Case Number: 3205586/2021

EMPLOYMENT TRIBUNALS

Claimant: **XY**

Respondent: **AB**

Heard at: **East London Hearing Centre**

On: **6 March 2023**

Before: **Employment Judge Russell**

Representation
Claimant: **Mr C Jamieson (Counsel)**
Respondent: **Mrs L Banerjee (Counsel)**

JUDGMENT having been sent to the parties on **9 March 2023** and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. By a claim form presented on 26 August 2021, the Claimant brought complaints of discrimination because of race and/or sex against her former employer. She also brought complaints of sexual harassment against a Second Respondent (now the only Respondent in this claim). The Claimant and the Respondent were both employed by the same company and were in a four-month personal relationship. The breakdown in the relationship and its aftermath have been acrimonious and have led to these complaints, which have been vigorously denied by the initial employer and by the Respondent.

2. At a Preliminary Hearing on 28 February 2022, I made a Deposit Order in respect of all claims against the Respondent on the grounds that they had little reasonable prospect of success for two principal reasons: firstly, they had been presented out of time and secondly, the claims did not appear to arise out of a working relationship but a purely personal one. That Order was sent to the parties on 5 May 2022, with payment of the deposit due by 27 May 2022. The deposit was not paid as, on 3 May 2022, the Claimant withdrew all claims against both the employer and the Respondent.

3. On the same day as the Claimant's withdrawal, the Respondent made an application for costs. Due to various practical difficulties, it was not possible to hear the costs application until today. The Claimant provided a bundle of documents, witness statement and written submissions. The Respondent provided its own bundle of documents. I heard evidence on oath from the Claimant who was cross-examined by Mrs Bannerjee and both Counsel made oral submissions at the hearing. I had regard to all of the documents, the evidence and the submissions in reaching my decision.

Law

4. Rule 76 of the Employment Tribunal Rules of Procedure 2013 governs the awarding of costs by the Tribunal. Insofar as it is relevant, it provides that:

> **"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."**

5. Rule 84 of the ET Rules deals with the ability to pay, it provides:

> "**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**."

6. As made clear by Choudhury P in **Mihailescu v Better Lives (UK) Limited** UKEAT/0184/19/BA at paragraph 17, the structure of these provisions dictates a three-stage approach. The Tribunal must first consider the threshold question of whether any of the circumstances identified in rule 76(1) applies and, if so, it must then consider separately, as a matter of discretion, whether to make an award of costs. If an award of costs should be made, the final stage is to decide what amount of costs to award.

7. In **Yerrakalva v Barnsley Metropolitan Borough Council** [2011] EWCA CIV 1255, Mummery LJ held that the Tribunal should consider the whole picture of what had happened in the case and ask whether there had been unreasonable conduct by the Claimant in bringing and conducting the case. If so, it should identify the conduct, what was unreasonable about it and the effect it had. The Tribunal should take into account any criticisms made of the employer's conduct and its effect on the costs incurred.

8. The correct approach to cost in the employment tribunal was again considered by the Court of Appeal in **Sud v London Borough of Ealing** [2013] EWCA Civ 140. From paragraph 67 it adopted and emphasised the importance of the **Yerrakalva** approach. A Tribunal has a broad discretion; it should avoid adopting an overly analytical approach, for instance by dissecting the case in detail or attempting to compartmentalise the relevant conduct into separate headings such as nature, gravity and effect. The words of the Rule should be followed and the Tribunal needs to look at the whole picture of what had happened in the case, then to ask whether there has been unreasonable conduct by the Claimant. As was made clear in **Yerrakalva**, although causation is undoubtedly a relevant factor it is not necessary for the Tribunal to determine whether or not there was a precise cause or link between the unreasonable conduct in question and a specific cost being claimed. The circumstances do not need to be separated into sections, each of which in turn forms the subject of individual analysis, as this risks losing sight of the totality of the relevant circumstances.

Findings of Fact

9. The claim form was presented on 26 August 2021 but not served on the Respondent

directly, instead being passed to him by the employer (the former First Respondent) which led to some delay in it coming to his attention. The date for presentation of a Response was 5 October 2021.

10. On 30 September 2021, solicitors acting for the Respondent sent a "without prejudice save as to costs" letter to the Claimant in which they identified what they perceived to be key weaknesses in her case: it was presented out of time and did not appear to relate to conduct in the course of employment. The Claimant was warned that if she continued with her sexual harassment claim, and if it were dismissed by the Tribunal whether at a Preliminary Hearing or final hearing, the Respondent would apply for his costs incurred in defending the claim. The Claimant was given until 12 midday on 4 October 2021 to withdraw her sexual harassment claim without being pursued for costs incurred to date. This gave the Claimant only 3 days to make a decision but I accept that the short deadline was because the Response was due on 5 October 2021.

11. Solicitors acting for the Claimant did not initially reply directly to the costs warning letter but in correspondence to the Tribunal, her solicitors set out the reasons why the Claimant believed she had a reasonable prospect of successfully showing that the claim was in time as a continuing course of conduct or that it would be just and equitable to extend time.

12. In November 2021, the Claimant sent two emails to the Respondent in which she set out her version of what had happened between them and her sense that she had been seriously wronged by him, particularly in the dying days of their relationship. The Claimant indicated that this would be shared with members of the press, both in the United Kingdom and in other countries. The content of the emails appeared to be designed to cause embarrassment for the Respondent. In a Preliminary Hearing on 28 February 2022, I referred to that conduct as potentially unreasonable in all of the circumstances of the case and that the content and/or tone of the Claimant's emails could lead an Employment Judge to conclude that the claims were being pursed with the intention of causing maximum embarrassment and with the view of extorting either revenge or financial settlement as Ms Banerjee submitted to me at that hearing.

13. In December 2021, the Claimant entered into settlement negotiations with her former employer and sought to engage the Respondent in similar negotiation with a view to concluding the claim without a hearing. In an email sent on 1 December 2021, the Claimant proposed terms that she and the Respondent would each bear their own costs and agree to a mutual obligation not to make any derogatory comment about other in return for her withdrawal of the claims against him.

14. The negotiations were primarily conducted between the Claimant's solicitors and the solicitors acting for the former employer, the settlement terms being more extensive in that regard. The email correspondence in December 2021 makes clear that solicitors for the Clamant and solicitors acting for the former employer were each actively pursuing the possibility of settlement. The Respondent wished to have some time to consider the position over Christmas and would revert at the beginning of January 2022.

15. In early January 2022, the Claimant sent a further email directly to the Respondent again referring to potential contact with the press. This was unhelpful and it did nothing to improve the progress of settlement discussions. On balance, I accept that it was borne out of frustration because the Claimant was genuinely seeking to resolve proceedings swiftly

without incurring further costs and the Respondent had still not replied. This is consistent with the email sent on 11 January 2022 by her solicitor expressing the view that the Respondent had had long enough to decide whether or not to accept the offer made to him and setting a deadline for acceptance.

16. On 13 January 2022, the Respondent's solicitor contacted the Claimant's solicitor stating that it was in the interest of all parties to settle but that the Respondent felt very strongly that he should not be out of pocket and should have his costs covered. The Respondent was unwilling to agree a mutual non-derogatory comments clause and sought a contribution to his costs. If an agreement was not reached, the Respondent would pursue applications for strike out and/or deposit orders and costs in due course. The email stated that the Respondent had a recording which would make clear that the Claimant had lied to the Tribunal in key parts of her claims, adding:

> '**That recording has not been shared with anybody so far but if this does not settle, the recording will be referred to the Tribunal in due course and the vexatious manner in which your client sent recent threats, that were in open correspondence would be referred to the Tribunal in support of the strike out and deposit order as well as an order for costs.**'

17. The email went on to suggest that the best outcome would be to settle with the Respondent's cost paid and if settlement was not agreed, the Respondent reserved the rights to bring claims against the Claimant in the Employment Tribunal and courts for libel, sexual harassment and defamatory claims. The Respondent did not state what contribution to costs was sought, simply that the "costs are at a level you would expect".

18. I accept that the Claimant's solicitor had intended to write to the Respondent's solicitor asking for particulars of the allegations that she had lied to the Tribunal and to give details of the recording. That email was not in fact sent to the Respondent's solicitor. At no stage of negotiations did the Respondent's solicitor volunteer particulars of the allegation of lying nor did it disclose a copy of the recording.

19. In an email sent on 18 January 2022, the Claimant's solicitor informed the Respondent's solicitor that an "in principle" agreement had been reached with the employer, that the Claimant wished to settle claims against both Respondents which included each party being responsible for their own costs and mutual non-derogatory comments clauses. The solicitor says that he was surprised to learn that the Respondent had refused to agree to that and stated that if he continued to refuse, it would make difficult the settlement of any claim against the employer. If the Respondent continued to insist on his cost being paid without even specifying what they are, then the Claimant would apply for costs in the event that her claim was successful. The Claimant's solicitor considered it unlikely that the claim would be struck out at the Preliminary Hearing listed for 28 February 2022. It could not have been as Employment Judge Burgher had already refused to convert it to a public Preliminary Hearing.

20. In the reply on 20 January 2022, the Respondent's solicitor again expressed a willingness to settle but with his costs covered and the Respondent should not be forced to agree to what was effectively a gagging clause given that the Claimant had already made derogatory comments about him to numerous parties such that he had a right to clear his name. Again, the solicitor accused the Claimant of lying in her pleaded case and making vexatious threats of going to the media, causing the Respondent to incur costs. It suggested

that these costs come out of any money paid to the Claimant by the employer. The Respondent's costs would be confirmed if the Claimant agreed in principle but there was no indication of what level of costs was being claimed.

21. On 9 February 2022, the Claimant's solicitor made clear that she did not want to agree a settlement with the employer which did not include the Respondent as he may claim costs against her. She was prepared to accept the proposed settlement with the employer if the Respondent agreed a "drop hands" settlement with each bearing their own costs and mutual non-derogatory comments clauses. As a result, the parties prepared for the forthcoming Preliminary Hearing thereby incurring additional costs.

22. At the Preliminary Hearing on 28 February 2022, I made a deposit order in respect of those claims where I considered that the Claimant had little reasonable prospect of success for the reasons given. I made clear that the purpose of the deposit order was to give the Claimant pause for thought, to consider whether or not she wished to proceed given the identified weaknesses in her claims and the potential costs consequences. The Claimant did indeed reflect upon her claims and there were further negotiations through ACAS with regard to a potential settlement.

23. On 11 March 2022, the Respondent's solicitor made an offer of settlement on terms that the Claimant withdraw her claims against him and pay £15,000 towards his costs, in return he would not bring any Employment Tribunal claim against her. The offer was repeated via ACAS on 14 March 2022 with a copy of the draft Employment Tribunal claim for sexual harassment and/or discrimination on grounds of sex. In the six-page Particulars of Claim, the Respondent pleaded his account of the background to the personal relationship. He averred that they had met through a mutual work colleague, had worked together from her flat in a Covid support bubble before the intimate relationship started. It makes a number of allegations about the Claimant's conduct, such as sharing personal messages with their colleagues and inappropriate comments and emails by the Claimant to colleagues and his new partner about the events at the conclusion of that intimate relationship. It avers that the Claimant had made complaints about him to HR at their employer, subsequently made an ethics violation complaint about him and the Claimant's November 2021 threats to go to the press which he had been obliged to bring to his employer's attention.

24. I find that the Respondent's claims based upon the Claimant's contact with colleagues and threats of going to the press appear to arise out of the failure of the personal relationship, not a working relationship even if they did have an impact upon him at work. This is much the same as my earlier conclusion that the Claimant's complaints that the Respondent had shared with colleagues photographs of her taken on a joint holiday did not appear to have the necessary connection with employment required to bring a claim in the Employment Tribunal. There is a significant blurring of the lines between the workplace and the personal relationship on the part of both the Claimant and the Respondent in their respective claims.

25. Correspondence continued through ACAS. On 15 March 2022, the Claimant offered to withdraw her claim with each side bearing their own costs. On 21 March 2022, the Respondent indicated that he would accept only if the settlement did not compromise his own potential claim, in the alternative he would settle all claims if the Claimant paid him £15,000. I find it significant that the £15,000 is claimed alternatively both as a settlement figure for his potential claim and as a contribution to legal costs incurred defending the

Claimant's claims. It does not appear to be based upon actual costs incurred to date as evidenced by the costs schedule provided for today's hearing.

26. Settlement correspondence continued, with the Respondent increasing the sum sought to £20,000. Ultimately the Claimant withdrew all claims against both Respondents on 3 May 2022 having entered into an agreement with the employer but not the Respondent. The Respondent then made this application for costs.

27. The Respondent's application for costs is based upon three grounds:

(1) The Claimant acted unreasonably in bringing a complaint which had little reasonable prospect of success as there is no sufficient connection with the workplace and it was presented late.

(2) The Claimant conducted these proceedings in a manner that was unreasonable and or vexatious, in particular with threats of going to the press.

(3) The claims were borne of malice. The Claimant was seeking to embarrass the Respondent in order to pressure him into settlement with no genuine belief in the merits of her claim. This caused him to incur significant costs which the Claimant has means to pay.

28. The Claimant resists the application. She says that she had reasonable belief in the prospect of success given the grey area caused by the effect of Covid whereby colleagues worked from home together in a bubble. There is medical evidence which may well have led a Tribunal to conclude that it was just and equitable to extend time. She made genuine and repeated efforts to settle proceedings at an early stage and it was the Respondent who put in place unreasonable obstacles to settlement - imposing short notice deadlines for acceptance of offers, failing to respond to her offers of settlement, making threats that she was lying based on undisclosed recordings and, finally, in threatening to bring his own claim in the Tribunal.

29. The Claimant denies that her emails referring to going to the press were either vexatious or unreasonable as she was suffering from significant mental health difficulties which affected her judgment, she did not in fact go to the press and she believes the contents of what she was saying was true and would be aired in due course in a public tribunal hearing. The Claimant denies being motivated by malice in bringing her claims, maintaining that they were legally sustainable claims brought in good faith. She says that she does not have the means to make any significant costs payment.

30. It might be wondered what level of costs is incurred in a case presented on 26 August 2021 and withdrawn on 3 May 2022 where the only significant steps that had taken place were the drafting of a Response and attendance at the Preliminary Hearing. The answer according to the costs schedule presented on behalf of the Respondent today is £63,325.58. This figure includes costs for work undertaken after the claim had been withdrawn and consideration of a response to the threatened press release.

Conclusions

Unreasonable behaviour in bringing the claims

31. The two jurisdictional challenges to the Claimant's claims were significant but I am not satisfied that the claims were so hopeless that the Claimant can be said to have acted unreasonably in bringing them at all. The test for an extension of time in Equality Act claims is "just and equitable". It is a generous test which permits for balancing of the evidence and a decision in all the circumstances of the case, which will include medical evidence explaining any delay. There are many claims brought to the Employment Tribunal which are out of time and where an extension of time is given.

32. As for the employment connection, I considered this at the Preliminary Hearing where I ordered the Claimant to pay a deposit. I did not consider then and I do not consider now that there were strong prospects of establishing the necessary link to employment. However, there were some facts which if proved were potentially capable of creating the necessary link, for example photographs shared by the Respondent with her colleagues. Indeed, the Respondent sought to rely on comments made to colleagues by the Claimant about his conduct in their personal relationship as the basis of his own sexual harassment claim. I also accept Mr Jamieson's submission that there was some blurring of the lines at a time when people were co-working for the same employer but at home in Covid bubbles, particularly as the Claimant and Respondent were not in an intimate relationship at the time and their contact, even working in different teams, could potentially have extended into the course of employment.

33. The employment tribunal is not a jurisdiction were costs follow the event. There are many claims that are brought which ultimately do not succeed but which could not properly give rise to a costs order. For these reasons, I do not consider the Claimant's prospects so weak as to amount to unreasonable conduct in even bringing the claims.

Unreasonable behaviour in the conduct of proceedings

34. There are two aspects of the Claimant's conduct which are said to give rise to unreasonable behaviour: her threats to go to the press and her decision to continue the claims until 3 May 2022 having been told on 28 February 2022 that they had little reasonable prospects of success.

35. Dealing with the press threats, I am satisfied that this was clearly foolish behaviour by the Claimant which reflects badly upon her judgment and could properly have formed the basis for a strike out application. Balanced against that is the fact that the Claimant did not in fact make good her threats to go to the press and she was not using the threats to secure financial advantage given that the settlement she was seeking with the Respondent was a walk away involving no payment of money. I am satisfied that the Claimant's conduct in context was not vexatious. However, I do consider that it was unreasonable – it was unnecessary and it was an attempt to put pressure on the Respondent to settle albeit not done to extract money from him.

36. In applying the guidance given in **Yerrakalva,** it is necessary to look at the case in the round and that includes the Respondent's conduct. The Claimant made genuine efforts to settle the proceedings with a walk away but the Respondent would not agree to a mutual non-derogatory comments clause and who, in March 2022 as negotiations continued, for the first time intimated that he may bring his own claims against the Claimant. I consider that this was an attempt by the Respondent to put pressure on her to settle on payment of an arbitrary sum of £15,000. Moreover, the Respondent made a serious allegation that the Claimant had lied to the Tribunal and yet failed to disclose the recording said to evidence

this lie. Overall, I consider that just as the Claimant was unreasonable in her threat to go to the press, the Respondent was unreasonable in threatening to bring a Tribunal claim and making unsubstantiated allegations that the Claimant had lied.

37. I also consider relevant the chronology of the negotiations in the context of the costs incurred. I attach no significance to the short deadline imposed by the Respondent for acceptance of his first offer as this was due to the impending date for presentation of the Response and a desire to avoid those costs being incurred. However, the Claimant had been taking significant steps to resolve this dispute from the 1 December 2021. It was the Respondent who was delaying. Whilst it was entirely permissible for the Respondent to refuse to agree to a mutual non-derogatory comments clause or to have each side bear their own costs, his position did have the effect of preventing settlement being reached before the Preliminary Hearing. Furthermore, when insisting on a contribution to his costs, I consider it unreasonable of the Respondent to have initially failed to indicate what his costs were and then later to have plucked the apparently arbitrary figure of £15,000 out of the air, whether as a settlement of his own claim or as contribution to costs.

38. On balance, I find that this is a set of proceedings where both the Claimant and the Respondent has sought to use the Tribunal's time and resources to continue their dispute arising primarily out of the breakdown of their personal relationship. Much as the Claimant had been criticised for allegedly bringing the claim to cause maximum embarrassment to the Respondent, I do not consider that it was to extort a financial settlement. The Respondent has also sought to use these proceedings, and indeed his own threatened claim, to cause difficulty to the Claimant. It is unattractive behaviour on both parts not least at a time when Tribunal resources are stretched and much time has been expended on an acrimonious dispute arising from a failed short-lived relationship.

39. For those reasons, whist I am satisfied that the unreasonable conduct threshold has been met by the Claimant's conduct in threatening to go to the press, I conclude that it is not appropriate to exercise my discretion to order her to pay the Respondent's costs.

40. At the conclusion of the hearing, the Respondent made an application for the rule 50 anonymity order to be extended permanently. This was not opposed by the Claimant's Counsel. Given the strong feeling on both sides, including the Claimant's vehement belief that she has been ill-treated by the Respondent, and the fact that there has been no determination of the merits of the claims, which are equally vehemently denied by the Respondent, I am persuaded that such an order is an appropriate derogation from the principle of open justice.

Employment Judge Russell

19 December 2023