EMPLOYMENT TRIBUNALS

Claimant: **Ms S Sasheva**

Respondents: **(1) All Techmart UK Limited**
(2) Mr A Uddin

Before: **Employment Judge Moor**

JUDGMENT

1. **The Second Respondent acted unreasonably in applying to extend time to present a response.**
2. **The Second Respondent is ordered to pay to the Claimant £2,219.40 in respect of costs.**
3. **No award of costs is made against the First Respondent.**

REASONS

1. The Claimant applies for an order that the Respondents pay the costs of pursuing her claim.

Procedural History

2. On 11 June 2021 the Claimant presented an ET1 for sexual harassment, direct sex discrimination and notice pay after a period of ACAS Early Conciliation from 1 April to 13 May 2021.

3. Notice of claim was sent to the Respondents on 12 July 2021. They were required to send a response 21 days later. They did not do so.

4. In the absence of any response, a Default Judgment was made on 9 December 2021 and sent to the parties on 21 December 2021. It found that the Respondents had harassed the claimant sexually; had constructively

dismissed her which was direct sex discrimination and owed her 1 week's notice pay. There was insufficient information on the claim form for the assessment of remedy therefore a remedy hearing was listed.

5. At a remedy hearing on 17 January 2022, I awarded the Claimant £17,607.67 in compensation.

6. On 11 January 2021 (6 days before the remedy hearing) the Respondents made an application to reconsider the Default Judgment and extend time to present a response. I did not allow a postponement of the remedy hearing. The Respondent did not have the evidence, at that time, that they required to pursue their application, so I listed a hearing for 12 July 2022.

7. At the hearing in July, I refused the Respondents an extension of time to serve their Response. My reasons are set out in the Judgment sent to the parties on 12 July 2022. In essence I considered there was no good reason for the much of the delay; and that the defence had no real prospect of success given that it was inconsistent with the texts passing between the parties.

8. On 3 August 2022, the Claimant's solicitor made an application for costs. It has not been possible to determine it until today for the reasons I deal with later.

9. The Claimant and her solicitors agreed her liability as to their costs under a Damages Based Agreement ('DBA') sometimes called a 'no win no fee' agreement. The DBA provides at clause 3 that '*You enter this agreement with us for the pursuit of your employment tribunal claims arising out of your employment with the First Respondent (your claims)*'

10. The DBA requires the Claimant to pay her solicitors 35% of her winnings when received, clause 11.1 provides as follows:

    If you win, you agree to pay us a share of 35% of any money… received. This includes VAT but does not include the expenses that you are responsible for… The reason for setting our payment at 35% is in having regard to the level of risk involved with your case, and level of costs likely to be incurred we believe this is a fair percentage given the commercial risk to Oakwood solicitors Ltd

11. Clause 9.1 of the DBA deals expressly with who benefits if the Tribunal awards costs. It states:

    If the tribunal awards costs against All Techmart Ltd

    (a) ***You agree for those costs to be paid direct to us*** *and if [the First Respondent] to pay us direct [sic]* ***to pay us those costs on receipt*** *as they will be awarded on the basis of the work that we have done on your behalf; and*

    (b) for the purpose of recovering such costs from the First Respondent all costs will be the amount ordered by the tribunal or calculated in accordance with any tribunal order or direction. If the award includes

payment of expenses that you are responsible for, as long as we receive payment from the first respondent these will be paid to you if you have already paid them or not charge to you if you are yet to pay them. (my emphasis)

Submissions

12. The Claimant argues the Respondent (she does not say which one):

    12.1. acted unreasonably and vexatiously in disputing that the Second Respondent had sexually harassed her;

    12.2. acted unreasonably and vexatiously in accusing her of harassing the Second Respondent;

    12.3. acted unreasonably and disruptively by failing to submit the ET3 form for over 7 months without sufficient reason;

    12.4. acted unreasonably and disruptively by submitting a response with no real prospects of success;

    12.5. acted unreasonably and vexatiously and disruptively by continuing with the response and application to reconsider the default judgment sent on 28 January 2022 (ordering the Respondents to pay the sum of £17, 607.67) after the Claimant made an offer to settle of £17,000 on 31 March 2022. This offer was made without prejudice save as to costs and warned the Respondents that the Claimant would seek costs if they were subsequently unsuccessful.

13. The Claimant's solicitor complains about the time taken to decide her application. The Tribunal has attended to the application as quickly as it attends to such applications generally. The Claimant's solicitor has been responsible for the delay by:

    13.1. not sending the application in writing by post to the Respondents when they knew they were no longer represented by solicitors, until the Tribunal required them to do so. It was plainly insufficient for them to say they could not do so because they did not have an email address. Nor was it appropriate to rely on what the Respondents' solicitors, then no longer on the record, had told them;

    13.2. not providing the Tribunal and the Respondents with the Damages Based Agreement ('DBA') referred to in their application, when it was clearly a relevant document;

    13.3. deliberately deciding not to send the Damages Based Agreement to the Respondents once the Tribunal had ordered it to be disclosed. This was not an error by solicitors but an express decision which had to be reversed by the tribunal. A copy of the DBA was sent on 25 April 2023 and the matter referred to me on 5 May 2023.

Had the Claimant's solicitor sent the application and the DBA to the postal address that it had for the Respondents in the first place, then I would have been able to decide this application long ago.

14. At paragraph 57 of the costs application it is stated '*The Claimant would also assert any costs awarded by the tribunal will be deducted from the costs owed by the claimant under the DBA to ensure the claimant's recovery for the claim is as reasonable and proportionate as possible.'*

15. The Second Respondent wrote to the Tribunal arguing that the costs application was out of time. This was not the case and I directed that he be informed of this and given another chance to respond. He has not done so.

Legal Principles

16. Rule 76 provides that:

A tribunal may make a custom order and shall consider whether to do so where it considers that (a) a party has acted… Unreasonably… In the way that the proceedings (or part) have been conducted.

'Unreasonably' is given its natural meaning. I should bear in mind the context, and not hold litigants in person to the same standards as a professional representative.

'Vexatiously' means something very different and goes to conduct that is essentially an abuse of process.

17. Rule 74 provides that no order shall be made unless the paying party has had a reasonable opportunity to make representations in response to the application.

18. Rule 75 states that an order for costs 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.' (my emphasis)*

19. Where there has been a DBA, whether the Tribunal can still make a costs order will depend on the wording of the agreement.

    19.1. If the DBA provides that any costs recovered from the respondent will be set off against the contingency fee payable to the representative, so that it is the claimant and not the representative who will benefit from a costs order, there will be no bar to their making an application under Rule 76(1). They will be 'the receiving party' (i.e. 'another *party*' to whom the payment of costs will be made: see Rule 75(1)(*a*)), and they will be the person who will be compensated.

    19.2. Conversely, if the DBA stipulates that any costs recovered from the respondent must be paid to the representative on top of the contingency fee, so that it is the representative and not the claimant

who will benefit from the costs order, then this will bring the case outside the scope of Rule 75(1)(*a*) because the representative cannot be 'the receiving party' within the meaning of the rule and the tribunal will have no power to make an order. These points were considered in Barry v University of Wales Trinity St David Case No.1603120/2013 ET.

20. Rule 84 provides that I may have regard to the paying party's ability to pay:

In deciding whether to make a costs … order, and if so in what amount, the Tribunal may have regard to the paying party's … ability to pay.

21. Thus, if I consider there has been unreasonable conduct, I may make a costs order but I do not have to do so. I must consider whether to exercise the discretion to do so. In doing so, I may take into account a party's ability to pay. Further, in considering the amount of any award I may consider a party's ability to pay. If I do not take it into account, I should explain why.

22. I bear in mind the principle set out In Gee -v- Shell UK Limited [2003] IRLR 82. Sedley LJ said:

It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to ordinary people without the need of lawyers and that in sharp distinction from ordinary litigation in the United Kingdom losing does not ordinarily mean paying the other side's costs.

This principle applies as much to respondents as to claimants.

23. There is no 'Calderbank principle' in the employment Tribunal, but I can take into account an offer to settle without prejudice to costs in considering the conduct of the Respondents.

Analysis

24. The first question for me is whether I have the power to award the costs sought under Rule 75(1)(a). Are they costs that 'another party', the Claimant, has incurred while legally represented?

24.1. The Claimant is liable to pay her solicitor 35% of her winnings received, clause 11 of the DBA. Thus, she must pay her solicitor £6,162.68 if she receives the full award. This payment is not expressly described as costs but is explained as the value of the commercial risk in the solicitor working on the case. In my judgment this means the amount of costs the solicitor requires to be paid on success, bearing in mind the risks.

24.2. If I order the First Respondent to pay an amount of costs to the Claimant, under clause 9.1(a) the Claimant must pay them to her solicitor. Clause 9.1(b) makes it clear that the only clawback the

Claimant can make is in respect of expenses (like counsel's fees), which are not relevant here.

24.3. My analysis of the contractual position between the Claimant and her solicitors is therefore that she is obliged to make both payments: the 35% of her winnings to her solicitor and any costs award the Tribunal makes against the First Respondent in her favour to her solicitor. In other words if I make such a costs award and it is paid to her directly, her solicitors are entitled to sue her under the agreement for the whole of it.

24.4. In my judgment the assertion at paragraph 57 of the application does not make any legal difference to this analysis. This is because it is an assertion by the Claimant not her solicitor. Her solicitor would not be estopped by it in any claim they make against her for any amount I were to award in costs against the First Respondent. They could still sue under the agreement for the whole of any such award. Under the DBA, it is the solicitors who wholly benefit from such a costs order. They are not a 'party' and therefore, under Rule 75, I have no power to make a costs award against the First Respondent.

25. I have then asked whether it make a difference that clause 9 of the DBA is made expressly in relation to the First Respondent and not the Second Respondent. Is it open to me to consider the application against the Second Respondent? If I make a costs award against the Second Respondent and it is paid directly to the Claimant, then her solicitors should be unable to sue for it under the express terms of clause 9 of the DBA. But the DBA is expressed as being made for the pursuit of the claims arising out of her employment with the First Respondent and this includes the claim against the Second Respondent. Would this persuade a court to read 'All Techmart Limited' in clause 9 as including the Second Respondent? In my judgment this would be unlikely given the precise wording of the clause and the rule that interpretation in the case of ambiguity be against the interest of the party who drafted the agreement (previously called the 'contra proferentum' rule).

26. This leaves the question whether the Claimant has incurred any of the costs of the solicitor. She must pay her solicitor £6,162 only if the award has been paid to her. I have no information whether this is the case now, but it had not been paid by the time the costs application was made. In my judgment, I can find that this amount represents costs incurred by the solicitor in pursuing the claim on her behalf, even if it is not expressed entirely in this way in the DBA.

27. Thus, I can consider whether to order the Second Respondent to pay, directly to the Claimant, an amount representing the costs she is liable to pay to her solicitor of £6,162 in the event that she receives the original award. This is the limit of my power.

Respondents' Conduct

28. I do not consider that the Second Respondent's decision not to respond to the claim was an abuse of the Tribunal's process. I have found that he knew about the claim and took the decision not to respond to it. It is not an abuse not to do so.

29. The Second Respondent's decision however led to the default judgment. I have concluded that it was then unreasonable conduct of the Second Respondent to apply for an extension of time to present a response, rather than merely make submissions on remedy. I have taken into account the following reasons:

    29.1. the Second Respondent had not forgotten about the claim, he was able to seek advice in the period of the delay, he made a decision not to respond to it.

    29.2. his purported defence was that the Claimant had allegedly sexually harassed him. This, I judged, was going to be very difficult to make good given the texts I quote in my previous judgment and the implausibility of him not dismissing the Claimant for such alleged conduct during her probationary period;

    29.3. and, although a less weighty factor, the early offer by the Claimant to settle for a slightly lower amount than awarded in order to avoid that second hearing.

30. I have considered the countervailing factors:

    30.1. that costs do not normally follow the event;

    30.2. that the Second Respondent experiences chronic schizophrenia. However I looked at the effect of this condition upon him at the relevant time and concluded he was sufficiently mentally well to deal with the claims. Additionally by the time I am considering the Second Respondent had the benefit of legal representation;

    30.3. that generally claims should be determined after a full trial. I took this fully into account at the hearing that decided the Respondents should not be allowed to extend time. Here there seem to be really unusual features: a change of mind; and an attempt to pursue likely uncredible counter-allegations of harassment.

Whether to exercise discretion to award costs

31. The unreasonable conduct I have found led to the necessity for a further hearing. It therefore did create the extra costs of preparing for that hearing. I do not take into account the costs of preparing the claim and attending the remedy hearing: they would have been necessary in any event.

32. The Second Respondent has not informed the Tribunal about his ability to pay. The Claimant points out that he was able to afford to travel to Bangladesh with his wife last year and to instruct solicitors and counsel. These facts she

suggests show that the Second Respondent has funds available. I note that he told me that he had closed his business. I also take into account that he has chronic schizophrenia, a condition which means his wife is his carer and therefore the household income is likely to be less.

33. Doing my best on this material, I do exercise my discretion in principle to award part of the costs against the Second Respondent but not the whole given what I know of his household circumstances. He has conducted proceedings unreasonably by, far too late, changing his mind and seeking to respond to the claim with a defence that had no real prospect of success.

Amount of the Award

34. The unreasonable conduct of the Second Respondent is only in respect of the final hearing: the costs up to and including the remedy hearing would have been incurred in any event. Thus I only award costs incurred after the remedy hearing. I also cannot award costs of any more than the amount the Claimant is liable to pay her solicitor.

35. From the second costs schedule provided, setting out the fees for each fee earner, the costs after the remedy hearing begin on 13 June 2022. Not including preparation of the costs schedule those costs are £1,714.50 plus VAT. I judge that only 20% of the costs schedule preparation should be awarded to reflect that only part of the costs are awarded. This amounts to £135.00 plus VAT. The costs including VAT incurred after the remedy hearing are therefore £1849.50 + 369.90 = £2,219.40.

36. I judge that the Second Respondent is likely to be able to afford this amount, given that as recently as last year he was able to afford to travel long distance and instruct solicitors and counsel. I have taken into account the likely limit on his household income because of his disability.

37. If the Claimant receives the remedy award made by the Tribunal, the Claimant will have to pay her solicitor £6,162.68 in respect of costs.

38. I order the Second Respondent to pay to the Claimant directly £2,219.40 as part of the costs she will incur.

Employment Judge Moor
Dated: 9 May 2023