EMPLOYMENT TRIBUNALS

Claimant: **Havovi Anklesaria**

Respondent: **Trinity College, Cambridge**

Heard at: **Cambridge Employment Tribunal** **On:17 January 2025**

Before: **Employment Judge Freshwater**
Tribunal Member Mr A Hayes
Tribunal Member Mr B Smith

Representation
Claimant: none
Respondent: none

JUDGMENT ON COSTS

1. The respondent's application for a costs order is dismissed.

REASONS

Application

1. The is the respondent's application for a costs order against the claimant.

2. The application was made on two grounds:

   (i) That the claimant unreasonably refused an offer of settlement and made a wholly unrealistic counteroffer, which constituted unreasonable conduct of the proceedings; and

   (ii) That the claims (or aspects of the claims) had no reasonable prospect of success for the purposes of rule 76(1)(b) and pursuit of those aspects of the claims was unreasonable conduct.

3. The application was made under the Employment Tribunal Rules of Procedure 2013.

4. The tribunal convened on 17 January 2025 to consider the application without a hearing. By that time, new rules of procedure were in force. This application therefore was determined under the Employment Tribunal Rules of Procedure 2024. There is no material difference in respect of costs order between the two sets of rules, and therefore the new rules made no difference to the decision in question. For that reason, it was appropriate to consider the application without seeking further representations from the parties.

5. The parties agreed that the tribunal could hear the matter without a hearing. Both parties made written representations.

Background

6. The claimant submitted an ET1 claim form on 20 December 2021. She brought claims of direct and indirect race discrimination. The claimant was legally represented at that point. On 1 December 2022, the claimant applied to add a victimisation claim relating to not being offered exam invigilation work in 2022. This was not opposed by the respondent and the tribunal granted the application on 25 January 2023.

7. An agreed list of issues was confirmed by the tribunal at a case management hearing on 27 February 2023. The claimant was legally represented at the hearing, but her solicitors came off the record on 3 May 2023. Disclosure took place on 22 May 2023. The bundle was agreed on 4 July 2023.

8. On 21 July 2023 the respondent made a without prejudice settlement offer to the claimant. This offered the Claimant a cash payment of £25,000 in settlement of all claims along with an offer of a permanent daytime contract.

9. The claimant replied making a counter offer on 8 August 2023, seeking a higher cash payment and a more flexible permanent contract than had been offered.

10. The claimant's solicitors came back onto the record on 21 August 2023 prior to disclosure (by both parties) of a few additional documents and witness statements in November 2023.

The law

11. Rule 74 of the Employment Tribunal Rules of Procedure 2024 states:

> "(1) The Tribunal may make a costs order or a preparation time order (as appropriate) on its own initiative or on the application of a party or, in respect of a costs order under rule 73(1)(b), a witness who has attended or has been ordered to attend to give oral evidence at a hearing.

(2) The Tribunal must consider making a costs order or a preparation time order 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 of it, or the way that the proceedings, or part of it, have been conducted,

(b)any claim, response or reply had no reasonable prospect of success, or

(c)a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which that hearing begins."

12. It is a fundamental principle of the costs jurisdiction within the Employment Tribunals that costs are the exception, not the rule. They do not 'follow the event' (see *Gee v Shell UK Limited [2002] EWCA Civ 1479; [2003] IRLR 82; Barnsley MBC v Yerrakalva [2012] IRLR 78*).

13. In *Khan v Heywood and Middleton Primary Care Trust 2006 ICR 543, EAT* the Appeal Tribunal stated that whether conduct could be characterised as unreasonable required an exercise of judgment about which there could be reasonable scope for disagreement among tribunals, properly directing themselves.

14. In *Vaughan v London Borough of Lewisham and ors 2013 IRLR 713, EAT*, the EAT held that nothing could be read into the respondents' offers to settle as these had been made on a purely 'commercial basis' to avoid a long hearing.

Unreasonable conduct

15. The tribunal must consider whether the claimant conducted these proceedings, or any part of the proceedings, unreasonably in the ordinary sense of the word.

16. Failure to accept a prior settlement offer may be relevant to the overarching question of whether a party has conducted proceedings, or part of the proceedings, unreasonably. It should also be noted that it does not follow from the fact that a settlement offer has been made by a Respondent that the claim has reasonable prospects of success.

17. The claimant's rejection of the settlement offer did not amount to unreasonable conduct.

18. The settlement offer related in part to the Claimant's employment arrangements, which is not unreasonable conduct of the litigation (in contrast to the cash sum.)

19. The claimant was aware that her case was nuanced, but at the point she responded to the offer of settlement, she was unrepresented. Lititgants are not obliged to be legally represented. The respondent did not further engage with the claimant's counter offer of settlement when it could have done so or seek to offer any futher settlement.

20. The respondent could have applied to strike out the proceedings or to seek a deposit order but it did not do so. This is not determinative, but a relevant factor in the overall circimstances of this case.

No reasonable prospect of success

21. The relevant question is whether the claimant reasonably ought to have known that the claims had no reasonable prospect of success at a particular point in time.

22. The tribunal must consider each cause of action separately. The Respondent accepts that the victimisation claim had a reasonable prospect of success. Therefore the focus is on the claims of direct and indirect discrimination.

23. A failure of the receiving party to apply for strike out or a deposit order (on grounds of no or little reasonable prospect of success) may be a relevant factor, although it is accepted that a failure to make such an application does not mean that a claim necessarily has a reasonable prospect of success.

24. The respondent did not need to make either such application in order to make this costs application (or for there to be jurisdiction to make an order) but it is a relevant consideration that no such application was made when the tribunal considers whether, objectively, the Claimant ought to have known the complaints had no reasonable prospects of success.

25. In reaching our decision, we assessed the evidence in order to reach findings of fact. For example, at paragraph 81 of the reserved judgment, we concluded that the reason for any difference in treatment stemmed from the business needs of the Respondent and the fact that the Claimant would be unavailable for work for 4 months, including an entire term. That is a conclusion reached on the evidence heard. The judgment does not proceed on the basis that the discrimination complaints had no reasonable prospects of success from the outset. We observed at paragraph 75 of the reserved judgment: "The issues in this case stem from different interpretations about what happened and why".

26. The claimant believed that discrimination cases were complex, and that the paper documentation was only part of the picture. We agree with this analysis. In the context of this case, it was not unreasonable to think that

there was a prospect of success in the interpretation of the oral and documentary evidence as a whole. This was a case with an unusual factual background in respect of the working arrangements which had been agreed between the parties for many years. Ultimately we did not agree with the claimant's interpretation of events – but that does not mean she was unreasonable to ask us to determine her case.

Conclusion

27. As a result of the reasons set out in paragraphs 15 to 26 above, the pursuit of the complaints after the 8 August was not unreasonable conduct for the purposes of Rule 74(a) and neither is this a case falling within Rule 74(b).

28. The application for costs is dismissed.

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Employment Judge **Freshwater**

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Date 14 February 2025

JUDGMENT & REASONS SENT TO THE PARTIES ON
6 March 2025

FOR EMPLOYMENT TRIBUNALS

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/