EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Grace Ejiga	**v**	**Olive Jar Digital Limited**

JUDGMENT

1. The claimant is awarded £15,000 in costs.

2. The respondent is not awarded any costs.

REASONS

1. The parties wanted me to decide their costs applications on the papers. They supplied these documents: the claimant's costs application dated 27 January 2025; the claimant's schedule of costs; the respondent's response and counter-application for costs dated 8 April 2025; the claimant's response to the respondent's counter-application dated 28 April 2025; the respondent's response to the claimant's letter of 28 April 2025 dated 20 May 2025.

2. The claimant applies for costs capped at £20,000 under rule 74(2)(a) on the grounds that the respondent had acted unreasonably in the way that the proceedings or part of the proceedings were conducted; alternatively under rule 74(2)(b) on grounds that the response had no reasonable prospect of success.

3. The respondent makes a counter-application under rule 74(2)(a) on grounds that the claimant acted unreasonably in conducting the proceedings or part of the proceedings by unreasonably rejecting its settlement offer. The respondent would have accepted the outcome of the proceedings without applying for costs had the claimant not made an application. The respondent adds that the nature of the settlement negotiations is also relevant to whether it is just and equitable to award the claimant costs.

The law

4. The power to award costs is set out in the Employment Tribunal Procedure Rules 2024. Under rule 74(2) a tribunal may make a costs order, and must 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 of it, or the way that the proceedings, or part of it, have been conducted; or (b) any claim, response or reply had no reasonable prospect of success.

5. Under rule 82, in deciding whether to make a costs order, and if so the amount of any such order, the tribunal may have regard to the paying party's ability to pay.

6. In exercising its discretion to award costs, the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct. However, its discretion is not limited to those costs that are caused by or attributable to the unreasonable conduct. The unreasonable conduct is a precondition of the existence of the power to order costs and is also a relevant factor to be taken into account in deciding whether to make an order for costs and the form of the order, but that is not the same as requiring a party to prove that specific unreasonable conduct caused particular costs to be incurred. (McPherson v BNP Paribas [2004] EWCA Civ 56.)

7. The judgment in *McPherson* was never intended to rewrite rule 40, or to add a gloss to it, either by disregarding questions of causation or by requiring the tribunal to dissect a case in detail and compartmentalise the relevant conduct under separate headings, such as “nature” “gravity” and “effect.” The relevant thrust of that judgment was to reject as erroneous a submission to the court that, in deciding whether to make a costs order, the tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission the court had not intended to imply that causation is irrelevant. (Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78, CA.)

8. 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 was 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. (Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78, CA.)

9. In Daleside Nursing Home Ltd v Mathew UKEAT/0519/08, the claimant’s central allegation that she had been racially abused was found to be a lie. The tribunal found she had made up the allegation of being called a ‘black bitch’ as a deliberate and cynical lie to deflect attention from disciplinary matters which were about to be brought against her. The EAT said it was perverse for a tribunal to fail to conclude that the making of such a false

allegation at the heart of the claim did not constitute unreasonable conduct.

10. The tribunal can consider an offer marked 'without prejudice save as to costs' in relation to a party's costs application. However, failure by a claimant to achieve an award in excess of the rejected offer should not by itself lead to an order for costs. Before the rejection becomes a relevant factor in the exercise of its discretion, the employment tribunal must first conclude that the conduct of the claimant in rejecting the offer was unreasonable. (Kopel v Safeway Stores PLC [2003] IRLR 573, EAT.)

The claimant's application

Rule 74(2)(a)

11. I find that the respondent acted unreasonably in the way that the proceedings or part of the proceedings were conducted, ie by contending that the claimant had resigned on 3 May 2024, whereas the respondent did not actually believe the claimant had resigned on 3 May 2024 and knew it had artificially tried to create a picture that she had done so. Instead, the respondent had brought the employment relationship to an end by dismissing the claimant on 21 May 2024.

12. In my decision on liability, I found that Mr Thakrar did not at the time interpret the handover email as a resignation. I also found that:

> 'the respondent's later email on 21 May 2024 was artificially constructed to suggest the respondent believed the claimant had already resigned. As Mr Thakrar admitted, the company by this time believed the relationship had broken down and did not want the claimant back. Rather than have to find legitimate grounds for dismissal and go through a proper process, the respondent tried to reinterpret events to suggest the claimant had already resigned.'

13. When defending the claimant's unfair dismissal claim, the respondent insisted that the claimant had not been dismissed and that she had resigned on 3 May 2024.

14. This was compounded by the respondent stating in its letter of 21 May 2024, that it would not in any event have continued to employ the claimant because of (alleged) gross misconduct which it had discovered since 3 May 2024. The respondent relied on these in the tribunal hearing. In my liability decision, I found that the respondent did not come even close to providing evidence that the claimant was guilty of ordinary misconduct, let alone gross misconduct in relation to these matters. I further found that 'This has all the appearance to me of an employer seeking to build a case against an employee in anticipation of unfair dismissal proceedings.' This was not a finding I made lightly.

15. I therefore find that the respondent acted unreasonably within rule 74(2)(a) in relying on these arguments.

16. I now have to consider whether to use my discretion to award costs. I think it is appropriate that I do so. The respondent, although a small company, was professionally represented in the proceedings. The argument which the respondent persisted with went to the heart of the unfair dismissal and wrongful dismissal claims because they concerned whether the claimant was actually dismissed, and were also consequentially relevant to the unauthorised deductions claim.

17. That would be sufficient reason on its own to exercise my discretion. However, I would add that the allegations of gross misconduct caused the claimant a huge amount of distress and potential damage to her reputation. I know this was of great concern to her because, as well as what she said during the hearing, she rejected a favourable settlement offer because she did not feel what was on offer sufficiently cleared her name.

18. I did consider whether the fact that the claimant rejected a settlement offer of greater, or perhaps – after taking account of tax – similar value to her schedule of loss and the ultimate award, affects the exercise of my discretion. I decided that it did not because, as explained below, the claimant's reason for wanting a tribunal decision given the (unjustified) allegations of gross misconduct was reasonable.

19. I now have to consider how much to award in respect of costs.

20. The unreasonableness went to the heart of the case and the whole way it was run from the outset. The result was that the claimant incurred the costs of dealing with an unsustainable defence. Subject to any question about the calculation of the schedule of costs, I think the claimant should be compensated in respect of the cost of the entire case.

21. The parties are both legally represented. They wanted me to make the decision on the papers and have said what they wanted to say. Neither of them said anything about the hourly rate on the claimant's schedule of costs. The respondent has said nothing about the overall total either.

22. The schedule shows a running total of £16,801 (excluding VAT). It is based on an hourly rate predominantly of £335 (DRW) and later £350 (PK). The solicitors are based in Leeds. The claimant has been billed £11,713.50 (excluding VAT) to date. There is in addition £5,825 for Counsel, which strikes me as a reasonable amount. The overall total including VAT is £21,045.60. The application is confined to £20,000.

23. I am not comfortable with awarding the full £20,000. The apparent total was not a great deal more than £20,000, so it is not a case where the difference is so large that keeping it to £20,000 must be warranted. The solicitors were based in Leeds, which usually attracts a lower hourly rate

in the guidelines than where solicitors are based in London. There is also no explanation why PK attracted a higher rate than DRW or why PK had to do those elements of the work. I will take as a very loose guide that the claimant has so far been billed £5000 (excluding VAT) less than the solicitors' running total. This is not intended to be scientific or to cover everything that claimant has to pay, but I think an award which appropriately compensates the claimant and recognises these contingencies to some extent would be £15,000.

24. I therefore order that the respondent pay the claimant £15,000 in costs.

Rule 74(2)(b)

25. For completeness, I would also have ordered costs on this basis. The response also had no reasonable prospects of success because, as I explained in my liability judgment, an objective bystander in the respondent's position would have known the claimant had not resigned. Therefore, the central plank of the response was highly unlikely to succeed.

The respondent's counter-application

26. I was shown the 'without prejudice, subject to contract and save as to costs' correspondence between the parties in December 2024. The claimant accepted the final offer of £35,000 in principle, but subject to agreeing terms. The claimant said that her primary aim had always been to rebut the allegations against her, which is why she had wanted a tribunal finding above all else.

27. The respondent makes the point that the sum offered was the full amount of the claimant's schedule of loss, and is broadly £10,000 more than the amount the claimant was actually awarded in the tribunal. I do not find this any reason to award costs against the claimant. One reason for the discrepancy is that figures in the without prejudice COT 3 were calculated gross – and indeed at paragraph 1.2, the notice amount would have been subject to tax because of PENP.

28. More to the point, the reason the claimant did not settle was because she wanted a tribunal finding in the absence of COT3 which she felt would acknowledge the allegations of dishonesty and poor performance were unwarranted. In my view, the claimant was entitled to seek a tribunal finding in those circumstances.

29. The main point which the respondent makes is that the COT 3 wording it offered should have been adequate to satisfy the claimant and that she was asking the respondent to lie. The claimant denies this.

30. In the respondent's first draft COT3, under paragraph 5 headed 'Allegations against the claimant', the respondent suggested:

'5.1 The respondent has raised, as part of the tribunal proceedings, matters and allegations relating to the claimant and her involvement in other work outside of her work or the respondent while employed by the respondent.

5.2 The respondent hereby confirms that it has not investigated or pursued these issues and that it has not therefore concluded that the claimant committed any act of wrongdoing whatsoever and so this allegation has never been substantiated.'

31. The claimant amended paragraph 5.1 to define 'allegations' as including her misuse of TOIL and requiring her to attend a Performance Improvement Plan. She amended paragraph 5.2 so that the relevant parts read:

'The respondent hereby confirms that:

I. it investigated the allegations whilst the claimant remained in its employment;
II. The allegations were not substantiated by the respondent's investigation;
III. It has therefore concluded that the claimant has not committed any act of wrongdoing whatsoever, or that a PIP was indeed required;
IV. The allegations are hereby formally withdrawn'

32. The respondent refused to say that it had investigated the allegations because it said that was not true, since it had never discussed the matters with the claimant. It was prepared instead to say that it did not pursue the allegations fully and so did not reach a conclusion around the allegations.

33. The claimant refuted the suggestion that she was asking the respondent to lie. She reiterated that there was no evidence to substantiate the allegations. The claimant was not prepared to change the wording and the negotiations broke down.

34. I do not believe that the claimant – or for that matter, the respondent – acted unreasonably in relation to the wording of this clause. In my experience, it is typical of the type of dispute which often arises in settlement negotiations over the wording of an agreement when both parties are assessing the potential future implications of every word. The respondent's wording is slightly weaker than the claimant's, in that investigating and rejecting an accusation provides stronger exoneration than simply saying it is an allegation which the respondent had not gone into. The factual position and what was meant by having investigated or not having investigated was complicated when the claimant expanded the 'allegations' to include the PIP. The definition of 'investigated' is also potentially ambiguous in the particular context. I am not inclined to criticise either side for being unable to reach agreement on the final wording.

35. More generally, given what I have said about the gross misconduct allegations, the claimant was entitled to have her claim, including that aspect, heard.

Employment Judge Lewis

Dated: 20 August 2025

Judgment and Reasons sent to the parties on:

2 September 2025

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For the Tribunal Office