Case Number: 1300032/2015

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	AND	**Respondent**
Mr M Mvula		The Co-Operative Group Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 24 July 2017

EMPLOYMENT JUDGE Dimbylow **MEMBERS** Mrs RA Forrest
Mr PR Trigg

Representation

For the claimant: Not present or represented
For the respondent: Mr G Graham, Counsel

JUDGMENT

Upon the respondent's application for costs

The unanimous decisions of the tribunal are that:

1. We consider that the claimant acted vexatiously, abusively and unreasonably in bringing and conducting these proceedings; and the claims had no reasonable prospect of success. Furthermore, we consider it to be just, fair and proportionate to make an order for costs, and we order the claimant to pay to the respondent costs assessed in the sum of £19,733.15.

2. The claim for costs against the claimant's representative Dr R Ibakakombo is dismissed upon withdrawal by the respondent.

REASONS

1. The claim. The background and history of this claim is fully set out in our judgement (sent to the parties on 8 June 2017) and reasons (sent to the parties on 16 June 2017) and therefore there is no need for us to recite it all here. In short, the claimant was unsuccessful in his claim for victimisation contrary to s.27 of the Equality Act 2010.

2. The issue. The respondent applied for a costs order against the claimant and his representative Dr Ibakakombo, and the purpose of this hearing was to determine that application only. We gave directions for the just disposal of the costs application when we gave our judgment orally on 7 June 2017 and confirmed them in a written order sent to the parties on 8 June 2017.

3.1 The law. This is to be found in the Employment Tribunal Rules of Procedure 2013, schedule 1, Rules 76 to 84, and we recite some of the main areas we considered:

When a costs order or a preparation time order may or shall be made

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 (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; or

(b) any claim or response had no reasonable prospect of success.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—

(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and

(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract

claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

The amount of a costs order

78

(1) A costs order may—

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;

(c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;

(d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or

(e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

Ability to pay

84

In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

As always, we had regard to Rule 2, which states:

Overriding objective

2

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

3.2 We make some general points about dealing with an application for costs. The fundamental principle in the Employment Tribunal is that costs are the exception rather than the rule and costs do not normally follow the event. If the tribunal has to consider an application for a costs order then it has to undertake a two-stage process. Firstly, the tribunal must be satisfied that the claim has been conducted in a manner falling within rule 76 (a) and/or (b). If it is so satisfied, then at the second stage the tribunal has to consider whether to make the order and in doing so may proceed to make the order if it thinks it is appropriate. As part of the second stage, if it is appropriate then the tribunal must consider the amount, and if the amount is above £20,000 the tribunal may order a detailed assessment, either here in the tribunal or in the County Court. We can undertake our own summary assessment of costs in the Employment Tribunal up to £20,000 if we consider that this properly compensates a party for the costs incurred because of the culpable conduct in question.

3.3 The purpose of a "no costs" regime in the Employment Tribunal is regarded as providing a more level playing field between employers who may be prosperous and employees who are less likely to be so in comparison. For that balance to be observed it seems to be the case that, for example, false or unwinnable claims are discouraged. This would be particularly so in relation to false claims; and where there was no available remedy, the no costs regime here would fall into disrepute. In the case before us, the claimant advanced serious allegations of discrimination, wherein the amount of compensation potentially

recoverable is unlimited and reputational issues arise. False or exaggerated claims should be considered carefully. We remind ourselves that the object of any costs order, if made, must always be compensatory and not punitive.

3.4 We know that we have a further discretion, as we may have regard to the paying party's ability to pay. This is the case even if the tribunal orders a detailed assessment. Guidance has been given from previous cases encouraging tribunals to give their reasons for any decision whether or not to take ability to pay into account. We also have regard to the status of the claimant as a litigant, and in this case, he was represented throughout by Dr R Ibakakombo, although he did not attend at today's hearing, and made no written submissions. Neither the claimant nor his representative have engaged with the directions we gave to deal with this costs application.

3.5 When considering unreasonable conduct, we know that we do not have to dissect the case in detail and we are encouraged to look at the whole picture in the case and ask whether there has been unreasonable conduct by a party in bringing and conducting the case, and when doing this identify the conduct, stating what was unreasonable and what effects it had. This arises out of the case of Barnsley MBC v Yerrakalva [2011] EWCA Civ 1255.

3.6 When considering no reasonable prospect of success, we have to consider, amongst other things, the question of whether the claimant ought to have known that there was no supportive material for his case. There is some overlap with unreasonableness. We look at costs warnings that may have been given. The test we apply is an objective one and is not dependent on whether the claimant genuinely believed in the claim, this being taken from Vaughan v London Borough of Lewisham [2013] IRLR 713, EAT.

4. The evidence. We received documentary evidence which we marked as exhibits (continuing the sequence from the main hearing) as follows:

R6 respondent's application for costs dated 28 June 2017
R7 respondent's schedule of costs claimed
R8 respondent's costs bundle (59 pages)
Authorities referred to by Mr Graham:
Mirikwe v Wilson & Co Solicitors & Others UKEAT/0025/11/RN
Matthew v Daleside Nursing Home Ltd EAT 18 February 2009

We received nothing in writing from the claimant in relation to his means; notwithstanding the order we had made, wherein we directed that if the claimant wished the tribunal to have regard to his ability to pay he should provide us with details of his: income, outgoings, assets and liabilities. We do note from the tribunal file that the claimant applied for an adjournment of this hearing on 20 July 2017. The application was opposed by the respondent in a detailed letter dated 21 July 2017. The claimant's application was considered and refused by

Acting Regional Employment Judge Findlay on 21 July 2017. In a letter to the parties confirming the refusal of the application, Judge Findlay stated that: "…the claimant and his representative should attend on Monday with any further medical evidence and make the application then if so advised. The case remains listed for hearing on 24 July 2017." Neither the claimant nor his representative attended today and no further medical evidence was produced by them. Dr Ibakakombo sent in a further letter to the tribunal later on 21 July 2017, complaining that the medical evidence had not been properly examined by the tribunal when refusing the request for a postponement. Dr Ibakakombo also said that he: "…cannot attend the hearing because he will not give evidence on behalf of the claimant."

5. The submissions. Mr Graham spoke to the respondent's written costs application and therefore there is no need for us to repeat everything he said here. Mr Graham had not prepared any written skeleton argument or submissions because the claimant did not engage in the costs process and had breached orders made by the tribunal. He touched briefly on the two cases that he referred to. Arising from the Daleside case, Mr Graham submitted that it was relevant to the case before us, because in the claim before the EAT the claimant had at first instance pursued a claim for racial abuse which amounted to a lie. The EAT held that the decision by the tribunal not to make a finding that this amounted to unreasonable conduct and make a costs order was perverse. The case of Mirikwe concerned the question of means. It was relevant to the tribunal's ability to exercise its discretion on the claimant's means when the claimant had failed to attend at a hearing. When delivering his oral submissions, we asked Mr Graham to develop his argument that Dr Ibakakombo should be made the subject of an order for costs payable by him personally. The tribunal had formed the provisional view that such an order did not fall within the scope of the costs order under rule 76, otherwise why would there exist rule 80, which dealt with wasted costs ordered against representatives? In due course, Mr Graham conceded the point and withdrew that part of the application.

6. The claimant has had the opportunity to attend at this hearing; but has taken the decision not to attend. There was nothing before us from the claimant by way of submissions. Bearing in mind the specific orders we made on the subject, we found and concluded that the claimant positively decided not to give his financial information to us. We noted the comments made by Employment Judge Hughes in her decision involving the same claimant, following a hearing on 3 and 4 May 2016, and 9 and 10 August 2016. Paragraph 50 on page 46T of our main trial bundle sets out her findings and conclusions in respect of the claimant's evidence with regard to his means.

7. Our conclusions and reasons. We apply the law to the facts. We acknowledge once again that an Employment Tribunal is generally a cost-free environment. Our starting point is that we are reluctant to make an award of costs. However, there are exceptions and a careful analysis is required before a

decision is made. We reminded ourselves of our findings of fact and conclusions set out in our reasons following the main hearing. We made a finding that the claim was a false allegation and had been made in bad faith. The claimant had lied to the respondent and the tribunal, with no thought of the consequences of his conduct. The claimant held no genuine belief in the truthfulness and validity of his case; being driven by spite, wanting to be hurtful and potentially damaging towards the respondent, its staff and their reputations. We stood back and considered the case as a whole; and concluded the claimant's conduct was vexatious, abusive and unreasonable, both at the point of bringing the proceedings and then continuing with them. The claimant's conduct amounted to an abuse of the process of the tribunal, the effect of which was to cause the respondent and its employees inconvenience, harassment and expense in costs.

8. In carrying out our analysis at this stage, perusing our detailed findings, and those of Judges Gaskell and Hughes (in the main trial bundle), we concluded that the claimant had no reasonable prospect of success in his claim, which was false from the beginning. We noted that the respondent's solicitors wrote to the claimant's representative with a costs warning (at pages 1-3 in the bundle R8), dated 21 October 2015, shortly before the beginning of the trial which was due to have started on 26 October 2015, although it was postponed on the claimant's late application which led to an award of costs against him in the sum of £4,500.00. The letter accurately predicted the outcome of the case. It was fair and balanced. Unfortunately, the claimant and his representative did not engage with it and carried on regardless, taking no notice of it. The letter is significant in that it is also a costs warning letter aimed at the claimant's representative as well. Dr Ibakakombo has not provided us with any documentation to demonstrate the basis of his retainer. However, in the end, we did not need to know this because that part of the costs claim was withdrawn.

9. In relation to the claimant's means, we knew from the main hearing, that at the time he was still an employee of the respondent; but Mr Graham brought us up to date when he told us the claimant had recently been dismissed by the respondent. The claimant did not state his age in the claim form. We would estimate he has over 20 years of working life ahead of him. It is difficult for the tribunal to assess ability to pay, or lack of it, when the claimant has failed to cooperate with the process. We know, of course, that should the respondent take any enforcement proceedings the claimant's means and financial circumstances will be taken into account.

10. Once we had decided that the first stage of the test was met, we then proceeded to the second stage. We considered that it was appropriate to go on to make an order for costs, and it was just, fair and proportionate to order the claimant to pay the respondent its assessed costs.

11. The total of the respondent's costs amounted to the sum of £28,947.86

(inclusive of VAT), together with the costs of and occasioned by the hearing today. However, the respondent was prepared to limit the application for costs to the sum of £19,733.15. We considered the grades of fee earners employed in the case; and the rates of charge applicable to them. We also considered counsel's fees, bearing in mind that Mr Graham has been called for over 10 years. We had regard to the volume of work undertaken and took into account the complexity and seriousness of the allegations. We concluded that the sum of £19,733.15 was a sum which was fair and reasonable; and reflected the work involved in defending this claim, including a three-day hearing. This amount is calculated by reference to the sums referred to on pages 27 to 40 inclusive of exhibit R8, together with counsel's fees for the three days of hearing in June 2017 amounting to £2,900.00.

12. The claimant's conduct in bringing and conducting this unwarranted case caused the respondent to have to spend a considerable sum of money in defending itself. Such expenditure was caused entirely by the claimant and it is just, fair and proportionate that he is ordered to pay costs assessed in the sum of £19,733.15 to the respondent.

13. We accepted and adopted the submissions of Mr Graham, which we found helpful. At the end, Mr Graham applied for full written reasons. Whilst he had made a note in accordance with his professional obligations; there are likely to be proceedings in the EAT (such a step being routine for a case involving the claimant's representative); and this seemed a sensible thing to do. We have no doubt that Dr Ibakakombo would have asked for written reasons later in any event.

Signed by ___________________on 27 July 2017
Employment Judge Dimbylow

Decision sent to Parties on

28/07/2017

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