EMPLOYMENT TRIBUNALS

Claimant: **Ms A. Mohammed**

Respondent: **Migrant Helpline Ltd**

JUDGMENT ON COSTS

The judgment of the Tribunal is that: -

1. The Respondent's application for a costs order is refused.

REASONS

Findings of fact

1. The Respondent is a charity which supports asylum seekers, refugees and victims of human trafficking and modern slavery. The Claimant applied for a position as an outreach worker in April 2019 and was offered the post. The Respondent withdrew the offer when it discovered that the Claimant, who has refugee status, did not hold a passport.

2. On 12 September 2019, after an ACAS early conciliation period between 20 June 2019 and 20 July 2019, the Claimant, who was represented throughout by Mr Michael Raffell of Cora Employment Law, presented a claim of direct and/or indirect race discrimination in relation to the withdrawal of the offer.

3. On 2 December 2019 the Respondent, which was represented throughout by Orchard Employment Law, presented its ET3. It contended that the claim had no reasonable prospects of success and should be struck out and/or that a deposit order should be made. It denied discrimination. Its explanation for withdrawing the offer was that, without a valid passport, the Claimant could not pass the Counterterrorism Check (CTC), and so the Respondent could not employ her.

4. A telephone preliminary hearing was listed for 17 February 2020, later postponed to 2 March 2020, to clarify the issues and to make case management orders. The final hearing was listed for one day on 7 May 2020.

5. The preliminary hearing came before EJ Crosfill. The parties had prepared a list of issues, which required some small amendment. There is no indication from the record of the preliminary hearing that the Respondent sought to pursue a strike-out/deposit order application. EJ Crosfill recorded his provisional view that the direct discrimination claim 'face some substantial obstacles principally that the reason for the treatment could not be conflated with race'. As for the indirect discrimination claim, he noted that it 'will focus on whether the necessary substantial disadvantage can be demonstrated. I encourage the parties, and the Claimant in particular, not to overlook the need to lead evidence on this point'.

6. The Judge gave case management orders for preparation for the hearing. There is no suggestion that the Claimant did not comply with those orders, or otherwise conducted the preparation for the hearing unreasonably.

7. The final hearing on 7 May 2020 was postponed because of the pandemic. A further telephone preliminary hearing took place before EJ Reid on that date. By a notice sent to the parties on 26 October 2020, the final hearing was relisted in person for two days on 6 and 7 May 2021.

8. At the hearing before EJ Reid, both parties expressed interest in judicial mediation, and the matter was set down for a preliminary hearing before the Regional Employment Judge to consider suitability. However, by letter dated 6 November 2020, the Respondent asked for the preliminary hearing to be vacated, giving as its reason: 'the Respondent is keen to have this case heard at the full hearing scheduled for 6 and 7 May 2021, in order to ascertain whether they need to amend their processes and procedures surrounding the issues raised.' The preliminary hearing was duly vacated.

9. On 5 May 2021 at 13:51 the Claimant's representatives lodged a bundle, index, cast list and chronology for the hearing, copying in the Respondent. At 19:23, Mr Raffell wrote to the Tribunal, copying in the Respondent, withdrawing the claim in full, and inviting the Tribunal to dismiss it. The Respondent's representatives wrote to the Tribunal at 20:26 that evening, stating that it had been able to stand down its witnesses for the hearing, but observing that it would be seeking to submit a costs application.

10. Somewhat to the Tribunal's surprise, the Respondent's representative, Ms Fairclough-Haynes attended the Tribunal the following morning and, as the case had been listed before me, I heard from her briefly. I pointed out that it was not clear from the correspondence that either party planned to attend the hearing, which had been vacated. Ms Fairclough-Haynes explained that she had attended to make sure that the hearing was not going ahead. She invited me to dismiss the case. She stated that she wished to make a costs application. I explained that the cost application would have to be made in writing, copied to the Claimant (who was not present), and supported by relevant documents.

11. By a judgment sent to the parties on 12 May 2021, the claim was dismissed on withdrawal. On the same day, the Respondent submitted an application for costs. The application was solely put on the basis that the Claimant had acted unreasonably in pursuing the claims, alternatively that she had acted unreasonably in withdrawing the claims the night before the hearing. Although

there was some reference in the application to the fact that the Claimant had had ample time to assess the merits of her claim, the application was not put on the basis that the claim was misconceived. It observed that the Claimant had not provided any explanation as to why she had decided to withdraw.

12. The Respondent contended that it had incurred unnecessary costs as a result of the Claimant's claim and late withdrawal. The application stated that the Respondent had paid:

> 'a fixed fee of £6,200 in relation to representation from Orchard Employment Law, which included two days of representation, which the Respondent was obliged to pay due to the short notice of the withdrawal of the claim. Although the payment was based on a fixed fee we have attached details of time spent on the claim for your inspection. Please note that our usual hourly charges are £175 plus VAT.'

13. In order to avoid incurring the further costs of a hearing, the Respondent was content for its application to be dealt with on the papers.

14. Mr Raffell lodged his response on 24 June 2021, in which he set out his view at some length that the claim was arguable, and that the Claimant genuinely believed that the Respondent's decision was discriminatory. I will not rehearse the arguments set out in it, as it is a matter of record. Mr Raffell observed that the Respondent had rejected the possibility of resolving the matter by mediation, and had rejected an open offer of settlement by the Claimant, stating 'our client wishes to proceed with the Tribunal hearing in order to ascertain, once and for all, the correct procedures.'

15. The explanation provided for withdrawing the claim the night before the hearing was as follows: that the Claimant's representative (it is unclear from the letter whether this was Mr Raffell himself) changed his/her view of the merits of the case to 50/50 on indirect discrimination – the stronger of the two claims – in the course of preparation over the two days before hearing. The representative spoke to the Claimant about this change of view only the day before the hearing. After extended discussion, she decided to withdraw the case. Mr Raffell observed:

> 'I accept this timing was not ideal, but I make clear that this was not a deliberate planned action of timing to inconvenience the Respondent by this later withdrawn. At that stage, it would have been much easier to roll ahead and run the case through to conclusion, at which point the parties and the Tribunal would have experienced two full days of expense and attendance.'

16. Mr Raffell observed that the Claimant's representatives received no fee for any work on the case.

The law to be applied

17. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provide as follows (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;**
>
> **(b) any claim or response had no reasonable prospect of success …"**

18. Orders for costs in employment Tribunals are the exception, not the rule (*Gee v Shell UK Ltd* [2003] IRLR 82 CA *per* Sedley LJ at [35]). However, the facts of a case need not be exceptional for a costs order to be made. The question is whether the relevant test is satisfied (*Vaughan v London Borough of Lewisham and others* [2013] IRLR 713).

19. The EAT in *Haydar v Pennine Acute NHS Trust* UKEAT/0141/17 held that the determination of a costs application is essentially a three-stage process (*per* Simler J at [25]):

> **'The words of the Rules are clear and require no gloss as the Court of Appeal has emphasised. They make clear (as is common ground) that there is, in effect, a three-stage process to awarding costs. The first stage - stage one - is to ask whether the trigger for making a costs order has been established either because a party or his representative has behaved unreasonably, abusively, disruptively or vexatiously in bringing or conducting the proceedings or part of them, or because the claim had no reasonable prospects of success. The trigger, if it is satisfied, is a necessary but not sufficient condition for an award of costs. Simply because the costs jurisdiction is engaged, does not mean that costs will automatically follow. This is because, at the second stage - stage two - the Tribunal must consider whether to exercise its discretion to make an award of costs. The discretion is broad and unfettered. The third stage - stage three - only arises if the Tribunal decides to exercise its discretion to make an award of costs, and involves assessing the amount of costs to be ordered in accordance with Rule 78"**

20. 'Unreasonable' has its ordinary meaning. It is not equivalent to 'vexatious' (*Dyer v Secretary of State for Employment* UKEAT/183/83).

21. Costs awards are intended to be compensatory, not punitive. The costs awarded should be no more than is proportionate to the loss caused to the receiving party by the unreasonable conduct (*Barnsley Metropolitan Council v Yerrakalva* [2012] IRLR 78). However, unlike the wasted costs jurisdiction, in exercising its discretion to order costs, the Employment Tribunal does not have to find a precise causal link between any relevant conduct and any specific costs claimed. Mummery LJ gave the following guidance at [41]:

> **'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. The main thrust of the passages cited above from my judgment in McPherson was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET 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 I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances.'**

22. In awarding costs against a Claimant who has withdrawn a claim, an Employment Tribunal must consider whether the Claimant has conducted the proceedings unreasonably in all the circumstances, and not whether the late withdrawal of the claim was in itself unreasonable (*McPherson v BNP Paribas (London Branch)* [2004] ICR 1398, CA. The Court warned that it would be wrong if, acting on a misconceived analogy with the Civil Procedure Rules, Tribunals took the line that it was unreasonable conduct for Tribunal Claimants to withdraw claims, and that if they did so, they should be made liable to pay all the costs of the proceedings. The Court pointed out that, in fact, withdrawals could lead to a saving of costs, and that it would therefore be unfortunate if Claimants were deterred from dropping claims by the prospect of an order for costs upon withdrawal that might well not be made against them if they fought on to a full hearing and failed. Therefore, before an order for costs can be made, it must be shown that the Claimants conduct of the proceedings has been unreasonable. This is determined by looking at the conduct overall.

Conclusions

23. On the material before me, it is clear that the Claimant's decision to withdraw was prompted by a last-minute change of advice by her legal advisers, who suggested to her that her claim had worse prospects than she had previously been led to believe. In those circumstances, I do not find that she acted unreasonably. I infer that it came as a shock to her to be told that her case was weaker than she thought at the last possible moment. In those circumstances, I am not satisfied that she acted unreasonably in withdrawing her claim.

24. It is highly regrettable that the change of view took place so late in the day. I considered whether the Claimant's representatives had acted unreasonably by its conduct at that late stage. I do not find that it did. It is not unheard of for a practitioner to change their view of the merits the case when the close analysis of final preparation takes place. There is nothing before me to suggest that the change of view was not genuine. In those circumstances, the representative was duty-bound to inform the client of his perception of increased risk.

25. I had regard to the fact that, despite early threats to pursue a strike-out application, the Respondent did not do so, nor was this application pursued on the basis that the claims had no reasonable prospects of success. I also had regard to the fact that neither of the two judges who case managed this case took the view that it was hopeless. Indeed, it is plain from the Respondent's conduct in withdrawing from the judicial mediation, and rejecting offers of settlement, that it too regarded the issues as far from clear-cut. In my view, this was a difficult case, whose outcome was uncertain.

26. I remind myself that I must look at the Claimant's conduct overall. There is no suggestion that the Claimant's conduct of the proceedings prior to the late withdrawal was in any way unreasonable. The preparation for the hearing appears to have been orderly.

27. For these reasons, I conclude that the threshold for making a costs order has not been crossed. The conduct of the Claimant and her representative, while regrettable, was not, in my judgment, unreasonable.

28. If I am wrong about that, I record that this is not a case in which I would have made a costs order. Costs awards are intended to be compensatory, not punitive. So far as I can see, the Respondent incurred no additional cost as a result of the lateness of the withdrawal. I am told that it had committed to a fixed fee 'in relation to representation', which 'included representation'. Insofar as it is suggested that the Respondent had to pay extra for attendance at the hearing, which it would not have had to pay for at the withdrawal occurred earlier, that is inconsistent with the fee being fixed. I note that there was no attempt to identify what element of the fee, if any, would have been saved, had the withdrawal happened earlier. In the absence of evidence to the contrary, I infer that part of the reason the Respondent was content to proceed to the hearing, and rejected suggestions of mediation or settlement, was precisely because it would not incur additional cost by proceeding with the hearing.

Employment Judge Massarella
Date: 12 August 2021