EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Razan Alsnih	**Al Quds Al-Arabi Publishing & Advertising**

COSTS JUDGMENT

The respondent's application for costs is refused.

REASONS

The application

1. The hearing took place on 19 – 21 April 2023, and 19 June 2023 (20 June 2023 was in chambers.) By a judgment dated 20 June 2023 and sent out on 22 June 2023, the tribunal found that the claimant was unfairly dismissed. The tribunal made no deduction for Polkey or contributory fault / conduct. The tribunal did not order reinstatement or re-engagement. For the unfair dismissal, the tribunal awarded £1,730.75 basic award and £17,999.80 compensatory award (subject to recoupment). The tribunal also awarded £1,563.70 net for lack of notice; £9,230.40 gross for holiday pay and £1,496.15 gross for unauthorised deductions from wages. The total is £32,020.80.

2. The respondent made an application for costs dated 7 July 2023, pursuant to rule 76(1)(a) or (b). The ground was that the claimant's refusal to accept settlement offers of £40,000 and then £51,600 was unreasonable under rule 76(1)(a) because it was clear that she had no reasonable prospect of being reinstated, and that she was further unreasonable not to accept a revised offer of £33,100 made after much of the evidence had been given. The respondent refers to three costs warning letters, each marked 'without prejudice … save as to costs'.

3. The claimant provided a detailed written response to the respondent's application. I felt it was unnecessary for me to hear the parties' comments at a hearing, which would simply incur yet more costs. The written

applications together with the costs bundle provided by the respondent were sufficient for me to reach a decision.

The law

4. The power to award costs is set out in the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. Under rule 76(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.

5. 'The tribunal's power to order costs is more sparingly exercised and is more circumscribed by the tribunal's rules than that of the ordinary courts. There the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the tribunal, costs orders are the exception rather than the rule.
Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78, CA

6. In exercising its discretion to award costs, the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct. However, its discretion is not limited to those costs that are caused by or attributable to the unreasonable conduct. The unreasonable conduct is a precondition of the existence of the power to order costs and is also a relevant factor to be taken into account in deciding whether to make an order for costs and the form of the order, but that is not the same as requiring a party to prove that specific unreasonable conduct caused particular costs to be incurred.
McPherson v BNP Paribas [2004] EWCA Civ 569

7. '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 was 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.'
Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78, CA

8. The tribunal can consider an offer marked 'without prejudice save as to costs' in relation to a party's costs application. However, failure by a claimant to achieve an award in excess of the rejected offer should not by itself lead to an order for costs. Before the rejection becomes a relevant factor in the exercise of its discretion, the employment tribunal must first conclude that the conduct of the claimant in rejecting the offer was unreasonable.
Kopel v Safeway Stores PLC [2003] IRLR 573, EAT.

The documents provided by the respondent

9. I would start by registering my concern, first that the respondent made reference to and put in the bundle without prejudice correspondence with the claimant's representative, Mr Neckles, and through ACAS. Negotiations through ACAS are privileged and not to be referred to in the employment tribunal proceedings. Similarly, letters headed 'without prejudice' should not normally be referred to, even in regard to costs. If however a letter is headed 'without prejudice save as to costs', it may be referred to purely on the matter of costs. That does not mean the phrase can have retrospective effect and allow reference to earlier privileged conversations.

10. The respondent's solicitors did from 31 March 2023 mark their three costs warning letters 'Without prejudice save as to costs and subject to contract'. However, the 31 March 2023 letter made reference to earlier without prejudice negotiations. There is no evidence that the claimant has waived privilege on the earlier wholly without prejudice communications.

11. My second concern is that the respondent included in the bundle privileged correspondence between the solicitor and the lay client. It is up to the respondent if it wishes to generally waive privilege on its privileged discussions with its own lawyers, but it cannot pick and choose.

12. These two matters may have caused me difficulty. However, on considering all the documents and representations, both including and excluding those which I believe were improperly put before me, I do not consider it appropriate to award costs.

The sequence of events and my observations

13. By way of overall context, I bear in mind that, as both parties knew, the claimant always had a high chance of succeeding in her unfair dismissal claim because no disciplinary hearing was held prior to dismissal and fair procedures were not followed. Indeed at the start of the hearing, the respondent offered to concede the unfairness of the dismissal on procedural grounds, provided that the claimant conceded the true reason was misconduct (which she was entitled not to do). Ultimately I did indeed find the dismissal was procedurally unfair.

14. The claimant wanted her job back. Despite certain clashes towards the end, she had loved the job itself. She had made substantial but unsuccessful attempts to find permanent and stable alternative employment. At the hearing, the respondent did not argue that she had failed to mitigate. She made it clear in negotiations from the outset that what she really wanted was reinstatement.

15. The respondent's first costs warning letter, that of 31 March 2023, said that the claimant's rejection of its offer (at that stage only £21,000) was 'wholly unreasonable and vexatious' because even if the tribunal found that the claimant was unfairly dismissed this was most likely to be based on procedural unfairness so there would be very limited compensation. In the event, the respondent was wrong about this. I found that the claimant had also been unfairly dismissed on substantive grounds, that there should be no Polkey deduction and I awarded far more than £21,000.

16. The letter said that the other main reason the claimant's rejection of its offer was unreasonable was that a reinstatement order was rare and very unlikely in this case because of the time that had passed and the breakdown in trust and confidence. The respondent was ultimately correct on this. I did not think it practicable to order reinstatement because of the breakdown in trust and confidence.

17. The respondent's letter then increased the offer to £30,300 (still below the total eventually awarded). The letter said that if the claimant declined the offer and was not reinstated or awarded more than £30,300 in total by the tribunal, the respondent reserved the right to refer the tribunal to the letter in support of an application for costs. That offer would be open until 4 pm 3 April 2023.

18. This letter is an example of the 'to and fro' and 'bluster' that is common in negotiations. It asserted that the claimant's rejection of £21,000 had been 'wholly unreasonable and vexatious'. It is unlikely that rejection could have been wholly unreasonable and vexatious since, as matters transpired, it was well below the ultimate award. The offer then jumped by nearly £10,000. So the claimant would be entitled to view with caution the respondent's assertions that she was taking an unreasonable negotiating position.

19. The claimant rejected the increased offer. She still believed she would be reinstated.

20. Surprisingly there is then an email in the bundle from Ms Ireland to Ms Sundram, with redacted content. As I have already mentioned, this concerns me. It is a privileged communication and the respondent cannot pick and choose what elements of the conversations between its solicitors and the lay respondent it chooses to disclose. However, the content of the letter makes no difference to my conclusions either way.

21. On 13 April 2023, Mr Neckles emailed the respondent's solicitors to say that the claimant would settle for £51,600 (£45,000 and £6,600 'wasted costs') by close of play that day, and an agreed reference. The respondent's solicitors replied that 'it is highly unlikely that our client will accept this offer' but they would take instructions.

22. Soon after, the respondent made a counter offer of £40,000. By email dated 14 April 2023, Mr Neckles stated the claimant had rejected this and he would now concentrate on exchange of witness statements which was due to take place at 4 pm that day. The respondent's solicitors replied that they doubted their client would change its mind so they also would concentrate on finalising the witness statements.

23. The respondent's solicitors then sent a 'without prejudice and subject to contract, save as to costs' email at 12.25 that day, confirming their telephone conversation with Mr Neckles at 10.36 am when they had indicated the respondent would accept £51,600. This was subject to COT3 terms being agreed. The letter said that if the claimant had changed her mind about settling, 'we reserve the right to bring this email to the attention of the tribunal in relation to an application for a costs order against her'.

24. Mr Neckles did not get back on this. He said he was awaiting instructions. It seems that the claimant did not after all wish to accept the £51,600.

25. Again, I see nothing unreasonable about this sequence of negotiation. The claimant had said £51,600 was on offer until the end of 13 April 2023. The respondent chose to call her bluff. The solicitors said it was 'highly unlikely' that the respondent would go for that figure and in fact came back with £40,000. By the time the respondent agreed the £51,600 the next day, the claimant had clearly changed her mind. That is what can happen in negotiations. The evidence suggests that what the claimant really wanted, and what she had wanted all along, was reinstatement.

26. The hearing then started and ran initially from 19 – 21 April 2023, when one further day was fixed for 19 June 2023. At the end of 21 April 2023, the respondent's solicitors emailed again 'without prejudice and subject to contract, save as to costs', to withdraw the offer of £51,600 and offer £33,100 instead. The offer would be open until 9 June 2023. Again if the claimant did not accept the offer, the respondent reserved the right to bring the email to the tribunal's attention on the matter of costs.

27. Mr Neckles responded on 27 April 2023 that the claimant was not interested in settling as she preferred the tribunal to decide the case. If the respondent wished her to change her mind, a significant uplift in the offer would need to be made. Again, I see nothing unusual or unreasonable in this negotiation. The respondent had reduced its offer by nearly £20,000. That is rarely a successful negotiating tactic. Moreover, the claimant may well have perceived by the end of day 3 that the hearing had been going reasonably well.

Conclusion

28. I understand the respondent's frustration that the claimant rejected an offer considerably higher than what was ultimately awarded, and indeed that the figure was one which at one point the claimant had indicated she

would accept. However, I do not consider that the claimant acted unreasonably in rejecting any of the offers.

29. Even looking purely at the sums involved (and these did cover the other strong claims as well as the unfair dismissal), the negotiation was normal. The respondent strongly asserted the claimant was unreasonable and 'vexatious' in rejecting early offers which were patently too low, in a context where she obviously had a good case. The respondent then, having made such assertions, made large jumps in the sums offered. All this would have sent the message that the respondent was just blustering and that the warnings as to the claimant's chances of success on reinstatement were not necessarily to be trusted.

30. The claimant also had the experience of having successfully proved at an earlier tribunal hearing that she was an employee when the respondent had persisted in asserting that she was not.

31. The claimant, not only had a strong case on all her claims, but she was not asking for ludicrous sums of money. She may have overestimated what she would be awarded – and in particular, she may have overestimated her chances of getting an order for reinstatement – but that is her loss. It was a misjudgement. It was not unreasonable or vexatious.

32. Reinstatement is the primary remedy for unfair dismissal. It is rarely ordered, partly because few successful claimants seek reinstatement, and partly because of the practicalities. However, the claimant did want reinstatement. She had good chances of succeeding in her unfair dismissal claim and she was entitled to ask for it. Whether or not the tribunal ultimately found capable of being carried out with success was a matter of analysis of the evidence by the tribunal judge. Reinstatement was not part of any of the offers made by the respondent.

33. For all these reasons, I do not award costs against the claimant and the respondent's application is not upheld.

Employment Judge Lewis
15/08/2023

Judgment and Reasons sent to the parties on:

15/08/2023

For the Tribunal Office