EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mrs Bonnie Marie Som **v** **1.Technical One Limited**
2. Eleven Plus Exams Tuition Limited
3. Mr Ilesh Kotecha
4. Mrs Nita Lakhani

Heard at: Watford **On**: 18 May 2023
26 July 2023 (In chambers)

Before: Employment Judge Bedeau
Members: Mrs C Smith
Mr B McSweeney
Appearances
For the Claimant: Mr R O'Dair, counsel
For the Respondents: Mr G E Heimler, counsel

RESERVED JUDGMENT ON COSTS

The claimant and her representative are jointly ordered to pay the respondents' costs in the sum of £10,000 in respect of their conduct of proceedings being unreasonable.

REASONS

1. On 17 August 2022, following a liability hearing held in May 2022, the tribunal promulgated its Reserved Judgment to the parties in which all claims were dismissed against the respondents as not having been well-founded.

2. On 12 September 29022, the respondents applied to the tribunal for their costs to be paid by the claimant. Further information in support of their application was sent on 9 January 2023. On 21 November 2022, the tribunal listed this case for a hearing on costs on 18 May 2023.

The evidence

3. The tribunal heard evidence from Mrs Nita Lakhani on behalf of the respondents. The claimant called Mr Eric Som who gave evidence. Towards the end of the hearing she was invited to give evidence only on her professional relationship with Mr Som.

4. In addition to the oral evidence the tribunal were referred to two bundles of documents, Bundle A and B, totalling 585 pages.

5. Following on from the costs hearing and as ordered by the tribunal, the parties sent in their written submissions and attached further documents in support.

The issues

6. The issues for the tribunal to hear and determine are as follows:-

   6.1 Whether the claimant and/or her representative, Mr Eric Som, had acted vexatiously, disruptively and/or otherwise unreasonably in the bringing of the proceedings, or part thereof, or the way the proceedings, or part thereof, have been conducted, rule 76(1)(a); and (2)?

   6.2 Whether the claims had no reasonable prospect of success, rule 76(1)(b), and

   6.3 Further or alternatively, whether the respondent should be granted a Wasted Costs Order against Mr Eric Som as a result of alleged improper and/or unreasonable acts on his behalf?

The law

7. The costs provisions are in rules 74 to 84, schedule 1, Employment Tribunals (Constitution and Rules of Procedure) regulations 2013, as amended. "Costs" includes any fees, charges, disbursements, or expenses including witness expenses incurred by or on behalf of the receiving party, rule 74(1).

8. The power to make a costs order is contained in rule 76. Rule 76(1) provides,

> "A tribunal may make a costs order or a preparation time 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."

9. In relation to Wasted costs, rule 80(1)a, states:

> "A tribunal may make a wasted costs order against a representative in favour of any party (the receiving party) where that party has incurred costs –
>
> (a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative."

10. Rule 80(2) describes "a representative" as, "a party's legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit."

11. "A wasted costs order may be made in favour of a party whether or not that party is legally represented and may also be made in favour of a representative's own client. A wasted costs order may not be made against a representative where that representative is representing a party in his or her capacity as an employee of that party.", rule 80(3).

12. "A wasted costs may order the representative to pay the whole or part of any wasted costs of the receiving party, or disallow any wasted costs otherwise payable to the representative, including an order that the representative repay to its client any costs which have already been paid. The amount to be paid, disallowed or repaid must in each case be specified in the order.", rule 81.

13. In deciding whether to make a costs order the tribunal may have regard to the paying party's ability to pay, rule 84.

14. When exercising the discretion whether to award costs for unreasonable conduct, the tribunal must have regard to the nature, gravity and effect of the unreasonableness, McPherson v BNP Paribar (London Branch) [2004] ICR 1398, Mummery LJ.

15. In the case of Yerrakalva v Barnsley Metropolitan Borough Council [2011] EWCA Civ 1255, the Employment Judge in the case awarded the respondent 100% of its costs based on the claimant's lies prior to her decision to withdraw. On appeal the EAT said that it was unable to see how the lies told at the prehearing review caused the respondent any loss at all from which they were entitled to be compensated. She succeeded in her appeal. On appeal to the court of Appeal, Mummery LJ giving the leading judgment, held:

> "The vital point in exercising their discretion to order costs is to look at the whole picture of what happened in the case and asked whether there has been 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 affects it at that. The main thrust of the passages cited above from my judgement in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs the claimant. In rejecting that submission I have no intention of giving birth to erroneous notions, such as that causation was irrelevant or the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances….

> 52 In my judgment, although the employment tribunal had jurisdiction to make a costs order, it erred in law in the exercise of its discretion. If, as should have been done, the criticisms of the council's litigation conduct had been factored into the picture as a whole, the employment tribunal would have seen that the claimant's unreasonable conduct was not the only relevant factor in the exercise of the discretion. The claimant's conduct and its effect on the costs should not be considered in isolation from the rest of the case, including the council's conduct and its likely effect on the length and costs of the prehearing review."

16. In the case of Vaughan v London Borough of Lewisham UKEAT/0533/12/SM, the Employment Appeal Tribunal held that there was no error of law when the Employment Tribunal in awarding costs took into account whether there was a reasonable prospect of the claimant being able, in due course, to return to well-paid employment and be in a position to pay costs. Also in that case it was held that the failure on behalf of the respondent to apply for a deposit order was not necessarily an acknowledgement that a claim has a reasonable prospect of success as there were a variety of reasons why such a course of action may not be adopted, such as additional costs involved in having the matter considered at a preliminary hearing and which may not deter the claimant.

17. The tribunal have to consider, once the claims have been brought, whether they were properly pursued, Npower Yorkshire Ltd v Daly UKEAT/0842/04.

18. Knox J, in Keskar v Governors of All Saints Church England School and Another [1991] ICR 493, page 500, paragraphs E-G, held,

> "The question whether a person against whom an order for costs is proposed to be made ought to have known that the claims he was making had no substance, is plainly something which is, at the lowest capable of being relevant, and we are quite satisfied from the decision itself, in the paragraph which I have read and need not repeat, that the industrial tribunal did have before it the relevant material, namely that there was virtually nothing to support the allegations that the applicant made, from which they drew the conclusion that he had acted unreasonably in bringing the complaint.
>
> That in our view, does involve an assessment of the reasonableness of bringing the proceedings, in the light of the non-existence of any significant material in support of them, and to that extent there is necessarily involved a consideration of the question whether the applicant ought to have known that there was virtually nothing to support his allegations."

19. We have also taken into account the cases E.T Marler v Robertson [19974] ICR 72, a judgment of the National Industrial Relations Court, Oni v Unison UKEAT/0370/14/LA, and the judgment of HHJ Auerbach in the case of Radia v Jeffries International Ltd [2020] IRLR 431.

20. In Marler, it was held by Sir Hugh Griffiths under the old "frivolous or vexatious" costs requirements that:

> "If the employee knows that there is no substance in his claim and that it is bound to fail, or if the claim is on the face of it so manifestly misconceived that it can

> have no prospect of success, it may be deemed frivolous and an abuse of the procedure of the tribunal to pursue it. 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.", page 76 D-F.

21. In the Oni case, Simler J, President, re-stated the principles, namely that the tribunal has a wide discretion in deciding whether to award costs. It is a two-stage process. The first being, to determine whether the paying party comes within one or more of the parameters set out in rule 76. The second, is, if satisfied that one or more of the requirements have been met, whether to make an award of costs. However, costs had to be proportionate and not punitive, and reasons must be given.

22. In Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797, a case where the claimant was ordered to pay costs of £3,000 because she had made a case dependent on advancing assertions that were untrue. The Court of Appeal held that under rule 41(2) the tribunal was not obliged to take her means into account although it had done so. The fact that her ability to pay was limited, in that she was unemployed and no longer in receipt of statutory maternity pay, did not require the tribunal to assess a sum limited to an amount she could pay. The amount awarded was properly within the tribunal's discretion.

23. In relation to the exercise of the tribunal's discretion whether to take into account the paying party's ability to pay, under the old rules, HHJ Richardson, in the case of Jilley v Birmingham & Solihull Mental Health NHS Trust (EAT/584/06), held:

> "The first question is whether to take ability to pay into account. The tribunal has no absolute duty to do so. As we have seen, if it does not do so, the County Court may do so at a later stage. In many cases it will be desirable to take means into account before making an order; ability to pay may affect the exercise of an overall discretion, and this course will encourage finality and may avoid lengthy enforcement proceedings. But there may be cases where for good reason ability to pay should not be taken into account: for example, if the paying party has not attended or has given unsatisfactory evidence about means."
>
> "If a tribunal decides not to do so, it should say why. If it decides to take into account ability to pay, it should set out its findings about ability to pay, say what impact this has had on its decision whether to award costs or on the amount of costs, and explain why. Lengthy reasons are not required. A succinct statement of how the tribunal has dealt with the matter and why it has done so is generally essential."

24. The maximum sum a Tribunal can award by way of a costs order, apart from a detailed assessment, is £20,000, rue 78(1).

Submissions

25. We have taken into account the detailed submissions by Mr Heimler, counsel on behalf of the respondents, and by Mr O'Dair, counsel on behalf of the claimant and Mr Som. We do not propose to repeat their submissions herein having regard to rule 62(5), Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended. We have also taken into account the authorities they have referred us to.

Findings of fact and conclusions

The correct employer/respondent

26. The claimant brought proceedings against all four respondents. The contentious issue during the hearing on liability, was the correct respondent. We had the contractual documents, wage slips and P60 between the claimant and Eleven Plus Exams Tuition Limited, "Eleven Plus", which showed that Eleven Plus was her employer. In addition, there was the oral evidence form the respondents' witnesses to that effect. There was also the sponsorship letter by Eleven Plus in support of the claimant's immigration from the United States to the United Kingdom.

27. There was no documentary evidence in support of the assertion and no oral evidence by the respondents to the effect that Technical One Limited was the claimant's employer. Indeed, this issue was addressed at the commencement of the hearing with Mr Som who insisted that both Technical One Limited and/or alternatively Eleven Plus, should remain as either one was, or both were the claimant's employer. The matter was again addressed on the last day of the hearing to which Mr Som agreed that Elven Plus was the correct employer and that Technical One could be removed from these proceedings. In paragraph 10 of our judgment we dismissed all claims against Technical One trading as Eleven Plus Exams UK. Our observations on the correct employer being Eleven Plus, are in paragraph 121 of the judgment.

28. In the respondents' response they asserted that the correct employer was Eleven Plus not Technical One Limited. They wrote the following:

> "1. The First Respondent, Technical One Limited, was not the claimant's employer. The claimant's written contract of employment was with Eleven Plus Exams Tuition Limited ("EPET"), a separate company and legal entity. The employment contract, payslips and P45 were issued in the name of EPET. Furthermore, all salary payments were made by bank transfer via EPET's bank account.
>
> 2. In the circumstances, the claimant does not have a valid claim against the First Respondent who should be discharged from these proceedings."

29. In the respondents' correspondence to Mr Som, on 15 September 2021, they stated that Elven Plus was the claimant's correct employer, something which Mr Som should know as he was employed by Eleven Plus. They invited him to confirm that Eleven Plus was the claimant's employer and the

correct respondent, and that he would not be pursuing an indirect disability discrimination claim. They stated that should the tribunal uphold their argument they will apply for costs orders under rules 76 and 80. Rule 80 being the wasted costs provisions. The warning as to costs was again repeated in their letter of 20 September 2021. Further correspondence followed on 27 September; 5 November; and 21 December 2021, in which the respondents' legal representatives invited both Mr Som and the claimant to withdraw claims against Technical One Limited as both knew that Eleven Plus was the correct respondent. They again warned that should the claims proceed against Technical One there would be a wasted costs application as well as costs against the claimant. (B54, B61, B59(a), B64, B77 and B136 of the bundle).

30. When Mr Som withdrew claims against Technical One Limited it was on the basis of a concern he had that Mr Kotecha, had in the past opened and closed other companies. He was of the view that Technical One had the greater financial resources and that Eleven Plus was not financially viable. He, however, accepted on the third day of the hearing, that Elven Plus was the correct employer.

31. We find that the preponderance of the evidence was to the effect that, at all material times, the claimant was employed by Eleven Plus and Eleven Plus was the correct respondent in that regard, not Technical One Ltd.

32. Mr Som argued that this was his first employment case, and he was not an employment law specialist. In the light of that he was prone to make errors.

33. The fact that Mr Som is not an employment specialist is of little significance. On the facts of this case, it was abundantly clear and should have been abundantly clear to him that Technical One was neither his employer nor the claimant's employer but Eleven Plus. It did not take someone who specialises in employment law to form that conclusion as all the documentary he had in his possession supported this conclusion. It was he who persuaded Mr Kotecha to take on the claimant as an employee of Eleven Plus. Applying Mummery LJ in Mcpherson and Yerrakalva, it was a grave error to have persisted in this approach which costs the respondents time and expense in challenging.

Wasted costs

34. Was Mr Som acting in pursuit of profit?

35. On 7 October 2021, Mr Som set up a firm called Eric Som to represent the claimant in an official capacity. We have considered the various extracts from correspondence referred to in section E of Mr Heimler's written submissions, E(i) to (vi).

36. In correspondence sent by Mr Som dated 28 August 2021 to the respondent's representatives, waving legal privilege, he referred to an offer to settle at £25,000 within 14 days. Should they fail to accept the offer he then wrote the following:

> "Given my client's conservative Schedule of Loss at £35,000 excluding interest and grossing up for tax, this is a generous offer. Indeed, my client is currently receiving pro bono legal assistance from me and will not incur legal fees if this matter proceeds to trial. However, if your clients do not accept this offer, then, pursuant to rule 76(1) of the ET Rules, my client intends in due course, to:
>
> - Bring the contents of this letter to the attention of the tribunal on the issue of costs;
> - Contend that, by failing to accept this offer, your clients chose to act vexatiously, abusively, disruptively, or otherwise unreasonably in pursuing these proceedings; and
> - Seek a tribunal order requiring your clients to pay my client's costs, which would include, but are not limited to, the legal assistance provided at my corporate counsel rate, from the indemnity basis."
>
> (B38-39)

37. Mr Som said in evidence that he believed that the respondents were behaving unreasonably, and that the claimant was at her wits end. The letter was sent in order to demonstrate the unreasonable aspect of the respondents' conduct.

38. This was the reason he raised the issue of costs as he thought he could claim for preparation time. He referred to rule 76 in seeking an order for costs in favour of the claimant on an indemnity basis. He did not have a conditional fee agreement. The intention of the correspondence was to put the respondent on notice that they were behaving unreasonably. In retrospect, he said, he was mistaken as to costs. He hoped that the respondents would be reasonable and settle the claims.

39. Enclosed with his letter were his bank details, not the joint bank details of both him and his wife, the claimant.

40. The claimant in evidence said that she did not enter into any fee arrangements with Mr Som.

41. We find, taking into account the above matters, that Mr Eric Som was acting as Eric Som Solicitor-Advocate on behalf of the claimant, in pursuit of profit and had the respondent paid him the sum of £25,000 asked for, it would have gone into the account, the details of which he gave.

42. In seeking to contest the issue of the correct employer up until the third day of the liability hearing, we conclude that his conduct was unreasonable.

Race discrimination

43. In relation to the direct race discrimination claims, the claimant relied on a number of individuals as comparators, and the tribunal had to investigate, forensically, their particular circumstances when compared with hers. Following that analysis the tribunal concluded that they were not appropriate comparators and that the direct racial discriminaiton claims were not well-founded. In our judgment, the claimant was entitled to rely on them in the belief that they were appropriate comparators. It was not a case of the

claims being misconceived, or that in pursing her claims her conduct was unreasonable.

44. As regards the indirect race discrimination claim this was predicated on the claimant's United States citizenship not entitling her to have recourse to public funds and the impact being dismissed would have had her access to public funds.

45. For the reasons given by Mr O'Dair in his written submissions, paragraphs 42 to 44, it was an arguable case to put before a tribunal. It was neither vexatious nor misconceived. Mr O'Dair suggested that the group disadvantage flowed from immigration law and practice as no recourse to public funds is a condition imposed on grounds of limited leave to enter or remain. This argument was not presented to the tribunal. Her conduct in pursuing this claim was not unreasonable.

Disability discrimination

46. In relation to the indirect associative of disability discrimination claim, we accept that the claimant felt she had been discriminated based on her son being asthmatic. She was entitled to pursue that claim before an employment tribunal. However, when the evidence was examined in some detail, there were inconsistencies in her account of events. She also stated in support of her son's trip, that as far as she was concerned, her son was suffering from mild asthma. There was not enough evidence to find that he was disabled, and no evidence of group disadvantage. We do not conclude that such a claim was misconceived, vexatious, or in bringing it her conduct that was unreasonable.

Sex discrimination

47. We apply the same approach in relation to indirect sex discriminaiton and the conclusion we reached in the liability judgment. In pursuing such claims the claimant had not acted vexatiously, nor could her conduct be described as unreasonable, or the claims being misconceived.

Ability to pay

48. Documents in relation to Mr Som and the claimant's finances were disclosed in the joint bundle with further documents sent after the conclusion of the costs hearing. From these documents the tribunal has made the following findings of fact:

    48.1 Mr Som works as an Associate Corporate Counsel for Hyland UK Operations Limited. He has held that position since 1 June 2021. His basic gross annual salary is £72,800. He has assets in the United States bank of $175,896. This equates to £141,399. This figure would vary depending on the exchange rate.

    48.2 The claimant has an income of £16,755 gross per annum She also has $40,000, the equivalent of £32,155 in the United States. She is

expecting twins and is due to give birth this year. This would mean that she will be unable to work for at least one year. She works as a Teaching Assistant, SEN, since September 2021. She told us that there is due to be an increase in her annual salary to £17,063.45 effective from 1 April 2023. She and Mr Som are likely to be repaying their United States student loans of £171 and £457 per month respectively. There is a SOFI holdings of £11,479 jointly.

48.3 They have a joint monthly income net of tax and national insurance, of £5,413.90. Their monthly expenses are:

- £13 towards trade union membership;
- rent of £1,285;
- internet usage of £58;
- telephone £76.83;
- food and household expenses £800;
- a car loan of £356;
- cleaning of £144;
- water of £28;
- gas and electricity £84 jointly;
- council tax £170;
- rental and car insurance £70.81;
- national health service prescriptions £10.81;
- TV licence £13.25;
- Gym and swimming membership £82; and
- business insurance £14.

29.4 This gives a total of £3,205.70, with a surplus of £2,208.20.

29.5 In relation to their joint savings, from their US portfolio, they have £11,479; and of significance a current balance in their UK joint bank account of £4,198.54. This gives a total of £15,677.54.

49. We have decided to take into account their means in assessing costs.

50. For the avoidance of any doubt, we have accepted the submissions by Mr O'Dair in relation to the claims in which we have decided to make no order for costs.

51. We are solely concerned with our findings and conclusion in respect of the correct employer. It was difficult to assess the proportion of the respondents' time spent in addressing this issue from the date of its response to the third day of the liability hearing when Mr Som conceded that Eleven Plus was the correct respondent. From the documents we have been taken to, this issue generated a lot of correspondence between the parties. We have also taken into account that this was one aspect of the case the respondent had to address as well as the other claims and issues. In their schedule of costs, apart from counsel's fees of £35,232, their other costs came to £42,274 making a total claim of £77,506. Taking all matters into account and doing the best we can, we have come to the conclusion

that the claimant and Mr Som are jointly liable for paying the respondents' costs in the sum of £10,000.

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Employment Judge Bedeau
7 September 2023
Date: ……..

Sent to the parties on:
12 September 2023

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For the Tribunal Office