



EMPLOYMENT TRIBUNALS

Claimant: Mr M Walsh

Respondent: The Home Office

HELD AT: Liverpool **ON:** 10 May 2017

BEFORE: Employment Judge T V Ryan
Mr K J Bott
Mrs J E Williams

REPRESENTATION:

Claimant: Written submissions

Respondent: Mr A Serr, Counsel

JUDGMENT & ORDER ON COSTS

The unanimous judgment of the Tribunal is that the claimant is ordered to pay to the respondent £2,508 costs incurred by the respondent on 18 and 19 October 2016 at the final hearing of this matter on the basis of his unreasonable conduct.

REASONS

1. The respondent made an application for wasted costs against the claimant's representative, Mr S Pinder, in connection with his handling of the claimant's claim, and at the same time made an application for a costs order against the claimant. These applications were made in the light of the reserved judgment of the Tribunal which was signed by me on 21 October 2016 and sent to the parties on 25 October 2016.
2. The claimant made a wasted costs application against Ms S Begum, solicitor for the respondent.
3. In considering whether either of the legal representatives ought to be responsible for the payment of costs, the Tribunal had to decide whether either of them had acted improperly, unreasonably or negligently through any act or omission on their part in their capacity as representative for their respective party. Subject to

that deliberation the Tribunal may have wished to consider their respective means and may have wished to then make an order for the payment of some or all of the applying party's costs.

4. With regard to the application for a costs order made by the respondent against the claimant, the Tribunal would have to consider whether he had acted unreasonably, vexatiously, abusively or disruptively in either bringing the proceedings or the way in which the proceedings were conducted. Again subject to that deliberation the Tribunal may take into account the claimant's means before determining how much ought to be paid by him, if anything.

5. In respect of all of the above applications the Tribunal would have to assess the appropriate level of costs to be ordered in respect of any wasted costs order or costs order.

6. It is clear that the preparation for the final hearing was vexed and having seen the correspondence between the parties the Tribunal notes the tone of it. That said, it was evident, save in one respect detailed below, that both representatives advanced their respective clients' cases appropriately, if at times forcefully. The conduct of the proceedings was at times robust, but not unreasonably discourteous and neither were the representatives unduly obstructive to the other. Firm positions were taken up by the respective sides and they were argued fully within the bounds of professional courtesy. Both representatives conducted themselves entirely appropriately in their dealings with the Tribunal.

7. It follows from those findings that subject to the one matter mentioned below we did not consider that either representative had acted improperly, unreasonably or negligently through any act or omission.

8. Our only hesitation with regard to the actions of Mr Pinder related to his response to a costs warning that the respondent issued on 8 September 2016. On receipt of it Mr Pinder indicated he would not deal with the letter unless the respondent paid his costs which he estimated for them at somewhere in the region of £1,000. The Tribunal was concerned in its deliberations that Mr Pinder may not have passed on that letter with appropriate advice to his client, the claimant. The Tribunal required confirmation of what transpired; it is satisfied with the confirmation received both from Mr Pinder and from the claimant that the costs warning was passed on with advice. In those circumstances the Tribunal finds that it cannot be said that Mr Pinder had acted improperly, unreasonably or negligently through any act or omission.

9. The claimant argued his case forcefully notwithstanding the opposition to it which the Tribunal found persuasive at the final hearing. The arguments advanced at the final hearing on the evidence heard were entirely consistent with the submissions and representations made by the respondent's solicitor to the claimant's solicitor throughout the case. At the final hearing the Tribunal heard evidence from witnesses including an expert in the field which entirely bore out the respondent's contentions in its response to the claim. The witness statements had been exchanged in advance of the hearing. There was some slippage in the timetable for preparation; nevertheless the claimant ought to have realised prior to the commencement of the final hearing on 18 October 2016 that his claim had no reasonable prospect of

success. He received a costs warning putting him on notice that the respondent would claim costs if he were to lose for all the reasons it had stated he would lose in its lengthy correspondence and disclosure process.

10. The Tribunal finds that it was unreasonable of the claimant to pursue the claim through a two day final hearing on 18 and 19 October 2016 against insurmountable odds. By no later than 17 October 2016 the claimant ought reasonably to have realised that he could not succeed with his claim and then he ought to have considered withdrawing it. The claimant was unreasonable in pursuing the matter up to and including a two day contested hearing at the Tribunal in all of the circumstances and he did so knowing that in the event of his losing then he would face an application for a sizeable costs award. He chose to take that risk despite overwhelming evidence which he could not effectively counter. The respondent ought not to be penalised by having to bear all of its costs in such circumstances; it could not have done more by 17th October 2017 to make the risks facing the claimant owing to the weakness of his claim known to him. The claimant was unreasonable proceeding regardless of all of this.

11. On that basis the Tribunal decided that some or all of the costs incurred by the respondent in respect of the two day hearing ought to be recoverable by the respondent, subject to consideration of the claimant's means and identifying the paying party which was in turn dependent on ascertaining whether or not Mr Pinder had disclosed the costs warning of 8 September 2016 to the claimant.

12. As stated above, the Tribunal is satisfied that Mr Pinder acted appropriately with regard to the costs warning of 8 September 2016, and in those circumstances no order should be made against him.

13. With regard to the claimant, the Tribunal has taken into account his somewhat limited means. The claimant made written submissions as to his means which would appear to indicate a shortfall between his income and outgoings of £48 per month. The Tribunal took note of the contents of an email that the claimant sent to the Tribunal on 25 April 2017 (timed at 15:53) setting out his income and outgoings. In that email he says amongst other things that he did not have "other assets of significant value". He did not provide details of any assets and the Tribunal was unable to assess their value or form a view as to whether in context their value was significant.

14. The Tribunal also took into account that the means of the paying party are a factor to be taken into account but they are not determinative. The Tribunal was also disappointed not to have the opportunity of hearing from the claimant in giving evidence as to his means, both income and capital. It was noted that the claimant says that he had been advised by his doctor that attendance would have been stressful. The claimant's means were taken into account by the Tribunal, which felt that notwithstanding those limited means the claimant ought reasonably to pay some element of the respondent's costs. In this regard the Tribunal was reassured at the comment made by Mr Serr that whilst he could not undertake as to the respondent's further actions with regard to enforcement he was confident it would adopt a sensible approach, and in that context he referred to the possibility of a request for instalment payments.

15. The Tribunal considered the costs claim made by the respondent and its initial schedule showing some £27,000 worth of costs had been incurred to 3 November 2016. The Tribunal had previously indicated that the costs under consideration were only those in respect of the hearing on 18 and 19 October 2016. The respondent submitted a revised schedule for those two days showing costs attributable to the endeavours of Ms Begum in the sum of £1,800 and fees payable to counsel in the sum of £2,508, being a grand total of £4,308.

16. Having heard Mr Serr's submissions on the sums, the Tribunal considered that there was an element of duplication in the billing, and it was not satisfied that the costs incurred by the respondent in respect of not only counsel's fees but also the instructing solicitor for two whole days was a sum that ought be visited upon the claimant. The Tribunal took into account counsel's expertise, the preparation for trial that he had undertaken and for which he claimed a fee, and the fact that he had with him witnesses including knowledgeable and expert witnesses on the pension scheme such that whether or not he had additional legal support was an option for him and for his convenience, but its costs ought not reasonably be borne by the claimant.

17. In conclusion the Tribunal assessed the costs payable by the claimant to the respondent in the sum of £2,508.

Employment Judge T V Ryan

Date: 10.05.17

JUDGMENT AND REASONS SENT TO THE PARTIES ON

16 May 2017

FOR THE TRIBUNAL OFFICE