EMPLOYMENT TRIBUNALS

Claimant: Mr T Duncan

Respondent: Fujitsu Services Limited

On: 15 December 2023 (on the papers, in the absence of the parties)

Panel: Employment Judge Quill; Ms Harris; Ms Barratt

JUDGMENT

(1) By a unanimous decision, the two deposits (of £50 each), paid by the Claimant in response to the orders sent to the parties on 14 July 2022, will be paid to the Respondent in accordance with Rule 39(5) of the Employment Tribunals Rules of Procedure.

(2) By a majority decision, (EJ Quill and Ms Harris), an order that the Claimant pay costs to the Respondent is appropriate. (The minority, Ms Barratt, disagrees that any such order should be made).

(3) By a unanimous decision, the amount of the Costs Order is for £5000, which leaves a net sum that the Claimant owes to the Respondent of £4900 (taking account of the deposit).

(4) The order for payment of the remedy sum is varied as follows. The net sum which the Respondent must pay is the balance of the remedy sum, less the award of costs, and is, therefore, (£21,572.05 minus £4,900 =) £16,672.05. the Respondent is ordered to pay that sum to the Claimant. The date for payment is within 21 days of the Claimant sending his bank account details to the Respondent's representative.

(5) Either party is at liberty to apply for further orders in relation to payment method if necessary. Alternatively, the parties are at liberty to mutually agree an alternative payment method without the Tribunal's involvement (though such agreement should be recorded in writing).

REASONS

Introduction

1. At the remedy hearing on 20 October 2023, it was agreed by parties and panel that the panel would make costs decisions on the papers, in the absence of the parties.

2. The parties had the opportunity to make submissions, including any which specifically addressed the remedy decision. In the event, each party confirmed that they relied on, and did not wish to add to, the documents that had been sent to the Tribunal prior to the 20 October hearing.

The Documents and Submissions

3. The Tribunal continues to have access to the documents referred to in the liability decision and the remedy decision. These included the Claimant's 13 October 2023 skeleton argument, as well as everything else.

4. The Respondent had prepared a 60 page costs bundle, which included its 2 October 2023 correspondence (covering email, letter, attachments) which made up about 55 pages of the bundle, as well as the Claimant's 6 October comments in response.

5. We also had the Claimant's email of 6 December 2023, and the Respondent's reply of 7 December 2023.

The Law

6. In the Employment Tribunals Rules of Procedure, the section "Costs Orders, Preparation Time Orders and Wasted Costs Orders" is Rules 74 to 84.

7. When an application for costs is made, or when the Tribunal is considering the matter of its own initiative, there are potentially the following stages of decision-making.

7.1 Has one (or more) of the criteria (for costs to potentially be awarded) as set out in the rules been met.

7.1.1 If not, there can be no order for costs.

7.1.2 If so, which specific criteria have been satisfied (and why)?

7.2 Has a rule been satisfied which requires the Tribunal to consider making an award, or is it a rule which says the Tribunal "may" consider making an award.

7.3 Either way, if the criteria for a costs order are met, that means that the Tribunal has discretion to make an award, not that it is obliged to. So what are the relevant factors in this case, and, taking into account all of the relevant factors (and ignoring anything which is irrelevant), should an award be made.

7.4 If an award is to be made, what is the amount of the award? (And what is the time for payment, etc).

8. Rule 84 states:

> **84. Ability to pay**
>
> In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

9. As per the rule, "ability to pay" is something that "may" be taken into account at each of the last two stages of the decision-making. That is: should an award be made at all; and, if so, what is the size of the award (and the timetable for payment). A tribunal is not obliged to take "ability to pay" into account, but should specify whether it has done so or not (and, if not, why not). Generally speaking, where a party wants the Tribunal to decide that they do not have the ability to pay, then the onus is on them to (i) raise the point and (ii) provide evidence to back up the argument. That being said, in accordance with the Tribunal's duty of fairness, and in accordance with Rule 2, it may be appropriate for the Tribunal to seek to ensure that a party (especially a litigant in person) understands that the onus is on them (at least, in cases where the order might be a large one): Oni v NHS Leicester City UKEAT/0133/14.

10. Rule 76, insofar as is relevant, states:

> **76.— When a costs order or a preparation time order may or shall be made**
>
> (1) 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;
>
> (b) any claim or response had no reasonable prospect of success
>
> (c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.
>
> (2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

11. Furthermore, Rule 39(5) states:

> **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
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> (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),
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> otherwise the deposit shall be refunded.

12. So one set of criteria for a costs order to be made are those set out in Rule 76(2). The tribunal is not obliged to consider making an award in such circumstances, but it may make an order. These criteria cover breaches of orders or practice direction, and they also cover postponement/adjournment where the application was made more than 7 days before the hearing was due to start.

13. If the criteria set out in Rule 76(1) are met, the Tribunal must actively consider whether or not to make an award (though it is not obliged to decide to make the award). The three subparagraphs are each independent. It is sufficient that any one of (a), or (b) or (c) is met.

14. As was noted in Radia v Jefferies International Ltd [2020] UKEAT 7_18_2102:

> 63. … earlier authorities, about the meaning of "misconceived" in Rule 40(3) in the 2004 Rules of Procedure, are equally applicable to this replacement threshold test in the 2013 Rules. See in particular Vaughan v London Borough of Lewisham [2013] IRLR 713 at paragraphs 8 and 14(6). However, in such a case, what the party actually thought or knew, or could reasonably be expected to have appreciated, about the prospects of success, may, and usually will, be highly relevant at the second stage, of exercise of the discretion.
>
> 64. This means that, in practice, where costs are sought both through the Rule 76(1)(a) and the Rule 76(1)(b) route, and the conduct said to be unreasonable under (a) is the bringing, or continuation, of claims which had no reasonable prospect of success, the key issues for overall consideration by the Tribunal will, in either case, likely be the same (though there may be other considerations, of course, in particular at the second stage). Did the complaints, in fact, have no reasonable prospect of success? If so, did the complainant in fact know or appreciate that? If not, ought they, reasonably, to have known or appreciated that?

15. So there can be an overlap in the arguments about whether the party acted reasonably in bring the claim (or conducting the pursuit of the claim or response) [Rule 76(1)(a)] and about whether the claim or response had no reasonable prospects of success [Rule 76(1)(b)]. Both sets of arguments can (and should) be

considered. See Opalkova v Acquire Care Ltd EA-2020-000345-RN at paragraphs 24 and 25.

16. As Radia makes clear (paragraphs 65 to 69), a tribunal deciding that the claim/response had no reasonable prospect of success for costs purposes is not conducting the same analysis as for a strike out application. The Tribunal is not necessarily obliged to take the paying party's case at its highest, but rather can assess what the paying party knew (or ought reasonably to have known), and when, about the strengths/weaknesses of its case. In terms of what they knew (or should have known), a party is "*likely to be assessed more rigorously if legally represented*": Opalkova para 26.

17. As Opalkova also makes clear, when there are multiple claims/complaints, the issue of bringing, or continuing, with a claim or response which had no reasonable prospect of success must be analysed separately for each complaint.

    17.1 The fact that one or more of the complaints succeeded would not – in itself - prevent a respondent from persuading the Tribunal that there were other complaints that had no reasonable prospect of success.

    17.2 Correspondingly, the fact that one or more of the complaints failed – that is that the response to that part of the claim succeeded - would not, in itself, prevent a claimant from persuading the Tribunal that part(s) of the response which dealt with the complaint(s) which did succeed had no reasonable prospect of success

18. Rule 39(5) provides a different path, for a party seeking costs, towards establishing that the criteria for a potential costs order have been met. It requires that the Tribunal which made the liability decision compares its reasons that a party "lost" on a particular argument or allegation to those given by the judge who made the deposit order about that particular argument or allegation.

    18.1 If the party did not "lose" on that particular argument or allegation then Rule 39(5) has no relevance.

    18.2 If the party did "lose" on that particular argument or allegation, but for reasons different to those stated by the judge as the reasons for making the deposit order, then Rule 39(5) has no relevance. [A fine tooth comb approach to the comparison is not appropriate. The Tribunal must analyse whether its reasons were substantially the same as those in the deposit order: Dorney v Chippenham College. [1997] UKEAT 10_97_1205.]

    18.3 If the reasons are substantially the same, then the party against whom costs are sought has the opportunity to seek to persuade the Tribunal that, even so, they should not be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76.

18.4 However, even if they fail in that attempt (that is, even if the Tribunal decides that they have not rebutted this presumption of unreasonableness), then it does not follow that costs are automatically ordered.

19. Where Rule 39(5) does not apply (for example, because a party "lost" on a particular argument or allegation but for reasons that were different to those in the deposit order; or, for example, because a party paid the deposit, but then withdrew the relevant complaint(s) before a decision was made at a final hearing) then the existence of the deposit order may still be taken into account, if appropriate, when considering (a) whether the criteria in Rule 76(1)(a) are met and/or (b) whether, in all the circumstances, the Tribunal should exercise its discretion to make a costs order.

20. Where the argument is that the party has acted "vexatiously, abusively, disruptively or otherwise unreasonably" then the only conduct that is taken into account is that which relates (either to the bringing of the proceedings or) to the way that the litigation has been conducted. This ground can potentially be established even where the paying party has been successful in the litigation. The precise details of the conduct in question will be relevant to both (a) whether the criteria in Rule 76(1)(a) are met and (b) whether, in all the circumstances, the Tribunal should exercise its discretion to make a costs order.

21. If the criteria to potentially make a cost order are met, then the factors which are potentially relevant to the decision about whether to make such an order (and, if so, how much the award should be) include, but are not limited to, the following. The Tribunal's primary duty is to follow the wording of the rules, and to make specific decisions on the facts and merits of the case in front of it.

21.1 Costs are the exception rather than the rule. A party seeking costs will fail if they do not demonstrate that the criteria (in the Tribunal rules) for *potentially* making such an order have been met. However, the mere fact alone that the criteria have been met does not imply that the general rule is to make a costs order in such circumstances.

21.2 Costs, if awarded, must be compensatory, not punitive. If the argument that there has been unreasonable conduct is made then the whole picture of what happened in the case is potentially relevant. However, it is necessary to identify the specific conduct, and decide what, specifically, was unreasonable about it and analyse what effects it had. Some causal link between the conduct and the costs sought by the other party is required. Yerrakalva v Barnsley [2011] EWCA Civ 1255.

21.3 Was the party warned that an application for costs might be made, and, if so, when, and in what terms.

21.3.1 The lack of such advance warning does not prevent an application being made (or the Tribunal granting it). Rule 77 gives a party up to 28 days after the date on which the judgment finally determining the proceedings was sent to the parties. Furthermore, while the rule gives the other party the right to a reasonable opportunity to make representations in response to the application, it does not impose a requirement that they were warned before the application was made.

21.3.2 However, the issue of whether a party (especially a litigant in person) was aware of the possibility of having to pay costs is likely to be relevant. This can be demonstrated by something other than a costs warning from the opposing party: for example, comments made at a preliminary hearing; the fact that they had been involved an earlier case in which there was a costs application; the fact that they themselves had expressed an intention to seek costs from the other side.

21.3.3 If a warning has been made, its precise terms will be relevant. A simple boilerplate threat to apply for costs, which appears to a knee jerk response that the party (or its representative) always sends out, is likely to be far less persuasive than a considered attempt to address the arguments raised by the other party, and explain why they have no prospect of success, or to explain why the particular conduct has been unreasonable, and what the rules or case management orders (specifically) require instead.

21.3.4 The timing of the warning will be relevant, as will the issue of whether the warning was updated and repeated at relevant stages.

21.3.5 The fact that a costs warning was made, even one which is clear and detailed and well-timed, and which foreshadows the precise basis on which the application was later made, does not guarantee that an order will be made.

21.4 What advice did the party have? Who from? When? It can be a double-edged sword that a party has taken legal advice. On the one hand, they might seek to argue that since a lawyer advised them that the claim had merit, it was not unreasonable to pursue it. On the other hand, the opposing party might seek to argue that (even if the paying party was a litigant in person at the Final Hearing) the fact that they had legal advice available shows that they ought to understood the claim was hopeless, and/or that their conduct was inappropriate, and/or that a settlement offer that had been made was a good one. To rely on the former argument, the paying party might have to waive privilege over the advice in question. However, there is no obligation to do so to defend itself against the latter inference; where privilege is not waived, the Tribunal will not make assumptions that the party specifically received advice

that they were acting unreasonably, but the fact that advice was available to them is likely to undermine an argument that, as a litigant in person, they could not reasonably have been expected to anticipate the arguments being raised by the costs application.

21.5 Is there admissible evidence about settlement offers. Was there an "open" offer (that is, one which was not "without prejudice"). Alternatively, was there an offer which was "without prejudice save as to costs" (that is, an offer which was inadmissible at an earlier stage, but which became relevant when costs were being discussed; whether raised as a defence to a costs application, or in support).

21.5.1 Rules in the civil courts about so-called "Calderbank" offers do not apply in the Employment Tribunal. Kopel v Safeway. EAT/0281/02

21.5.2 There is no presumption that an unsuccessful claimant who rejected an offer (which was an open offer, or which was "without prejudice save as to costs") will have to pay costs, even if they were warned that their rejection of the offer would be (part of) the basis for a costs application.

21.5.3 The same is true (even more so) if a Claimant "wins" their case, but is awarded less compensation than was offered.

21.5.4 The same is true if a respondent "loses" the case, and is ordered to pay more compensation than the claimant offered to settle for.

21.5.5 Admissible evidence about a prior offer (and the rejection) can be taken into account, but the test which must be applied is set out in the wording of Rule 76. The failure to accept a prior offer might be relevant to whether the claimant has conducted proceedings unreasonably, but does not automatically establish that they have done so. Anderson v Cheltenham and Gloucester plc. UKEAT/0221/13/BA.

21.5.6 The fact that a respondent has made an offer to settle, even a sizeable one, does not, in itself, demonstrate that the respondent considered that the claims (or any of them) had reasonable prospects of success. (See Vaughan v Lewisham UKEAT/0533/12/SM, especially para 14(3)). Similarly, the fact that a claimant had made offers to settle (even for small sums, does not, in itself, demonstrate that the claimant considered that the claim(s) had low prospects of success.

Analysis and conclusions

22. The history of the matter, including the timing of the submission of each of the three claim forms, is set out in the liability decision.

Deposit – Rule 39(5)(b)

23. There were several preliminary hearings. Following a hearing which dealt with claims 1 and 2, on 2 November 2021, EJ Daniels made several deposit orders (declining the Respondent's application on several others) and gave detailed reasons. These were sent to parties in December 2021. The Claimant did not pay these deposits, and a number of complaints therefore did not proceed. Paragraphs 44 to 50 of the liability decision itemise those which did.

24. There was a further preliminary hearing on 7 July 2022. EJ R Lewis made three deposit orders which related to claim 3 about these allegations or arguments:

    (1) That the dismissal was an act of direct disability discrimination;

    (2) That the failure to refer back (paragraph 38 of the ET1) was an act of direct disability discrimination;

    (3) That the Claimant was unfairly dismissed.

25. The Claimant did not pay the deposit for the middle allegation or argument, but paid the other two. The complaints in Claim 3 which proceeded are identified in paragraph 51 of our liability decision.

26. EJ R Lewis's reasons, as sent to the parties on 14 July 2022, included:

> 2. I take the claimant's case to be that set out in the pleaded claim signed by experienced counsel attached to the ET1.
>
> 3. The respondent's case is that the claimant was dismissed for prolonged, repeated use of abusive language on a work-based Slack system, as set out in the schedule attached to its response. The claimant does not deny use of the language in question.
>
> 4. I can see little prospect of the tribunal finding that disability was a factor in the decision to dismiss. I can see little prospect of the claimant showing that a non disabled person who used the same language would not have been dismissed.
>
> 5. In the factual matrix of the claimant's disciplinary case I can see little prospect of the tribunal finding that disability was a factor in failing to refer back to him, or that a disciplinary case against a non disabled employee would have been managed differently.
>
> 6. The conduct which led to dismissal is and was admitted. Allowing for the range of reasonable responses test which applies to a disciplinary investigation and outcome I can see little prospect of the claim of unfair dismissal succeeding.

27. In this Tribunal's liability decision, our analysis of Claim 3 (which built on the earlier findings of fact, and comments about the law, and, in so far as was relevant, the decisions on the other complaints) was at paragraphs 1118 to 1163.

28. The analysis in relation to direct discrimination commences at paragraph 1130. We noted that the dismissal reasons were "*those [the dismissing officer, Ms Walton] sets out in the dismissal letter (and paragraph 19 of her witness statement).*" We said why Ms Shelton and Mr Welek were not actual comparators, and went on to consider hypothetical comparators. At paragraph 1134, we said: "*Even taking into account section 136 EQA, there is no evidence from which we could conclude that a hypothetical comparator would not have been dismissed*."

29. We summarised the procedure and (at paragraph 1138) decided that it was not an unreasonable procedure. Our decision (at paragraph 1162) that the decision to dismiss was within the band of reasonable responses built on our analysis (paragraphs 1144 to 1161) about which remarks had been made (and when and why) and whether the decision was "proportionate", as per section 15(1)(b) of the Equality Act 2010.

30. It is the panel's unanimous decision that the reasons that the Claimant was unsuccessful in establishing that the dismissal was discriminatory, and unsuccessful in establishing that the dismissal was unfair are substantially the same as the reasons given by EJ R Lewis for making deposit orders in relation to allegations/arguments (1) and (3) as set out above.

31. Therefore, Rule 39(5)(b) applies, and the two deposits are to be paid to the Respondent.

Are the criteria for a costs award met

32. The panel's unanimous opinion is that some of the material included by the Respondent in its costs application is inadmissible.

33. Paragraphs 62 to 72 of the liability decision set out our decision on an application made by the Claimant (which was opposed by the Respondent) which was twofold: (i) that certain material which the Respondent said was "without prejudice" ought to lose that privilege (or be deemed not to have it) and (ii) that the material supported the Claimant's argument that the response should be struck out.

34. We concluded paragraph 71 by saying:

> Our decision is that the content of the settlement discussions, including via written correspondence and/or orally, is not admissible evidence, either in relation to the strike out application, or for the substantive hearing. We have put what we have been told about those things out of our minds.

35. Had the Respondent, before or during the liability hearing, decided to argue that the Claimant had waived without prejudice privilege, and that it wished to accept that waiver, and that – therefore – the without prejudice material was all admissible evidence because of a joint waiver by the parties, then that argument was – in the

circumstances – almost certain to succeed. However, the Respondent did not do so. It maintained that the material was privileged, and that it did not agree to a joint waiver. Its argument was successful. It cannot now – after we decided the material was inadmissible at the liability stage – revert back to the Claimant's actions prior to (or during) the liability hearing and say that it wishes to accept the Claimant's waiver. It is too late. Since our liability decision was sent to the parties, we do not consider that the Claimant has taken further action to (again) waive privilege. [We do not ignore paragraph 14 of the Claimant's 13 July 2023 email, which was treated as a reconsideration request, but we deem it to be part and parcel of the liability hearing.]

36. The letter dated 12 September 2022 [Costs Bundle 44] is marked "without prejudice" rather than "without prejudice save as to costs". We deem it inadmissible for that reason. Furthermore, while the letter deals with several points, it said: "The purpose of this letter is to confirm how we ended the mediation and provide clarity." Evidence of what occurred during judicial mediation is not admissible, and a letter written after judicial mediation is not admissible for the purposes of confirming what took place in the mediation. It does not mean that it was unreasonable to put in writing that an offer had been made, and that it remained open until a specific date; but that is a separate point to whether details of the offer are admissible. In any event, the assertion in the letter that the offer was first made in the judicial mediation is not admissible.

37. Elsewhere in the costs bundle, both in its application and, in the documents (letters sent by the Respondent's representative to the Claimant) there are various references to judicial mediation. In each case, we regard the details of what (according to the Respondent) as having happened during the judicial mediation hearings as being inadmissible, and we have disregarded those comments. We have not deemed the entire documents to be inadmissible, just those parts which purported to reveal the contents of the judicial mediation.

38. Similarly, the 14 March 2022 letter [Costs Bundle 12 to 17] purports to give a lot of information about the contents of private mediation. We are not satisfied that the Claimant agreed, at the time of that private mediation, that it was to be "without prejudice save as to costs". The Respondent cannot later render the (alleged) contents of the prior mediation admissible simply by setting them out in a letter marked "without prejudice save as to costs". We have disregarded the assertions about precisely what was said and (especially) the assertions about the opinions of the mediators or alleged comments by the Claimant's legal representative. In fairness to both sides, we do not ignore that there were some discussions at that time (towards the end of 2021). In fairness to both sides, we find that each side showed some willingness to attempt to reach agreement, but that neither side thought that the other's offers were acceptable.

39. Based on the admissible evidence, therefore, our findings about the negotiations are:

39.1 Following previous unsuccessful attempts at settlement, the Respondent made an offer which was "without prejudice save as to costs" on 14 March 2022. This was on the basis that it was in full and final settlement of all claims, including Claim 3 (issued the previous July). This was about 11 months after dismissal, and after various preliminary hearings. It was after EJ Daniels' deposit orders and before EJ Lewis's. The offer was made to the Claimant as a litigant in person, though it – correctly – asserted that he had previously had legal representation when Claims 1 and 2 were issued, and during the earlier preliminary hearings, and negotiations. (In fact, the Claimant was also legally represented when Claim 3 was issued, according to Box 11 of that claim form.) The letter mentioned the size of what it said were typical ET awards, and included some material about prior mediation which we deem inadmissible. It made an offer of "£48,750 in full and final settlement of the Claims" and suggested the Claimant seek advice. It gave details of CAB. The offer was open for 11 days, to 25 March 2022. It included:

> … if you reject this settlement offer, but fail to beat this offer at trial, we may bring the contents of this letter to the attention of the Tribunal at the end of the trial and ask the Judge to make an order requiring you to pay the legal costs that our client incurs from the expiry of the Deadline, together with interest on those costs from that date until payment.

39.2 On 22 July 2022, the Respondent made an offer, which referred back to the 14 March letter. It alleged that refusal would be unreasonable conduct, and that it reserved the right to bring it to the Tribunal's attention. It referred to the deposit order that had recently been made by EJ Lewis. It commented on the Claimant's schedule of remedy and comments made about it by EJ Lewis. It made an offer of £70,000, open for 7 days, until 29 July 2022. The letter included:

> We would urge you to reconsider your position, and also to take further sensible legal advice on the potential consequences of rejecting it.
>
> If a settlement cannot be reached, the Respondent is committed to defending these proceedings as robustly as possible and seeking full recovery of its costs. It has been patient in the face of increasingly unreasonable settlement demands. That patience is now at an end.
>
> **COSTS**
>
> The Respondent has made the offer set out above in an attempt to save both parties unnecessary upheaval, distress and costs associated with adversarial litigation over the next few months (and likely beyond). It is intended to afford you the opportunity to have a lump sum in order to look to the future. We would urge you to do so.

39.3 A letter dated 9 August 2022, though marked "without prejudice save as to costs" contained no fresh offer. We disregard the comments about preparations (or alleged lack thereof) in relation to judicial mediation, including, and especially, the comments attributed to the judge when outlining the process to the parties. The letter repeats/reiterates some comments from the July letter. It includes:

> To be clear, nobody is seeking to interfere with your right to have your case determined at a trial if that is the way that you wish to proceed, but you must be fully aware of the risks of doing so.

40. It is common ground that the offers mentioned above were not accepted.

41. Although we do not consider the evidence about it to be admissible, none of the panel believes that our respective analysis/decisions would be any different if we took into account that there was a later offer by the Respondent of £100,000 which was also not accepted.

42. In terms of the effects, on the final hearing, of the fact that the dismissal complaints continued after the deposit orders, some of the Respondent's witnesses would not have been required if the dismissal allegations had not been part of the case. That includes, of course, Ms Walton who took the decision to dismiss on behalf of the Respondent, and Mr Marsden who dealt with the appeal.

43. In addition, a lot of time was spent at the hearing in discussing issues related to the "chat logs". The panel wanted to see clearly what material had been sent by the Claimant to Dryden etc as part of his grievance (these being the redacted versions of the chat logs). That required a supplement to Mr Dryden's evidence to be prepared (liability reasons, paragraph 39).

44. There was also the dispute about how the unredacted versions had been obtained, and submitted to Ms Walton (and Mr Middleton). That caused Ms Walton to have to make the further enquiries – during the hearing, but before her evidence commenced – set out in paragraph 422 of the liability reasons.

45. There was also the issue the Claimant raised about hacking or improper access to his devices (which was not mainly about the chat logs, but included reference to the dispute about how the Respondent obtained those).

46. It is clear that the Respondent's legal representatives would have had significantly less work to do to prepare for the hearing had it not included dismissal. It is also our decision that the final hearing would have been shorter. It is not feasible to place precise figures on how many hours of legal work would have been saved, or how many days' reduction in the final hearing there would have been. While not negligible, the "savings" would have been significantly less than half of the overall totals in each case.

47. The Respondent's representative also seeks to rely on the fact that the Claimant did not question Ms Walton about the chat logs, or give evidence about them himself. We dealt with that in paragraphs 30 and 31 of the liability reasons. We simply do not agree with the Respondent that this was conduct within the definition in Rule 76(1)(a). We accepted that the Claimant was genuinely not able to deal with these issues, and that any attempt to seek to require him to do so would have meant that he became too upset to continue with the hearing. A litigant, such as the claimant, faced with a scenario such as that still has the right to a fair trial; they are not required to simply drop that part of the claim. The party may well be disadvantaged by being unable to deal with the issue (and we accepted at the time, and still do, that the Respondent was potentially also disadvantaged), but the court or tribunal has a duty to try to minimise any disadvantage to either side, and to make a decision on the merits.

48. The Claimant has not worked since the termination of his employment. He had savings at the start of the litigation, but that has all been spent. He is living off universal credit, and regards himself as insolvent.

49. The Tribunal accepts that, for medical reasons, the Claimant is not currently capable of work. We cannot say how long that situation will continue. For the purposes of this costs decision, it is not necessary or appropriate to comment on the reasons that he is unable to work. The Claimant's genuine opinion is that the Respondent has brought this about. We do not assume that the situation will necessarily improve, just because this litigation is now at an end (especially because, but not only because, the Claimant has mentioned continuing it by way of appeal). However, nor do we decide that the situation is necessarily one which will not improve in due course.

Should there be a costs order: Majority decision – Ms Harris and EJ Quill

50. Having considered Rule 39(5), we do not think that "the contrary is shown".

51. We do think that the Claimant's pursuit of the dismissal allegations was unreasonable conduct of the litigation, taking into account the clear warning given by EJ Lewis in the reasons for making the deposit order. It is also clear that doing so led to significant extra expenditure for the Respondent.

52. It does not automatically follow that just because Rule 39(5)(a) or Rule 76 is satisfied, that a costs award should be made. However, in this case:

    52.1 The Claimant did have legal advice at various stages in the litigation, including when Claim 3 was issued.

    52.2 He did receive several warnings from the Respondent about costs.

52.3 He was offered alternatives to proceeding. He could simply have not paid the deposit orders (as he knew, given that he did not pay others). He could have accepted the settlement offers.

52.4 He knew the hearing was to be a long one, and knew this was a significant part of the time that would be spent.

52.5 He knew that a large part of his schedule of loss depended on being able to show that the dismissal was discriminatory. Further, failing that, he knew that a large part depended on showing that it was, at least, unfair.

53. In terms of the offers made, we take account that one potential reason for continuing with a claim is that, if successful, there is a public declaration that the other party has breached legal obligations. That can be a benefit in and of itself to the claimant. Additionally, a claimant might reasonably think that by "standing up" to the employer, they might benefit others too; we accept that, in this case, the Claimant had that opinion.

54. However, unless the Claimant had been able to prove that his dismissal was discriminatory (or, at least, unfair) then the financial offers exceeded anything that he might have hoped to achieve for injury to feelings, plus interest, plus grossing up. The offers were in excess of the top of the upper Vento band (£45,000 at the time Claim 2 was issued), and we consider that (without the dismissal element) it was unreasonably unrealistic to think that an award in the upper Vento band might be made, for the allegations in Claims 1 and 2, even had they all succeeded.

55. We take account of the fact that the Claimant was not so intransigent as to refuse to negotiate. That is a point in his favour. At the same time, the reasons that the negotiations failed was that the Claimant was seeking higher sums than were offered; it was not, for example, that the Claimant had agreed to take what was offered (in March say, being £48,750) but also wanted some assurances about how the Respondent might deal with disabled employees in the future.

56. We take account of the Claimant's disability. However, the Claimant's disability has not prevented him doing legal research, for example, in relation to appellate level decisions about awards of costs. We are satisfied that the Claimant fully understood what EJ Lewis wrote, he just did not agree that a judge's explanation of why those complaints had little reasonable prospects of success gave him a reason for him to drop his claim.

57. A telling point was that, during the early stages of cross-examination, when asked to consider documents and to agree that they said certain things (and/or that they did not say what he had alleged they said), the Claimant was willing say that the document might not be genuine and/or that it did not match his recollection of what he said. When asked (by the panel) if he possessed different versions of the

document, he said that he did not know, and he might have. He suggested that he had neither given detailed consideration to the contents of the bundle, or, recently, reviewed the contents of documents in his own possession. These questions were not about the items that he was too upset to be able to read (the chat logs and documents about dismissal), but were about much earlier points in time.

58. Our view is that it was not the Claimant's disability which prevented him giving detailed consideration to the merits of his case and the merits of the Respondent's opposing arguments. He knew the risks, and understood the risks, but he simply wished to continue with the case and to pursue the allegations, including two for which he had to pay a deposit, because a judge had told him they had little prospects of success.

59. We take account of the fact that the Claimant was successful in 6 complaints, as set out in the liability decision. He was unsuccessful on the vast majority, but, by definition, he was not unreasonable to pursue those complaints that did succeed.

60. The Respondent's application is limited to a maximum of £20,000 (because that is the amount in Rule 78(1)(a)). We are satisfied that the Respondent's costs of dealing with the dismissal elements alone far exceed £20,000. (This amount being less than 7% of its overall costs, including counsel fees, but not including VAT).

61. We take account of the Claimant's ability to pay. He is not working and does not have savings. However, in all the circumstances (including that an award of compensation is being made in his favour), we do not think that the lack of ability to pay should lead to a decision to make no costs order at all. Rather, the majority decision is that we should exercise our discretion to order costs, but take account of the Claimant's lack of ability to pay when making the decision about the size of the order.

Should there be a costs order: Minority Decision – Ms Barratt

62. A very important factor is the Claimant's disability. The Claimant felt a strong sense of injustice, and that was an important motivating factor for (i) continuing the litigation after the settlement offers and (ii) carrying on with the arguments about dismissal after the 2022 deposit orders. The Claimant's disability was an important factor which led him to believe that accepting a settlement offer, or dropping the parts of his claim relating to dismissal, would be against his moral code, and would be unethical.

63. The Claimant's disability was a contributory factor to regarding everything which the Respondent and its legal representatives did as being unethical, and his perception that a settlement could be used as a cloak to disguise wrongdoing.

64. The Claimant believed that the fact that the Respondent was willing to offer any payment (especially offers of the size mentioned above) was firstly a sign that the company knew its employees had discriminated and secondly a sign that they would rather pay money to him than tackle discrimination in its workforce. His disability was a factor in that, but not the only reason for his opinion.

65. The wording of the offer letters / "without prejudice save as to costs" letters / warning letters was inappropriate to the Claimant's circumstances. They were likely to, and did, upset the Claimant and increase his sense of grievance. They inflamed the situation further rather than gave the Claimant an incentive to reach an amicable agreement.

66. The minority decision is that the "contrary" has been shown for the purposes of Rule 39(5) and, furthermore, that the Respondent has not demonstrated, for the purposes of Rule 76, that the Claimant's conduct of the litigation, or pursuit of any of the claims, had been unreasonable.

67. The Claimant succeeded on some of his complaints. While that, in itself, would not prevent a costs order in relation to (some or all of) the others, it demonstrates that there was a legitimate substance to the Claimant's sense of grievance.

68. The minority decision is that the criteria for a costs order have not been met.

69. The Claimant does not have the ability to pay a cost order (at least, if the remedy compensation is ignored), and the minority decision is that – even if the criteria for a costs order had been met – the tribunal should exercise its discretion by making no order for costs.

Size of Award - unanimous

70. The Respondent's schedule is for solicitors costs of £226,566.40 and counsels' fees of £84,275.00 plus some other disbursements. Since the application is limited to a request for £20,000, we do not need to comment in detail.

71. While we cannot assess, in precise detail, how much was spent on dealing with the dismissal elements, and/or how much was spent after the 2022 deposit orders were paid, and/or how much was spent after the March 2022 or July 2022 offers respectively expired, we can confidently say that the amount of time dealing with the dismissal elements immediately before, and during, the liability hearing comfortably accounted for in excess of £20,000. As we said above, the hearing would not have been reduced in half, but even apart from the two witnesses who would not have been needed at all, there would have been fewer cross-examination questions to the other witnesses, including the HR witnesses, and Dryden, and Welek and Shelton. The time spent dealing with various issues about the chat logs would have been avoided. While we reject the Respondent's specific submission that the Claimant's inability to give evidence about the chat logs was

an example of unreasonableness, it is a simple fact that had he not paid the deposit, he would not have been asked questions about them, and the hearing time that was lost while he recovered from those questions would not have been lost.

72. Thus, the Respondent has demonstrated that (well in excess of) £20,000 costs has been incurred by the conduct which the majority found to be unreasonable.

73. It is appropriate to take into account the Claimant's ability to pay. Had he failed on all of his complaints, and had no income and no savings, we might have considered an award which required him to make payment by instalments.

74. We are satisfied that the Claimant does not have the ability to pay an award of £20,000. If such an award was to be paid in (small) instalments from Universal Credit, it would take many years. (Although, of course, as with any claimant, their circumstances might change in the future, enabling them to make immediate payment.)

75. He did succeed on some complaints. As a result, he is entitled to an award of remedy. In fact, he would have received this already, but, as the parties' correspondence shows, he asked the Respondent to defer payment.

76. In the circumstances of this case, exercising our discretion, we do not think it would be appropriate to make an award which almost entirely wiped out the entirety of the remedy award. However, nor do we believe that it would be in the interests of justice to turn a blind eye to the fact that the Claimant does not have nil assets; he has the expectation of payment of a lump sum of £21,572.05.

77. Our unanimous decision is that (on the basis of the majority decision that there should be a costs order) the appropriate amount to order the Claimant to pay to the Respondent is £5,000. Our decision is that the Claimant's £100 deposit, that will be paid out to the Respondent by HMCTS, should count towards the £5000.

78. Furthermore, based on the parties' correspondence in December 2023, we vary the order for payment of the remedy sum, and instead order the Respondent to pay the Claimant a sum which is the net amount left over after taking account of the £4900 balance (for the costs the Claimant is ordered to pay) is deducted from the remedy award.

Employment Judge Quill
Date: 22 December 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 2/1/2024.
N Gotecha - FOR EMPLOYMENT TRIBUNALS