.

43. The true complaint made by the claimant at its heart was essentially a complaint about the fairness of her dismissal. The claimant as someone dismissed on the grounds of conduct with sufficient qualifying service had at least an arguable case that her dismissal might have been unfair. If the matter had been pursued on this basis alone, the Tribunal would be unlikely to be in the position where it was considering making a costs award. Whilst the unfair dismissal complaint was ultimately not successful, it was not unreasonable conduct for the claimant to have pursued this particular claim, which required the respondent to show that it had dismissed by reason of conduct and the Tribunal to consider the overall fairness of that dismissal. However the complaints under the Equality Act 2010 had no basis in fact or in law and it is our view that the claimant was either aware that this was the case or should have been aware that this was the case on the basis of what she did know at the time. These allegations were largely ones with no basis in fact and were doomed to fail from the outset. They relied on outlandish factual scenarios in many cases, in particular the allegations referred to in paragraphs 17.7, 17.25, 17.28, 17.35, 17.36 and 17.41 of the Written Reasons. These were damaging, potentially embarrassing allegations pursued against individuals with whom the claimant interacted with at work. Such claims were made not only as against the employer but also in many cases the individuals directly. It was unreasonable conduct for such complaints to be brought and pursued in the manner in which they were within the meaning of Rule 76 (1) (a) of the Rules.

44. Secondly, we considered whether, when the claim was begun it had no reasonable prospects of success under rule 76(1)(b). For the same reasons to those set out above, we cannot conclude that the claimant's complaint for unfair dismissal was one which had no reasonable prospects of success from the outset, but we do conclude that the other complaints of direct sex and race discrimination and harassment were complaints which had no reasonable prospects of success and so Rule 76 (1) (b) is in part made out.

45. Thirdly we considered the circumstances surrounding the claimant's application to postpone the hearing to be held on 11 November 2022. As this was a

postponement made on the application of the claimant less than 7 days in advance of the listed hearing, the circumstances as set out in Rule 76 (1) (c) are engaged. We deal with whether it is appropriate to then go on to make a costs order below.

Should a Costs Order be made?

46. Having found that the claimant's conduct falls within rule 76 (1) (a), (b) and (c) the Tribunal had to then go onto ask whether it is appropriate to exercise the discretion in favour of awarding costs against her.

47. In considering whether a costs order should be made, we accepted the submissions of Ms Anderson. In relation to unreasonable conduct we find that the direct sex discrimination, direct race discrimination and sex related harassment claims brought by the claimant have clearly taken up considerable time and involved significant effort being expended by the respondent in dealing with the claim. It has necessarily incurred considerable legal costs in dealing with these matters which could have been avoided had the claimant not behaved unreasonably in pursuing such complaints that were wholly without merit. The claimant was warned of the consequences of continuing to pursue these matters from an early stage in terms of costs. She had access to legal advice at various points. To continue to pursue these matters and require the respondent to deal with these complaints right up to final hearing caused significant unnecessary cost.

48. In relation to the postponement matter, the Tribunal granted the claimant's very late application on 11 November 2022 despite its misgivings as to the sufficiency of evidence produced. The claimant was given the benefit of the doubt and given the opportunity to provide the required evidence after the event to support what she was saying. The claimant has consistently and continuously failed to comply with orders made and instructions given by the Tribunal and had provided no explanation for any of these failures. For these reasons, we conclude that it is entirely appropriate for this Tribunal to exercise its discretion to make a costs order against the claimant in this case.

How much should be awarded?

49. In terms of how much should be awarded by way of a costs order against the respondent, we have considered the Costs Schedule submitted by the respondent. This has been provided to the claimant but she has decided not to make any representations on this. There is nothing which suggests to the Tribunal that the sums claimed are unreasonable or excessive in the context of the claims made by the claimant. In terms of the costs incurred up to the date of hearing, as we conclude that the claimant did at least have a complaint of unfair dismissal which was not one with no reasonable prospects of success, we have decided not to make an award in respect of this matter. The claimant brought four separate complaints against the respondent, unfair dismissal, direct race discrimination, direct sex discrimination and harassment related to sex. On the basis that approximately one quarter of the claim before us was one not brought unreasonably or one that never had prospects of success, we have reduced the costs total by 25% to award the sum of £13,410 . However in relation to the additional costs sought in respect of postponement, this factor is not relevant so the full costs sought are awarded in the sum of £1,755.

50. We have decided not to take account of the claimant's means in determining how much should be awarded against her. The reason for this is that the claimant has not provided any details of her means so as to allow the Tribunal to do this despite having ample opportunity to do so. The claimant was ordered on 5 August 2022 to provide information on means and relevant supporting documents on or before 30 September 2022 and she failed to do this (and so was in breach of the Order of the Tribunal). The claimant was given a further opportunity to provide this information by 25 November 2022 by the Order sent to the parties on 11 November 2022. Again she failed to do so. The claimant did not provide any information on ability to pay in advance of the hearing on 14 December 2022 (or even at that hearing) where the application for costs was to be considered.

51. The claimant has failed to provide any information on means/ability to pay within any given deadline or at all. Because of this, we have decided not to take the claimant's ability to pay into account.

52. For these reasons, we make the Order in favour of the respondent and order that the sum of £15,165 is paid by the claimant to the respondent as broken down above.

Employment Judge Flood

14 March 2023