EMPLOYMENT TRIBUNALS

Claimant: Karen Tuffney

Respondent: South Central Ambulance Service NHS Foundation Trust

Heard at: Southampton (on the papers) **On:** 22 March 2024

Before: Employment Judge Housego

Representation

Claimant: Written response to application

Respondent: Written application made by DAC Beachcroft

JUDGMENT

The Claimant is ordered to pay to the Respondent costs assessed at £4,305.48.

REASONS

Background

1. By a Judgment given ex tempore at a preliminary hearing on 03 August 2023 the Claimant's claims of unfair dismissal and of disability discrimination were dismissed as out of time. The Respondent requested full reasons so that it might make a costs application. The Judgment was promulgated on 18 August 2023. The Respondent made its costs application on 13 September 2023. The Claimant appears not to have responded until 30 January 2024. On 29 February 2024 the Respondent indicated that the information provided by the Claimant was unclear. The Claimant gave further information about her means on 06 March 2024 and the documents were sent to me on 18 March 2024.

The applicable Rules

2. A successful Respondent may claim costs. Rule 76 deals with costs orders. It states:

> **When a costs order or a preparation time order may or shall be made**
> **76.** (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.
>
> (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.
>
> (3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—
>
> (a)the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and
> (b)the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.
>
> (4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.
>
> (5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

3. Means may be relevant – Rule 84. The Tribunal may (but is not obliged to) take account of the means of the "paying party", in this case the Claimant.

The principles to be applied

4. Costs do not follow the event in Employment Tribunals. For a costs order to be made against a party, that party must have behaved unreasonably (as described in Rule 76(1)(a)) or the case put forward by that party must have had no reasonable prospect of success.

5. If the Tribunal finds either or both of these criteria to be met, the Tribunal must consider whether or not to make a costs order. The Tribunal then has a discretion as to whether to order costs or not. The Tribunal must consider all the circumstances when exercising that discretion.

6. If it decides to order costs it may summarily fix the amount, up to £20,000, or order detailed assessment of costs (Rule 76).

Principles to be applied[1]

7. McPherson v BNP Paribas (London Branch) (1) [2004] EWCA Civ 569 (13 May 2004, paragraphs 39-41:

> 39. Ms Mc Cafferty submitted that her client's liability for the costs was limited, as a matter of the construction of rule 14, by a requirement that the costs in issue were "attributable to" specific instances of unreasonable conduct by him. She argued that the tribunal had misconstrued the rule and wrongly ordered payment of all the costs, irrespective of whether they were "attributable to" the unreasonable conduct in question or not. The costs awarded should be caused by, or at least be proportionate to, the particular conduct which has been identified as unreasonable.
>
> 40. In my judgement, rule 14 (1) does not impose any such causal requirement in the exercise of the discretion. The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring BNP Paribas to prove that specific unreasonable conduct by Mr McPherson caused particular costs to be incurred. As Mr Tatton-Brown pointed out, there is a significant contrast between the language of rule 14(1), which deals with costs generally, and the language of rule 14(4), which deals with an order in respect of the costs incurred "as a result of the postponement or adjournment." Further, the passages in the cases relied on by Ms McCafferty (**Kovacs v. Queen Mary & Westfield College** [2002] IRLR 414 at para 35 **Lodwick v. London Borough of Southwark** [2004] EWCA Civ 306 (at paras 23-27) and **Health Development Agency v. Parish** EAT/0543/03, BAILII: [2003] UKEAT 0543_03_2410, LA at para 26-27) are not authority for the proposition that rule 14(1) limits the tribunal's discretion to those costs that are caused by or attributable to the unreasonable conduct of the applicant.
>
> 41. In a related submission Ms McCafferty argued that the discretion could not be properly exercised to punish Mr McPherson for unreasonable conduct. That is undoubtedly correct, if it means that the indemnity principle must apply to the award of costs. It is not, however, punitive and impermissible for a tribunal to order costs without confining them to the costs attributable to the unreasonable conduct. As I have explained, the unreasonable conduct is a precondition of the existence of the power to order costs and it is also a relevant factor to be taken into account in deciding whether to make an order for costs and the form of the order.

8. For a costs order:

> 1. *there is nothing in the wording of the ET Rules to limit the costs that may be awarded by an employment tribunal to those costs incurred at a particular stage of the proceedings or indeed to costs incurred after they have begun*
> 2. *the Tribunal's discretion to award costs where a party has conducted the proceedings in an unreasonable way is not limited to those costs that are caused by, or attributable to, the unreasonable conduct of that party*
> 3. *the Tribunal is not required to identify the particular costs caused by particular conduct; rather it should look at the whole picture of what happened in the case and the effects of such conduct*
> 4. *the conduct of the litigation by the party applying for the costs order can be taken into account*
> 5. *the conduct of a claimant in rejecting a 'Calderbank' type offer of settlement can be taken into account, provided the claimant is found to have been unreasonable in rejecting the offer*

[1] All the guidance is taken from LexisNexis PSL, and I acknowledge its derivation. Not all of it is relevant to this case, but it is helpful as it sets out the principles overall, which gives context.

6. *although the CPR[2] do not apply directly to Employment Tribunal proceedings, Tribunals should exercise their powers under the ET Rules in accordance with the same general principles which apply in the civil courts, but they are not obliged to follow the letter of the CPR in all respects.*

9. Costs orders are not to be imposed for punitive reasons, and the Tribunal is entitled, but not obliged, to consider the ability of the paying party's ability to pay. It should give reasons.

The application and response

10. The costs application is full, and it is reproduced in the Schedule to this Judgment. I record that it is factually accurate, and the legal principles set out are also accurate. What that letter says about the correspondence between the parties is also accurate, as I have checked the contents of the letter against the original documents, copies of which were provided to me by the Respondent.

11. The Claimant responded on 21 September 2023, attaching documents:

> *"I write in response to the costs application to defend and appeal any costs being issued to myself in relation to this case.*
>
> *I have attached supporting documents including an income and expenditure form (Issued to me by the Citizens Advice Bureaux) and bank statements.*
> *I would be grateful if this can be forwarded for Employment Judge Housego's attention.*
>
> *Apologies for any delay sending this across to you but I needed to liaise with the Citizens advice Bureaux and the earliest appointment I could get was 20/09/23."*

12. The Respondent then wrote to the Tribunal (and to the Claimant) on 04 October 2023:

> "We write further to the Claimant's email below and evidence attached, relating to the Respondent's costs application.
> Having now reviewed the Claimant's evidence, consisting of her bank statements for account number ending 857 and her Personal Budget Sheet, we would raise the following points:
>
> 1. Whilst the Claimant has included figures for rent and other household bills on her Personal Budget Sheet, we cannot see that those outgoings are evidenced by the screenshots of her bank statement. We would ask the Claimant to either identify these payments on the screenshots below, or confirm whether she has another bank account from which these payments are made, and if so to provide copies of those bank statements also.
> 2. Additionally, the income the Claimant appears to be receiving from her dog training business, "Kazzis Cosmic K9", is evidenced on her bank statements but is not separately listed on her Personal Budget Sheet, which references state benefits as her only income. We would ask the Claimant to confirm whether, in addition to her benefits, she also receives £250-£260 per month from her dog training business.

[2] Civil Practice Rules

> To allow the Tribunal to determine the application for costs as swiftly as possible, we would ask the Claimant to provide this evidence to us and the Tribunal by no later than **18 November 2022**.
> We have copied the Claimant into this email.

13. It appears that no action was taken by the Tribunal about the application and the Respondent wrote again on 24 January 2024:

> "We write further to the thread of emails below and in relation to the Respondent's outstanding application for costs from the Claimant, attached.
> On 4 October 2023, we notified the Tribunal of two discrepancies we had identified between the Claimant's financial evidence and her Personal Budget Sheet, provided by her on 21 September 2023. We asked that the Claimant provide clarification on these issues and her financial circumstances by no later than 18 November 2023. The Claimant has not replied to this request to date.
> As set out in the Respondent's costs application attached, the Tribunal is not obliged or required to consider the Claimant's ability to pay when determining a costs application: Rule 84 of the Employment Tribunal Rules of Procedure 2013 states this "may" be considered. This was confirmed by the case of *Jilley v Birmingham & Solihull Mental Health Trust* UKEAT/0584/06.
> We would ask that the Claimant respond to this email before **31 January 2024**, clarifying the discrepancies identified in our email below and providing any further relevant financial evidence. If that is not received by then, on the basis that the Claimant has to date failed to provide a complete and accurate picture of her financial circumstances, we submit that the Tribunal should disregard the Claimant's evidence provided on 21 September 2023 and determine the Respondent's application without taking into account her ability to pay, as it is permitted to do.
> We have copied the Claimant into this email."

14. The Claimant further responded on 06 March 2024:

> *"Please find attached further screen shots of the proof requested.*
> *August and September rent payments, I used my credit card for one transaction, please see screen shot*
> *Proof of my business account*
> *Universal credit statements*
>
> *I do not have other 'work' my dog training business is the only work I do (currently signed off) Please also see highlighted on the screenshots proof of payments for the bills"*

Decision and reasons

15. The Judgment is as the basis predicted by the Respondent in its costs warning letter to her dated 19 July 2023.

16. The essence of the Claimant's explanation for filing her claim out of time was that she was too busy doing other things and was unwell.

17. The first of these reasons is merely to say that the claim was lower in her list of priorities than the things she was doing. The second is not backed by any medical evidence and is contradicted by the fact that she was well enough to do other things.

18. This was spelled out to her in the Respondent's letters to her about costs, dated 19 July 2023. That letter, which followed a Case Management Hearing on 15

June 2023, set matters out fully. That letter urged the Claimant to seek advice about the contents of the letter and signposted her to the Citizens Advice Bureau for free advice and included a hyperlink (it was sent by email) to make it very easy for her to seek that advice.

19. The Claimant did not seek advice. She replied on 25 July 2023 stating:

> *"It is in my view that I do have a good chance of succeeding this case. My claims were out of time but as stated in my witness statement I had a number of issues I was dealing with at the time."*

20. This failed to address the points clearly made in the costs warning letter, and as the Respondent points out this made matters worse for the Claimant as she accepted that her claims were out of time and indicated that the reason was that she was busy with other things. It is fair to say that she added:

> *"Even though I was able to undertake several activities, mainly starting a new job, trying to build on my business and setting up with universal credit, as you are aware I do suffer with significant health conditions which are chronic and long term."*

However, these do not undermine the two points above – she was not so ill that she could not start a new job, and she was spending time and effort on a new business.

21. The Respondent followed this by a clear email of 26 July 2023 setting out that costs would be claimed. It pointed out that:

> *"…it was not ours or our client's intention to place undue pressure on you with the 'drop hands' offer. It was necessary to make you aware of my client's intentions should your claims not succeed on time points, and inform you of the likely costs involved. The offer was advanced as a way of you avoiding the risk of our costs being awarded."*

22. The Claimant's claims never had any chance of succeeding. The Claimant accepted that they were filed out of time. There was no way that it could be argued that it was not reasonably practicable for the claim for unfair dismissal to be filed before the time limit expired. The Judgment sets out the factual matrix. It was bound to be dismissed as out of time. The disability discrimination claim has a different test, but it was never going to be just and equitable to extend time in the circumstances set out in the Judgment.

23. In addition, the claims themselves were weak, as set out in the Judgment.

24. In summary the claims had no prospect of success, and it was unreasonable to pursue claims which were clearly out of time with no rational argument as to why time should be extended.

25. Therefore, I must consider making an order for costs.

26. The Claimant gave much documentation about her means, but it is opaque. There are multiple screen shots, but they are partial. There are other bank statements and an assertion that she is in receipt of universal credit, but nothing

to show how much and from when. It appears that she rents her home, but I could discern nothing about her family circumstances (such as whether her living expenses are met in whole or in part by another). Despite providing much documentation it is not possible to form a clear picture of her economic circumstances.

27. In any event, the facts of this claim are so stark that a costs order is warranted because of the way the Claimant has acted. The Respondent had no choice but to defend the claims and should not have had to do so having pointed out in clear terms why they must fail.

28. As to the amount of a costs order, the point I made in the Judgment about taking the time point first is immaterial to the amount of a costs order because the order sought is of only just over a quarter of the costs incurred by the Respondent. Had it been a relevant point I would have accepted what the Respondent says about it.

29. The costs claimed are modest (not to the Claimant, I appreciate) in the context of the total costs incurred. The total costs incurred were not excessive.

30. While recovery may well be an issue for the Respondent, that is not a reason of itself to limit the costs order.

31. The amount sought is clearly explained in the costs application and it is reasonable amount in the circumstances of this claim. I see no reason to order a lesser figure, and every reason to award the amount claimed, £4,305.48 and so order the Claimant to pay that sum to the Respondent.

Schedule – costs application

[note: copying the text has altered the format somewhat.]

Our Ref: HAT002-2108761
Claim Number: 1402689/2022
13 September 2023

Employment Judge Housego
Bristol Employment Tribunal
Bristol Civil and Family Justice Centre
2 Redcliff Street
Bristol
BS1 6GR

Dear Judge,

Karen Tuffney -v- South Central Ambulance Service NHS Foundation Trust
Claim No. 1402689/2022
Application for a Costs Order pursuant to Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules")

We write on behalf of the Respondent to make an application pursuant to Rule 76 of the Rules for an order for the Respondent's costs incurred in defending the

Claimant's unfair dismissal and discrimination claims (limited to £4,305.48) on the grounds that:

1. the Claimant acted unreasonably in bringing the proceedings (Rule 76(1)(a) and the Claimant's conduct in proceedings were unreasonable; and

2. the claims had no reasonable prospect of success (Rule 76(1)(b) as the claims were issued outside the limitation period for the respective claims, as found by the Tribunal at the conclusion of the preliminary hearing of this case on 3 August 2023, and as detailed in the judgment and written reasons sent to the parties on 18 August 2023 (the “Judgment”).

In summary our application and reason it should be allowed is:

1. The Claimant acted unreasonably in bringing the proceedings out of time in circumstances where she was "too busy with other things to get round to her claim" [para 18 of the Judgment] and where there was "no adequate explanation for the delay" [para 26 of the Judgment].

Further, the Claimant’s conduct in proceedings has been unreasonable, given her actions during settlement correspondence, in that she rejected the Respondent's 'drop hands' Without Prejudice Save As To Costs settlement offer of 19 July 2023 ("the Offer") on the basis that she considered she had "a good chance of succeeding this case". Had she accepted the Offer, the parties would have walked away from the claim and the open Preliminary Hearing on 3 August 2023 ("the Preliminary Hearing") would have been vacated. The Claimant's rejection of the Offer saw the Respondent and the Tribunal wasting valuable time on continuing to defend the claim and hearing the issue of time points respectively, and saw the Respondent waste significant cost in continuing to defend the claim to the Preliminary Hearing. The Respondent notes that Kopel v Safeway Stores Plc [2003] IRLR 753, Raggett v John Lewis plc UKEAT/0082/12/RN confirm that whilst there is no ‘Calderbank’, an unreasonable refusal of a settlement offer can lead to a costs award;

2. The Tribunal should exercise its discretion in this case. The Respondent contends that since it filed its Response on 4 October 2022, to which the Claimant was copied, it will have been clear to the Claimant that her claim was very likely to be struck out or dismissed on time points. The Respondent submits that the weaknesses in her position will have been even more apparent to the Claimant following the Respondent's offer letter of 19 July 2023 ("the Offer Letter") – see below. The issue of timing was also discussed at the Case Management Preliminary Hearing with Judge Dawson on 15 June 2023. Within the Judgment, Judge Housego commented that "the time point was an obvious one to take". We encouraged the Claimant to seek legal advice on the Offer. It is evident that the Claimant did not do this, and instead adopted a blinkered and unreasonable view of her position.

3. The Respondent, a public sector employer, is only claiming sums from the date of the Offer Letter and has in fact applied a discount to this too, and so the sum of £4,305.48 is appropriate even having regard to the assumed financial position of the Claimant.

Grounds for the application and relevant background

The relevant factual and procedural background to this application is as follows:

1. On 19 August 2022, the Claimant issued her claims.

2. On 4 October 2022, the Respondent filed its Response to her claims. The Particulars of Response included clear arguments that the Tribunal did not have jurisdiction to hear the Claimant's claims as they had been issued prima facie out of time. This was reiterated in the Respondent's covering email to the Tribunal of the same date. A Preliminary Hearing was requested to determine the application to strike out the claims. The Claimant was copied to that email.

3. On 27 October 2022, the Tribunal accepted the Response. This was copied to the Claimant.

4. On 15 June 2023, a Case Management Preliminary Hearing took place, at which the issue of time points was discussed. The Claimant was asked for her position on this, and in particular why she had filed her claim late. Our note of the Case Management Preliminary Hearing shows that the Claimant apologised for filing her claim late, and said it was a "mistake" on her part. The Preliminary Hearing was listed as a result.

5. On 5 July 2023, we received the Claimant's witness statement and supporting evidence in relation to time points.

6. On 19 July 2023, having reviewed the Claimant's evidence, the Respondent wrote to the Claimant on a Without Prejudice Save As To Costs basis to advance the Offer, i.e. they offered not to pursue the Claimant for their costs in continuing to defend the claim if she withdrew on or before 26 July 2023 (the Offer Letter). The Respondent made clear the reasons why this offer was being advanced, in particular that:

a) All the claims had been issued prima facie out of time;

b) ACAS had advised the Claimant to seek advice on the time limit and she did not. She could have looked online or spoken to the Citizens Advice Bureau for free;

c) The Claimant had been able to undertake numerous activities between her resignation and the limitation date of 26 July 2022. As such, it was not at all clear why she had been unable to also file her claim in that period, particularly as there had been significant blocks of time where she had no specific commitments;

d) One of her complaints dated back to December 2021 and so was significantly out of time. The fact that she had been able to work for the Respondent since then significantly undermined any argument that she had not been able to file that complaint in time.

7. The Offer Letter also explained the legal tests the Claimant would need to overcome in order for her claims to proceed. Reference was made to discussions had at the Case Management Preliminary Hearing, where Judge Dawson had

explained the two different tests. The letter made clear that mere ignorance of the time limit would not be enough to surpass these tests.

8. In an attempt to encourage the Claimant to appreciate the weakness in her claims, we also briefly set out our view of the claim's merits. This is because, per the case of Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132, merits is a factor the Tribunal may take into account when determining the 'just and equitable' test.

9. We then set out the Respondent's anticipated costs in continuing to defend the claim. We highlighted that the Respondent is a publicly funded NHS Trust and cannot afford to waste time and cost on claims which have little or no prospects of succeeding, such as this. We informed the Claimant that the anticipated costs of continuing to defend the claim to Preliminary Hearing would be £2,500 plus VAT, including counsel's fees of £1,500 plus VAT.

10. We advised the Claimant to seek independent legal advice on her position, and / or speak with her local Law Centre or Citizens Advice Bureau, who would be able to offer some support for free. A link to Citizens Advice Bureau was also provided.

11. On 25 July 2023, the Claimant responded, rejecting the 'drop hands' offer. She accepted her claims were issued out of time, but stated "I had a number of issues I was dealing with at the time". We had already pointed out to the Claimant that, in her case, this fact went against her. She asserted that she had been dealing with her various conditions during this period, but had provided no medical evidence to confirm this, or to suggest her conditions had become any worse since she had been employed and was working for the Respondent.

12. On 26 July 2023, we acknowledged the Claimant's rejection of the 'drop hands' offer and reiterated that, if her claims were struck out at the Preliminary Hearing, we would pursue her for the Respondent's wasted costs. We then continued to liaise with the Claimant to ready the case for the Preliminary Hearing.

Relevant case law

Unreasonable behaviour

1. The key question is whether in all of the circumstances the Claimant has conducted the proceedings unreasonably. For that purpose the Tribunal should examine the course of the proceedings and the Claimant's conduct in them in detail, see *McPherson* Mummery LJ §4 and 30 and Barnsley Metropolitan Borough Council Mummery LJ §41.

2. Where a party makes an offer to settle a case, a costs order can be made if in refusing it a party has acted unreasonably, see Kopel v Safeway Stores plc [2003] IRLR 753 and Raggett v John Lewis plc UKEAT 0082/12 (2012). A fortiori, rejecting or ignoring an obvious legal deficiency or impediment to the case, which has been pointed out may be unreasonable. In the same way the pursuit of a futile, hopeless or frivolous case may be unreasonable, see Stein v Associated Dairies Ltd [1982] IRLR 447 and Carr v Allen-Bradley Electronics Ltd [1980] ICR 603.

3. To determine whether the Claimant has acted frivolously, it is necessary to examine what the Claimant knew or ought to have known if she had gone about

the matter sensibly, properly advised, see Cartiers Superfoods Ltd v Laws [1978] IRLR 315, Philips J §18 and Beynon v Scadden [1999] IRLR 700, EAT.

4. The discretion of the Tribunal is wide. it is not fettered by any requirement to link the award to particular costs incurred as a result of specific conduct which is unreasonable, see *McPherson* Mummery LJ §40 and *Barnsley Metropolitan Borough Council* Mummery LJ §40-42.

No reasonable prospect of success

1. No reasonable prospect of success is a lower standard than the test of 'frivolous' under the previous Rules, it does not require unreasonable behaviour of the Claimant, see Balamoody v UK Central Council for Nursing etc [2002] ICR 646 §46 and Ezsias v North Glamorgan NHS Trust [2007] ICR 1126 §25. The threshold simply requires establishing that the claim or part of it had no reasonable prospect of success or was misconceived, which have the same meaning.

2. Whether a claim had no reasonable prospect of success is an objective issue and does not depend on the Claimant's belief in it, Vaughan v London Borough of Lewisham [2013] IRLR 713 §14(6) and Harvey Para 1090.

Ability to Pay

1. In deciding whether to make a cost's order and the amount of any such order the Tribunal may have regard to the Claimant's ability to pay. Rule 84 of the Rules provides as follows

> *Rule 84. 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.*

2. The Tribunal is not obliged nor is there any absolute duty to take the Claimant's ability to pay into account but if it does it should give succinct reasons for doing so, see Jilley v Birmingham & Solihull Mental Health Trust UKEAT/0584/06 [2008] All ER (D) 35 (Feb) HHJ Richardson §44.

Costs

Between 19 July 2023 (the date of the Offer) and today's date, the Respondent has incurred £2,087.90 plus VAT plus counsel's fee of £1,500 plus VAT in the defence of the claims. This is a total of £4,305.48 (£3,587.90 plus VAT). The reasons that this is higher than the anticipated total costs of £2,500 plus VAT (total £3,000) stated in the Offer Letter are:

1. Following receipt of the Claimant's letter dated 25 July 2023 we needed to seek further instructions from our client, particularly in light of the assertion that the failure to provide the Claimant a wrist support had continued up to February 2022, as opposed to December 2021 per the List of Issues. This was necessary to ensure that we were prepared for the Case Management aspect of the Preliminary Hearing, should the claims have succeeded;

2. We advised our client on the merits of the Claimant's complaints, both in respect of the prospects of them succeeding past the Preliminary Hearing, and the prospects of them succeeding at Final Hearing;

3. We prepared the Agenda for the hearing, including careful consideration as to appropriate witnesses to answer the allegations of a failure to provide a wrist support and chair, and obtained dates to avoid; and

4. We reviewed and finalised the Preliminary Hearing bundle, which included liaising with the other side regarding a page limit extension, and filing a joint application with the Tribunal in respect of the same.

The Tribunal will note that this application does not cover the Respondent's costs in defending the entire claim, which are in the region of £16,300 plus VAT, but rather is constrained to the costs incurred from the date of the 'drop hands' offer onwards.

That said, when making a costs order on the ground of unreasonable conduct, as above, the discretion of the tribunal is not fettered by any requirement to link the award causally to particular costs which have been incurred as a result of specific conduct that has been identified as unreasonable: see McPherson v BNP Paribas (London Branch) [2004] EWCA Civ 569, [2004] ICR 1398 and Salinas v Bear Stearns International Holdings Inc [2005] ICR 1117: -

> *"The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring [the receiving party] to prove that specific unreasonable conduct by [the paying party] caused particular costs to be incurred"* (McPherson, Mummery LJ §40).

However, the above passage in McPherson does not mean that questions of causation are to be disregarded or that tribunals must 'dissect a case in detail and compartmentalise the relevant conduct under separate headings, such as "nature" "gravity" and "effect"' (Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255, [2012] IRLR 78, Mummery LJ §40):

> *"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 if had"* (Yerrakalva, Mummery LJ §41).

Whilst we are constraining our costs to those incurred from the 'drop hands' offer onwards, we do wish to address the comment at paragraph 26 of the Judgment, where Judge Housego provided his preliminary view that filing a detailed Response on 4 October 2022 addressing the merits of the claim may not have been in line with the overriding objective in this case, since the time points were obvious. Instead, he suggests the Respondent should have waited until if and when any of the claims survived the Preliminary Hearing, and then sought leave to apply to amend the Response to address merits thereafter.

Per the timeline above, the Respondent did raise time points as a preliminary issue, both in the Response and the covering email of 4 October 2022. We also

briefly addressed the issue of merits within the 19 July 2023 offer letter. This was for multiple reasons, mainly:

1. So that the Tribunal and the Claimant could clearly understand the Respondent's position in respect of the claims, and what further evidence it required to be able to fully respond. The Claimant provided further and better particulars prior to the Case Management Preliminary Hearing, which narrowed the issues and led to the dismissal of the sexual orientation discrimination claim. The Respondent's view is that this approach facilitated discussions at the Case Management Preliminary Hearing;

2. So that the Tribunal could consider the merits of the case when determining the issue of time points, if it considered that appropriate, per Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132, and avoid the risk of an adverse inference being drawn that a lack of response meant a lack of defence. It appears that the Tribunal did take merits into account in this case, for example at paragraph 30, Judge Housego stated that "this is not a strong claim"; and

3. So that any 'drop hands' offer advanced to the Claimant had the best prospect of achieving the desired result: had we not addressed merits or responded to the Claimant's claims at all, it is submitted there would be a higher risk of the Claimant (or any claimant) refusing to engage in negotiations on a mistaken assumption that the lack of response implied a lack of defence. The Respondent sought leave to amend the Response at the Case Management Preliminary Hearing "if so advised". Having taken advice, the Respondent decided not to file an amended Response at that stage. Considering the overriding objective, it was decided that it would be most proportionate to wait until after the Preliminary Hearing to file an amended response, if any claims proceeded.

In light of the above, it is respectfully submitted that any cost incurred by the Respondent in relation to the merits of the claims is legitimately and appropriately incurred and can be included as part of this costs application. However, as already noted above, only legal fees from the date of the Offer Letter are being sought by the Respondent. This significantly limits the amount sought.

The Respondent’s case in summary is that:

1. The Claimant was unreasonable not to accept the Offer. The Claimant ought to have accepted that she did not have any good reason why she could not have filed her claims in time;

2. The Claimant was on notice of this application prior to the Preliminary Hearing. The Claimant's claims were struck out at the Preliminary Hearing and so did not “better” the Respondent’s offer.

3. We understand that the Claimant is now employed by Right at Home care company and has been since at least 25 April 2023.

4. In unreasonably rejecting the Offer, the Respondent was required to attend the Preliminary Hearing thereby incurring significant legal fees (see details enclosed). This is not simply a case of failure to better an offer but the unreasonableness in

relation to settlement offers was such that there really was no reason for the parties to attend Tribunal.

Details of costs sought:

The Respondent seeks an order that the Claimant make a payment in respect of £4,305.48 of legal fees, including VAT, that the Respondent has been required to incur since 19 July 2023. For the avoidance of doubt, the Respondent does not seek its full costs in defending this case, which surpass £16,300 plus VAT.

For the avoidance of doubt, the Respondent is an NHS Trust, and is unable to claim back VAT on litigation. The normal rules that VAT on litigation is recoverable as a business expense do not apply to NHS Trusts.

We enclose a schedule of costs to support this application, and other supporting documentation.

We understand that it is the Judge's intention to determine this application on the basis of written representations. For the avoidance of doubt, we confirm that the Respondent does not request a hearing, in order to avoid the need to incur the additional associated costs.

In accordance with Rules 30(2) and 92 we have copied the Claimant into this application. She is reminded of the Judge Housego's direction that any objections to this application should be sent (along with supporting documents) to the Tribunal (with a copy to us) as soon as possible. She is also reminded that she may wish to include details of her financial circumstances.

Yours sincerely,

DAC Beachcroft LLP

CC. Karen Tuffney, the Claimant

Enc.

Employment Judge Housego
Date 22 March 2024

Judgment & Reasons sent to the parties on 04 April 2024

For the Tribunal Office