



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Levy

**Respondent:** Harrogate and District Hospital NHS Foundation Trust

## JUDGEMENT

In accordance with Rule 76(1) of the Employment Tribunals Rules of Procedure 2013, the Claimant is ordered to pay the Respondent costs in the sum of £10,000.

## REASONS

1. The Tribunal heard this case over 3 days on 1-3 February 2017. The Claim originally had only been a complaint of breach of contract in that the Claimant claimed 7 months salary from September 2015 until his resignation on 19 April 2016 during which time the Claimant was absent from work. A complaint of constructive unfair dismissal was added by way of amendment at a preliminary hearing on 6 January 2017.
2. The Claimant was represented by Counsel at both hearings (Mr. Robinson Young).
3. Both complaints failed and were dismissed and reasons were given orally to the parties on 3 February 2017. The Claimant applied for written reasons to be provided which were sent to the parties on 23 March 2017.
4. On 19 April 2016 the Respondent applied for costs in accordance with Rule 76 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, as it is entitled to do. Rule 77 provides that a party may apply for a costs order at any stage up to 28 days after the date the judgment was sent to the parties.
5. Both parties agreed that the costs application could be determined based on written representations. The Respondent provided its grounds and schedule of costs on 23 June 2017 and the Claimant after allowing additional time as requested submitted his representations on the 25 July 2017.
6. The Respondents application for costs is limited to £20,000, although the actual costs incurred are in excess of that amount. It applies for costs under rule 76(1) which provides that "A tribunal may make a costs order

and shall consider whether to where it considers that –

- a) a party has acted ...otherwise unreasonably in either the bringing of the proceeding (or part) or the way that the proceedings (or part) have been conducted”.
7. In the application 4 areas of the findings of fact made in the judgment are relied upon which are cross referenced to the paragraphs of the judgment relied upon. The Claimant in his written representations responds to those 4 areas
  8. The underlying principle is that, an award of costs, in the Employment Tribunal are the exception rather than the rule. The Court of Appeal has given some guidance to tribunal in the exercise of its discretion to make a costs order in **Barnsley Metropolitan Borough Council-v- Yerrakalva 2012IRLR 78**. The Court of Appeal said that :

*“ the vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and 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” and that the costs should be limited to what was ‘reasonably and necessarily incurred’ as a consequence.*
  9. The case of **Vaughan- Lewisham LBC** also provides that *“it was not the case that as a matter of law an award of costs could only be made where the party in question had been put on notice, by making a deposit order or otherwise, There was also no reason why the question of affordability had to be decided once and for all by reference to the party’s means as at the moment the order fell to be made”*.
  10. The first area of unreasonable conduct relied upon by the Respondent is the assertion made by the Claimant at the hearing for the first time that Mr Tritschler had ‘planted’ the wording into the letter dated 7 September 2017 in order to get rid of him (see paragraph 18 of my judgment). The Claimant’s witness statement and the documentary evidence did not support the assertion and I found it to be unsubstantiated. Notably after my reading on the first day and before I heard any evidence I sought clarification from the Claimant’s counsel about the letter referred to so that I could be clear about what the Claimant was alleging made it a fundamental breach of contract. Notably nothing was said about comments ‘planted’ by Mr Tritschler to get rid of the Claimant.
  11. In his representations the Claimant now tries to explain what he means by ‘planted’. My findings of fact are based on the evidence I saw and heard and are correctly recited by the Respondent. Is it unreasonable conduct to shift your case as it progresses during the hearing so that your evidence comes as a surprise to the other party? The Claimant does not believe this is unreasonable conduct. I do not agree especially in circumstances where the opportunity to provide clarification has been given.
  12. The second ground relies upon paragraphs 23 and 24 of the judgment where the claimant had ‘presented a picture which was ‘untrue’ he had continued to give a ‘misleading’ picture and ‘false’ impression and had

over a seven month period been generally obstructive. I found this was unreasonable conduct. The Claimant denies he took an unreasonable position in the course of his interaction with the Respondent but my findings of fact are clear.

13. The third ground refers to my findings at paragraph 27 of the judgment, which, the Claimant suggests, have been misinterpreted by the Respondent. I do not agree, the findings of fact are clear and have not been misrepresented. I found that 'by December 2015, it could not have been made any clearer to the Claimant that there was only one investigation and that was the investigation conducted by Mr Moss. This was another area where the evidence presented was clear and undisputable. It was not something the Claimant would not know until witness evidence was tested in cross examination at the hearing. It was made clear to the Claimant at the time and before these proceedings.
14. The fourth ground was about the Claimant 'working elsewhere from December 2015' prior to his resignation in April 2016 in full knowledge of the Respondent's considerable attempts to manage his sickness absence and get him back to work. The Claimant again suggests this is misinterpretation and misleading. He is attempting to challenge my findings of fact when he states "it was not the case the claimant was telling his employer he was unfit to work for them and unable to attend meetings but was at the same time able to work for another employer and provide them that faithful service". Unfortunately that is what I found as set out at paragraph 30. I have also noted at paragraph 31 that despite this the claim as clarified at the beginning of the case was a claim for damages of seven months salary from September 2015 to 5<sup>th</sup> April 2016 which gives no credit for those earnings.
15. Although the Claimant acknowledges that the Respondent's application for costs is "*based on the reasons contained in the findings from the written judgment*" he states "the Respondent's interpretation of the written reasons was both selective and manipulative to establish its costs application'.
16. I do not agree. The references made to my findings of fact are accurate. They may be specifically selected to support the application made but they have not been manipulated.
17. The Claimant has made a general comment in his written representations that the employer should have taken him down the disciplinary route for his conduct in 'real time' (his words). He says that their failure to do that makes his conduct 'reasonable' not 'unreasonable' and does not support a costs order. I find it odd for the Claimant to run the argument that he should have been disciplined by the Respondent at the time and do not agree that is a reason why a costs order should not be made.
18. The Claimant made the choice to bring and continue with these proceedings based on his interpretation of the facts which was unsupported by the evidence. The problem for the Claimant was that most of the relevant evidence was contained in undisputed documentary evidence, which he had seen in 'real time' before these proceedings were commenced.

19. He also complains that no deposit order or costs warning letter was sent to him. Although that is factually correct having such notice/warning is not a prerequisite to making a costs order. It might have been helpful if a costs warning letter had been sent but the Claimant did have the benefit of legal advice which he has paid £10,000 for.
20. I was satisfied the Claimant had acted unreasonably in his conduct of these proceedings. He has been represented by Counsel since January 2017 and in particular at both hearings. He had the benefit of legal advice in setting out and clarifying his claim on more than one occasion. With the assistance of Counsel he applied to amend his claim to add a constructive unfair dismissal complaint. This has involved additional costs and time in preparation for the Respondent. He appears to have failed to consider the strength of his case as the case progressed to take into account the undisputed documents (he had seen in real time) and the witness evidence. He has shifted his case during the course of the hearing and had made new allegations at the hearing. He presented a picture to the Respondent in real time which was untrue and misleading and continued to present that picture at the hearing. The consequences of his unreasonable conduct are the costs incurred by the Respondent in defending these proceedings.

#### **Ability to pay/amount of costs**

21. The Respondent's schedule of costs is £20,452 which represents the costs incurred as a result of the Claimant's conduct. The Respondent position is that these costs have been incurred because of 'needless and protracted' Tribunal litigation at the expense of the public purse. The Respondent is a hospital trust a public resource which should be recompensed for the costs it has incurred which should not have been incurred. The Respondent invites the Tribunal to exercise its discretion and award a lesser sum if it considers it appropriate.
22. The Claimant invites me to make no award of costs or to award as little as possible taking into account his circumstances. He provided a joint bank account statement from 13 June-12 July 2017 with a credit balance of £780.27. He is unable to take any employment at present due to his poor health particularly because of the stress and anxiety he is suffering which is not helped by these proceedings. He will take up some part time employment as soon as he can. He is 60 years old this year and has a young family to support so expects to return to work. He owns his own property which is mortgaged with 15 years left on that mortgage. He says he has no savings. He refers to the Respondent having 'unlimited resources' to defend the claim or insurance to cope with the burden of legal expenses. He has paid nearly £10,000 for his own legal costs and has taken out a loan to pay this.
23. The Claimant has referred to the case of **Howman –v- Queen Elizabeth Hospital Kings Lynn UKEAT/0509/12** in which following an unsuccessful unfair dismissal complaint, the Employment Judge ordered the Claimant to pay the Trust's costs (£43,076) of defending the claim. The costs were ordered to be by way of a detailed assessment by the County Court on an indemnity basis. The Employment Appeal Tribunal decided that an order for indemnity costs was not appropriate and that the tribunal had failed to take into account the claimant's ability to pay. This is not a case where the

Respondent is applying for costs in that amount or a detailed assessment of costs to be paid on an indemnity basis or where I am not taking into account the information the Claimant has provided me with on his ability to pay.

24. Rule 84 refers to the 'ability to pay' and provides that "in deciding whether to make a costs order and if so, what amount, the Tribunal may have regard to the paying party's ability to pay. I did ask the Claimant to provide me with the information he wanted me to consider about his ability to pay
25. Although the Claimant is not working his intention is to find some work in the future and his financial position is likely to improve. His wife has her own business and he intends to work because he and his wife have a young family to support and he will take steps to secure work. He has an asset which is his home which has a mortgage and has a loan for £10,000 and no savings.
26. The fact that the Respondent has more 'resources' does not mean that this exonerates the claimant from any responsibility for the cost consequences of his unreasonable conduct in these proceedings. The Respondent had no choice but to defend the claim and incur costs of over £20,000. That is a substantial amount for it to pay from its resources and the 'public purse'.
27. I could have ordered the full amount of costs claimed to be paid but in exercising my discretion half the costs incurred is reasonable and proportionate (and is the sum the claimant has paid in pursuing his claim) In my view £10,000 is a reasonable and proportionate amount of costs to order the Claimant to pay in all of the circumstances including his ability to pay.

Employment Judge **Rogerson**

Date: 28 July 2017