EMPLOYMENT TRIBUNALS

Claimant: Mrs R Ayub

Respondent: North Warwickshire Borough Council

Heard at: Midlands West

On: 13 June 2024 (in Chambers)

Before: Employment Judge C Knowles
Dr G Hammersley
Mr N Forward

Representation

With the agreement of the parties, the application was decided on the papers.

JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

The Respondent's application for costs dated 15 December 2023 (intimated orally at the conclusion of the hearing on 7 December 2023) is refused.

REASONS

1. This decision has been made on the papers (as agreed by the parties), taking into account their written submissions.

Documents considered

2. In deciding this application, the Tribunal had before it:

   (a) The Tribunal's Judgment, and written reasons sent to the parties on 18 January 2024.

(b) The Respondent's written application for costs dated 15 December 2023, and letter dated 15 April 2024.

(c) The Claimant's response to the Respondent's application attached to her email of 21 December 2023, and her emails dated 29 February 2024 and 30 April 2024.

(d) The bundle of documents and witness statements that were before us for the liability hearing in December 2023.

Issues

3. The issues that the Tribunal has to decide on this application are as follows:

(1) Is the Tribunal satisfied that one or more of the threshold criteria set out in rule 76 (1) (a) and / or (b) is met, i.e.:

(rule 76 (1) (a)) Did the Claimant act vexatiously, abusively, disruptively or otherwise unreasonably in the bringing of the proceedings (pr part) or the way that the proceedings (or part) have been conducted, and if so, in what way?

(rule 76 (1) (b)) Did the claim have no reasonable prospect of success?

(rule 76 (2)) Was the claimant in breach of the Tribunal's order, and if so, in what way?

The Respondent makes the following specific allegations:

(i) The claimant misled the Tribunal when she said in her claim form that she "emailed Morgan at Agency to inform what happened, Emailed few times, no response."

(ii) Alternatively, the Claimant failed to take reasonable steps to obtain the emails for disclosure.

(iii) The claimant made wide ranging factual allegations (practically all of which were ultimately not found) and that it was unreasonable of the claimant to present the case as she did, placing inaccuracies in her witness statement and claim form.

(iv) It was unreasonable of the Claimant not to accept the Respondent's offer dated 27 November 2023, made "without prejudice save as to costs" (WPSATC), and that the Claimant must have known that the assertions she was making were at very least inaccurate.

2. *If the Tribunal is satisfied that one or more of the threshold criteria set out in rule 76 (1) (a) and / or (b), and / or rule 76 (2) is met, should the Tribunal exercise its discretion to make a costs order?*

3. *If the answers to questions 1 and 2 are yes, what amount should the Tribunal order the Claimant to pay?*

Submissions

4. We considered the written representations made by the parties. We did not take into account any representations about anything reportedly said during Judicial Mediation, this being a confidential process that it would be inappropriate for us to consider.

5. We do not set out the parties' submissions in full in these written reasons, but in summary:

   (a) Respondent. The Respondent applied for an order for costs on the basis that the Claimant acted unreasonably (and / or vexatiously, abusively or disruptively) and the claim stood no reasonable prospect of success. The specific matters relied upon were firstly that it was said that the claimant misled the Tribunal in her claim form, in asserting that she had emailed "morgan" at the agency when she had not. Alternatively, it was said that the claimant had at best failed to make a subject access request and comply with the Tribunal's order for disclosure. Secondly, it was said that the Claimant had made wide ranging factual allegations, practically all of which were ultimately not found. Whilst the Claimant was not a lawyer, she had experience in the legal sphere. Thirdly, it was said that the Claimant had been unreasonable in failing to accept the "without prejudice save as to costs" offer made to her by the Respondent on 27 November 2023. The Respondent asked for access to all advice the Claimant had received from ACAS. The Respondent sought its costs said to have been incurred from 5pm on 29 November 2023 until the conclusion of the liability hearing. The Respondent relied upon Kopel v Safeway Stores plc [2003] IRLR 753, and referred to Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797 and Ghosh v Nokia Siemens Networks UK [UKEAT/0125/12/MC.

   (b) Claimant. The Claimant disputed the Respondent's assertions and said that at no point had she ever misled, or attempted to mislead, the Tribunal. She had presented her claim to the best of her ability without representation. She had behaved sensibly and honestly and cooperated with the Tribunal to the best of her understanding during a time she had been suffering ill health. She had not brought proceedings without sufficient grounds, or for the purpose of causing trouble or annoyance to

the respondent, but because the issues she faced were disturbing and damaging to her and had been very real and painful. It was important for her that she was heard and that no one else ever had to go through the same. The fact that she had lost did not mean what happened to her was untrue. Her allegations had been based on facts. She said it had been a challenge to prove her case when it was her word against many, and she was self-representing against a legal team. Her knowledge of the law was limited to homelessness / housing law and she was not a lawyer. She had not lied on her claim form, she had genuinely been unable to find emails she had sent to "morgan" at the agency. She accepted she had received the costs warning letter and she had said she would get advice from ACAS. She said ACAS had advised such letters were often seen, stating that a claim has no chance of success and an application for costs will be made and that this is meant to frighten claimants into dropping the case and is standard practice. She was not advised her case had no merit and she should accept the offer. She had only been represented by a Solicitor for the judicial mediation and had otherwise represented herself. The application for costs was unfair and unrealistic. The Respondent was also adding unnecessary hotel and parking costs, when the Tribunal building was no more than 10 minutes' walk from the train station.

Background and relevant facts

6. The Claimant brought claims of harassment related to race, and direct race discrimination, arising out of her work for the Respondent as an agency worker between 14 June 2022 and 8 July 2022, and the termination of her assignment on 8 July 2022.

7. During her assignment, the Claimant worked in the role of temporary Housing Options officer. The Claimant was not legally qualified, and no evidence was presented to the Tribunal to suggest that she had any experience of employment law.

8. The Claimant presented her claim on 14 December 2022 without the benefit of legal representation. In her claim form she detailed what she said had happened to her. She said she had "*emailed Morgan at Agency to inform what happened, Emailed few times, no response. Spoke to Agency Fri 01/07 told them."* The Respondent submitted its ET3 and Response to the claim. It set out the Respondent's account of what had happened, and said that it "*strenuously contests any claim of discrimination".* It concluded that "*the Council notes and acknowledges the Claimant's perception of ill-treatment that they felt they received during their time with the Council. The Council has accepted the feedback the Claimant gave and will reflect on it when considering the approach to training new members of staff in the future. Whilst the Claimant may perceive the treatment to be discrimination due to race, the Council's view is that no discrimination occurred."* The

Response did not state that the claims stood no reasonable prospect of success.

9. A preliminary hearing for the purposes of case management took place on 15 March 2023. The issues in the case were identified, and case management directions were made. The Claimant represented herself. The Respondent was represented by Mr. Tobin, Solicitor. The Respondent did not make an application to strike out any of the claims, nor did it make any application for a deposit order.

10. On 28 April 2023, the Respondent wrote to the Claimant suggesting that the dates for completing case management orders be postponed. Amongst other things, the Respondent noted that the Claimant had referred in her claim form to emails sent to the agency regarding her concerns but that she had not provided these as documents. The Claimant replied on 2 May 2023 saying that the documents she had provided were those she intended to rely on. She stated that the emails she had sent to the agency had been sent "*whilst at work"* for the Respondent and the call was to a different person on the Friday she was last at work. With regards to the emails, she said "*the emails provided are what I had access to which is why there is only limited emails. I will rely on my own statement and that will be my evidence which I will present to the court. In terms of physical evidence, I have limited access to the same, however, but will rely on my own testimony of truth as to what happened to me during my time at* [the respondent]." She thanked the Respondent for offering more time but said she would not need it. The Respondent replied on 3 May 2023 noting the Claimant's response and saying that a draft index of documents would be sent to her. The Respondent did not press further for disclosure of emails, suggest that the Claimant should make a subject access request, or make any application for specific disclosure.

11. As a result of the parties agreeing to engage in judicial mediation, the dates for compliance with case management orders were subsequently varied. The Claimant experienced some ill-health between March and November 2023.

12. On 3 November 2023, a further preliminary hearing for case management took place before Employment Judge Wedderspoon. It was recorded that "*disclosure is now complete."* The date for the Respondent to provide the Claimant with the file of documents was varied to 17 November 2023, and the parties were to exchange witness statements on Friday 24 November 2023, ten calendar days before the final hearing was due to start. Employment Judge Wedderspoon decided that it was in accordance with the overriding objective and in the interests of justice that the final listing be retained.

13. The parties did exchange witness statements on Friday 24 November 2023. The Claimant's witness statement did not make any reference to the emails to Morgan at the agency that had been referred to in the claim form.

14. On Monday 27 November 2023, the Respondent made an offer to the Claimant to settle the claim (**"the Respondent's offer**"). The Respondent's offer was made "without prejudice save as to costs". The letter was sent to the Claimant directly because she was not legally represented at this time, and it stated:

"*We refer to our previous correspondence in relation to these proceedings (including our ET3 and witness statements) which you have received. As is plain from these documents, your claim is firmly denied. We do not seek to repeat here the arguments contained therein.*

Our position is that your claim is bound to fail. Prior to any consideration of the specificities of your claim we consider it unlikely that the Tribunal will find they have jurisdiction in this matter. Even if the Tribunal does accept jurisdiction, the documentary evidence and the witness evidence point towards your claim being unsuccessful.

We write to put you on notice that, if you continue to pursue your claims and are unsuccessful at trial, we will make an application to the Employment Tribunal for a costs order to be made against you under rule 76 of the Employment Tribunal Rules of Procedure…."

The letter then set out rule 76 (1), and having done so went on to say:

"*In our opinion, your claim has no reasonable prospect of success, and in both bringing it and continuing it you are acting vexatiously, abusively and disruptively."*

The letter then set out the costs that the Respondent said it was likely to incur, and went on:

"*Despite having incurred significant costs to date in these proceedings we are prepared to make a final offer of the below subject to a suitably worded COT3:*

1. *£1,000 payable within 28 days.*

2. *10 Counselling sessions.*

3. *A basic reference.*

This offer automatically expires at 5pm on 29 November 2023 at which point it will be automatically withdrawn. Following this, our costs will increase accordingly.

If you decide to continue with your claims, we reserve the right to bring the contents of this letter, and any other relevant correspondence, to the attention of the tribunal in support of our client's claim for costs."

15. The Claimant did not accept the Respondent's offer.

16. On Friday 1 December 2023, the day after the expiry of the Respondent's offer, and the last working day before the start of the final hearing, the Respondent disclosed 38 pages of further documents to the Claimant. It was not clear to the Tribunal why at least some of these documents had not been disclosed at an earlier date. For example, various emails were disclosed that had come to light following a search using the dates of the Claimant's assignment and the Claimant's first name as a keyword. Some of these emails discussed the Claimant, how she was getting on in the role, and the termination of her assignment. The termination of the assignment was the last alleged act of unwanted conduct / less favourable treatment. We referred to some of these emails in our Judgment. These additional documents were added into the hearing bundle by agreement on the first day of the hearing on Monday 4 December 2023, once the Claimant had had an opportunity to read them during the course of that morning.

17. The Tribunal heard evidence and submissions in the case on 4, 5 and 6 December 2023. The Claimant represented herself. She conducted herself appropriately and politely during the hearing and was not disruptive. Although in her own witness statement she had not mentioned the alleged emails to Morgan at the agency, she answered questions about this part of her claim form under cross-examination.

18. Where there were relevant disputes between the parties as to what had happened, the Tribunal had to reach findings, on the balance of probabilities, as to what happened. Following deliberations, the Tribunal delivered a unanimous oral judgment on 7 December 2023, dismissing the Claimant's claims. Within the Tribunal's Judgment, we did reject the Claimant's oral evidence that she had sent emails to the agency complaining about her treatment in the second week of her employment. The reasons for that finding are set out in the written reasons at paragraph 54.

19. At the conclusion of that oral judgment, the Respondent indicated that it wished to make an application for costs on the basis of unreasonable conduct. There was insufficient time left to hear submissions, and directions were made for the Respondent to put its application in writing by 21 December 2023.

20. On 15 December 2023, the Respondent made a written application for costs, setting out its representations in support. The Respondent asked that its application be dealt with on the basis of the written representations only so as to avoid the need for the parties to attend a hearing and incur additional associated costs. The Respondent attached a statement of costs, seeking costs of £11,713.33 (including VAT and expenses), said to represent costs incurred from 29 November 2023 to 7 December 2023.

21. The Claimant replied to the Claimant's email on 21 December 2023, attaching a word document with her reasons for opposing the application.

22. In the meantime, the Claimant had requested written reasons for the Tribunal's Judgment, which were sent to the parties on 18 January 2024.

23. By an order dated 21 February 2024, the Tribunal asked the Claimant to confirm by 29 February 2024 whether she agreed that the application should be considered on the basis of written representations only (or whether she wanted a video hearing), whether there were any other reasons she wished to rely upon other than those set out in her response of 21 December 2023 (and if so, to put those in writing), and asking whether there was any information that she wanted the Tribunal to take into account when considering ability to pay any costs order.

24. On 29 February 2024, the Claimant replied to the Tribunal's email. The Claimant indicated that she was also happy for the application to be dealt with by way of written representations.

25. On 15 April 2024, the Respondent wrote to the Tribunal objecting to the Claimant referring to what took place during Judicial Mediation, and asking the Tribunal to disregard that. In reaching its decision on this application for costs, the Tribunal has not taken into account anything said about what was, or was not, discussed at Judicial Mediation. Discussions at a Judicial Mediation are confidential between the parties and the Employment Judge conducting the Judicial Mediation.

26. In its letter dated 15 April 2024, the Respondent also made an application for specific disclosure, which was refused by an order dated 7 June 2024 (sent to the parties 11 June 2024) for reasons given in that order. The Tribunal also directed that if the Claimant wished to rely on documents other than her correspondence of 21 December 2023 and 29 February 2024 (there was a typographical error in the order which referred to 22 February), she was required to copy that to the respondent straight away and to confirm to the Tribunal that she had done so. No further correspondence was received from either party following this order and before this decision was made.

Law

27. The Tribunal's power to make an order for costs is set out in the rules contained at Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (**the rules**).

28. Rule 75 provides (so far as relevant):

(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…

29. Rule 76 says (again, so far as relevant):

(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.

30. The effect of rule 76 (1) is that *if* the Tribunal considers that one or more of the threshold criteria in rule 76 (1) is met, the Tribunal must consider making a costs order. However, whether or not a costs order should then be made is a matter of discretion.

31. Rule 77 says that an application for costs may be made 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. In this case, the application for costs was made in time, both parties agreed to the application being decided on the

written representations and the Claimant has been given an opportunity to provide written representations.

32. Rule 84 says that in deciding whether to make a costs order and, if so, in what amount, the Tribunal may have regard to the paying party's ability to pay.

33. A structured approach to the rules is required, and there are three stages to be considered in an application under rule 76 (1) (**Abaya v Leeds Teaching Hospitals NHS Trust** UKEAT0258/16, paragraphs 14 to 16). First, the Tribunal should consider if one or more of the threshold criteria have been met. This requires the Tribunal to make findings about the conduct of the party against whom the costs order is sought. Secondly, if the threshold for making an order has been met, the Tribunal must consider whether it is appropriate to make a costs order. The Tribunal must take account of all relevant circumstances, including, where appropriate, the paying party's ability to pay any costs order. Thirdly, the Tribunal must decide what amount to award.

34. Costs in the employment tribunal are "*the exception rather than the rule"* (**Barnsley Metropolitan Borough Council v Yerrakalva** [2011] EWCA Civ, 1255 (at paragraph 7). The Presidential Guidance on General Case Management (2018) (**the Presidential Guidance**) says that in deciding whether the threshold criteria in rule 76 (1) are met, "*each case will turn on its own facts. Examples from decided cases include that it could be unreasonable where a party has based the claim or defence on something which is untrue. That is not the same as something which they have simply failed to prove. Nor does it mean something they reasonably misunderstood. Abusive or disruptive conduct would include insulting the other party or its representative or sending numerous unnecessary e-mails."*

35. The meaning of the term "vexatious" has been described as follows (**Scott v Russell** [2013] EWCA Civ 1342, approving the definition cited in **AG v Barker** [2000] 1 FLR 759):

"*The hallmark of a vexatious proceeding is in my judgment that is has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process."*

36. The "threshold tests" are the same whether a litigant is professionally represented or not, but the application of the tests must consider whether a litigant is professionally represented. In **AQ Ltd v Holden** [2012] IRLR 648,

HHJ Richardson stated, at paragraph 32:

"*A tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals; and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent themselves. Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life….lay people are likely to lack the objectivity and knowledge of the law and practice brought to bear by a legal adviser. Tribunals must bear this in mind when assessing the threshold tests in rule 40 (3). Further, even if the threshold tests for an order for costs are met, the Tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice."*

37. The making of a lie on its own is not necessarily sufficient to justify an award of costs. It will always be necessary for the Tribunal to examine the context and to look at the nature, gravity and effect of the lie in determining the unreasonableness of the alleged conduct (**Arrowsmith v Nottingham Trent University** [2012] ICR 159 (paragraphs 32 and 33, endorsing the approach in **HCA International Ltd v May-Bheemul** (EAT, 23 March 2011). In **Arrowsmith,** the claimant had made an application for a new permanent post which had been unsuccessful. She claimed that this was because of her pregnancy, and it was central to her case that at the time the decision was being made as to who to appoint, the panel was aware, or suspected, that she had been pregnant. The claimant relied on various alleged statements to support her contention that the panel had known, or suspected, which were found to be untrue.

38. The fact that there is no express finding that a claimant was dishonest does not prevent a Tribunal from concluding that a claimant was unreasonable (**Ghosh v Nokia Siemens Networks UK Ltd** UKEAT/0125/12/MC). In **Ghosh**, whilst the Tribunal had not made an express finding that the claimant had been dishonest, equally there had been no finding that she did genuinely believe in the matters of which she complained, and she had made a large number of serious allegations of discriminatory conduct which had been rejected on the basis that what she said had happened had not happened.

39. In **Kopel v Safeway Stores plc** [2003] IRLR 753, the EAT held that in deciding whether a claimant had acted unreasonably, the Tribunal was entitled to take into account an offer made without prejudice save as to costs. However, failure by a claimant to achieve an award in excess of a rejected order did not itself mean that an order for costs should be made. Before rejection of the offer is relevant, the Tribunal must first conclude that

the rejection of the offer was unreasonable.

40. Where a claim is said to have had no reasonable prospect of success, the Tribunal must consider first, whether objectively the claim or response had no reasonable prospect of success (the threshold question), whether subjectively the party knew that was so, and if not, whether they ought reasonably to have known that (**Opalkova v Acquire Care Ltd** [2021] UKEAT/0056/21) (paragraphs 22 to 26).

41. Where the threshold for an award of costs has been met, the Tribunal must consider whether it is appropriate to make an order for costs. When considering whether to make a costs order on the ground of unreasonable conduct: "*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"* (Mummery LJ in **Yerrakalva**, paragraph 41).

42. It is not necessary that a party has been put on notice that a costs order may be made, but it may be relevant. In **Vaughan v LB Lewisham** UK/EAT/0533/12/SM, the EAT (Underhill P) said (paragraph 18):

    "*We do not believe that as a matter of law an award of costs can only be made where the party in question has been put on notice, by the making of a deposit order or otherwise, that he or she is at risk as to costs. Nor, however, do we believe that the absence of such notice, or warning, is necessarily irrelevant: indeed it was expressly relied on in a recent decision of Mr Recorder Luba QC as one of the reasons for not exercising a discretion to award costs ….-see Rogers v Dorothy Barley School….What, if any, weight it should be given in a particular case must be judged in the circumstances of that case…"*

43. Rule 84 is a permissive provision which allows a tribunal to have regard to a paying party's means but does not require it to do so. The tribunal should give reasons for a decision whether or not to take account of ability to pay (**Jilley v Birmingham & Solihull Mental Health NHS Trust** UKEAT/0584/06, at paragraph 44).

Conclusions

44. We will set out our conclusions on rule 76 (1) (a), rule 76 (1) (b) and then rule 76 (2) in turn.

Did the Claimant act 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?

Did the Claimant mislead the Tribunal in her claim form when she said she had emailed Morgan at the Agency?

45. Whilst we rejected the Claimant's oral evidence that during the second week of her assignment she had sent emails to the agency complaining about how she had been treated, when considering the application for costs we were not satisfied that the Respondent had shown that the Claimant's conduct in referring to these alleged emails in her claim form crossed the threshold of unreasonable conduct.

46. We had to reach our findings of fact based on the balance of probabilities. This meant that where there was disagreement between the parties as to what had happened, or not happened, we had to make findings about what had probably happened. In relation to the sending of these alleged emails, our findings rested heavily on the fact that the Claimant had not produced the emails to us. Given that these were emails the Claimant herself claimed to have sent, the fact that she did not then produce them counted against her account being the more probable. Ultimately, however, we did not consider the reference to these emails in the claim form, or in the Claimant's oral evidence under cross-examination, to be central to our decision as to whether the claims succeeded or not. The Claimant did not rely upon the alleged sending of the emails in her witness statement.

Did the Claimant conduct the proceedings unreasonably by placing inaccuracies in her claim form and her witness statement?

47. There were disputes between the parties as to what had happened during the Claimant's assignment, and we had to make findings on the balance of probabilities. After hearing all the evidence, we did find that the version of events put forward by witnesses called by the Respondent was more probable. However, we did not make findings that the Claimant had come to the Tribunal to lie about what had happened in respect of the seven incidents of alleged less favourable treatment / unwanted conduct. Further, there were other matters where there was common ground that things had happened, but where we found after hearing all the evidence that there was not sufficient evidence to shift the burden of showing they were related to race (or less favourable treatment because of race) and we accepted that they were not. This was the case, for example, with regards to the Claimant having been asked to place calls on hold in the first week, Mrs Josen correcting the Claimant's work on 1 July (the correction being an error in one respect) and the termination of the Claimant's assignment. We found that Mrs Josen had called the Claimant a spoilsport on 1 July. We found that the claimant had been surprised and insulted by her sudden termination. It was the first time she had ever had an assignment terminated and she was not given an explanation for it at the time. As set out in our Judgment, we considered that if someone is not given the reason for such a sudden termination of their assignment, it is understandable that they will

search for what the reason is, and wonder what has happened. In the circumstances, we were not persuaded that there was unreasonable conduct on the part of the Claimant.

Was it unreasonable for the Claimant not to accept the Respondent's offer dated 27 November 2023?

48. We concluded that it was not unreasonable conduct for the Claimant not to accept the Respondent's offer of 27 November 2023.

49. The Respondent's offer letter asserted that the claim was "*bound to fail"* on two grounds:

    (a) First, that it was unlikely that the Tribunal would find it had jurisdiction. The meaning of this was not explained to the Claimant in the letter. We assume that the Respondent was referring to an argument that the claims were out of time, since that was the only jurisdictional issue in this case. The last act complained of (the termination of the assignment) was accepted by the Respondent to be in time, so the Respondent itself cannot have believed that the Tribunal would reach a conclusion that it had no jurisdiction to hear that claim. For reasons explained in our Judgment, we in fact found that it was just and equitable to extend time in respect of the claims that pre-dated the termination of the assignment and that we did therefore have jurisdiction to hear them (although we found those claims did not succeed on their merits).

    (b) Secondly, the letter asserted that "*the documentary evidence and the witness evidence point towards your claim being unsuccessful."* There was no explanation within the letter as to <u>why</u> the Respondent believed this to be the case. No particular parts of the documentary or witness evidence were referred to. There was no attempt to explain, in simple terms or otherwise, what the legal tests were or why it was said the evidence did not meet those legal tests.

50. At the date that the Respondent's offer was made (Monday 27 November), the Claimant had only just received the Respondent's five witness statements (Friday 24 November). She would not have had much time to read and digest them, and no particular parts were pointed out to her in the letter. The Claimant was not legally represented at the date of the Respondent's offer. She was given only a very short time to decide whether or not to accept it, until 5pm on Wednesday 29 November. Against that background, and the other matters we have discussed above, we do not consider that the Claimant acted unreasonably in not accepting the offer.

Did the claimant act vexatiously, abusively or disruptively?

51. In so far as the Respondent was suggesting that the matters we have

addressed above represented vexatious, abusive or disruptive conduct, we did not accept that for the reasons that we have already given when considering the issue of unreasonable conduct. The Respondent has not persuaded us that the Claimant acted in any other way vexatiously, abusively, or disruptively. The Claimant behaved politely and appropriately throughout the tribunal hearing, and she was not disruptive.

<u>If we were wrong, and the matters above amount to unreasonable conduct, would we have exercised our discretion to award costs?</u>

52. We went on to consider whether we would have exercised our discretion to award costs *if* we were wrong that referring to the alleged emails to Morgan, the making of the factual allegations that were made, and not accepting the Respondent's offer were not unreasonable conduct. Considering all the circumstances of the case, we decided that we would nevertheless not have exercised our discretion to award costs.

53. On the one hand, we considered the importance of discouraging unreasonable conduct by litigants, and the fact that the Respondent is a local authority, which could no doubt have made alternative use of the funds it had to use to defend this claim. We did not think it was relevant that the Respondent had not applied to strike out any of the Claimant's claims. Given the very high threshold for striking out discrimination claims we can understand why no such application was made. We noted that the Respondent had warned the Claimant on 27 November 2023 that it took the view that she was being unreasonable in bringing her claims and that the Respondent said the claims had no reasonable prospect of success. The Claimant had not provided us with evidence about her financial means.

54. However, we considered that other factors would weigh against making a costs order and that we would not have considered it appropriate to make any order. In particular:

    (a) The reference in the claim form to having sent alleged emails to Morgan was not central to our findings that the Claimant had not established a prima facie case of harassment and / or discrimination. We found that the present case was distinguishable from a case such as **<u>Arrowsmith</u>**, in which the claimant had made untrue statements (to the effect that people had known, or suspected, she was pregnant) that were central to her claim having any prospect of success.

    (b) Whilst we had preferred the evidence of witnesses called by the Respondent where there were disagreements as to whether some of the alleged less favourable / unwanted treatment had occurred as the Claimant alleged, we did not find that the Claimant had come to the Tribunal to lie. Again, we found that the position here was

distinguishable from the position in a case such as **Arrowsmith**. Further, as set out in our Judgment, we found it understandable that where an assignment is suddenly terminated, without explanation, the worker will search for the explanation and will wonder what had happened (as the Claimant did here). The Respondent itself had not suggested in its initial Response that the Claimant's perception that she had been discriminated against was not genuine.

(c) For most of the litigation, the Claimant was a litigant in person. She had no legal qualifications and no background in employment law. She had a period of ill-health between March 2023 and the preliminary hearing on 3 November 2023. The only time she was legally represented was on 3 November 2023.

(d) We did consider it to be of some relevance (though we were mindful that this would not be determinative, as illustrated in **Vaughan**) that the Respondent had not applied for a deposit order in respect of any of the claims. An application would at least have put the Claimant on notice at an earlier stage that the Respondent considered her claim to be without merit. It would also have given her the opportunity to understand why the Respondent held that view. The first time that the Respondent warned the Claimant that it considered her claims to be being brought unreasonably and to lack prospects was on 27 November 2023.

(e) We thought that it was more relevant that in the costs warning letter on 27 November 2023, the Respondent did not explain to the Claimant *why* it considered that she was being unreasonable or why it felt her claim had no reasonable prospect of success. We did not consider that a litigant in person reading that letter would understand *why* the Respondent was saying what it was saying.

(f) Coupled with this, we also considered it relevant that given the date that the offer was made, and the very short time-scale for acceptance, the Claimant would have had very limited time to have read and digested the Respondent's five witness statements, and to then read and digest the Respondent's offer, in a week when she would also have been having to prepare for the final hearing.

(g) Finally, we considered that as at the date of the Respondent's offer, the Respondent had not in fact disclosed to the Claimant all relevant documents. It was not until Friday 1 December 2023, the last working day before the hearing, that the Respondent fully complied with its requirement to disclose all relevant documents to the Claimant. The further disclosure made on 1 December contained emails, including the emails referred to in our Judgment at paragraphs 70, 76, 80 and 82. The very late disclosure of those

emails was likely to have contributed further to the Claimant's perception that something untoward had gone on with regards to (in particular) the termination of her assignment, although we ultimately did not find that the Claimant had established a prima facie case of discrimination or harassment.

Did the claim have no reasonable prospect of success (rule 76 (1) (b)), and if so, should we exercise our discretion to make an order for costs against the Claimant?

55. Whether a claim could be said to have no reasonable prospect of success requires the Tribunal to make an objective assessment. The fact that a claim is dismissed after a trial does not necessarily mean that it had no prospect of success. We were not persuaded here that we could go so far as to say that the claims had no reasonable prospect of success from the outset. In reaching this conclusion, we have taken into account the matters set out at paragraph 47, above.

56. Further, even we had been satisfied that the claims could be said objectively to have had no reasonable prospect of success, it would not necessarily follow that an order for costs should be made. We would have to decide whether to exercise our discretion to award costs. On this issue, it would be relevant whether or not we could be satisfied that the Claimant should have known that her claim had no reasonable prospect of success, and specifically (given the costs sought by the Respondent) whether the Claimant should have known that by 29 November 2023, the last day for acceptance of the Respondent's offer. We were not satisfied that the Claimant should have known that her claim lacked any reasonable prospect of success, and we would not have exercised our discretion to award costs.

57. In particular, we took into account the fact that for most of the litigation the Claimant was a litigant in person, the Respondent had not at any stage applied for a deposit order, and that in the Respondent's offer letter, it had not explained *why* it took the view that her claim had no reasonable prospect of success when it made the offer on 27 November 2023. The Claimant was only given a very short period of time in which to digest that letter and she had only received the Respondent's five witness statements the working day before the Respondent's offer. She did not have all the relevant disclosure at that time, and did not receive that from the Respondent until 1 December 2023, which was the last working day before the final hearing. Such late disclosure of documents discussing her performance in her role and the termination of her assignment was only likely to harden the Claimant's belief that there was something untoward about the termination of her assignment, that she believed was linked to her race. Such late disclosure was likely to have made it more difficult for her to objectively assess the prospects of her claims succeeding.

Did the Claimant breach the order made by the Tribunal for disclosure by not disclosing emails from her to Morgan (rule 76 (2))?

58. As already addressed above, we rejected the Claimant's evidence that she had sent emails to Morgan complaining of the Respondent's conduct in the second week of her assignment, but we have not found that the Claimant's conduct crossed the threshold of unreasonable conduct, or, if we are wrong about that, that it would be appropriate for us to make an order for costs.

59. However, for completeness, we would not have made a costs order on the basis of non-disclosure by the Claimant. As well as the matters that we have already discussed at paragraphs 53, 54, 56 and 57, we note that the Respondent could have made an application for specific disclosure but chose not to. Instead, the Respondent relied on the Claimant's failure to produce the emails as evidence that they did not exist. Further, the Respondent itself failed to disclose all relevant emails until the working day prior to the final hearing. Overall, considering **Yerrakalva,** the effect of the Claimant's failure to produce the emails was that the Tribunal rejected her evidence that she had sent such emails, but it did not materially lengthen the hearing time, or itself leading to a hearing taking place when it would otherwise not have done.

Other matters

60. As we have concluded that no costs order should be made, issue (3) in the list of issues does not arise.

Employment Judge **C Knowles**

Date 18 June 2024