**Case No. 1802895/2022**

# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Mubin

**Respondent:** Arla Foods UK PLC

**HELD AT:** Manchester (via CVP) **ON:** 9th January 2024

**BEFORE:** Employment Judge Anderson
Mr Lannasman
Mr Wilson

**REPRESENTATION:**

**Claimant:** Mr Malik (Counsel)

**Respondent:** Mr Frew (Counsel)

# RESERVED JUDGMENT

1. The Respondent's application for costs succeeds. The Claimant is ordered to pay the Respondent the sum of **£5000 (Five Thousand Pounds).**

# REASONS

**Introduction**

1. This is the reserved Judgment of the Tribunal in respect of an application for costs made by the Respondent in Employment Tribunal proceedings, namely Arla Foods UK PLC. The Claimant is Mr Mudassar Mubin, a job applicant in respect of an advertised role within the Respondent.

## The Issues

2. The parties agreed that the following issues fell to be determined:

   a. Whether the Respondent had proven that the threshold for a costs award had been met.
   b. If it had been met, whether the Tribunal should exercise its discretion as to whether to take into account the means of the Claimant.
   c. Whether, exercising its residual discretion, there should be an award of costs.
   d. If there should be an award of costs, the amount of costs to be ordered to be paid

## Procedural Matters

3. Following the Respondent's costs application, there was correspondence with the parties and with the Tribunal regarding the claimant's preparation for today, including the claimant seeking a postponement. That application had been refused previously. Today, the claimant was represented for the first time by Counsel. No further applications were made. The Tribunal is satisfied that the parties had sufficient notice of todays hearing and were in a position to proceed. No party took issue with the hearing taking place by way of CVP.

4. The Claimant had not produced a witness statement for today, though there was no specific direction in this regard. The Claimant did serve a second set of documents the day or so before the hearing in breach of a previous order regarding disclosure of documents for today. The Tribunal nonetheless allowed the Claimant to rely on the documents that were submitted late. The basis for this was that it was better that the Tribunal had more rather than less information before it and the nature and volume of the documents were not such that the Respondent couldn't deal with them.

5. It was the position of both parties that the claimant should give live evidence as part of the proceedings today.

6. The Claimant took the affirmation and Mr Malik undertook evidence in chief with him. He was then cross-examined by Mr Frew on behalf of the Respondent. Mr Frew then spoke to his application and Mr Malik then made submissions on behalf of the Claimant. Mr Frew then spoke in a brief reply.

7. Mr Mubin reminded the Tribunal that he had a stammer. The fact that disability was in dispute between the parties did not prevent the Tribunal from making adjustments. The Employment Judge indicated that the Tribunal was proceeding on the same basic ground rules were in place as they were during the full hearing. The Equal Treatment Bench Book had been consulted. During the full hearing, the Claimant had a paper and pen with him so that he could write sown he question or make notes as he wished. He also, if he wished could use an aid in the form of a coloured sheet that could be placed over text. As occurred during the full hearing, no party sought to interrupt the Claimant when he was stammering or to finish

his answers for him. The Claimant was given the opportunity to answer every question in full, before the next question was asked.

8. A point of procedure arose during the hearing as to whether the Employment Judge should check the Case Management system to see how many claims had been submitted by the Claimant. This is dealt with in the Judgment below.

## Background Facts

9. The Respondent advertised for the role of Senior Quality, Environmental, Health & Safety Manager (Senior QESH Manager). The Claimant applied for this role, which was based in Lockerbie Scotland by CV & cover letter.

10. The Claimant relies upon his stammer as a disability. Previous proceedings, in relation to a different prospective employer, resulted in a finding that this was not a disability for the purposes of s.6 Equality Act 2010. That finding is not binding on this Tribunal. The Claimant's stammer was not referred to in his CV or covering letter. No evidence was provided to the Tribunal as to how Mr. Collins, (the Site Director and decision maker) would or could have been aware of the Claimant's stammer.

11. The Claimant was not shortlisted for the role. A British Pakastani woman was shortlisted. Ms Esther Paul, who had a role as 'Talent Acquisition Manager' responded to the Claimant's request for feedback via a telephone call. The Claimant asserted that this call was recorded but has not produced the recording.

## The Final Hearing

12. This application for costs comes before the Tribunal in the following circumstances.

13. The Claimant, Mr Mubin brought claims of race discrimination, disability discrimination and a claim in respect of religion and belief discrimination. This later religion and belief claim was withdrawn at a hearing in October 2022.

14. Following a preliminary hearing, this matter proceeded to a full hearing. The Claimant represented himself. The Respondent was represented by Mr Frew. The Claimant gave evidence on his own behalf. The Respondent called one witness, namely Mr Collins The Respondent had difficulty in securing the attendance of its second witness, namely Ms Paul who was ultimately not called.

15. Days one and two were in person. Submissions were concluded on day two. Due to the Tribunal building being closed, day three was listed to be via CVP with the Tribunal deliberating in the morning and then aiming to deliver Judgment at 2pm.

16. On the morning of day three, the Claimant emailed the Tribunal withdrawing his claims. This was not communicated to the Panel and the Panel continued to deliberate and returned at the agreed time of 2pm in a position to deliver Judgment. It was at this point that the Panel were informed that there had been in fact a withdrawal of all claims.

17. A Judgment dismissing the claims on withdrawal was then produced. The Respondent subsequently made an application in writing and on notice to the Claimant in respect of its costs in these proceedings.

18. The above points are recorded so as to make clear, the Tribunals jurisdiction regarding liability ended at the point of withdrawal. No Judgment on the substance of the case was handed down. The Tribunal is only able to consider the application for costs because there is specific provision (Rule 77) in the rules of procedure to consider such an application.

## The Respondent's Application

19. The Respondent applies for costs on the following grounds as provided for in Rule 76:
    a. That the Claimant has acted vexatiously, abusively, disruptively or otherwise unreasonably both in bringing the claimant's claim and in the way in which the proceedings have been conducted by the Claimant and/or
    b. The claim had no reasonable prospect of success.

20. The application itself is a detailed document. The Tribunal has read that document in full. The conclusions below seek to deal with the key points of this application.

## The Allegation of the Claimant being a Serial Litigant

21. As part of its cross-examination during the final hearing, referencing public documents in the bundle and as part of its written costs application to the Tribunal, the Respondent referred to the Claimant as a 'serial litigant'. This was again raised during the course of todays hearing. It is necessary for the Tribunal to make a finding of fact on this point as it is an assertion made by the Respondent as part of its application for costs.

22. In cross-examination, the Claimant said that he could not remember how many claims he had submitted or how many active claims that he had. This was clearly an evasive answer. It was not consistent with a party seeking to assist the Tribunal by giving straightforward evidence. Given the frequency with which the Respondent raised this at the full hearing and then made detailed submissions on it as part of their written application, the Claimant knew full well that this was going to be a matter addressed at the When later asked by the Judge about the number of claims, the Claimant did modify his position and said that he couldn't say exactly but he had submitted around 12 claims to the ET and had 4 or so that were active.

23. The Claimant did not consent to the Judge checking the correct number on the case management system. This was a novel point and the parties

had not had the opportunity to consider the point in advance. Mr Malik took the opportunity to take instructions. He reiterated that the Claimant did not consent and that the risk of the Tribunal obtaining the evidence outweighed any possible inference that may be drawn from the uncertain answers given under oath. The Judge was concerned about balancing obtaining the best evidence against the GDPR principles under which the data had been collected. In the circumstances, the Judge did not obtain the correct number from the system and proceeded only on the evidence presented by the parties.

24. The Tribunal makes the finding that the label of 'serial litigant' is one that can be applied to the Claimant. In making this finding, the Tribunal acknowledges that the label itself is simply a shorthand way of making a wider point. What is of greater importance is the substance that leads to the finding. Taking the Claimants own evidence, there have been at least 12 claims to the Tribunal. The Tribunal infers from the Claimant's repeated vagueness and lack of disclosure on this point that the real number is in fact greater. Even taking the Claimant's own number, 12 is a lot of claims, taking up time and resources of both the Tribunal and of those advertising jobs. The Tribunal also finds that the vast majority of these were job application discrimination claims.

25. In cross-examination, it was put to the claimant that it was his belief that if he withdrew his case on day three prior to Judgment, then it was not possible for there to be an award of costs against him. The Claimant agreed that this was his belief at the time of the withdrawal.

**The Claimant's Means**

26. The Claimant was cross-examined as to his means. There were a number of gaps in the evidence, though this was not a wholesale failure and a number of relevant documents were before the Tribunal. There was no income and expenditure form. Evidence as to the Claimant's income and outgoings was patchy at best. The Claimants oral evidence was that he is currently employed on £40,000 gross per annum.

27. There was evidence that the Claimant's credit rating is not good. He has some mortgage arrears and is in a payment plan for water utilities. In addition, there was evidence of at least one non priority debt that was being repaid.

28. The Claimant was pressed as to the equity that he has in the property, and a ballpark figure of £60,000-£80,000 was established. Given the way that it was necessary to press for the oral evidence on the point and the lack of documentary evidence, the Tribunal formed the view that this was the minimal equity figure.

29. The overall picture was that the Claimant was not in a secure financial position, though the Tribunal could and should have been given clearer evidence on the point. We do not know about alternative sources of income. The Tribunal acknowledges the general pressures of inflation and the general increase to cost of living. In contrast, there was equity in the

Claimant's property, though the Tribunal was wholly reliant on the Claimant's oral evidence in this respect.

## The Law

30. The relevant legislation is the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 as amended.

31. "Costs" are defined within Rules 74. Rule 75 defines what a cost order is, namely an order that a party (the paying party) make a payment to another party "the receiving party".

32. Rule 76(1) provides:

*(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; or*
*(b) any claim or response had no reasonable prospect of success; or*
*(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.*

33. Once it has been established that the threshold for costs has been met, the Tribunal has a wide discretion in respect of whether or not to make a costs award: **Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78.** Furthermore, there must be some element of causation between the threshold being met and the costs incurred.

34. Rule 77 permits an application to be made up to 28 days after the date on which the Judgment finally determines the proceedings. No costs application may be considered until the paying party has had reasonable opportunity to make representations in response.

35. Rule 78 caps the amount of costs at £20,000 unless the detailed assessment procedure or designated costs Judge is used.

36. Rule 84 states:

*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.*

37. The fact that there is the absence of precise figures does not prevent the Tribunal from drawing conclusions as to whether the paying party has sufficient means to pay a costs order: **Brooks v Notingham University Hospitals NHS Trust UKEAT/0246/18/JOJ**

## Conclusions

38. Costs in the Employment Tribunal are rare. That rarity goes beyond stating that costs are the exception rather than the rule. It is a matter of

substance. The Tribunal seeks to ensure access to justice for all and to avoid a punitive costs regime that would discourage litigants from bringing legitimate claims that should be determined. This includes the ability to bring claims that following judicial consideration are ultimately unsuccessful and that in the Employment Tribunal costs do not follow the event. There is no Part 36 or equivalent. No Tribunal should make an award of costs lightly.

39. First, the Tribunal must consider whether the threshold for an award of costs is met. In this case, the application is put on more than one basis.

40. The Tribunal agrees that the Claimant has commenced proceedings which had no reasonable prospect of success. On the Claimant's behalf, whilst Mr Malik sought to mitigate the Claimant's position generally, nothing specific was identified in rebuttal of the Respondent's propositions as to why there were no reasonable prospects. The Tribunal is clear however that it is still the Respondent's burden to show that the threshold has been met. In particular, the Tribunal identifies the following points:

a. There was no reasonable prospect of the Claimant establishing knowledge of the alleged disability (stammer) for the purposes of his disability discrimination claim. Knowledge is an essential element of the claim. Mr Collins was the relevant decision maker and he did not have knowledge and there was no basis for suggesting how on a shortlisting exercise he would have such knowledge. The Claimant's brief previous employment (a large company) with the Respondent was many years ago, there is no basis on which that would have resulted in Mr Collins, (who did not know the Claimant) in having knowledge or Esther Paul.

b. It was inherently implausible that as part of a shortlisting exercise, that the Claimant would be singled out and not put through to the interview phase because he had a stammer. Nothing was advanced for the purposes of being a primary fact from which an inference of discrimination could be drawn. This must also be seen in the wider context of a previous finding in different litigation that the Claimant's stammer did not amount to a disability for the purposes of s.6. Equality Act 2010.

c. In respect of race discrimination, the Claimant relied upon 'British Pakistani'. Someone with this identical characteristic was put through to the interview stage when the Claimant was not. The suggestion that this was a 'token' had no basis. Again, no primary facts were adduced from which an inference of discrimination could be drawn.

d. Acknowledging that discrimination need not be overt or conscious, there was still no positive evidence pleaded or advanced that the decision not to shortlist the Claimant was discriminatory.

41. In respect of the Claimant's conduct of the proceedings, the Tribunal identifies the following unreasonable conduct:

a. At the full hearing, the Claimant's credibility was successfully impugned by the Respondent:

i. in cross-examination of the Claimant, the Respondent was able to establish that the Claimant had been dismissed from

his previous role with Morrisons, which was marked on his CV as an interim role. When this was put to him and explored, the Claimant said that he put interim because he didn't not to put a negative on his CV. Hs CV was misleading. However, he did not and could not see that identifying a role as interim when it was not an interim role could be a problem in any way.

ii. The Claimant would freely make allegations or statements that had no basis. He would frequently respond to a question to allege a wider conspiracy or similar without any evidential basis. In his witness statement, allegations of sex discrimination are also made, on top of the other protected characteristics that had already been pleaded.

iii. Continuing the point above, in evidence, when an unfavourable evidential comparator was put to him, i.e. a British Pakistani person being interviewed when he was not, his response was that she must have been interviewed as 'token' to hide the discrimination against him. Throughout, his evidence was not credible and could not be relied upon.

iv. The Claimant asserted that the call with Esher Paul was recorded but did not produce the recording.

b. The Tribunal accepts the Respondent's characterisation of the Claimant as a serial litigant. That is to say, the Claimant has brought a number of factually similar claims, the majority of which relate to job applications. It is important to note the fact of job application cases as the potential Respondents for such a case are a significantly wider pool of recruiting employers. There need not be any previous relationship. Merely advertising a job can result in litigation. The Tribunal also accepts that these claims appear to be brought with a view to achieving a commercial settlement. This is further reinforced by the finding made above that the Claimant's clear view was that costs could not be awarded in this case provided he withdrew prior to Judgment. This ties into the previous criticism of the Claimant and the freedom with which allegations are made without a basis.

42. In relation to the point made by the Respondent regarding inter-parties correspondence, the Tribunal does accept that the Claimant would engage in correspondence with an inappropriate tone that ranged from high handed to sarcastic. The Tribunal does not wish to take too pious an approach with a litigant in person, nonetheless, it is apparent that the Claimant's conduct was unreasonable in this respect. However, given the points already found above, the Tribunal does not consider it necessary to make specific findings on this point given the volume of correspondence. Therefore, whilst the tone of the correspondence may be relevant to the Claimant's intentions in bringing Tribunal claims, (this is already dealt with above) the Tribunal does not in addition to that make an award of costs on the individual basis of the words used by the Claimant in correspondence.

43. The Tribunal emphasises in respect of all of the points above, full allowance has been given for the fact that the Claimant is unrepresented. Unpresented parties may have greater difficulty in maintaining emotional distance from their own case, they may be unfamiliar with the basic courtesies of litigation, and they do not have the core of legal knowledge on which to draw. The above points go beyond this essential leeway. They are capable of falling within the language of the Rules that engages the costs jurisdiction.

44. Turning now to the Tribunals discretion as to whether or not to take into account the Claimants means. The Tribunal has determined that it should take into account the means of the Claimant. The Tribunal recognises that the Respondent was capping its application at £20,000. However, even then this was a significant costs application and making an order so far beyond the means of the paying party is something that Tribunals should be slow to do.

45. The Clamant did provide some evidence as to his means. It is clear that there were gaps. There was no income & expenditure document.

46. Notwithstanding the fact that the threshold for costs has been met, the Tribunal retains a residual discretion in terms of the amount of the costs award and whether to make any award at all. This is a discretion.

47. The Tribunal exercises its discretion in favour of making a costs award. This is an exceptional case. There are no significant mitigating factors beyond the Claimant's means and the Tribunal will be taking those into account. The Respondent has been put to unnecessary cost, even after making all of the necessary allowances to the Claimant as a litigant in person.

48. The Respondent put the claimant on notice as to its intentions regarding costs. It did so in clear terms. The costs warning of the 21st July was detailed, related to the facts of the case and went beyond making bold, sweeping assertions. In response to the Claimant seeking settlement, the Respondent (at least) on seven occasions responded restating its position with regard to costs.

49. In his closing submissions, Mr Malik suggested that there was genuine contrition from the Claimant both in terms of bringing the claim and the manner in which proceedings were conducted. Mr Frew using his opportunity to reply made the point that this was in effect counsel giving evidence, there was no apology or other sense of contrition in the Claimant's oral evidence or written documentation and that matters continued to be conducted in the same tone and manner as they always have been. The Tribunal accepted Mr Frew's submission on this point in full on the basis that it was accurate. As to the relevance of this point, the Tribunal makes clear that an award of costs is not being made due to the Claimant's lack of contrition, all that is being recorded is the rejection of the submission that the Tribunal should take into account the Claimant's contrition when exercising its discretion. There was no such contrition.

50. The Tribunals broad view of the Claimant's finances is that he is not well off and has some debt. We don't consider that we have been told the full picture in this respect however and would have preferred better disclosure and more frank answers from the Claimant. Based on the Claimant's evidence there is at least £60,000 to £80,000 equity in his home.

51. The Judgment of the Tribunal is that the claimant must pay the Respondent five thousand pounds.

52. The Tribunal considers that this sum is realistic, it avoids being punitive in nature. At the same time, it is not a nominal sum. The reason why we have awarded £5000 and not £20,000 is the Claimant's ability to pay. £5000 can be paid within a reasonable period. A sum of £20,000 would be unlikely to be paid within a reasonable period and the Claimant would struggle, even with the equity in his property to pay this sum within that reasonable period.

53. The Respondent capped its application at £20,000. In summarily assessing costs, the Tribunal would have considered this sum to have been reasonably incurred, including when assessing any doubt in favour of the paying party. The Respondents costs were significantly in excess of this figure, but capped at £20,000, this is a reasonable figure for defending a three day discrimination case inclusive of counsels fees, particularly when taking into account the need to deal with the Claimant's correspondence, deal with pleadings, preliminary hearings, disclosure and witness evidence.

54. Therefore, the Tribunal summarily assesses the costs incurred at £20,000 as capped by the Respondent's application but reduces the sum payable to the Respondent to £5,000, inclusive of any VAT, exercising its discretion and taking into account the Claimant's ability to pay.

Employment Judge Anderson
6th February 2024

JUDGMENT SENT TO THE PARTIES ON
6 February 2024

FOR THE TRIBUNAL OFFICE