EMPLOYMENT TRIBUNALS

Claimant: Miss I Atta

Respondent: Football Beyond Borders

JUDGMENT ON COSTS

The respondent's application for costs is well-founded. The claimant will pay the respondent £1000.

REASONS

Introduction

1. On 15 June 2023, I conducted a public preliminary hearing the purpose of which was twofold:

    a. To consider the claimant's application to amend her claim.
    b. To consider the respondent's application to strike her claims out.

2. I refused the claimant's application to amend her claim. I struck out the claimant's claims on the basis that they had no reasonable prospect of success. The judgment was sent to the parties on 22 June 2023.

3. On 13 July 2023, the respondent emailed the tribunal and applied for costs to be awarded against the claimant on the basis that they believed that she had acted vexatiously in pursuing her claim. That was the headline contained an email. However, in the accompanying costs application the reasons for the application as set out in paragraph 15 are as follows:

    a. The claimant failed to comply with 9a of the order (as per paragraph

15 of the Case Management Orders made by Employment Judge Martin on 9 March 2023) (a request for further information about discrimination claims).

b. Even on the claimant's case – taken at its highest – the allegations were not linked to her race or religion.

c. The claimant refused the offer to withdraw her claims with no costs consequences and consciously decided to proceed, having been put on notice of the risk of costs.

d. The claimant then added a further claim in respect of alleged whistleblowing/cocaine.

e. The claimant confirmed she had obtained legal advice before the latest hearing.

4. The respondent seeks a restricted costs order to be limited to the costs incurred solely in relation to instructing and representation by counsel (Miss Robinson). These are restricted to Miss Robinson's preparation for and attendance at the public preliminary hearing on 15 June 2023. The costs incurred were £2160. The application states that the respondent, a registered charity, has incurred a total of £3480 inclusive of Counsel's costs to defend the claims brought by the claimant.

5. On 14 July 2023, I instructed the Tribunal administration to email the claimant asking for her representations on the costs application. She was to provide these within seven days (i.e. on or before 28 July 2023). I also instructed the Tribunal administration to ask the claimant to confirm whether she wished to have a hearing on costs or whether she was content for me to deal with the application without a hearing. The claimant did not respond. The respondent confirmed that it was content for the matter to be dealt with without a hearing and I have proceeded on that basis.

<u>The conduct of the litigation</u>

6. On 28 February 2023, the claimant communicated a settlement offer via ACAS in the sum of £42,826.66. This included an element for "defamation of character".

7. At the private preliminary hearing before Employment Judge Martin on 9 March 2023, I note that the respondent indicated that it may wish to make an application for a strike out order, or, a deposit order. I also note that the learner judge explained to the claimant that her claim as currently pleaded did not **<u>set out a basis for her discrimination claims</u>**. I further note that Employment Judge Martin stated:

> *…that what she has described is an away day which involved other people from different ethnic backgrounds and different religions and beliefs. What the Claimant has to do is to identify what parts of her narrative in her ET1 relate to background issues, what parts related*

to discrimination, what type of discrimination and why she says what happened was because of her religion or race.

8. On 10 March 2023, the respondent rejected the offer to settle and made a counter offer for the claimant to drop hands (i.e. withdraw her claims) without costs consequences. This was communicated to the claimant via ACAS. The respondent also indicated that it believed that the claimant had no chance of success in any of the pleaded claims and deemed it to be a vexatious claim. It warned the claimant that if she proceeded with her claims, the respondent would seek costs.

9. On 13 March 2023, the claimant declined counteroffer and indicated her intention to continue with the proceedings. This communicated through ACAS.

10. The respondent identifies the following examples of behaviour which it believes could be considered vexatious or unreasonable on the part of the claimant:

    a. Her valuation of her claims in excess of £40,000 was excessive. Her reference to defamation was fundamentally misconceived (the wrong forum and without any foundation). Her assessment of injury to feelings was placed at the higher end of the **Vento** band, which was an exaggerated sum even if the allegations were acts of discrimination. I agree that the sums are excessive and exaggerated. I also agree that seeking compensation for defamation was ill-conceived as there is no basis to do so in an employment tribunal.

    b. The claimant had made a very serious allegation against a manager but only after that person was promoted instead of the claimant's friend. I have seen no evidence to support this allegation. Consequently, I do not accept what is alleged.

    c. The claim proceeded on the basis that the claimant knew that it was about merit and was motivated by personal issues with her manager. I do not accept this on the evidence.

Applicable law

11. A costs order or a wasted costs order may be made either on the Tribunal's own initiative or following an application by a party. A party may make such an application at any stage of proceedings and up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. Before any order is made, the proposed paying party must be given a reasonable opportunity to make representations, either in writing or at a hearing, as the Tribunal may order in response to the application.

12. Rule 75 (1) (a) of the Tribunal Rules gives the Tribunal the power to make a costs order against one party to the proceedings (the "paying party") to pay the costs incurred by another other party (the "receiving party") on

several different grounds. Rules 76(1) sets out the grounds for making a costs order are which as follows:

a. A party (or that party's representative) has acted vexatiously, abusively, disruptively, or otherwise unreasonably in the bringing or conducting of proceedings (or part thereof).

b. A claim or response had no reasonable prospect of success.

c. A party has breached an order or Practice Direction.

d. A hearing has been postponed or adjourned on the application of a party.

13. Rule 76(1)(a) imposes a two-stage test. The Tribunal must first ask itself whether a party's conduct falls within rule 75(1)(a). If so, it must ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party. If a party's representative has acted vexatiously, abusively, or disruptively or otherwise unreasonably in the bringing or conducting of the proceedings the Tribunal may make a costs order against the party in question.

14. Within the context of the employment tribunal rules, the classic description of vexatious conduct is that of Sir Hugh Griffiths in **ET Marler Ltd v Robertson [1974] ICR 72 at 76, NIRC**:

> *If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously, and likewise abuses the procedure. In such cases the tribunal may and doubtless usually will award costs against the employee …*

15. A more modern, and somewhat wider, meaning of 'vexatious' was given by Lord Bingham CJ in **A-G v Barker [2000] 1 FLR 759** at [19], in the context of an application for a civil proceedings order under the Senior Courts Act 1981, section 42. Under this formulation, the emphasis is less on motive and more on the effect of the conduct in question:

> *"Vexatious" is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.*

16. Vexatious conduct can apply both to the bringing or conducting of the proceedings, and, as appropriate, to conduct by either a claimant or respondent. Instances of a specific finding of vexatious conduct are fairly rare, as the finding tends to be one of unreasonable conduct, even where there is shown to be an improper motive present. An example is **Keskar v**

Governors of All Saints Church of England School [1991] ICR 493, EAT, where costs were awarded against a claimant in a discrimination case on the basis that he was 'motivated by resentment and spite in bringing the proceedings', and that there was 'virtually nothing to support his allegations of race discrimination'. The ground on which the award was made was unreasonable conduct, but it could as easily have been vexatious conduct. It does not matter, however, what particular label is put on it; if the conduct of the party or their representative justifies an order for costs, its decision will be upheld even if the EAT would have used a different label from that used by the tribunal. In **Beynon v Scadden [1999] IRLR 700, EAT**, an employment tribunal categorised a union's behaviour as vexatious and unreasonable on the ground that its pursuit of a case on behalf of the claimants was both without merit and done with the collateral purpose of achieving union recognition from the respondent, and awarded costs against the claimants. The EAT upheld the award and the grounds on which it was made even though it would itself have categorised the conduct as simply unreasonable rather than vexatious.

17. The terms 'abusive' and 'disruptive' in the context of the bringing or conducting of proceedings are not defined in the rules but have a straightforward meaning that will be applied by tribunals. Abusive bringing or conducting of proceedings will be close to vexatiousness in many cases and connotes the use of tribunal litigation for something other than, or in a way other than, its intended use within the judicial system. Abusive and disruptive conduct in this context may also be apt to cover gratuitous insults or unsubstantiated slurs which have no justification in the context of the litigation, directed by one party to another during a hearing, or in correspondence. 'Disruptive' may cover excessive prolixity and time wasting, unduly lengthy or aggressive cross-examination of witnesses, calling unnecessary witnesses, and failing to respect the tribunal's attempts to manage the claim and maintain an orderly hearing. The grounds for a finding that there has been abusive or disruptive conduct will be all the stronger if a party has continued their behaviour in the face of a warning from the tribunal that it considers it to be unacceptable.

18. Tribunals have a wide discretion to award costs where they consider that there has been unreasonable conduct in the bringing or conducting of proceedings. Every aspect of the proceedings is covered, from the inception of the claim or defence, through the interim stages of the proceedings, to the conduct of the parties at the substantive hearing. Certain common examples relied upon as alleged unreasonable conduct are knowingly pursuing a hopeless claim, the unreasonable refusal of an offer to settle and where a claim has been withdrawn late in the day after costs have needlessly been incurred.

19. Where a party makes an offer to settle a case, which is refused by the other side, costs can be awarded if the Tribunal considers that the party refusing the offer has thereby acted unreasonably (**Kopel v Safeway Stores plc [2003] IRLR 753, EAT**). It is important to recognise, however, that the principle applicable in matrimonial proceedings by virtue of the decision in **Calderbank v Calderbank [1975] 3 All ER 333, CA**, namely, that a party can protect himself against costs in a case involving a money claim by making an offer marked 'without prejudice save as to costs', with the result that a failure by the other side to beat the offer will normally

mean that an award of costs will be made against that party—does not apply as such in proceedings before employment tribunals. As Mitting J pointed out in **Kopel,** not only must a true Calderbank offer be accompanied by a payment into court, as to which there is no provision in the tribunal procedure, but (citing Lindsay J in **Monaghan v Close Thornton Solicitors EAT/3/01, [2002] All ER (D) 288 (Feb)**) if the Calderbank principle became widely applied, it would run counter to the whole legislative basis for awarding costs in tribunals. In employment tribunals, therefore, it does not follow that a failure by a party to beat a Calderbank offer will, by itself, result in an award of costs against him. In Kopel, Mitting J stated that the tribunal 'must first conclude that the conduct of an appellant in rejecting the offer was unreasonable before the rejection becomes a relevant factor in the exercise of its discretion under [r 76(1)(a) of the 2013 Rules]' (see also **Anderson v Cheltenham & Gloucester plc UKEAT/0221/13 (5 December 2013, unreported**). On the facts of that case, the EAT upheld a tribunal's award of £5,000 costs against the claimant where she had failed in her unfair dismissal and sex discrimination claims and had not only turned down a 'generous' offer to settle the case but had persisted in alleging breaches of the provisions of the Human Rights Convention prohibiting torture and slavery, which the tribunal categorised as 'frankly ludicrous' and 'seriously misconceived'. In the circumstances, the EAT held that the tribunal was entitled to find that the rejection of the offer was unreasonable conduct of the proceedings justifying the award of costs that was made.

20. When considering whether to award costs in respect of a party's conduct in bringing or pursuing a case that is subsequently held to have lacked merit, the type of conduct that will be considered unreasonable by a tribunal will obviously depend on the facts of the individual case, and there can be no hard-and-fast principle applicable to every situation. In general, however, it would seem that the party must at least know or be taken to have known that their case is unmeritorious. In **Cartiers Superfoods Ltd v Laws** (which was decided under the 1974 rules, when the only grounds for awarding costs were whether the claimant or respondent to any proceedings had acted frivolously or vexatiously), Phillips J considered that, in order to determine whether a party had acted frivolously, it was necessary 'to look and see what that party knew or ought to have known if he had gone about the matter sensibly'. On the facts of that case, the EAT held that if the employers had taken the trouble to inquire into the facts surrounding the alleged misconduct for which the employee had been dismissed, instead of reacting in a hostile manner with threats and false statements that the employee was guilty of dishonesty, they would have realised that they had no possible defence at all to the claim, except as to the amount of compensation.

21. Rule 76(1)(b) also follows a two-stage test. The Tribunal has a duty to consider making an order where this ground is made out but there a discretion whether actually to award costs. Whether or not the party has received legal advice or is acting completely alone may be an important consideration when deciding whether or not to make a costs order against him or her.

22. It was well established under previous versions of the Rules of Procedure that the term ‘misconceived’ could cover unmeritorious claims brought by

employees who, possibly because they are unrepresented, are unaware of the legal position and genuinely believe that their employers have committed illegal acts against them. This continues to be the case under the current Procedure Rules, and of course the same will apply to unmeritorious responses put in by unrepresented employers, since now a Tribunal merely has to decide whether or not a claim had reasonable prospects of success. The effect of this is also to emphasise that the test for whether the claim had no reasonable prospect of success is objective, not subjective (**Vaughan v London Borough of Lewisham [2013] IRLR 713**).

23. In **Scott v Inland Revenue Commissioners 2004 ICR 1410, CA**: Lord Justice Sedley observed that 'misconceived' for the purposes of costs under the Tribunal Rules 2004 included 'having no reasonable prospect of success' and clarified that the key question in this regard is not whether a party thought he or she was in the right, but whether he or she had reasonable grounds for doing so. The Court of Appeal held that the employment tribunal's decision in this particular case not to award costs against S should be reconsidered, as it was not clear that the tribunal had directed its attention to the questions of whether S's case was doomed to failure or, if it was, from what point.

24. In **Hamilton-Jones v Black EAT 0047/04**: B instituted tribunal proceedings against a number of parties, including H-J. In due course, the employment tribunal determined that H-J had never been B's employer and, accordingly, that he should not have been a party to the proceedings. Despite this, it refused H-J's application for a costs order to be made against B on the basis that B had a genuine belief that H-J was his employer. On appeal, the EAT held that the tribunal's decision could not stand. It understood why B — a layman without any legal experience — might not understand the true employment situation. His decision to issue proceedings against H-J was not therefore 'vexatious' (a word that connoted a degree of malice or ulterior motive). However, for the purposes of the 'misconceived' rule, that was not the point: the tribunal was simply required to assess objectively whether the claim had any prospect of success at any time of its existence. This it had not done. There had been no rational basis for B's belief (even if genuinely held) that H-J had been his employer, meaning that the claim against that respondent had been misconceived from the outset. The EAT remitted the matter to a different tribunal to decide whether costs should be awarded on this basis.

25. Rule 78 (1) sets out how the amount of costs will be determined. The Tribunal Rules provide that such an order is in respect of costs incurred by the represented party meaning fees, charges, disbursements, and expenses.

26. It is important to recognise that even if one (or more) of the grounds is made out, the Tribunal is not obliged to make a costs order. Rather, it has a discretion whether or not to do so. As the Court of Appeal reiterated in **Yerrakalva v Barnsley Metropolitan Borough Council 2012 ICR 420, CA**, costs in the employment tribunal are still the exception rather than the rule. It commented that the Tribunal's power to order costs is more sparingly exercised and is more circumscribed than that of the ordinary courts, where 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 employment tribunal, by contrast, costs orders are the exception rather than the rule. If the Tribunal decides to make a costs order, it must act within rules that expressly confine its power to specified circumstances, notably unreasonableness in bringing or conduct of the proceedings.

27. In order to deter an un-meritorious claim, respondents may write to the claimant warning them that they will apply for costs if they persist with the claim. Alternatively, they may apply to the Tribunal for a preliminary hearing if they believe that the claim has no prospects of success. The fact that a costs warning has been given is a factor that may be considered by the Tribunal when considering whether to exercise its discretion to make a costs order. The absence of a warning may be a relevant factor in deciding that costs should not be awarded. A costs warning is not, however, a precondition of making an order.

28. In considering whether to make an order for costs, and, if appropriate, the amount to be awarded, the Tribunal may have regard to the paying party's ability to pay. It is not obliged to do so; it is permitted to do so. The Tribunal is not required to limit costs to the amount that the paying party can afford to pay. However, we remind ourselves that in **Benjamin v Inverlacing Ribbon Ltd EAT 0363/05** it was held that where a Tribunal has been asked to consider a party's means, it should state in its reasons whether it has in fact done so and, if it has, how this has been done. Any assessment of a party's means must be based upon evidence before the Tribunal.

Discussion and conclusions

29. On the evidence, I am not satisfied that the respondent has established that the claimant acted vexatiously in bringing and continuing with her proceedings. It is a very high threshold that has to be met for such finding can be made.

30. I am, however, satisfied that the claimant acted unreasonably in bringing and continuing these proceedings. Her claims had no merit. At the preliminary hearing it was necessary for Employment Judge Martin to make an order requiring the claimant to provide further information about her claims. The claims as pleaded did not disclose a colorable case of unlawful discrimination. The claimant did not comply with the case management order set out in paragraph 9a to provide further information. That is unreasonable behaviour. Furthermore, Employment Judge Martin was clearly satisfied that a public preliminary hearing to strike out the claims was justified because the claims were weak. After the hearing, the respondent warned the claimant that it would be seeking costs if she did not drop her claims. Her claims were ultimately struck out by myself because they had no reasonable prospect of success. I also believe that the claimant acted unreasonably by making an exaggerated quantification of her loss which included a cause of action that cannot be litigated in the employment tribunal. Taken in the round, her behaviour points to unreasonableness and a misconceived claim.

31. I am satisfied that it would be justifiable to exercise discretion to award costs against the claimant for her unreasonable behaviour. She knowingly pursued a hopeless claim and she unreasonably refused an offer to settle. She was on notice that the respondent would seek costs against her.

32. I must consider what would be an appropriate award. At the hearing on 15 June 2023, the claimant told me about her means. In this regard, I refer to paragraph 17 of my case management summary. Given that her means are limited and that she does not have any savings, I believe that it would be fair to limit the award of costs to £1000.

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Employment Judge A.M.S. Green

Date 1 August 2023