



# THE EMPLOYMENT TRIBUNALS

**Claimant:** Lydia Edwards

**Respondent:** University Hospital Bristol and Weston NHS Foundation Trust

**Before:** Employment Judge Beever (sitting alone)

## **THE RESPONDENT'S COSTS APPLICATION**

The Respondent's costs application succeeds and the Claimant is ordered to pay the respondent the amount of £1,500 (inclusive of any VAT applicable)

## **REASONS**

1. The hearing of the claim took place between 28 – 30 November 2022 and oral reasons were promulgated on 30 November 2022. Written reasons were provided to the parties following the request of the claimant dated 13 December 2022. The claimant's claim of unfair dismissal was dismissed. The claimant's claim of race discrimination had previously been dismissed by EJ Bax in a judgment sent to the parties on 7 February 2022.
2. The respondent sought to make an oral application at the end of the hearing in respect of costs but there was insufficient time to deal with it. Directions were made for dealing with any application that the respondent wanted to make.
3. By an application dated 14 December 2022, the respondent applied for costs on the grounds of the claimant's unreasonable conduct pursuant to Rule 76 of the Employment Tribunals Rules 2013 (the ET Rules). In addition, the respondent attached a 20 page costs bundle. The claimant sought was granted an extension of time to respond to the application and did so on 20 March 2023 in a document entitled, response to costs application with an accompanying attachment entitled, financial documentation.

4. In terms of the ET Rules and the relevant law, the tribunal has considered Rules 74 to 84 of the ET Rules and noting in particular Rule 76(1) of the ET Rules which provides that a Tribunal may make a costs order, and shall consider whether to do so, where it considers that 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.
5. Under Rule 76, there is a two-stage test: the Tribunal must consider (a) whether 76(1)(a) or (b) applies and, if so (b) whether to exercise its discretion to award costs.
6. The Tribunal has had regard to the cases referred to by the Respondent in its application: Kopel v Safeway Stores Plc [2003] IRLR 753, and Raggett v John Lewis plc UKEAT/0082/12/RN. The Tribunal also reminds itself of the guidance in Radia v Jefferies International Limited UKEAT/0007/18/JOJ of the two-stage process when determining a costs application: first, to consider whether the threshold is made out and then secondly, even if so, it does not automatically follow that a costs order will be made. This is an exercise of the tribunal's discretion. See Radia, paragraph 61:

*... "It is well-established that the first question for a Tribunal considering a costs application is whether the costs threshold is crossed, in the sense that at least one of r 76(1)(a) or (b) is made out. If so, it does not automatically follow that a costs order will be made. Rather, this means that the Tribunal may make a costs order, and shall consider whether to do so. That is the second stage, and it involves the exercise by the Tribunal of a judicial discretion. If it decides in principle to make a costs order, the Tribunal must consider the amount in accordance with r 78. Rule 84 provides that, in deciding both whether to make a costs order, and if so, in what amount, the Tribunal may have regard to ability to pay."*

7. Costs in the employment tribunal are still the exception rather than the rule: see Yerrakalva v Barnsley MBC [2012] ICR 420.
8. Before the Tribunal determined the application for costs, it considered whether the parties have had a fair opportunity to advance or to respond to the application and whether it was in the interests of justice that the application was determined at a hearing. The tribunal has had regard to the case of Kite v Clark [2022] EAT 194, a recent decision of HHJ Tayler.
9. The Tribunal invited comments at the conclusion of the Hearing in November 2022 and neither party indicated that it wanted a hearing in the event that a costs application was made by the respondent. The grounds of the application are plainly and clearly set out in the application dated 14 December 2022. The claimant asked for and was granted an extension of time to provide her response to the application. Both parties were invited to state whether they wished for the

application to be dealt with at a hearing. The respondent stated that it did not. The claimant did not state that she wanted a hearing and did not in fact respond to the question but she had the opportunity to do so. The claimant has responded to the application on 20 March 2023 in accordance with the tribunal's order. She does not seek to make further submissions or to ask for a hearing.

10. The grounds of the application are clearly set out in the application letter and supporting bundle. The claimant has had a reasonable opportunity to respond and has done so without suggesting she wished to make further submissions or that she wanted a hearing for the purposes of determining the application.
11. The Tribunal is satisfied that it is in the interests of justice to determine the application without a hearing and that the claimant has had a reasonable opportunity to respond to the application.
12. Turning then to the substance of the application, the parties had agreed in principle the terms of a settlement on 15 August 2022 which provided for payment to the Claimant of a significant sum of approximately £25,000 and appropriate wording for a reference and a letter of apology.
13. The Claimant's solicitor at the time wrote to the Respondent stating that she considered that the case was settled subject to formal COT3 wording. The Claimant had agreed in principle to the reference terms and the apology letter.
14. Sometime in August 2022, the Claimant resumed alternative employment with another employer as a Band 5 Nurse.
15. COT3 terms were then sent to the Claimant. However, the Claimant's solicitor indicated on 17 October 2022 that the terms, although previously agreed in principle, were no longer acceptable and that the matter must therefore proceed to hearing. No explanation was provided; nor any alternative engagement.
16. The Respondent made a further settlement offer on 27 October 2022 which gave a concession on what the Respondent believed to be the sticking point for the Claimant, namely, her wish to be able to disclose full details of the COT3 in connection with the NMC process. The Respondent asserts that at this point the only matter precluding a settlement was the wording of an apology; the apology being that which was previously agreed between the parties. The Claimant was fairly reminded that the Tribunal had no jurisdiction to order a letter of apology even if the Claimant was successful. The Tribunal reminds itself that the Claimant no longer had a discrimination claim and the Tribunal could not be asked to make any recommendations under the statutory procedure available in a successful discrimination claim. The Respondent clearly warned the Claimant of a costs application if no settlement was achieved. There was no engagement from the Claimant.

17. The Respondent resumed its settlement attempts on 16 November 2022. It repeated its offer of settlement on 16 November 2022. At this point, the Claimant was no longer legally represented. The Claimant rejected the offer and said simply that she “could not accept this offer without a proper apology letter”. The Claimant did not reasonably engage with the Respondent in the settlement attempt.
18. On 25 November 2022, the Respondent made a further final effort to settle in an email to the Claimant and to her direct access barrister who was instructed for the hearing, which was set to commence on 28 November 2022. The Tribunal finds that the letter was a conscientious, detailed and carefully explained letter setting out the Respondent’s position, the extent of the letter of apology that it was offering and the risk that the Claimant faced if the offer was not accepted, including a plain warning about costs. The Claimant of course had previously agreed a settlement in principle and had not since reasonably engaged with the Respondent on the settlement attempts.
19. The Claimant did not respond to the offer on 25 November and she says that she did not read it on 25 November as it was a working day, but she knew of it as her Counsel rejected the offer on 28 November 2022 prior to the commencement of the hearing. The Claimant continued not to engage with the Respondent in settlement discussions.
20. The Respondent has incurred significant costs in this case, in excess of £17,000 including Counsel’s fee for the Hearing in November 2022 of £5,250 + VAT.
21. In the Claimant’s response to the costs application, the Claimant asserts that she, “didn’t say that [I’m] not accepting the offer” albeit that is contradicted by the response of her own Counsel prior to the start of the Hearing on 28 November 2022.
22. The Claimant asserts that she, “wanted the Respondent to write me an apology letter for what they have done to me. The stress and mental illness that they have subjected me into, my livelihood that they had destroyed, my identity that they had tarnished, they made the NMC believe that I was unsafe practitioner and as such suspended me from the register”. The Claimant said that she did not see the offer on 25 November 2022 as it was a working day for her. She says that she did not see the apology letter attached to the offer. She does not dispute that her Counsel rejected the offer of settlement on 28 November 2022. The Claimant did not engage with the Respondent on what would have been acceptable to her. The Tribunal finds that if she had done so at any point in the run-up to the hearing and on 28 November 2022, then it is probable that a compromise would have been achieved.
23. The Tribunal then turned to the questions raised by the costs application.

24. Did the Claimant's conduct amount to "unreasonable" conduct for the purposes of Rule 76?
25. The Claimant, when legally represented, reached an agreement in principle by August 2022 such that her own representative had considered that the matter was settled subject to statutory formalities. At about the same time, the Claimant had also found alternative work as a Band 5 Nurse. There was an obvious opportunity to resolve the litigation.
26. Notwithstanding, the Claimant subsequently found the offer unacceptable; although on 17 October 2022, the Claimant's own representative did not provide any explanation for why the Claimant found it unacceptable.
27. Later when acting for herself the Claimant stated that she had wanted a "proper" apology letter but even allowing for the fact at that point that she was not legally represented, the Tribunal concludes that the Claimant failed to take any step to engage with the Respondent in its attempts to find a settlement, given particularly the fact that an agreement in principle had previously been reached.
28. The Respondent went on to make a further concession to reflect the Claimant's concern regarding disclosure within the parallel NMC process. The Claimant did not engage with the Respondent on terms of settlement. The Claimant did not engage with the Respondent in respect of its clear warning that costs may be applied for if in the event that the Claimant did not succeed. The Claimant had direct access Counsel to assist her in the preparation for and representation at the Hearing. Again, she did not engage with the Respondent on settlement options notwithstanding the clear terms of its letter dated 25 November 2022 and its clear expression of a desire to reach a compromise. The repeated offer of settlement was rejected on 28 November 2022. The Claimant now describes that she did not in fact reject the offer and in effect would have found the terms of the offer acceptable but she did reject the offer on 28 November 2022 by her counsel.
29. The failure to reach a compromise, with the consequence that the Hearing was required, was substantially a result of the Claimant's failure to engage in any meaningful way with the Respondent's serious and repeated offers of settlement. This was despite the Respondent's clearly expressed rationale and costs warning. The Tribunal concludes that the Claimant acted unreasonably for the purposes of Rule 76.
30. Should the Tribunal exercise its discretion to make an Order for Costs? And if so, in what amount?
31. The Claimant was legally represented for much of the relevant period, and had access to appropriate advice. She had legal representation by a direct access barrister for the purposes of the Hearing. The Claimant had opportunity to

engage with the Respondent and has not identified substantial reasons why she did not do so.

32. The terms of the Respondent's solicitor's letters were throughout clear and well explained, in particular its letters dated 16 November 2022 and 25 November 2022. The Claimant had since embarked on alternative employment as a Band 5 nurse and has not, in the view of the Tribunal, explained why the agreement which she had been willing to reach in August 2022 was no longer acceptable.
33. The Tribunal reminds itself that the question of whether to make an Order for costs is in the discretion of the Tribunal. The Tribunal is satisfied that there is good reason to do. The Tribunal finds that it is appropriate to make a costs order.
34. In turning to consider the appropriate amount, the Tribunal has taken into account the Claimant's financial position as indicated in the financial breakdown document provided by the Claimant. It in, the Claimant has recounted to a Debt Charity that her income is needed to meet her monthly commitments and that, by implication, she has debts. Those debts are not explained or made clear.
35. The Tribunal also takes into account the fact that the Respondent's application is in part based on the repeated offers of settlement up to and on the first day of the Hearing by which time substantial costs of preparation and representation had at least in large measure been incurred. For example, it is not clear what if any costs might naturally be attributable to the need to continue with the Hearing on the second and third day given the rejection of the offer on 28 November 2022.
36. An exercise of this kind is necessarily summary in nature. Taking a step back and taking into account the above features of the case, and in its discretion, the Tribunal concludes that the appropriate amount to order that the Claimant should pay to the Respondent is **£1,500 inclusive of VAT** (in other words a gross total of £1,500).

**EMPLOYMENT JUDGE BEEVER**

**Date: 26 April 2023**

**Judgment sent to the Parties: 10 May 2023**

**FOR THE TRIBUNAL**

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