

THE EMPLOYMENT TRIBUNALS



BETWEEN

Claimant

Respondent

Mr S Daly

AND

The Newcastle upon Tyne Hospitals
NHS Foundation Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL ON AN APPLICATION FOR COSTS

HELD AT: North Shields
in chambers

ON: 25 September 2017

EMPLOYMENT JUDGE HUNTER

MEMBERS: Mrs M Clayton
Miss E Jennings

RESERVED JUDGMENT

The claimant is ordered to pay to the respondent £3,000.00 towards its costs.

REASONS

The application and the response

1 By a letter dated 16 June 2017, the respondent made an application to the tribunal for costs in accordance with Rule 76 and indicated that it was content that that the application could be dealt with without the need for a hearing. The claimant agreed to proceed without a hearing and sent to the tribunal written submissions objecting to the application and a statement of his means.

2 The respondent's application in summary is that the claimant brought allegations of disability related discrimination, harassment, detriment as a result of making a protected disclosure and failure to make reasonable adjustments, many of which on the facts alleged by the claimant had no reasonable prospect of success. The respondent asserts that it asked the claimant to look reasonably at the claim in order to limit the preparation of the respondent's case and the number of witnesses required, but the claimant refused to do so. The claimant required all of the respondent's witnesses to give evidence and asked for documents to be added to the bundle which were not referred to in evidence. In a bid to settle the claim, the respondent's final offer was £7,000.00. The claimant refused to settle for less than £12,000.00. The respondent claims costs of £36,996.00 plus VAT.

3 The claimant's response, in summary is that the whole of his claim was legitimate and substantiated by apologies he had received from the respondent. He had been advised that his claim was worth between £10,000.00 and £14,000.00. There had been no strike out or deposit order. The respondents had made offers which could indicate a belief of a finding favourable to the claimant. The respondent acted unreasonably in accessing counselling records and withheld other documents. The respondent's solicitor harassed him throughout in the attempt to settle. The claimant alleges that there was a conflict of interest on the part of the respondent's solicitor and that the respondent's solicitor has billed for time spent which was inappropriate, for example by interviewing the claimant's counsellor. The respondent's disclosure of witness statements was staggered and unreasonable. All documents in the bundle were relevant.

The Law

4 The following rules in Schedule 1 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 are relevant.

- 76 When a costs order or a preparation time order may or shall be made
- (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.

- 78 The amount of a costs order
- (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.

(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.

84 Ability to pay

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.

5 In Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78, Lord Justice Mummery says at paragraph 41 of his judgment:

“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 in conducting the case and, in so doing, to identify the conduct, what was unreasonable about it and the effects it had”.

Conclusions

6 The disability discrimination claim was framed on the basis that the claimant had a physical impairment and a mental impairment, namely an adjustment disorder, both of which rendered him a disabled person. It alleged disability related discrimination, harassment and the failure to make reasonable adjustments, in respect of 27 incidents involving 13 members of the respondent's staff. On the first day of the hearing, the claimant limited his disability discrimination claim to a claim

based on his physical impairment. As we found in our judgment, not all of the incidents relied upon by the claimant were relevant to a claim limited to discrimination in respect of disability arising from the claimant's physical impairment. It was not until day 5 of the hearing that the claimant abandoned his claim in respect of reasonable adjustments. As a result, the respondent was put to unnecessary preparation to respond to the claims and the length of the hearing was prolonged. In this respect the claimant acted unreasonably in the way the proceedings were conducted.

7 The public interest disclosure detriment claim was framed on the basis that the grievance contained protected disclosures and that the detriment to the claimant was the inadequacy of the investigation. There was no evidence to suggest that any perceived inadequacy was motivated by the making of the grievance and no serious attempt was made in submissions to show that there was any legitimate basis for this claim. Our conclusion is that the public interest disclosure claim had no reasonable prospect of success. Similarly the claim based on the way in which the redeployment exercise was organised had no reasonable prospect of success because there was no evidence to connect any perceived inadequacy with the claimant's disability.

8 Although we found at paragraph 5.7 of our judgment that several of the incidents relied upon by the claimant could not support the sections 15 and 26 claims based on the claimant's physical impairment, we cannot say that his disability discrimination claim had no reasonable prospect of success. Some of the incidents relied upon clearly did relate to the physical impairment and it was only upon a consideration of the respondent's evidence that the tribunal was able to find in favour of the respondent.

9 We note that offers to settle this claim were made. The claimant was employed by the respondent at the date of the hearing and there would have been no claim for loss of earnings. To that extent the claim would have been modest, restricted to compensation for injury to feelings, expenses and dependent on the evidence, personal injury. Given the inherent risk in any litigation, the decision to turn down an offer of £7,000.00 might be regarded as imprudent. However, the claim was potentially worth more than this and the claimant cannot be regarded as unreasonable in taking the decision to pursue it to trial.

10 Having regard to the way in which the claimant limited his claim at the hearing, it appears to us that the evidence of Ms Carrol and Ms Grant was unnecessary because their evidence related to matters that had nothing to do with the claimant's physical impairment. The evidence in respect of the grievance and redeployment was also unnecessary because the public interest disclosure claim had no reasonable prospect of success as was any claim based on the way in which the redeployment exercise was organised. We consider that the respondent's solicitor was put to at least 12 hours unnecessary work in having to interview these witnesses and prepare statements for them. Moreover, this case could have been dealt with in three days if the claimant had limited his claim at an earlier stage and had co-operated with the respondent to limit the evidence to that which was strictly necessary. In total, therefore, the claimant's solicitors have been put to at least 22 hours of additional work, which at a charging rate of £130.00 per hour amounts to

£2860 plus VAT. This is a very conservative estimate. We note that the respondent was also put to additional work and expense in collating and copying documents that were never referred to.

11 We have taken into account the claimant's limited means and our view is that an award of £3,000.00 as a contribution towards the respondent's costs is fair.

JOHN HUNTER EMPLOYMENT JUDGE
JUDGMENT SIGNED BY THE
EMPLOYMENT JUDGE ON
9 October 2017
JUDGMENT SENT TO THE PARTIES ON
13 October 2017
AND ENTERED IN THE REGISTER
G Palmer
FOR TRIBUNAL OFFICE