EMPLOYMENT TRIBUNALS

Claimant: Mr D Ireland

Respondent: University College London

Heard at: London Central Employment Tribunal
(Remotely by CVP)

On: **23 – 25 March 2021**

Before: Employment Judge Brown

Members: Mr D Kendall
Mr R Baber

Appearances
For the claimant: In person
For the respondent: Ms M Tutin, Counsel

COSTS JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Claimant shall pay the Respondent's costs in the sum of £14,000.

2. The deposit of £1,000 shall be paid to the Respondent.

REASONS

1. On 25 March 2021, at the end of a liability hearing on 23 - 25 March 2021, the Tribunal dismissed the Claimant's claim against the Respondent of race discrimination in relation to the Respondent's withdrawal of an offer of employment which it had made to the Claimant.

2. The Tribunal concluded that the Respondent would not have treated a BAME comparator differently to the way in which it treated the Claimant. It also decided that Ms Fahad, the alleged perpetrator had valid, non discriminatory reasons for acting as she did.

3. The Respondent made an application for costs against the Claimant arising out of the judgment, after the Tribunal had given judgment. The Claimant objected to the costs application being heard on 25 March . He said that he was not prepared to deal with a costs hearing, that the Respondent had sent him the costs Bundle on 19 March 2021, very shortly before the liability hearing was due to start, and when the Respondent knew that he would not have time to consider it. The Claimant said that the Respondent had misled the Tribunal regarding disclosure and that he would be making an application for reconsideration. The Claimant said that he had made his own application for wasted costs.

4. The Tribunal decided that it would be fair, and in accordance with the overriding objective, to hear the Respondent's costs application. It would save time and costs to do so. The Respondent had written to the Claimant on 28 November 2019, 3 July 2020 (following the making of a deposit order against him), on 17 February 2021 and on 19 March 2021, warning him that it would make an application for costs against him and setting out the basis on which it would do so. The Tribunal had made a decision in the case on the basis of the evidence it had heard. Unless and until that decision was overturned or reconsidered, that decision would stand and the Tribunal would proceed on that basis .

5. At this hearing, Ms Tutin said that the Respondent was seeking costs on two grounds, that the Claimant had unreasonably pursued a claim with no reasonable prospects of success and that his conduct of the case had been unreasonable, making persistent applications and sending abusive correspondence.

6. Ms Tutin took the Tribunal through the history of the correspondence and hearings relevant to costs. She referred to a bundle of documents which had been produced by the Respondent for the costs hearing.

7. On 28 November 2019 the Respondent had applied to the Tribunal for an Open Preliminary Hearing to consider strike out and a deposit order, on the basis that the Claimant's claim had no reasonable prospects of success and he had acted unreasonably.

8. The Respondent had sent a letter to the Claimant on 28 November 2019. It said,

> "You maintain that UCL discriminated against you on the grounds of race when it withdrew an offer of employment. The legal test for discrimination on the grounds of race states that:
> "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."
>
> The job offer made by UCL to you was expressly conditional on the receipt of satisfactory references. It is entirely clear that the withdrawal of your job offer was on the basis that your references were not satisfactory. We have attached redacted versions of the references."

9. On 23 June 2020 EJ Quill made a deposit order against the Claimant in the following terms, "The Employment Judge considers that the claimant's allegations

or arguments that the respondent's decision to withdraw the conditional offer of employment was because of race have little reasonable prospect of success. The claimant is ORDERED to pay a deposit of £1000 not later than Friday 21 August 2020 as a condition of being permitted to continue to advance those allegations or arguments."

10. EJ Quill gave his reasons for making the deposit order as follows,

" [51]. I am, however, persuaded that there are little reasonable prospects of success for the Claimant. I do not ignore the burden of proof provisions. However, the Claimant has not put forward any convincing reason for why he would be offered the job in the first place if he seeks to rely on an inference that the panel was selected to be biased against him. He is free to argue that inferences should be drawn from the evidence (and that is why the case is not being struck out). However, a simple difference in race between him and the decision-maker is nowhere close to being a sufficient basis for an inference of discrimination to be drawn. Nor is the fact that the Respondent might have said that it was pleased with its record in appointing (UK based) BAME applicants.

[52]. Furthermore, based on the undisputed facts, there are very plausible reasons that a tribunal might be satisfied that race played no part whatsoever in the decision. The Respondent received one poor reference (Montgomery), one express refusal (Adams) and (unless he can prove otherwise) one non-reply (Groves) from the 3 referees that the Claimant asked them to contact. The Claimant's comments and suggestions about what might have happened had the Respondent made further enquiries of him or his referees are irrelevant unless a tribunal is satisfied that the Respondent would have acted differently if his race had been different."

11. The Respondent had also sent the Claimant a letter on 3 July 2020, after the Open Preliminary Hearing at which EJ Quill made the deposit order, PDF p74 costs bundle. The letter said,

> "At the Preliminary Hearing, Employment Judge Quill concluded that your claim that UCL's decision to withdraw your conditional offer of employment was because of your race has little reasonable prospects of success. He stated that "the Claimant has not put forward any convincing reason for why he would be offered the job in the first place if he seeks to rely on an inference that the panel was selected to be biased against him" (para 51), noting that "a simple difference in race between him and the decision-maker" and "the fact that the Respondent might have said that it was pleased with its record in appointing (UK based) BAME applicants" are "nowhere close to being a sufficient basis for an inference of discrimination to be drawn" (para 51). He also noted that "there are very plausible reasons that a tribunal might be satisfied that race played no part whatsoever in the decision" (para 52).
>
> As a result of Employment Judge Quill's decision that your claim has little reasonable prospects of success, you have been ordered to pay a deposit of £1,000 not later than Friday 21 August as a condition of being permitted to continue to advance this claim.

> The awarding of a deposit order, especially at this level, is not an overly common practice in the Employment Tribunal, even in instances where the Claimant is litigant in person. Therefore, this decision by Employment Judge Quill supports UCL's view that your claim is unlikely to succeed and anticipates that it is reasonably unlikely that a Tribunal judge will rule in your favour at a full hearing. We therefore write to invite you to withdraw your claim against UCL, instead of paying the Deposit Order and advancing your claim, before any further costs are incurred."

12. The Claimant had appealed deposit order. On 17 February 2021 his appeal to the Employment Appeal Tribunal against the Deposit Order was rejected on the papers with His Honour Judge Martyn Barklem, who noted: "the difficulties which his [your] claims are likely to encounter are self-evident, and the ET did not err in pointing them out."

13. Ms Tutin drew the Tribunal's attention to the Respondent's letter of 19 March 2021. She relied on its contents in making the application for costs. The letter said,

> "Our letter of 17 February 2021 highlighted the ways that your conduct, both in bringing your claim and during the course of these proceedings, has been unreasonable. We also issued you with a costs warning which set out the potential cost consequences of your continued unreasonable, vexatious and/or abusive conduct of the proceedings. As we have referred you to previously, under Rule 76 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the "ET Rules") (enclosed), the Employment Tribunal has the power to make a costs award against a party who has acted unreasonably i) in bringing a claim, or ii) in the conduct of the proceedings. Rule 78 of the ET Rules sets out the fact that the Tribunal may order you to pay up to £20,000 or the whole or specified amount of costs incurred by the Respondent (which may exceed £20,000) by way of detailed assessment. In light of the above, it should come as no surprise that UCL intends to apply for such a costs order to be made against you following the result of the upcoming liability hearing. Please note that although the costs incurred by UCL far exceed £20,000, UCL intends to seek to recover the costs in the enclosed schedule only from you. …
>
> In the course of determining UCL's application for costs, the Tribunal can have regard to your means to pay any cost award made against you..
>
> You should, however, come to the hearing on 23 March 2021 prepared to deal with the question of your means to pay any costs award made against you, by which we mean you should come prepared to deal with questions on your ability to pay a costs award which are put to you orally, and bring any relevant documentary evidence which supports your position. In the event you do not, we shall ask the Tribunal to infer from your failure to do so that you have the means to pay any award made against you."

14. Ms Tutin drew the Tribunal's attention to the Claimant's repeated applications to the Tribunal, including 5 Freedom of Information requests, 8 disclosure applications, repeated applications for the same disclosure, 6 applications to strike out, and a vast array of correspondence. She said that the Respondent had had to respond to all of these.

15. She drew the Tribunal's attention to the Claimant's conduct of the proceedings. This had been raised at the Preliminary Hearing on 23 June 2020, but EJ Quill had noted, at [44] & [45] of his judgment, that he was not making a decision regarding costs in relation to that conduct.

16. Ms Tutin said that the Claimant had engaged in abusive behaviour towards the Respondent and the Respondent's representatives –

17. On 6 March 2020 the Respondent had written to the Claimant recording some of the correspondence the Claimant had sent to the Respondent:

    "[Your] correspondence has included allegations that our client or this firm has attempted to mislead the Employment Tribunal (see for example your email to Ellie Shepherd of this firm on 16 February 2020) and is engaged in the falsifying of evidence (see for example your email to Ellie Shepherd of 20 February 2020). These allegations have been repeated in correspondence with the Employment Tribunal (see for example your emails of 24 February 2020).

    Furthermore, on occasion, these allegations have been accompanied by inappropriate comments directed at employees of our client (see for example your email to Mr Peter Warwick, Director of Employee Relations at UCL, on 18 February 2020 in which you suggested that certain members of our client's staff are "lazy", "inept" and "pigheaded") and solicitors of this firm (see for example your email to Rachel Robbins of this firm on 28 November 2019, in which you suggested Ms Robbins "arrogantly" implied she had "superior knowledge of the case").

18. Ms Tutin drew the Tribunal's attention to a stream of abusive emails sent by the Claimant to the Respondent's solicitors on 25 May 2020, costs bundle pp46 – 54. These included the following statements,
    "The gang that seeks to profit via bullshit and bullying should learn some ethics."
    "Would you agree that some who see themselves as law professionals in the city are in fact a type of narcissistic parasitical mafia who see themselves as entitled to manipulate and control those they deem as inferior? I think so."
    "I will spend the rest of my life ensuring that the world knows of the incompetent & biased shit that works for your client and the parasites it runs to for help when it fails."
    "Your ET3 is an utter crock of shit and you should know it. I will spend the rest of my life illustrating how disgustingly selfish and parasitical some people can be."
    "How dare you seek to tell me what to do. Unless you're the police and I'm someone subject to a restraining order, you have no right to tell me what to do. Learn your place and learn some respect for your elders. I'll never accept such arrogance."

19. Ms Tutin said that the Claimant should have heeded the Respondent's costs warnings and should have withdrawn his claim.

20. She presented a schedule of costs. Ms Tutin said that the Respondent's costs in defending the claim had vastly exceed £ 20,000, but that it was only seeking costs from November 2020, in the sum of £14,000.

21. Ms Tutin said that the Respondent is public facing institution and that it was in interests of justice that it was recompensed for the costs it had incurred.

22. The Claimant told the Tribunal that the Respondent had sent 100s pages of documents in relation to the costs application shortly before the liability hearing.

23. He said that the Respondent had misrepresented the position and quoted selectively from the deposit order.

24. The Claimant said that the Respondent had failed to provide disclosure and that the reason he had submitted lots of applications was that the Respondent had not responded to his emails.

25. The Claimant said that the abusive emails he had sent were discussed at the hearing before EJ Quill. The Claimant said that he had been medicated when he had sent them and had had a mental breakdown. He said that he should not have to pay for that.

26. He also said that he would be having a hearing in front of an EAT judge, at which his appeal against the deposit order would be heard. The Claimant said that he did not wish to address Tribunal about his means, but that he was not employed. He said, unfortunately, that he was suicidal.

27. The Tribunal encouraged the Claimant to seek support and help.

Relevant Law

28. *Rule 76 Employment Tribunal Rules of Procedure 2013*. Rule 76 provides as follows:

> "*76 (1)A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that:*
> *(a) a party … has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that proceedings or part have been conducted; or*
> *(b) any claim or response had no reasonable prospect of success."*

29. By *Rule 84* it is provided that, in deciding whether to make a costs, preparation, or a wasted costs order and, if so, in what amount, the Tribunal may have regard to the paying party's ability to pay.

30. By *R39 (5) ET Rules 2013* :

> (*5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—*

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded."

31. The Tribunal must consider making an order for costs where it is of the opinion that any of the grounds for making a costs order has been made out.

32. Following *Hayden v Pennine Acute NHS Trust* UKEAT/0141/17, the Tribunal should take two-stage approach:
    32.1. Consider whether any of the grounds in *r76(1)(a)* have been established;
    32.2. Consider whether, in all the circumstances of the case, a costs award is merited, *Ayoola v St Christopher's Fellowship* UKEAT/0508/13.

Unreasonable Conduct

33. "The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the Claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had." (Per Mummery LJ in *Yerrakalva v Barnsley MBC* [2012] ICR 420 at para 41.

34. The failure by the Claimant to "address their minds to [the prospects]", or to engage with a Respondent's costs warning letter, which would have led them to an earlier assessment of the merits of their claims, can justify a costs award, *Peat v Birmingham City Council* UKEAT/0503/11/CEA.

Decision

35. The Tribunal decided that the Claimant had acted unreasonably in pursuing his allegation that the Respondent's decision to withdraw the conditional offer of employment was because of race.

36. EJ Quill made a deposit order in respect of that allegation. He gave his reasons for doing so. These included,

"[52]… on the undisputed facts, there are very plausible reasons that a tribunal might be satisfied that race played no part whatsoever in the decision. The Respondent received one poor reference (Montgomery), one express refusal (Adams) and (unless he can prove otherwise) one non-reply (Groves) from the 3 referees that the Claimant asked them to contact. The Claimant's comments and suggestions about what might have happened had the Respondent made further enquiries of him or his referees are irrelevant unless a tribunal is satisfied that the Respondent would have acted differently if his race had been different."

37. The Tribunal rejected the Claimant's claim for this reason (and other reasons).

38. In the Tribunal's Judgment in this case, it said,

"[122] On the facts, the Respondent did not receive any positive references for the Claimant.

122.1 Referee 2 had declined to provide a reference at all; she had not suggested that her HR department might provide one.

122.2 Referee 1's reference was not good. It specifically said that the Claimant did not finish his probation period and he had a number of areas of weakness, p89.

122.3 There had been no response from referee 3, despite a chasing email. There was no out-of-office reply from referee 3's email system to the reference request.

This was a clearly unsatisfactory set of references and/or responses.

123. The panel, which included Ms Fahad, had given the Claimant the highest score of all candidates interviewed and had offered the role to him. Ms Fahad was keen to appoint the Claimant and encouraged Ms Jackson-Cole to obtain his references quickly, so that he could start in the role. Her enthusiasm about the Claimant commencing in the role only changed when the reference responses were received. This strongly indicated that it was the unsatisfactory references, and nothing else, which led to the decision to withdraw the offer of employment."

39. The Tribunal concluded that the references led to the withdrawal of the offer, as EJ Quill had indicated was likely.

40. Pursuant to *R39 (5) ET Rules 2013* the Claimant is to be treated as having acted unreasonably in pursuing the allegation where the Tribunal decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order. The Tribunal has indeed decided the allegation against the Claimant for substantially the reasons given in the deposit order. The Claimant has not shown that it was not unreasonable for him to pursue the allegation. Set against the background of repeated costs warnings from the Respondent, the Claimant knew that costs would be sought on this basis.

41. Even if the deposit order had not been made, the Tribunal considered that it was unreasonable for the Claimant to pursue his claim when the Respondent had pointed out to him repeatedly that it was unmeritorious. He ought to have addressed his mind to the costs warning letters, but he apparently failed to do so.

42. Furthermore, the Tribunal decided that the Claimant had acted unreasonably in his conduct of the proceedings by his abusive emails and intimidating language to the Respondent on 25 May 2020 and his allegations of falsification of evidence against them.

43. In addition, his 6 applications to strike out, 8 disclosure applications and repeated applications for the same disclosure were wholly disproportionate to this straightforward claim. Taking a step back, the Claimant's conduct of the proceedings, including the number and repeated nature of his applications, was unreasonable and disproportionate to the issues in the claim..

44. The Tribunal was satisfied that the conditions for making a costs order under *r76* had been met. It went on to consider whether it should exercise its discretion to make a costs order.

45. There was little reason not to make a costs order.

46. The Claimant had declined to give any evidence regarding his means.

47. The Claimant produced no medical evidence to explain, or excuse, his unreasonable conduct of the proceedings.

48. The Respondent had made very clear to the Claimant that it would seek costs. It had sent numerous letters to the Claimant, explaining the basis on which costs would be claimed. The Respondent had acted fairly and reasonably in pursuit of its costs.

49. The Claimant pursued his claim in full knowledge that he was at risk of costs.

50. The Tribunal decided that it was appropriate to make a costs order in the sum sought by the Respondent, £14,000.

51. The Respondent was only seeking its costs for the period 24 November 2020 – 22 February 2021.

52. The Tribunal considered that these were very reasonable costs. The £14,000 claimed by the Respondent was modest for the defence of a 3 day discrimination claim over this period, including Counsel's costs. The Respondent had produced a detailed breakdown, showing how the costs had been incurred. The fees were charged at modest hourly rates for London Partners (£ 275 per hour) and Associate Solicitors (£170 per hour). The Respondent's claim for costs was realistic and sensible.

53. The deposit of £1,000 shall be paid to the Respondent, pursuant to Rule 39 ET Rules.

_____ _25 March 2021__
Employment Judge Brown

Sent to the parties on:

27 June 2021

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For the Tribunal:

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