



EMPLOYMENT TRIBUNALS

Claimant: Ms Zalejska
Respondent: Cameo Consultancy (Recruitment) Limited
Before: Employment Judge Annand

JUDGMENT

1. The Respondent's application for a costs order is refused. No costs order is made.

REASONS

2. The Claimant brought a claim of direct disability discrimination. A liability hearing was held at Reading Employment Tribunal on 28 and 29 September 2023. The Tribunal reserved its judgment. A reserved judgment was sent to the parties on 19 October 2023. The Claimant succeeded with her claim for direct disability discrimination. A remedy hearing was listed for 15 December 2023.
3. At the remedy hearing, which was held in person on 15 December 2023, the Claimant was awarded a total of £18,703.79 in compensation. The Respondent was ordered to deduct the tax and national insurance payments owed on £3,022.26 of that amount. The reasons for the judgment were given orally at the hearing.
4. Following the remedy hearing, a remedy judgment was sent to the parties on 26 January 2024. The Claimant applied for reconsideration and appealed the remedy judgment on 5 February 2024, and asked for written reasons for the judgment on 8 February 2024. On 11 March 2024, the reasons for the remedy judgment were written up and subsequently sent out to the parties.
5. On 23 February 2024, the Respondent applied for a costs order under Rule 76(1)(a) of the Employment Tribunal rules and provided a costs schedule in the amount of £16,569. The basis of the application was that the Claimant had "acted vexatiously, abusively, disruptively, or otherwise unreasonably in the bringing or conducting of the proceedings, or a part of them". The Respondent set out in the application that the Claimant was invited to participate in settlement discussions on 1 November 2023. She indicated she would accept £12,000 on 17 November 2023. The Respondent agreed to this

proposal and said they would send a COT3 to the Claimant. On 20 November 2023, the Claimant withdrew her offer of £12,000 on the basis she believed she would obtain a higher award at the remedy hearing. She advanced a further offer of £20,000. While the Respondent considered the offer, it sent the Claimant a copy of a COT3 on 21 November 2023. The Respondent then made several attempts to contact the Claimant. On 27 November 2023, the Claimant advised the Respondent that the COT3 wording was not acceptable as it was unfavourable to her. She was asked to explain which wording she found objectionable. On 30 November 2023, the Respondent wrote to the Claimant to inform her that they were willing to accept the offer of £20,000 and asked for a response by 1 December 2023. The Claimant responded on 4 December 2023 stating she was not happy with the terms and conditions set out in the COT3 and stating that £20,000 would not compensate her loss. As a result, the Respondent prepared for and attended the remedy hearing.

6. The Respondent also set out in the application that the Claimant acted unreasonably in refusing to confirm her account details when they were requested on 30 January, 1 February and 5 February 2024. The Claimant said she was appealing the decision and did not want to receive the payment. The Respondent were able to find her bank details from when she had been paid previously and payment was made.
7. The Respondent's application seeks £12,887.40 for the preparation and attendance at the remedy hearing, and £4,471.80 in respect of the costs of arranging the payment to be made to the Claimant and the costs incurred making the costs application. The Respondent requested a hearing for the costs application to be heard.
8. The costs schedule sets out the Respondent's solicitors costs from 17 November to 15 December 2023, Counsel's costs for the remedy hearing, and the Respondent's solicitors costs from 30 January 2024 to 23 February 2024.
9. On 24 February 2024, the Claimant sent an email to the Respondent's solicitor and the Tribunal stating that she did not understand her responsibility to pay the Respondent's solicitors hourly rate of pay.
10. On 28 February 2024, the Claimant sent a further email to the Respondent's solicitor and the Tribunal saying she did not understand how the Respondent's schedule of costs had impacted on her case, she had tried to settle the claim multiple times before the hearing, and that she could not take responsibility for the Respondent's decision to hire a particular solicitor or the decision to charge a particular rate.

The relevant law

11. Rule 74 of the Employment Tribunal Rules 2013 sets out that "“Costs” means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing).”
12. Under Rule 75 (1), “A costs order is an order that a party (“the paying party”) make a payment to - (a) another party (“the receiving party”) in respect of the

costs that the receiving party has incurred while legally represented or while represented by a lay representative.”

13. Rule 76(1) states “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.”
14. Rule 77 sets out the relevant procedure. It notes, “A party may apply for a costs order or a preparation time order at any stage 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. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.”
15. Under Rule 78, a cost order is limited to a maximum of £20,000. Rule 84 states that the Tribunal may have regard to the paying party’s ability to pay.
16. When determining an application for costs, a Tribunal should consider first if the relevant jurisdictional threshold in Rule 76 is met. If so, the Tribunal should then ask if it should exercise its discretion in favour of making a costs order, and then consider the amount of any costs order.
17. For the purposes of Rule 76(1)(a) the word “unreasonable” is to be given its ordinary English meaning and is not to be interpreted as meaning something similar to vexatious (*Dyer v Secretary of State for Employment* UKEAT/0183/83).
18. The EAT in *AQ Ltd v Holden* [2012] IRLR 648, EAT held an employment tribunal cannot, and should not, judge a litigant in person by the standards of a professional representative. Justice requires that tribunals do not apply professional standards to lay people, who may well be embroiled in legal proceedings for the only time in their life. Lay people are likely to lack the objectivity and knowledge of law and practice brought to bear by a professional legal adviser. The EAT stressed that tribunals must bear this in mind when assessing the threshold tests in the rule that is the equivalent to Rule 76(1) of the Tribunal Rules 2013.
19. The Tribunal should consider the nature, gravity and effect of the unreasonable conduct, but it is appropriate to avoid a formulaic approach and have regard to the totality of the relevant conduct. As Mummery LJ explained in *Yerrakalva v Barnsley Metropolitan Borough Council and anor* [2012] ICR 420, CA at paragraph 41: “The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there 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 effects it had...”

20. A Tribunal is not however confined to making an award limited to those costs caused by the unreasonable conduct (*McPherson v BNP Paribas (London Branch)* [2004] ICR 1398, CA). In *Yerrakalva v Barnsley Metropolitan Borough Council*, the Court of Appeal emphasised that whilst the Tribunal is not limited to awarding those costs incurred by the receiving party as a result of the paying party's unreasonable conduct, the "effect" of the unreasonable conduct will often be a relevant factor in the Tribunal's exercise of its discretion.
21. With regard to litigation in the civil courts, the rule in *Calderbank v Calderbank* [1975] 3 All ER 333, CA, applies where a claimant, having succeeded on the issue of liability, obtains an award of damages equivalent to or less than an earlier settlement offer. The rule states that, in such circumstances, the claimant will bear the costs incurred by the respondent from the date on which the offer was rejected. In *Kopel v Safeway Stores plc* [2003] IRLR 753, EAT, however, the EAT held that the rule in *Calderbank* has no place in employment tribunal jurisdiction. A tribunal claimant will not necessarily be liable for costs where he or she rejects a *Calderbank* offer and is eventually awarded less than that offer, or even nothing at all. However, a claimant's refusal of such an offer was a factor that a tribunal could take into account in deciding whether to award costs.
22. In *Anderson v Cheltenham and Gloucester plc* EAT 0221/13 the EAT reiterated that the *Calderbank* principle does not apply in full to employment tribunal litigation but that the failure to accept a prior offer may have a bearing on whether the claimant has conducted proceedings unreasonably or pursued a claim that has no reasonable prospect of success.
23. In circumstances where the Tribunal finds that the jurisdictional threshold in Rule 76 is met, the Tribunal retains a broad discretion as to whether to make a costs order and the amount of any costs awarded. In *Radia v Jefferies International Ltd* UKEAT/0007/18/JOJ the EAT said:

"61. It is well-established that the first question for a Tribunal considering a costs application is whether the costs threshold is crossed, in the sense that at least one of Rule 76(1)(a) or (b) is made out. If so, it does not automatically follow that a costs order will be made. Rather, this means that the Tribunal may make a costs order, and shall consider whether to do so. That is the second stage, and it involves the exercise by the Tribunal of a judicial discretion. If it decides in principle to make a costs order, the Tribunal must consider the amount in accordance with Rule 78. Rule 84 provides that, in deciding both whether to make a costs order, and if so, in what amount, the Tribunal may have regard to ability to pay."

The Tribunal's conclusions

24. The Tribunal does not consider that the costs threshold is met. The Claimant's conduct, as described by the Respondent, does not reach the threshold of being "unreasonable". The Claimant has been unrepresented throughout these proceedings, English is not her first language, and she has mental health difficulties. She has had to navigate the process of bringing a claim in the Employment Tribunal herself. While she has generally managed that process well, it has been apparent at times that she has not fully

understood the process. It would appear from her correspondence to the Respondent and the Employment Tribunal, as set out above, that she has not fully understood the Respondent's application for costs.

25. The essence of the Respondent's complaint is that the Claimant acted unreasonably by failing to engage in a discussion about what she found objectionable about the terms of the COT3 wording. She is criticised for not having responded to their request for clarification sooner. However, it is noted that in the Respondent's description of these events, the Claimant made an offer of £20,000 on 20 November 2023 and the Respondent did not communicate its agreement to that offer until 30 November 2023 - 10 days later. It is then surprising that the Claimant is criticised for failing to respond to the draft COT3 wording between 21 November 2023 and 27 November 2023. Even if the wording of the COT3 was "standard" to the Respondent's solicitors, the Respondent cannot reasonably have expected it would have been easily understood by the Claimant.
26. Further, it was not reasonable for the Respondent to indicate its acceptance of the offer on 30 November 2023 and then have expected the Claimant to have confirmed agreement by 1 December 2023, particularly when she was not legally represented, and English is not her first language.
27. The Respondent asserted in the application that the Claimant acted "unreasonably in pursuing and conducting proceedings having put forward a number of proposals to the Respondent which it had agreed to pay". It clearly was not unreasonable for the Claimant to have withdrawn her offer of £12,000 given she was in fact awarded more than that at the remedy hearing. Nor is the Tribunal persuaded it was unreasonable for her to decline to confirm her acceptance of an offer which she originally made on 20 November 2023, which the Respondent only confirmed was accepted on 30 November 2023, and which they then asked her to respond to by 1 December 2023. The Tribunal does not find the Claimant's actions to have been unreasonable in these circumstances.
28. For these reasons, the Tribunal does not consider that the costs threshold is met. The Tribunal does not consider the Claimant acted unreasonably. Even if the threshold were to have been met, the Tribunal would not have exercised its discretion to award costs in any event as the Claimant has not been legally represented in these proceedings, English is not her first language, and she has mental health difficulties. As noted in the case law cited above, justice requires that tribunals do not apply professional standards to lay people.

Employment Judge Annand

Date: 14 March 2024

JUDGMENT SENT TO THE PARTIES ON

20 March 2024

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