



EMPLOYMENT TRIBUNALS

Claimant: Mr C Ntaka

Respondent: Lancashire Care Foundation Trust

HELD AT: Manchester **ON:** 1 December 2017

BEFORE: Employment Judge Porter

REPRESENTATION:

Claimant: Written representations

Respondent: Written representations

JUDGMENT

The application for costs is refused.

REASONS

Issues to be determined

1. A costs application was made by the respondent, as set out in its representative's email dated 1 August 2017.
2. This costs application follows a preliminary hearing held on 18 July 2017, when it was determined that the claimant was not continuously employed for a period of not less than two years ending with the effective date of termination. As a result, the claim of unfair dismissal was dismissed. Written reasons were sent to the parties on 31 August 2017 (hereinafter referred to as the Reasons).
3. It was agreed that the costs application would be determined on a consideration of the papers. Orders were made for the exchange of written

representations which the tribunal has considered with care, but does not rehearse here.

Evidence

4. No oral evidence was heard. The claimant adduced no further evidence. He did not provide a witness statement setting out his financial means and ability to pay costs, if ordered, as required to do by letters from the tribunal dated 6 and 12 October 2017.
5. The respondent relied upon the documentary evidence attached to its written application for costs, namely, letters dated 26 June 2017 and 25 July 2017 from the respondent's solicitors to the claimant's representative, a consultant who trades under the name "Robin Oliver Legal".

Facts

6. The tribunal relies on the Findings of Fact as set out in the Reasons. Having considered all the evidence the tribunal has made the following additional findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.
7. The claim of unfair dismissal was presented on 19 March 2017. The claimant was represented from the outset by Mr Robin Oliver who, before the tribunal, describes himself as a consultant, and who trades under the name "Robin Oliver Legal".
8. The claim form states that the claimant was employed from 16 February 2015 to 17 February 2017.
9. The grounds of claim include the following:
 1. The claimant started in his post of Bank Health Care Support worker with the respondent on 16 February 2015 or 23 January 2015, it not being clear from the documentation.
 5. On 9 January 2017 the claimant received a letter from the respondent stating "I am writing to you regarding the allegation made against you on 4 May 2016. This matter has been looked at by HR and a decision has now been made to disengage you from working shifts for LCFT".
 6. The claimant was thereafter offered no further shifts within the respondent's care facilities and his income dropped to zero.
 7. On 13 January 2017 the claimant submitted a letter to the respondent expressing his grievance at the decision that had been made.

8. No response was received from the Respondent.
9. On 17 February 2017 the claimant submitted his resignation from post citing fundamental breaches by the respondent of his terms and conditions of employment.
10. A Response was entered. The respondent asserted that the tribunal had no jurisdiction to hear the claim as the claimant had not been continuously employed by the respondent for the necessary qualifying period of two years. The respondent requested that a preliminary hearing be listed to determine that jurisdictional issue. The Grounds of Resistance include the following:
 9. The claimant was engaged on assignments on the Temporary Staffing Bank between 29 August 2015 and 8 January 2017 (i.e. for less than two years).
 - 20...The claimant was informed by the respondent that he would be offered no further shifts on 9 January 2017. The respondent denies that an employment relationship existed at any time after 9 January 2017.
 21. The claimant purportedly resigned almost 6 weeks later on 17 February 2017. The claimant has provided no adequate rationale for the delay. The respondent contends that any delay was artificial and the delay is attributable to the claimant seeking to pass two years' service with the respondent.
11. By letter dated 26 June 2017 the respondent's solicitors sent a costs warning to the claimant's representative, asserting that the claim had very poor prospects of success. The letter repeated the assertion that the claimant had less than 2 years service, citing as its rationale:

"The claimant signed terms of engagement on 21 August 2015. The claimant was engaged on shifts under those terms of engagement from 29 August 2015 to 8 January 2017."
12. The claimant applied for the post with the respondent in 2014, attended interview and was successful. He received a letter dated 12 January 2015 referred to in paragraph 13 of the Reasons. It was his genuine understanding that once he attended the compulsory training, he would be able to start work for the respondent.
13. Having received the letter (wrongly) dated 9 January 2016 from the respondent (see paragraph 23 of the Reasons), it was the claimant's understanding that he remained an employee of the respondent. After that date he did not receive a P45 or any other communication indicating that any employment relationship was at an end. He submitted a grievance. He received no response.

14. The claimant obtained legal advice from the CAB before sending his letter of resignation dated 17 February 2017. It was at that point that he became aware of the requirement for two years service to pursue a claim of unfair dismissal.
15. In evidence before the tribunal the claimant denied that he had sent a letter of resignation on that date to ensure that he had two years service, denied that it was contrived, asserting that it was simply coincidence.

The Law

16. Under rules 73 and 75 Employment Tribunals Rules of Procedure 2013 a tribunal may award a costs order where a party has in either bringing the proceedings or in the conduct of the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably; or the claim or response had no reasonable prospect of success.
17. The Rules impose a two stage test. The tribunal must ask itself whether a party's conduct falls within rule 73. If so, it must then ask itself whether it is appropriate to exercise its discretion to make the award.
18. The tribunal, in deciding whether to exercise its discretionary power under rule 75 should consider all relevant factors including the following:-
 - costs in the employment tribunal are still the exception rather than the rule;
 - the extent to which a party acts under legal advice;
 - the nature of the claim and the evidence;
 - the conduct of the parties.
19. The tribunal has considered and where appropriate applied the authorities referred to in submissions.

Determination of the Issues

(This includes, where appropriate, any additional findings of fact not expressly contained within the Reasons or the additional findings above but made in the same manner after considering all the evidence)

20. There is no satisfactory evidence to support the respondent's assertion that the claimant deliberately and dishonestly contrived the dates of his service stated in his claim form in order to give the impression that he had sufficient continuity of service to claim unfair dismissal.
21. The letter dated 12 January 2015 (see paragraph 13 of the Reasons) clearly states that the claimant's appointment to the post was confirmed and that the start date was 16 February 2015. It was the claimant's

understanding that once he completed the compulsory training course, he would be able to start work. He did attend for training on 16 February 2015 and was paid by the respondent for his attendance at that training. There was an arguable case that the claimant's employment commenced on the date stated in the letter dated 12 January 2015, that is, 16 February 2015.

22. The letter sent by the respondent on 9 January 2017 (see paragraph 23 of the Reasons) was not a clear indication of the termination of any employment relationship. It was the claimant's understanding that he remained an employee of the respondent. After 9 January 2017 he did not receive a P45 or any other communication indicating that any employment relationship was at an end. He submitted a grievance. He received no response.
23. After receiving legal advice the claimant chose to resign claiming that there had been a fundamental breach of contract by the respondent's failure to provide him with any further shifts. There is no satisfactory evidence to support the respondent's assertion that the timing of that resignation letter was contrived.
24. The tribunal does not accept that the claim was vexatious, does not accept that the claim had no reasonable prospect of success or that the claimant was unreasonable in pursuing the claim. The costs warning letter sent on 26 June 2017 says very little more than was stated in the Response.
25. The claimant was entitled to have this issue determined by the tribunal after hearing all the evidence.
26. The claimant's conduct in the commencement of proceedings, and continuing with the proceedings, does not fall within rule 73.
27. It is not appropriate to make any award of costs. The application is refused.

Employment Judge Porter
Date: 1 December 2017

JUDGMENT and REASONS SENT TO THE PARTIES ON
7 December 2017

FOR THE SECRETARY OF THE TRIBUNALS