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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr H Hinds		Ministry of Justice

Heard at: London Central **On**: 31 July 2017

Before: Employment Judge D A Pearl
Ms L Chung
Mr M Javed

Representation

For the Claimant: Mr S Paxi-Cato (Counsel)
For the Respondent: Mr M Purchase (Counsel)

JUDGMENT ON COSTS

The Claimant shall pay to the Respondent costs in the sum of £20,000.

RESERVED REASONS

1 The decision in this case was promulgated on 14 February 2017 and by letter dated 14 March 2017 the Respondent made this application for costs under Rule 76 of the Rules of Procedure, Schedule 1.

2 The application is put on the basis, first, that the claims lacked reasonable prospects of success; and, second, that it was unreasonable for the Claimant to have both brought and then pursued his claims. There is a third ground of unreasonable conduct relied on which relates to the need for an adjournment of the hearing in June 2016. In our view this is a subsidiary matter and we will come to it in due course. The Respondent limits its application for an order to the sum of £20,000, while reserving its right to argue that if the Claimant is found to be liable to pay costs, it would be within its right to seek a higher sum.

3 In resolving the application we heard evidence from the Claimant. The hearing took an unusual course today because the Claimant has not compiled any witness statement. What he has done over the course of the weekend has been to fill out the form EX140, a record of examination that is used in the civil courts. This, among other matters, sets out his income. He has said on the form that he owns two other properties, but it became necessary for his counsel to seek an adjournment during the course of the morning in order to draw up a more comprehensive summary of the Claimant's property holdings.

4 It is well-established that we have, first, to ask whether the application crosses the threshold, in that the claim had no reasonable prospect of success or there was unreasonable behaviour in bringing or conducting the claim.

5 Relevant to this exercise is the costs warning letter dated 24 March 2016 that was sent to the Claimant at the time when he was without any legal representation. The Respondent's solicitor stated that, having analysed the documents, the Claimant in his victimisation claim relied:

> "entirely upon one communication, that of you to Lindsay McKean of 15 March 2011 ... From this, your pleaded case states, all the victimisation that you allege flows. This is a wholly insufficient legal or factual 'peg' on which to hang such a widespread and lengthy claim as you have made. Your case must be that [7 people are then named] all took action against you, together and separately, at various times and on various alleged pre-texts, to victimise you because of the content of this email."

The letter went on to say that there seemed to be no other allegation of explicit racial conduct or language.

6 The warning letter argued that the constructive dismissal claim lacked legal merit and that the way that the Claimant was dealt with by managers during his period of sickness absence was wholly insufficient in terms of a last straw. The Claimant was given 21 days in which he could withdraw his claim in return for there being no costs order sought against him.

7 As it transpired, the two points that were alighted upon by the writer of this letter mirror two of the strongest conclusions that are to be found in our reasons in the liability judgment. On the first issue, victimisation, we drew attention in paragraph 68 to the weakness of this claim. We noted that:

> "It is improbable, and possibly irrational, to draw any link between the events of January 2014 or earlier concerns about the Claimant's performance and the 2011 email."

8 We said that the necessary implication was that Ms McKean had created to a false email trail after 2011 to cover up her real motivation. We described such suggestions as wild and said that they had no basis in the evidence. In our conclusions, in paragraph 113, we said that it was improbable that Ms McKean would have harboured a grievance against the Claimant for the next 4 or 5 years: and that during this period the Claimant never referred back to the exchange

of emails. We described the allegations as perplexing. The essential point here is that the contemporaneous response to the Claimant's email of 15 March 2011, in which he noted that black Caribbean males were "alarmingly unrepresented" in the department at EO grade, was to send to him the NOMS Staff Diversity Report which had recently been published. There is nothing here to suggest that Ms McKean was affronted by what the Claimant had written; and there is nothing in the subsequent chronology to lead any Tribunal to infer the same. The subsequent allegation of victimisation is one that the Tribunal found to be bordering on the irrational. In simple terms, it does not fit with any of the factual background. We acknowledge that the Claimant has never deviated from this claim and has reiterated it throughout his evidence.

9 On any objective basis we consider that the victimisation claims had no reasonable prospect of success and that the Respondent was correct to point this out in the letter that we have only latterly been shown. This is not a case where the claim fails only after disputed matters of fact have been resolved. The victimisation claim is without merit on its face and was as close to a claim that was bound to fail as any that the Tribunal can envisage.

10 The second part of the claim which on any objective basis lacked merit and had no reasonable prospect of success, was the constructive unfair dismissal claim. Our conclusions acknowledge that the claim had been presented so as to draw in all allegations over a number of years: see paragraph 116 of the Reasons. We also dealt with what we described as the real nub of the constructive dismissal case, the events after 19 May 2014 and ending on 29 May 2015 when the Claimant resigned. We stated in paragraph 132:

> "When applied to the communications during the Claimant's absence, we find it impossible to conclude that, analysed objectively, what the managers did destroyed or seriously damaged the necessary trust and confidence, or was likely to do so. There is nothing in the correspondence and emails of 10 December 2014 or January 2015 for which the Respondent could be criticised. The proposal that ill-health retirement should be examined was perfectly reasonable."

We went on to consider the other parts of the chronology, including the delay of 17 days after the final OH report was received. We said that this was a long way from a last straw case. Perhaps a holding letter ought to have been written to the Claimant after April 2015 but he had also been emailing and telephoning managers and he chose to do nothing at all. He simply could have raised an enquiry if he was concerned not to have heard from the Respondent.

11 This, again, was a point of weakness that was identified by the Respondent in their warning letter and it is difficult to see how any Tribunal could possibly have come to a different conclusion, given that most of the interactions were either written or recorded in writing. The constructive unfair dismissal claim had no realistic prospect of success in our judgment.

12 Looked at overall, we find it impossible to say that the threshold has not here been met in terms of the grounds for a cost order being made out.

Mr Purchase refers to **Vaughan -v- London Borough of Lewisham (No.2) [2013] IRLR 713.** He draws attention, in our view with some justice, to the similarity in the factual findings in the case of **Vaughan** and the present case. In that case the Claimant's interpretation and perception of events was held to be illogical or unreasonable. She was unprepared to countenance the possibility of any non-discriminatory explanation for any of the conduct of the Respondent, even when common sense dictated otherwise.

13 Underhill J noted that it is not the law that the issue of whether a claim is misconceived depends on whether the Claimant genuinely believed in it. This is very much in point here, because Mr Hinds appears to have convinced himself of the justice of his case, despite sizeable evidential difficulties. He also has blinded himself to the response to the claim, including a large number of documents. He believed he was being persecuted at work, on racial grounds, and we do not doubt that at the point at which he resigned he considered in his own mind that he was entitled to claim constructive dismissal.

14 Although what we have set out so far justifies the conclusion that the Claimant has crossed the threshold for an award of costs, there is one other aspect of the case that we ought to refer to. This is the piling of allegation upon allegation. The Respondent maintains that this was a disproportionate or extreme way to conduct the litigation and there is some merit in this complaint. In paragraph 140 of our reasons we noted the Claimant's case that each successive manager continued the campaign of discrimination perpetrated by the last manager. "Every point of dispute or dissatisfaction is cast as either harassment, victimisation or less favourable treatment amounting to direct discrimination." It may be that once the Claimant had convinced himself that he was the victim of this conduct, and that it went back at least to the email that he send in March 2011 to Ms McKean, he constructed in his own mind an ever more elaborate interconnection of facts that drew in every manager or other person with whom he had ever had any disagreement at work. Again, the fact that the Claimant may have come to believe this is irrelevant. It is a way of conducting the proceedings that is in itself unreasonable, lacks a sense of proportion and involves taking an extreme view of the objective facts, one that cannot be said to be reasonable, at least when applying the standards of the reasonable litigant. Therefore, the pursuit of the litigation in this way has compounded the unreasonable bringing of parts of the claim that we have set out above.

15 In turning to the question of whether we ought to exercise our discretion to make an order for costs, health difficulties or conditions have not been relied upon. This point was not taken by the solicitors when they responded to the application on 29 March 2017. What was said on the Claimant's behalf, among other matters, was that the Claimant had an arguable case on the evidence that he asserted. The letter makes it clear in all regards that it was the Claimant's own evidence that is relied upon. It is said that he was not behaving unreasonably in bringing the claims. Nor in counsel's written submission for today's hearing is any point pursued on the basis of ill-health, although we accept that this was produced hurriedly over the course of the weekend and should not be regarded as an exhaustive response to the application.

16 In the material that the Claimant has submitted on the morning of the hearing are three relevant documents. The first dated 30 June 2017 is a GP's statement of fitness for work that certifies that the Claimant was not fit for work because of depression for the period up to 12 October 2017, i.e. 3½ months. This does not imply that he would at that point necessarily be fit to work.

17 The second document, dated 4 April 2017, is a short letter from a trainee clinical psychologist from Improving Access to Psychological Therapies in Enfield and Haringey. She states that she had agreed with Mr Hinds that they would meet for an initial eight sessions to focus on improving his mood. The letter also says that he is consuming alcohol and this may negatively impact on his health.

18 The third letter dated 20 July 2017, from Islington People's Rights, states that the Claimant has depression and anxiety and also drinks alcohol daily. "These caused significant problems in your day-to-day life from poor physical and mental health symptoms, affecting yourself care and mobility. You received counselling … from a psychologist."

19 We find ourselves in agreement with Mr Purchase when he observes that there is an evidential void in the medical evidence produced by the Claimant. We know very little about his condition. We are told that his prescription has recently changed to 10mg of Sertraline and that previously he was on 10mg Amitriptyline for two years. We have no basis of knowing when the Claimant will be fit for work nor do we have any ground for saying that he will never be fit for work, a dramatic conclusion that we could not begin to draw. There is no evidence to cast any light on whether the medical condition that he has suffered from for some considerable time might have, or has, affected the way in which he has presented his claim. In short, we are left largely in the dark on medical matters.

20 The conclusion to which we have come is that it would not be right, on the basis of the medical difficulties that we have been told about, to say that no order for costs should be made. There is some interconnection between his mental state and the correct level of the award for costs and we will turn to this below. Nevertheless, in principle we know insufficient about his condition to say that no order for costs should be made in the exercise of our discretion.

21 We turn to the question of means. Under Rule 84 we may have regard to the Claimant's ability to pay any order. The Respondent has alleged in general terms that there was a certain reluctance to disclose means, but this is not a relevant factor, since the Claimant is not obliged to do so. It appears that over the course of the weekend immediately preceding the hearing he filled out the record of examination document and only disclosed two properties that he owned. Mr Paxi-Cato took further instructions during the course of the morning and the outcome was a list of properties that the Claimant says is complete. There are five of them, two of which he owns alone and three which are co-owned either with his sister or, in one case, a friend. The net equity in these properties is in the order of £700,000. Four of the five properties are rented out so as to produce a rental income.

22 The Claimant's income is, on his evidence, derived from two sources. The properties give what he calls a net overall monthly profit of £463 and in addition he receives £316 benefit. This gives a total disposable income of £779 per month or £9,348 a year. We do not have any further details of the various expenses that the Claimant has to meet out of this sum.

23 The unusual feature of this case is the considerable amount of capital tied up in property to which the Claimant can lay claim. In these circumstances we consider that there is no reason to mitigate the award of costs on the basis of the financial disclosure that has been made. We are not concerned with whether or not the Claimant can meet an order for costs out of his income by way of periodical payments. If the matter ever came to be enforced in a county court, we would expect matters to be gone into with more thoroughness and appropriate orders could be made. The free equity in the various properties does suggest to us that the Claimant might be able to raise sums by way of loans but we do not make our decision on the basis of this tentative supposition. He may or may not have an ability to pay, whether by way of payment from current income or otherwise, but our conclusion is that we would not mitigate the order that we would otherwise make by reason of his financial circumstances.

24 In our view the threshold is comfortably passed for the making of a costs order in two respects. First, there were central aspects of this claim that had no reasonable prospects of success, as we have set out. Second, the Claimant's reason for ignoring the costs warning, which is that he was concentrating on other matters at the time, is unconvincing. His conduct of the proceedings thereafter was unreasonable in that he was pursuing claims concerning which he had been specifically given a costs warning and, in our view, correctly so. We agree with Mr Purchase that by the time the trial took place he was professionally represented and that this is also a factor that should be taken into account. Had he remained unrepresented, it is at least arguable that the costs warning would have a lesser relevance.

25 We therefore have no difficulty in concluding that a costs order ought in principle to be made and we would exercise our discretion accordingly. The question than arises as to the amount of that order. It is immediately clear that the Respondent has limited itself to about 30% of its actual costs. The figure of £20,000 is conveniently one that falls within our jurisdiction to award without any further assessment. However, it is also a little less than the cost of the trial. Whether one looks at trial costs or takes a broad one-third rule, our view is that in this particular instance the figure of £20,000 is precisely the figure that we would have thought apt for an award. It fairly represents the proportion of costs for which he ought to be liable. We do not consider it necessary or sensible to reduce the amount of costs on the basis of the financial disclosure he has given to us. There are no other reasons why either a lower or a higher amount should be preferred. Accordingly, and with our thanks to both counsel for their detailed and careful submissions, we have come to the conclusion that a costs order ought to be made in the sum of £20,000.

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Employment Judge Pearl

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Date 12 September 2017