



## EMPLOYMENT TRIBUNALS

Claimant

**Mr J Mayanja**

Respondent

**v City of Bradford MDC**

## RECONSIDERATION HEARING

**Heard at: Leeds by CVP**

**On: 11 August 2023**

**Before: Employment Judge O'Neill**

**Mrs J Hiser**

**Mr G Corbett**

**Appearance:**

**For the Claimant: In person**

**For the Respondent: Ms Mellor of Counsel**

## JUDGMENT

The reconsideration application succeeds and the costs awarded are reduced to £200.

## REASONS

Application

1. The Claimant applied on 25 April 2023 for a reconsideration of the Judgment as to costs made on the papers on 5 April 2023. The Claimant was ordered to pay £2000. The application to reconsider the costs application has been made in time. There is no application before us to reconsider the Substantive Judgment.
2. The reasons that costs were ordered were summarised in paragraph 20 of the Costs Judgment as follows.

'We find that the claims in contract and harassment had no reasonable prospect of success and that the Claimant acted unreasonably in that he

- a. fabricated the harassment claim
  - b. constructed the contract claim on a basis which he knew to be untrue ie the telephone offer on 18 October 2021 and the email of acceptance on 19 October 2021
  - c. pretended to the respondent in the preparation stages to have evidence which did not exist ie transcripts and recordings of key telephone conversations and copy email of 18 and 19 October 2021’.
3. The grounds of the reconsideration application are in summary
- a. New evidence not before the Tribunal in that the email of 18 October 2021 from Mrs Clipsom to the Claimant has been located and a copy produced by the claimant.
  - b. It was unjust not to afford the claimant an adjournment
  - c. Fettered discretion in awarding costs – the exception
  - d. Misapplication of ‘No reasonable prospect of success’
  - e. Ability to Pay

Law

4. Rule 71 Employment Tribunals (Constitution and Rule of Procedure) Regulations 2013 provides that a Tribunal may reconsider any decision when it is in the interest of justice to do so.
5. Rule 76 Employment Tribunals (Constitution and Rule of Procedure) Regulations 2013 - Costs regime (set out in full in Costs Judgment).
6. Rule 77 Employment Tribunals (Constitution and Rule of Procedure) Regulations 2013 - Costs Procedure provides that a paying party shall be afforded a reasonable opportunity to make representations in writing.
7. Rule 84 Employment Tribunals (Constitution and Rule of Procedure) Regulations 2013 allows the Tribunal to take the claimant’s means into consideration.
8. The Respondent has referred to  
*Temblett v Avon County Council EAT 212/80 - credibility*  
*Wileman v Minilec Engineering Limited 1988 ICR 318, EAT*
  - a. *The evidence sought to be introduced could not with reasonable diligence have been obtained for use before the Tribunal;*
  - b. *The evidence is so relevant that it would probably have had an important influence on the result of the case, although it is not decisive in itself; and*
  - c. *The evidence is apparently credible, though it need not be incontrovertible.*

9. The Claimant has referred to a number of cases in his application of which we found the following most helpful

*Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78*

#### Evidence

10. The tribunal had before it a Bundle of documents paginated and indexed.
11. The claimant and Ms Clipsom both produced statements which were taken as read and each was cross-examined and answered questions of the Tribunal.

#### Findings

12. The costs order relates to a substantive Judgment of 1 November 2022 in which all the Claimant's claims failed.
- a. Breach of contract – fails;
  - b. Direct discrimination because of race (S13 EQA 2010) – fails;
  - c. Indirect discrimination because of race (S19 EQA 2010) – fails;
  - d. Harassment on the basis of race (S26 EQA 2010) – fails;
  - e. Victimisation (S27 EQA 2010) – fails.
13. The Costs Judgment records that
- 'The costs application was decided on the papers and the Tribunal had before it
- The Reserved Decision
  - The application for costs 12 December 2022
  - The email 4 October 2022 respondent to claimant
  - The costs warning letter 6 October
  - Letter to parties from Tribunal 13 March 2023 and 30 January 2023
  - Respondent's written representations 27 March 2023
  - The claimants written representations 17 March 2023
  - The claimants written representations 28 March 2023
  - The claimants request for a postponement 4 April 2023'

#### Postponement

14. The Costs Judgment considers the question of a postponement as follows

'The claimant applied on 4 April 2023 to postpone this costs consideration by 10 working days which would have deferred consideration to next Tuesday ie an additional 10 working days from today. The tribunal considered this application carefully but decided to go ahead with the cost determination today and refuse the application to postpone.

The claimant has never appeared to object to the matter being dealt with on the papers. On 30 January 2023 he was first ordered to give reasons by the 14<sup>th</sup> of February 2023 as to why cost should not be paid. He made no representations. On 13<sup>th</sup> of March 2023, he was given a further opportunity to produce reasons and arguments of affordability by the 27<sup>th</sup> of March 2023. We took into account

the representations he had submitted on the 17<sup>th</sup> of March and on the 28<sup>th</sup> of March 2023.

In the circumstances we are satisfied that this was a case suitable for being decided on the papers and the claimant had ample time to make all necessary representations and his application is refused’.

15. We remain of the view that the claimant had ample opportunity to make searches and representations and a postponement would not have made any difference.
16. The claimant has not explained what additional material would have been provided had his application that the matter be deferred for 10 days been granted. At today’s hearing, although in answer to my question he was not able to say when he located the email of 18 October 2023, in answer to Ms Mellor the claimant confirmed it was before 5 April 2023. The email of 18 October 2021 had been located by the claimant before the Costs Hearing and he could have submitted it to the Tribunal to consider at the Hearing but he did not. He did not require a postponement to look for the email and submit it.

#### **Misapplication of Law - Yerraklava**

17. The Tribunal had regard to the guidance in Yerraklava and the principle that costs are the exception not the rule and referred to it in the Judgment.

#### **Ability to Pay**

18. In his representations in support of his reconsideration application he has given few financial particulars to support a claim that he did not have the ability to pay. He says and we accept that he is unemployed and on universal credit of £600. We have taken this into account.

#### **Previous Findings**

19. The Tribunal made findings as follows in the Costs Judgment based on the findings in the Substantive hearing

‘We find that the claims in contract and harassment had no reasonable prospect of success and that the Claimant acted unreasonably in that he

- a. fabricated the harassment claim
- b. constructed the contract claim on a basis which he knew to be untrue ie the telephone offer on 18 October 2021 and the email of acceptance on 19 October 2021
- c. pretended to the respondent in the preparation stages to have evidence which did not exist ie transcripts and recordings of key telephone conversations and copy email of 18 and 19 October 2021.

20. We have been given no reason to change our finding as set out in the substantive Judgment that the harassment claim was fabricated.
21. We have been given no reason to change our finding as set out in the Substantive Judgment that the claimant had pretended to the respondent that he had material ie transcripts and recordings of key telephone conversations and copy email of 19 October 2021 which did not exist.

**New evidence. The email of 18 October 2021.**

22. The new evidence produced by the claimant is an email of 18 October 2021 from Mrs Clipsom to himself.

It says "Tried ringing but I think your phone is turned off. **I'm pleased to offer you the job.** Can I give you a ring in the morning to confirm you want to take it and discuss start date etc".

23. The Tribunal made findings as follows in the Costs Judgment that the claimant had

'constructed the contract claim on a basis which he knew to be untrue ie the telephone offer on 18 October 2021 and the email of acceptance on 19 October 2021'

24. It now transpires that an email from Mrs Clipsom to the claimant of 18 October 2021 does exist and it has now been produced by the claimant. At the Substantive hearing the claimant did not rely on such an email but said that the unconditional offer came in a voicemail which he had accepted by email dated 19 October 2021. He conceded that there was no such voicemail or email. As the Tribunal were aware that remained his position when the costs order was made.
25. That remains the position today in that there is no voicemail of 18 October or email from the claimant of 19 October.
26. The claimant failed to produce the email of 18 October 2021 for inclusion in the Bundle at the substantive hearing. He had been sent an index and ordered to send additional documents to the Respondent. He did not do so. He received an electronic Bundle about the beginning of September 2022 but took no steps to alert the Respondent of the missing email. His statement produced for the substantive hearing at paragraphs 17 to 19 or at all make no reference to an email of 18 October 2021.
27. He gives no explanation for his failure to produce the document in his application for a reconsideration or his response to the costs application of the respondent. At today's hearing he gave no explanation for his failure to produce the document earlier. The claimant suggested that he had had difficulty in accessing the electronic Bundle but we do not accept that was the case. He made no complaint about it and did not request a paper Bundle before the substantive hearing in October 2022. At today's hearing the claimant prepared and used an electronic Bundle. At the Hearing in October 2022 it became evident that the claimant was having difficulty managing with the electronic

Bundle at the same time as using the computer screen for the CVP Hearing and I asked the Respondents to courier over a paper bundle which they did.

28. It is submitted by the Respondent that the email could have been obtained by the Claimant and presented to the Tribunal with very little effort both before the substantive hearing of the matter and certainly before the decision on costs was made. There is no reason given by the Claimant as to why he could not produce the email with reasonable diligence before now. The Tribunal accepts that this was an oversight on his part and he had no intention nor any reason to conceal it. However the duty to produce this document did not lie with the respondents alone and the claimant had equal responsibility to ensure that all relevant documents are before the Tribunal.
29. The Tribunal finds that the claimant could have produced this email before the substantive hearing had he conducted a diligent search.

### **Due diligence – Dishonesty – Ms Clipsom**

30. The respondent failed to produce this document for inclusion in the Bundle. The respondent and their witness Mrs Clipsom now accept that the email of 18 October 2021 now produced is a genuine copy and that Mrs Clipsom sent an email in these terms on 18 October 2021. At the original hearing she had no recollection of such an email and had been unable to locate it when the Bundle was prepared or at the time of the Substantive hearing.
31. Now, having had sight of it and checked her email system, she has identified the email as having been sent by her on 18 October 2021 at 17.19. The credibility of the new evidence is accepted.
32. Ms Clipsom told us that at the time the Bundle was prepared the Council archived its documents differently from today when the archives are held on 'the Cloud'. At the time the Bundle was prepared she was using an old computer and that the 'Outlook Search' function had been turned off. Documents more than 6 weeks old were held in a separate archiving system which was stored elsewhere and had to be searched through a different search function than she had. She says that she conducted a search in July 2022 and this produced the documents in the Bundle. However it did not produce the email of 18 October 2021. She tells us that there were a lot of complaints about the old archiving system.
33. She told us that when the claimant produced the copy of the email she initially suspected that it was a false document as she had no memory whatsoever of having sent it and was convinced that she had not done so. However she conducted a new search using the new search system and found the document and accepts that she was mistaken and it had been sent by her.
34. It was put to her that emails before 5pm on 18 October 2021 had been produced and emails sent on 20 October 2021 had been found but the particular email sent at about 5.20pm and which appeared to make the claimant an unconditional offer of a job had not been produced. Further that was the only

email to have gone missing which the claimant suggested was highly suspicious and indicated that Ms Clipsom had been dishonest and had tried to conceal the document.

35. The Tribunal weighed this up with great care but having heard Ms Clipsom give evidence and observed her under cross examination accept her evidence that this was an oversight on her part brought about by the new computer system and that she had no intention of concealing the document.

36. Having no memory of the email, Ms Clipsom had nothing to put her on notice that such an email existed and had been omitted from the Bundle. The claimant had failed to refer to it at any stage as set out above at paragraph 26.

We note that it would have been impossible for Ms Clipsom to conceal the email from the claimant as he had a copy of it. It had been sent to him.

She accepts that so confident was she in her mistaken belief that she would not have sent and did not send such an email that she may not have searched as diligently as she should have done when faced with the obstacles of the old system.

37. We do not find that this was a dishonest act on the part of Mrs Clipsom such as to undermine her overall credibility.

38. In making the costs order the Tribunal found that the claimant had constructed the contract claim on a basis which he knew to be untrue ie the unconditional offer on 18 October 2021 and the email of acceptance on 19 October 2021. It remains the case that no email of acceptance has been produced and no telephone transcripts. At the Hearing the claimant conceded that there was no email of 19 October 2021 and it was partly on that basis that the Tribunal made its decision as to costs. Before the end of the hearing the claimant had abandoned his claim based on that contractual construction.

39. However although that conclusion may have been justified on the basis of the claimant's own evidence at the substantive hearing, it cannot stand now and the claimant cannot be said to have constructed his contract claim based on an unconditional offer knowing it to be untrue when the email of 18 October 2021 has the appearance of an unconditional offer.

## Conclusions

40. Yerraklava. In considering the question of costs the Tribunal gave consideration to the guidance in Yerraklava and the principle that costs should be the exception rather than the rule and applied that guidance appropriately. If the Claimant believes that we misdirected ourselves as to the law then the course to have taken should have been an appeal.

41. The Rules. Likewise, the Tribunal gave consideration to Rule 76 and in particular Rule 76 (1) a) and b) and applied the rule as to unreasonable conduct and reasonable prospects of success. If the Claimant believes that we

misdirected ourselves as to the law then the course to have taken should have been an appeal.

42. Adjournment. The Tribunal remains of the view that the claimant had ample opportunity to make searches and representations and a postponement would not have made any difference. The claimant has not provided any evidence of what additional material would have been provided had his application that the matter be deferred for 10 days been granted. He says he had found the email of 18 October 2021 before the Costs hearing on 5 April 2023. He did not send a copy to the Tribunal or refer to it.
43. Ability to pay was a factor which the Tribunal considered in that we inferred that the claimant had had a period of unemployment. The claimant has now told us that he continues to be unemployed and is living on universal benefit. The Tribunal concludes that if the claimant is on universal credit he will be in the poorest decile of the population and would struggle to make a payment of £2000 and a lower amount should be awarded.
44. New evidence – the email of 18 October 2021. This is accepted as credible by the respondent. Both the claimant and the respondent had an equal duty to produce the documents for the Bundle and that had either of them searched diligently for it the email would have been in the Bundle. However, having regard to the likely impact on our conclusions as to costs had the email been before us at the costs hearing, then we consider it would be unjust not to take that likely impact into account.
45. In the Costs Judgment we concluded that *'the claims in contract and harassment had no reasonable prospect of success and that the Claimant acted unreasonably in that he*
- a. fabricated the harassment claim*
  - b. constructed the contract claim on a basis which he knew to be untrue ie the telephone offer on 18 October 2021 and the email of acceptance on 19 October 2021*
  - c. pretended to the respondent in the preparation stages to have evidence which did not exist ie transcripts and recordings of key telephone conversations and copy email of 18 and 19 October 2021'.*
46. The email of 18 October 2021 has had no impact on our finding that the harassment claim was fabricated which remains our view. That conclusion was based principally on the claimant's own evidence. Nothing in the evidence today had led us to doubt the overall honesty and credibility of Ms Clipsom.
47. The email of 18 October 2021 does impact on our finding that the claimant constructed his contract claim on a basis which he knew to be untrue. That conclusion cannot stand now and the claimant cannot be said to have constructed his contract claim based on an unconditional offer knowing it to be untrue when the email of 18 October 2021 has the appearance of an unconditional offer.
48. The third ground at 45 c is so inextricably bound up with the alleged unconditional offer that we would not have awarded costs on those grounds



alone knowing the contents of the email of 18 October 2021, even though it remains the case that the claimant pretended to the respondent in the preparation stages to have evidence which did not exist ie transcripts and recordings of key telephone conversations and copy email of 19 October 2021.

49. In the circumstances we vary our order and reduce the sum to be paid to £200.

15 August 2023

**Employment Judge O'Neill**

Dated

Sent to the parties on:

17 August 2023