



EMPLOYMENT TRIBUNALS

Claimant

Respondents

Mr S C Martinez

AND

**1. HCC Services Inc.
2. Jane Nagelkerke**

Heard at: London Central

On: 23 April 2024

Before: Employment Judge Brown

**Members: Ms K O'Shaughnessy
Mr R Pell**

Representation:

For the Claimant: In person

For the Respondent: Ms M Tutin, Counsel

COSTS JUDGMENT

The unanimous judgment of the Employment Tribunal is that:

- 1. The Claimant acted unreasonably in the conduct of his claim by failing to engage at all in settlement discussion with the Respondents.**
- 2. The Tribunal exercises its discretion to make a costs award in favour of the First Respondents.**
- 3. The Claimant is ordered to pay £5,000 in costs to the First Respondents.**

REASONS

Preliminary

- 1. The Claimant had brought complaints of direct discrimination on the grounds of race and/or disability; discrimination arising from disability; victimisation; harassment; indirect discrimination on the ground of disability; and failure to make reasonable adjustments; against both Respondents.**
- 2. All the complaints were dismissed by judgment dated 22 May 2023.**

3. This hearing was listed to determine the First Respondents' application for costs.
4. The First Respondents made their costs application on 19 June 2023, p220-223. The Claimant gave a written response to the application on 2 July 2023, p234, and on 8 March, p242.
5. For this costs hearing, the Tribunal was provided with: an indexed Bundle of documents (page references in these reasons are to pages in that Bundle); and a skeleton argument from the Respondents. The Tribunal heard brief evidence from the Claimant as to his ability to pay any costs judgment. Both parties made submissions.

Law

6. The First Respondents make this application under *Rule 76 Employment Tribunal Rules of Procedure 2013*. Rule 76 provides as follows:

"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 ... has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that proceedings (or part) have been conducted; or*
- (b) any claim or response had no reasonable prospect of success."*

7. The Tribunal must consider making an order for costs where it is of the opinion that any of the grounds for making a costs order has been made out.
8. Following *Hayden v Pennine Acute NHS Trust* UKEAT/0141/17, the Tribunal should take two-stage approach:
 - a. Consider whether any of the grounds in *r76(1)(a)* have been established;
 - b. Consider whether, in all the circumstances of the case, a costs award is merited, *Ayoola v St Christopher's Fellowship* UKEAT/0508/13.

Unreasonable Conduct

9. "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." (Per Mummery LJ in *Yerrakalva v Barnsley MBC* [2012] ICR 420 at para 41.
10. The failure by the Claimant to "address their minds to [the prospects]", or to engage with a Respondents' costs warning letter, which would have led them to an earlier assessment of the merits of their claims, can justify a costs award, *Peat v Birmingham City Council* UKEAT/0503/11/CEA.

11. Where a party makes an offer to settle a case, which is refused by the other side, costs can be awarded if the tribunal considers that the party refusing the offer has thereby acted unreasonably *Kopel v Safeway Stores plc* [2003] IRLR 753, EAT.

No Reasonable Prospects of Success

12. In deciding whether to award costs on the basis that a claim had no reasonable prospect of success, the ET can take into account what the party knew or ought to have known if 'he had gone about the matter sensibly'. In *Keskar v Governors of All Saints Church of England School* [1991] ICR 493 the EAT said (Knox J): 'The question whether a person against whom an order for costs is proposed to be made ought to have known that the claims he was making had no substance, is plainly something which is, at the lowest capable of being relevant'. The fact that there was nothing in the evidence to support the allegations involved an assessment of the reasonableness of bringing the proceedings, and this 'necessarily involved' a consideration of the question whether the claimant ought to have known that there was no such supportive material.

13. It is usually appropriate for a litigant in person to be judged less harshly in terms of his or her conduct than a litigant who is professionally represented, given that "a lay person may have brought proceedings with little or no access to specialist help and advice. This is not to say that lay people are immune from orders for costs: far from it, as the cases make clear", *AQ Ltd v Holden* [2012] IRLR 648, EAT at [32]-[33].

14. Where allegations are made and shown to be "baseless" or that things alleged to have been said "were never said" or "never done", then such conduct will be viewed as "manifestly unreasonable" justifying a costs order, *Daleside Nursing Home Ltd v Mathew* UKEAT/0519/08, [2009] All ER (D) 99 (Aug).

Vexatious Conduct

15. The classic description of vexatious conduct is that of Sir Hugh Griffiths in *ET Marler Ltd v Robertson* [1974] ICR 72 at 76, NIRC: "If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously, and likewise abuses the procedure. In such cases the tribunal may and doubtless usually will award costs against the employee ...".

Ability to Pay a Costs Order

16. A party's ability to pay is a factor which the Tribunal may consider in deciding whether to make a costs order and, if so, in what amount (ET Rules 2013, rule 84).

Respondents' Contentions in this Case

17. The Respondents' application is made on the basis of both limbs under *Rule 76 ET Rules of Procedure 2013*:

- a. "Vexatious...disruptive or otherwise unreasonable conduct", and
- b. That the Claim had no reasonable prospect of success.

18. First, the Respondents say that the Claimant's claim had no reasonable prospects of success.

19. They point out that, at paragraph 23 of a Case Management Summary sent to the parties after the Preliminary Hearing in this case on 13 July 2022, the parties were given guidance :

- a. To prepare full written statements containing all of the evidence they and their witnesses intend to give at the final hearing;
- b. That the written statements must (among other directions) set out the relevant events in chronological order and contain all of the evidence which the witness is called to give; and
- c. Should cross-refer where relevant to the documents in the bundle in the written statements.

20. On 23 March 2023, the Respondents notified the Tribunal that the Claimant's witness statement was only seven short paragraphs in total and less than one page long.

21. In response, the Tribunal wrote to the Claimant on 29 March 2023, stating that "The claimant and the respondents shall prepare full written statements containing all the evidence they and their witnesses intend to give at the final hearing" and that "No additional witness evidence will be allowed at the final hearing without the Tribunal's permission".

22. The Claimant did not respond to or engage with the Tribunal's letter.

23. In its liability judgment at paragraph 6, the Tribunal said of the Claimant's witness statement, "The Claimant had produced a very brief witness statement, containing all most no evidence relevant to his claim."

24. At the final hearing on 17 April 2023 the Claimant was allowed to rely on his amended Particulars of Claim as his witness statement.

25. The Respondents say that the Claimant acted vexatiously, abusively and/or unreasonably in bringing proceedings and/or his complaints had no reasonable prospect of success, in circumstances where he put forward little or no evidence in his witness statement, or at the final hearing, to support his complaints, despite receiving the Respondents' disclosure and their full and complete witness statements.

26. They also contend that his pursuit of the claim appears to be part of a wider pattern of initiating similar proceedings against employers and in circumstances where he sought to exaggerate health issues to bolster one such claim.

27. Second, the Respondents also rely on costs warning letters in saying that the Claimant acted vexatiously, abusively and/or unreasonably in his conduct of the proceedings. They say that he continued to pursue his complaints long after it

became overwhelmingly clear that the remedy he was seeking was not remotely likely to be awarded. They say that he failed to engage with or respond to the Respondents' costs warning and/or settlement offer when he ought to have done so. They say that conduct resulted in unnecessary costs and time being incurred by the Respondents in defending the complaints.

28. In a letter dated 23 March 2023, the Respondents wrote to the Claimant saying that his claim had no real prospects of success because his witness statement contained no evidence of less favourable treatment because of race or disability, no evidence of acts of harassment, no evidence to substantiate his indirect discrimination, failure to make reasonable adjustment and discrimination arising from disability complaints.

29. In the same letter, the Respondents said that there was no real prospect of the Claimant being awarded £50,000 for injury to feelings. They said that paragraph 12 of the Case Management Summary had required the Claimant to provide evidence relevant to his claim for injury to feelings and referred to the Presidential Guidance to Employment Tribunal awards for injury to feelings and psychiatric injury. The Respondents said that the Claimant had provided no evidence with regards injury to feelings, and in particular to justify an award of £50,000 which. They said that such awards are only made in the most serious and exceptional cases of discrimination. In their letter, the Respondents said that, if the Claimant's claim were to succeed, they believed that any award would be in the lower Vento Band, between £990 and £9,900.

30. The Respondents warned that they would seek their costs if the Claimant's claim was unsuccessful, or where any award was significantly less than £50,000.

31. In another letter of the same date, the Respondents offered the Claimant £5,000 in full and final settlement of his claim. The letter said that ".The Respondents have on two occasions sought to engage with you on settlement negotiations. In your letter dated 2 August 2022 you explained that you would not be interested in settling for less than £75,000 and that this sum would likely increase should the Respondents wish to settle in the future. In early March 2023 you again confirmed via Acas that you were seeking £75,000 by way of compensation." They said that the Claimant's refusal to engage in settlement discussions for less than £75,000 was unreasonable.

32. The Respondents offered the Claimant £5,000 in full and final settlement and said they would refer to their letter in seeking costs following judgment.

33. The Claimant did not respond to the letters. The final hearing in the case started on 17 April 2023.

34. The Respondents seek costs by way of summary assessment, that is, limited to £20,000. They presented a schedule of costs they incurred in sending the costs warning letters of 23 March 2023 and in conducting the Final Hearing. Those costs came to £33,971.83, including VAT.

The Claimant's Contentions In this Case

35. The Claimant does not have English as a first language. He contended that he was at a disadvantage in the claim, as a litigant in person.

36. He told the Tribunal that he had spent about £20,000 in legal fees in this case and that he had had help drafting his amended particulars of claim. He had not been able to afford legal assistance in drafting his witness statement.

37. He told the Tribunal that he believed that he had reasonable chances of success in his claim and that it was important that his claim was heard. He said that he should not have been prevented from bringing his claim by the fact that the Respondent offered him £5,000.

38. The Claimant told the Tribunal that he had looked at the Vento guidelines and that he believed that he would be entitled to the maximum award for injury to feelings, about £50,000.

39. The Claimant did not dispute that he had asked for £75,000 to settle his claim through ACAS. He agreed that he had asked for this sum because he knew that the Respondents would not accept that offer. He said that he wished to bring the claim on the basis of principle.

40. The Tribunal accepted the Claimant's evidence regarding his financial circumstances. The Claimant receives £3,479 net salary each month in his new job. His monthly mortgage payment is £1,500. He has a mortgage of £237,894 and his property is worth £390,000. He bought this property in January 2024. The amount of the mortgage loan was the highest sum the bank would lend him, based on his monthly income.

41. His monthly bills, for Council Tax, utilities, telephone and food are about £1,000. He pays £200 for public transport each month. He has 2 credit cards and a loan. He repays the loan at £458 / month and makes payments of £75 per month and £195 per month on his credit cards. He is a member of a choir, for which he pays £40 / month, and a gym, for which he pays £75/month.

42. On those figures, his monthly outgoings come to £3,543. He told the Tribunal that he could not afford to pay any order for costs. He said that the Respondents could have instructed less expensive lawyers.

43. In reply, the Respondents said that they would try to come to an agreement with him on a schedule of payments regarding any costs ordered. They said that a costs order in the sum of £10,000 might be reasonable.

Discussion and Decision

No Reasonable Prospect of Success ?

44. Tribunal did not decide that the Claimant's claim had no reasonable prospect of success.

45. The Particulars of Claim, which he used as his witness statement, p73 – 91, set out the effects he said of his disability at paragraph [11], including distractibility and low self confidence, affecting his ability to compete tasks in a timely manner.

46. At paragraph [57] and [64] he set out how he said that that affected his ability to comply with the alleged PCPs in the claim.

47. The Claimant compared his treatment by Ms Bridges with comparators, Mr Jo Collis and Mr Cliff at paragraph [13,] giving details of the alleged differential treatment.

48. At paragraph [45] he set out the protected acts he relied on.

49. On the basis of his particulars which were used as his witness statement, the Tribunal did not accept that he had presented little or no evidence to support his complaints.

50. The Tribunal made a careful decision, taking into account all the evidence available to it. Ultimately, it accepted the Respondents' explanations for their treatment of the Claimant.

51. While the Tribunal did not accept the Claimant's evidence regarding the effects of his disability, it did so because the Tribunal found there was no medical evidence to support this, [223] – [227]. At paragraphs [196] – [199] the Tribunal found that he had not done a protected act, having construed the wording of the alleged protected act.

52. However, those decisions of the Tribunal were not inevitable. There was evidence, in the Claimant's witness statement, which would have supported a different decision on discrimination and the effects of his disability, had the Tribunal accepted that evidence.

53. It was also not unreasonable for the Claimant to argue that he had done protected acts on the basis of the wording of his email of 3 February 2022. The Tribunal construed it not to be a protected act, but the Claimant did mention both bullying and his protected characteristics in it.

54. The Tribunal decided at this costs hearing, therefore, that this was a case where the liability outcome could only have been known once the Tribunal had pronounced its judgment.

Alleged Unreasonableness – Multiple Claims?

55. The Tribunal did not find that the Claimant acted unreasonably in bringing this claim on the basis he had brought a number of other claims against previous employers. There was some evidence in his medical notes that he had brought at least one other claim against another employer.

56. The Tribunal did not have any details of those other claims. It did not know the outcomes of the other claims, including how many other claims the Claimant had brought.

57. The Tribunal concluded that the fact that the Claimant may have brought other claims against previous employers was therefore not a proper basis for deciding that he had acted unreasonably in bringing the present claim.

Costs Warning Letters/ Unreasonable Conduct in Pursuing Claim

58. The Respondents' costs warning letters on 23 March 2023 included a number of matters.

59. They said that the claim had no reasonable prospects of success because the Claimant's witness statement was so lacking.

60. They also said that there was no real prospect of the Claimant being awarded £50,000, which is how he had valued his claim. The first letter said, p231, that, if the Claimant succeeded, the award would be in the lower band of Vento - £990 - £9,000.

61. The Respondents also said that the Claimant had conducted the claim unreasonably by refusing to engage in settlement negotiations in the sum of less than £75,000.

62. They offered the Claimant £5,000 to settle the claim on a "drop hands" basis.

63. The Tribunal did not agree that, if the Claimant had succeeded in all his claims, that the likely award would have been in the lower Band of Vento. The Claimant had made numerous allegations, as well as contending that his dismissal was an act of disability discrimination. The Tribunal concluded that the likely award, if the Claimant had succeeded in all his claims, would have been in the Vento Middle Band.

64. As the Tribunal has concluded that the claim did not have no reasonable prospects of success, so that the Claimant did not act unreasonably in pursuing his claim, and that the likely award would have been in the Middle Band of Vento, the Tribunal decided that the Claimant did not act unreasonably in continuing to pursue his claim, despite the relatively low offer of settlement being made.

65. However, the Claimant's valuation of his claim at £50,000 - £75,000 was unreasonable. He never provided any basis for this valuation. His particulars of claim did not address the value of the claim at all. He was directed to the Vento bands by EJ Klimov at the Case Management Hearing.

66. At this hearing, the Claimant accepted that, at one stage, he had offered £75,000 to settle, on the basis that he knew the Respondents would not accept that offer. He accepted that he did not intend to engage in settlement discussions.

67. The Claimant conducted the claim unreasonably in essentially refusing to engage in any settlement negotiations. The only offer he made was intended to be rejected; he knew that the Respondents would not accept it.

68. He then failed to respond at all to the offer of settlement made on 23 March 2023. He made no counter offer.

69. His approach meant that there was no possibility of settlement, so that the Respondents would inevitably spend significant sums of money defending the claim.

70. As the Claimant's conduct of the claim was unreasonable, the threshold for making an order for costs has been met. The Tribunal must consider whether to make one.

Discretion to Award Costs and Amount of Costs

71. The Respondents seek their costs from 23 March 2023, when they did make an offer of settlement themselves.

72. They limited the costs they seek to £20,000; and, in submissions, to £10,000, on the basis of the Claimant's current limited cash flow.

73. In exercising discretion as to whether to award costs and in what amount, the Tribunal takes into account the effect of the unreasonableness.

74. It decided that, even if the Claimant had engaged in settlement negotiations after 23 March 2023, there was no guarantee that settlement would have resulted, or that all the Respondents' costs would have been avoided. The Respondents' £5,000 offer was reasonably low, which did not indicate that settlement was very likely. Settlement, even if it happened, might not have occurred until just before the hearing.

75. The result of the Claimant's unreasonableness was therefore the loss of a chance of settlement.

76. The Tribunal decided, however, that it was appropriate to award costs. It was not appropriate for the Claimant to refuse to engage in any settlement discussions at all, whatever the cost to the Respondents.

77. In deciding the amount of a costs order, the Tribunal took into account the fact that Claimant has limited cashflow at present. His outgoings exceed his income. However, he bought his property in January 2024, with substantial equity, after he knew an application for costs had been made.

78. The Tribunal noted that the Respondents' costs were relatively high. They included solicitor's attendance on Counsel for a number of hearing days. The Claimant should not have to pay for that. They included Partner's charge rates at £531.25 in the days leading up to and during the final hearing. Again, those were

fees which the Claimant should not have to pay, when Counsel was instructed to attend the hearing.

79. Counsel's fees for a 3 day hearing were £12,000. That figure was also relatively high.

80. Taking into account the fact that the legal fees were high and could not all be justified, the fact that the Claimant's cash flow is limited, and the fact that the consequence of the Claimant's unreasonableness was only the loss of a chance of settlement, the Tribunal decided that the appropriate amount to order the Claimant to pay the First Respondents was £5,000 costs.

81. The Tribunal encourages the First Respondents to reach an agreement with the Claimant about this, for repayments over say 36 months, given his limited cash flow.

Employment Judge Brown

Dated: ...23 April 2024.....

Sent to the parties on:

9 May 2024

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For the Tribunal Office