EMPLOYMENT TRIBUNALS

Claimant: Ms A **Respondent: (1) B Ltd**

Heard at Leeds **On: 19 May 2023 (panel only)**

Before **Employment Judge Davies**
Mr K Lannaman
Mr W Roberts

Appearances
For the Claimant: **Did not attend**
For the First Respondent: **Did not attend**

COSTS JUDGMENT

1. The Claimant shall pay the First Respondent £11,300 by way of costs.

2. The Tribunal decided each allegation to which the deposit order made by EJ Morgan relates against the Claimant for substantially the reasons given in the deposit order. The amount of the deposit when refunded, £1,300 in total, shall count towards the settlement of this judgment.

REASONS

Introduction

1. These reasons should be read in conjunction with the Tribunal's detailed liability judgment dated 16 January 2023.

2. The First Respondent has made two costs applications:

   2.1 On 12 August 2022, arising from the postponement by EJ Davies of the final hearing, originally listed for 2-5 August 2022, on the first day of that hearing. The hearing was postponed because the Claimant had not complied with an order for specific disclosure made by EJ Buckley, requiring her to disclose "copies of any and all Facebook Messenger messages between the Claimant and the Second Respondent during the course of her employment with the First Respondent." The First Respondent applies for its costs associated with the Claimant's initial failure to provide full disclosure of the Facebook Messenger messages, the consequent specific disclosure application and preliminary hearing before EJ Buckley, and the

costs of the postponed hearing on 2-5 August 2022. Those costs were said to amount to £9601.20. A schedule of costs is provided.

2.2 On 21 February 2023, on the basis that the Claimant had behaved unreasonably by pursuing claims that were the subject of a deposit order, had behaved unreasonably in pursuing the claims in any event, and that the claims had no reasonable prospect of success. A revised schedule of loss was produced, covering all the First Respondent's costs since EJ Morgan made the deposit order. The total claimed was £41,294.70 excluding VAT.

3. The First Respondent requested that its costs applications be dealt with on the papers. The Tribunal wrote to the Claimant on 2 March 2023 explaining to her what issues the Tribunal would have to decide and asking her whether she would prefer it to be dealt with on the papers or whether she would prefer to come to a hearing. The Tribunal explained what evidence and information would be required. The Claimant replied on 8 March 2023. She said that she did not want to come to a hearing. She said that she had done her best to present her honest beliefs, without legal advice, and that she did not feel she had acted unreasonably. She said that she did not have access to legal advice to prove that she did not have a reasonable prospect of success. She said that a costs order was unaffordable. She had no assets whatsoever and debts of more than £20,000. Her income was by way of a student loan (further debt) and a zero hours contract.

4. On 16 March 2023 the Tribunal wrote to the parties to confirm that the costs applications would be dealt with on the papers. The Tribunal again set out the questions that the Tribunal would have to decide and made orders for the Claimant to provide any further arguments or evidence she wanted to put forward.

5. On 29 March 2023 the Claimant sent some evidence of her financial position, namely:

5.1 Correspondence from Yorkshire Water relating to a debt of £828.02;
5.2 A Council Tax Attachment of Earnings Order in relation to an outstanding sum of £831.38;
5.3 An electricity bill showing an outstanding amount of £12,939,59;
5.4 A county court judgment relating to a debt of £1194.73;
5.5 A solicitor's invoice relating to advice in these proceedings between July and October 2021, for £1584.

6. The Tribunal panel convened today without the parties to determine the costs applications on the papers.

Issues

7. The issues for the Tribunal to decide were:

6.1 Is the threshold for making a costs order met, in particular:
6.1.1 Did the Tribunal decide each allegation to which the deposit order made by EJ Morgan relates against the Claimant for substantially the reasons given in the deposit order?
6.1.2 Did the Claimant behave unreasonably in her conduct of the claims?
6.1.3 Did the claims have no reasonable prospect of success?
6.2 If so, should the Tribunal make a costs order?

6.3 If so, for how much?

Legal principles

8. Rule 39 of the Employment Tribunal Rules of Procedure 2013 provides, so far as material, as follows:

> **39 Deposit orders**
> …
> (5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order –
> (a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and
> (b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),
> otherwise the deposit shall be refunded.
> (6) If a deposit has been paid to a party under paragraph 5(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

9. Rules 76 and 84 of the Employment Tribunal Rules of Procedure 2013 provide, so far as material, as follows:

> **76 When a costs order or a preparation time order may or shall be made**
> (1) A Tribunal may make a costs 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.
> …
>
> **84 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.

10. In considering whether to make a costs order, and for how much, the following principles apply:
    10.1 Litigants without legal representation are not to be judged by the standards of a professional representative - the Tribunal must make an allowance for inexperience and lack of objectivity: see *AQ Limited v Holden* [2012] IRLR 648 EAT.
    10.2 The Tribunal must identify the unreasonable conduct, say what was unreasonable about it and say what its effect was: see *Yerrakalva v Barnsley MBC* [2012] ICR 420 CA.
    10.3 The mere fact that a party has lied in the course of its evidence is not necessarily sufficient to found an award of costs. The Tribunal has to have regard to the context, and the nature, gravity and effect of the untruthful evidence in determining the question of unreasonableness: see *Arrowsmith v Nottingham Trent University* [2012] ICR 159 CA.

10.4 It is not necessary to link the costs awarded to costs caused by unreasonable conduct, i.e. the receiving party does not have to prove that the unreasonable conduct caused particular costs: see *Macpherson v BNP Paribas* [2004] ICR 1398 CA.

10.5 The Tribunal is not required to limit any costs order to a sum that the paying party can afford to pay: *Arrowsmith*. The Tribunal must, however, give proper consideration to such matters as future earning capacity and the alternatives to making a whole costs order: *Herry v Dudley Metropolitan Council* [2017] ICR 610.

Deposit order

11. Most of the Claimant's complaints that were determined by the Tribunal were the subject of the deposit order made by EJ Morgan on 20 January 2022. The Tribunal reviewed the deposit order the Tribunal's liability judgment. We were satisfied that the Tribunal decided each allegation that was the subject of the deposit order against the Claimant, for substantially the reasons given in the deposit order. In particular:

11.1 EJ Morgan considered that the Claimant was likely to lose her complaints of sexual harassment because the limited Facebook Messenger messages that had been disclosed at that stage were themselves suggestive of consensual dialogue between the Claimant and the Second Respondent. They included the Claimant sending images of herself and did not include any suggestion of resistance or request that the communications should cease. It also appeared to be common ground that the Claimant had provided the Second Respondent with her home address. Finally, the serious allegation of sexual assault was not mentioned in the grievance process. In its liability judgment, the Tribunal rejected the complaint of sexual harassment relating to the Facebook Messenger messages because it found, principally on the basis of the messages themselves, that this was consensual conduct. The Tribunal's reasoning included that the Claimant sent images of herself and did not request that the communications should cease: see paragraph 14-14.14 of the liability judgment. The Tribunal rejected the complaint of sexual assault for a number of reasons, including that the Claimant did not mention it in her grievance, drafted with legal advice: see paragraph 14.21 of the liability judgment. The Tribunal rejected the complaint of sexual harassment relating to the Second Respondent's attendance at the Claimant's home address, in part because the Claimant accepted that she had provided her home address to the Second Respondent: see paragraphs 14.22-14.27 of the liability judgment.

11.2 EJ Morgan considered that the Claimant was likely to lose her complaints of direct race discrimination because she had little prospect of establishing the primary facts upon which she relied. The Claimant's complaints of direct race discrimination were rejected by the Tribunal on the facts, because Mrs K did not know what the Claimant's race was, and in any event the Tribunal concluded that the events relied on in the complaints of race discrimination did not happen in the way the Claimant said: see paragraphs 15-58 and 78-81.10 of the liability judgment.

11.3 EJ Morgan considered that the Claimant was likely to lose her complaint of victimisation (relating to the conduct of the grievance process) because the evidence available to him suggested that the First Respondent went to significant efforts to conclude the Claimant's grievance within a reasonable timeframe, despite the constraints of the pandemic. The Tribunal concluded that a thorough and detailed investigation took place lasting three months in total and that were good

reasons for delays in the conduct of the grievance process: see paragraph 57, 81.9 and 85 of the liability judgment.

11.4 EJ Morgan considered that the Claimant was likely to lose her claims based on constructive dismissal (i.e. unfair and wrongful dismissal) because the allegation of constructive dismissal depended on the above allegations, which themselves had little reasonable prospects of success. The Tribunal rejected the contention that the Claimant was constructively dismissed because it rejected the above allegations and concluded that the First Respondent did not commit any fundamental breach of contract: see paragraphs 82-87 and 89 of the liability judgment.

Disclosure of Facebook Messenger messages

12. The Tribunal concluded that the Claimant acted unreasonably in failing to disclose in full the Facebook Messenger messages between herself and the Second Respondent, in particular because the messages she did disclose gave a misleading picture. In particular:

12.1 The relevance of the Facebook Messenger messages was obvious from the outset. The Claimant provided a very small number of the messages when she raised her August 2021 grievance.

12.2 EJ Morgan's case management order in January 2022 required the disclosure by lists and copies (if requested) of all relevant documents, including text messages and social media.

12.3 After initial disclosure had taken place, the First Respondent made an application for specific disclosure because it appeared to it that the Claimant had not disclosed all of the Facebook Messenger messages. That was determined by EJ Buckley on 14 July 2022. Her order was unambiguous. The Claimant was required to disclose "any and all" messages by 18 July 2022.

12.4 The Claimant did not do so by that date or prior to the hearing on 2 August 2022. She provided screenshots of a number of messages, which appeared to be a complete set of messages between November 2019 and May 2020 and a few "snippets" from May 2020 to June 2021. The First Respondent's solicitor told her on 20 July 2022 that he was "unconvinced" that all the messages had been disclosed. She told him, "They are there." The Second Respondent confirmed at the hearing on 2 August 2022 that he had deleted the messages previously when their relationship ended. The Claimant was told by the Tribunal in the initial discussion on 2 August 2022 to disclose any remaining messages while the Tribunal read the witness statements. She disclosed a further small set of messages. Eventually, when pressed after the hearing resumed that afternoon, she accepted that there were messages she had not disclosed. Those included, for example, all messages around the time that the Claimant alleged she had been sexually assaulted. It was necessary to postpone the hearing in those circumstances, so that all the messages could be disclosed and considered by the Respondents.

12.5 When the Claimant did disclose all the messages, there were more than 1700 pages of them. She had disclosed only a small fraction of those in response to EJ Buckley's order. The messages are dealt with extensively in the liability judgment. The fundamental importance of having a full set, giving a fair and not misleading account of the communications between the Claimant and the Second Respondent, was obvious and must have been obvious to the Claimant throughout. The determination of the serious allegation of sexual harassment relating to the messages themselves obviously depended on the Tribunal having a full and fair understanding of the messages. The full content of the messages was also plainly relevant to the

determination of the allegations of sexual assault and of arriving unannounced at the Claimant's house in the middle of the night. Relevant messages are referred to in the Tribunal's judgment. The Claimant must have known that they were relevant to those very serious allegations.

Unreasonable conduct of the proceedings

13. Nothing has been drawn to the Tribunal's attention to displace the presumption in Tribunal Rule 39(5)(a) that the Claimant acted unreasonably in pursuing the complaints covered by the deposit order. That covers the complaints of race discrimination and sexual harassment, part of the victimisation complaint and the complaints of unfair and wrongful dismissal.

14. Separately, the Tribunal concluded that the Claimant acted unreasonably in pursuing her complaints of sexual harassment, when she must have known that they were not true. She had plainly participated willingly in the exchange of sexual messages over a very prolonged period and she knew that this was not unwanted conduct from the Second Respondent. She had plainly engaged in consensual kissing and sexual touching with him, on the occasion about which she complained in December 2021 and on other occasions and she knew that this was consensual. She had regularly invited him to her home to smoke marijuana and she knew that that was the purpose of his visit in March 2021 and that he had not obtained her home address by accessing the First Respondent's systems. It was not reasonable to bring and pursue these serious complaints of sexual harassment knowing them to be false.

Should a costs order be made?

15. The Tribunal concluded that it should exercise its discretion to make a costs order. We considered that the Claimant's ability to pay could be taken into account when deciding how much to award and that it did not prevent the making of a costs order in principle.

16. The Tribunal took into account that the Claimant was not legally represented after her claim was presented, although she did have legal advice at the stage of presenting her grievance and drafting her claim form. However, she was an able and articulate person, currently studying at university for a degree. She had good understanding and ability. She was also warned by EJ Morgan that her claims had little reasonable prospect of success and this should have given her pause for thought about pursuing them. She chose to pay the deposits. The First Respondent also wrote to her explaining its view that her claims had no reasonable prospect of success and inviting her to withdraw them without having to pay any costs. She did not respond. It seemed to the Tribunal that she had plenty of opportunities to understand and reflect on whether it was reasonable to bring and pursue these claims. It did not take a lawyer to tell her that it was unreasonable to pursue claims she knew to be false, nor that it was unreasonable to withhold the evidence that demonstrated that.

17. The Claimant's unreasonable conduct in persisting with the claims after EJ Morgan had subjected almost all of them to a deposit order was in itself significant. It meant that the Respondents were put to the time, expense and stress of preparing for and then participating in a five day Tribunal hearing, to deal with allegations of the utmost seriousness.

18. The Claimant's unreasonable conduct in failing to disclose in full the Facebook Messenger messages prior to the original hearing dates on 2-5 August 2022 was a serious matter; she withheld from the Respondents and the Tribunal extensive, centrally relevant evidence that contradicted her own case. The effect of her doing so led directly to the postponement of that hearing, at inevitable cost to the Respondents.

19. The Claimant's unreasonable conduct in knowingly making and persisting in completely false allegations of sexual harassment and sexual assault was extremely serious. These were allegations of the utmost seriousness, which the Respondents were put to the time, expense and stress of defending.

20. In all the circumstances, the Tribunal considered that it was appropriate to make a costs order in this case.

For how much?

21. The Tribunal took into account the Claimant's ability to pay a costs order. We accepted at face value what she said about that. The limited evidence she provided supported her contention that she had no assets and substantial debts. The Tribunal approached this question on the basis that the Claimant currently has no ability to pay a costs order.

22. However, the Tribunal considered that her ability to pay a costs order is likely to improve in the future. She is a person of ability and should soon graduate with a degree. Those features will put her in a good position to secure a job at a substantially better salary than her work for the First Respondent. She may well be able to reach an agreement with the First Respondent to make payments by instalments, which could be modest at this stage but could increase when, as we anticipate, she secures a better paid job.

23. The First Respondent provided detailed schedules of loss. Its costs since EJ Morgan made his deposit order were said to be in excess of £40k. The Tribunal did not make any detailed assessment of those costs. Bearing in mind average rates of pay for solicitors and barristers, the seriousness of the allegations, the volume of the documentation, the number of applications and preliminary hearings and the nature and length of the final hearing, £40k is the sort of level of costs the Tribunal would expect to have been incurred.

24. But for her ability to pay, the Tribunal would have considered that the nature, gravity and effect of her unreasonable conduct made it appropriate to award the First Respondent its costs in full. Had we done so, we would have carried out a detailed assessment of them.

25. However, the Tribunal concluded that should exercise its discretion to order the payment of a lower figure, taking into account the Claimant's ability to pay, including her existing level of debt. We concluded that she should be ordered to pay £10,000 plus the £1,300 that will be refunded via the deposit she paid. Such a sum could be repaid, for example, at the rate of £40 per week over five years, assuming as we do that the Claimant will secure much better paid work when she graduates. The Tribunal considered that it was appropriate to order the payment of this, lower figure, rather than a substantially higher sum that the Claimant perhaps has little realistic prospect of paying back in the remainder of her working life.

Employment Judge Davies