Case Number: 3303074/2015
3322724/2016

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr B Kenbata	**v**	**London Borough of Brent**

Heard at: Watford **On**: 12 December 2017

Before: Employment Judge R Lewis
Mr S Bury
Mr A Kapur

Appearances

For the Claimant: Written representations
For the Respondent: Mr A Smith, Counsel

JUDGMENT

1. The claimant's application for postponement of this costs hearing is refused.

2. The respondent's application for an order for costs is allowed and the claimant is ordered to pay to it costs in the sum of £10,000.00.

REASONS

1. These reasons are given by the tribunal of its own initiative and as it is in the interests of justice to do so, the claimant not having attended this hearing. Where in these reasons we refer to the judgment of the tribunal sent on 1 July 2017 with reasons, we do so as "RJ" so that for example "RJ37" is a reference to paragraph 37 in our reasons.

2. Our reserved judgment was sent on 1 July 2017. On 18 July the respondent made a formal application in writing for costs. Notice of the present hearing was sent on 13 September. The notice was in template form including the following:

"You may submit written representations for consideration at the hearing. If so, they must be sent to the tribunal and to all the other parties not less than seven days before the hearing."

3. On 2 December the claimant wrote to the tribunal to state that he was unable to attend, and could not afford to travel to Watford. He wrote: "I request the listed hearing is adjourned until I am back in employment and able to meet preparation, travel, accommodation and subsistence costs."

4. The email was referred to a judge (not the present judge) and on 11 December the claimant was informed that the application had been refused, and that he should send written representations.

5. The claimant in response, and less than 24 hours before this hearing, submitted a brief statement, in which he stood by the allegations which the tribunal had rejected, and produced a summary of his indebtedness to financial institutions in excess of £30,000.00, as well as proof of indebtedness as at February 2016 pursuant to County Court Judgment in favour of Westminster City Council.

6. Mr Smith confirmed that the claimant had been dismissed by the respondent on 19 September 2017, for some other substantial reason. He confirmed that the claimant's appeal against dismissal was due to be heard at Brent the following day, 13 December, and that the claimant had confirmed that he would attend.

7. The tribunal first considered the application to postpone, which was resisted by Mr Smith. We noted that the notice of hearing had advised the claimant properly and well in advance of his right to put in written submissions. We noted in that context the power of the tribunal to proceed in absence of a party in accordance with Rule 42. It seemed to us that the claimant's request was potentially indefinable and open-ended. It did not seem to us in the interests of justice to adjourn pending an event of uncertainty. Mr Smith made the point that the claimant had committed to come to London the following day for his appeal against dismissal, and while that is indeed curious, we accept that the cost of a two day trip, with an overnight stay, might well be significantly more than the cost of a day return trip for the appeal. We decided to proceed.

8. The respondent had prepared a bundle of documents from the litigation (140 pages) and a bundle of authorities. The major authority to which reference was made was Vaughan v London Borough of Lewisham No 2 [2013] IRLR 713, followed in Oni v Unison UK EAT/0370/14. The bundle included judgments in other litigation pursued by the claimant (against Unison and against Westminster City Council) which we noted but did not think assisted us: on the contrary, we were concerned to avoid any risk of double penalising the claimant. We read a selection from the bundle as well as Mr Smith's very helpful skeleton argument. Mr Smith addressed the tribunal, and after a short adjournment we gave judgment.

9. This application was made under Rules 74-84 of the Employment Tribunals Constitution and Rules of Procedure Regulations 2013. Rule 76 states:

> "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… 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… had no reasonable prospect of success."

10. Rule 78(1) empowers the tribunal to order the paying party to pay "a specified amount, not exceeding £20,000.00."

11. Rule 84 provides that: "In deciding whether to make a costs… order, and if so in what amount, the tribunal may have regard to the paying party's… ability to pay."

12. We approach the matter on the basis of three stages. At the first stage, we consider whether the requirements of Rule 76(1) have been met, and if not, the application for costs must fail.

13. Mr Smith put his application on three footings, of which we have accepted the first two.

14. He submitted first that on a proper reading of our reserved judgment, the tribunal had found that the claim had no reasonable prospect of success. Mr Smith quoted extracts notably from RJ35-40 and 42-47 inclusive, as well as RJ86, 87, 96 and others. The significance of the portion referred to at length was that at RJ30-48 inclusive the tribunal had discussed credibility, and set out its reasons for stating why the claimant was not a reliable witness.

15. Mr Smith submitted that the tribunal had on a number of occasions referred to matters of which there was no evidence and of which there could not be evidence; matters which could not be proved; matters which were unrealistic, absurd, and the like. He reminded us of the overarching observation at RJ35, namely: "We note the absence of any positive evidence in support of any part of the claimant's case, including matters on which the claimant said there were up to 20 independent witnesses."

16. Mr Smith submitted that the tribunal had repeatedly found that the claimant put forward no positive evidence in rebuttal of the respondent's witnesses save his own assertion that a large number of his colleagues had pursued issues against him.

17. We agree with Mr Smith's analysis. Without wishing to repeat or paraphrase our own reasons, we accept that the findings of the tribunal were that in this unusual case, the claimant proceeded on the basis of assertion, assumption and no or no adequate analysis. The claim had no reasonable prospect of success.

18. Mr Smith's second submission was that the claim had been brought vexatiously. He quoted the old authority of Marler v Robertson [1974] ICR 72: "A hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive…"

19. Mr Smith cast his submission wide, stating that the claimant "advanced claims which he knew to be untrue and/or unsustainable" and with the motivation of "furthering some unjustified personal grievances against, and animosity and/or spite towards his former colleagues."

20. Mr Smith's submission gave us considerable difficulty, because it required us to consider and make findings about the claimant's state of mind and understanding. That is a difficult task in any case, and particularly difficult in considering the complex relationship between the claimant's perceptions, and the reality which we consider we have found on the evidence. We approached this submission with very great caution indeed, and save in one respect, declined to make the findings which Mr Smith invited us to.

21. The one respect in which we do make such finding relates to the claimant's dealings with Ms Weekes. We refer to RJ137-143 inclusive, 161 and 176-197. Ms Weekes was the named discriminator at issue 5.13.

22. We have found that Ms Weekes had no knowledge of the claimant's physical disability, or of any mental disability. The claimant did not try to prove otherwise, nor do we see any basis upon which he could have done so.

23. The tribunal found that the claimant's conduct towards Ms Weekes contained "examples of what we would describe as bullying behaviour towards her in the workplace" (RJ139). The tribunal found that on 28 October the claimant made an allegation of corruption against Ms Weekes, in which (RJ197) he "cannot have had a reasonable belief," and which was in part disingenuous. Certainly in making the allegation about the printing quotation, the claimant must be taken to have known that he personally had approved the quotation two months previously.

24. We find that the claimant must have known that allegation 5.13 was false; and that the protected disclosure of 28 October was made in the context which we have described.

25. We find that those portions of the case which related to the claimant's complaints or allegations against Ms Weekes, including the protected disclosure claims based on the email of 28 October 2017, were matters which the claimant must have known were untrue. We find that they were pursued to further an unexplained personal hostility which the claimant experienced against Ms Weeks. They were accordingly a portion of the case which was pursued vexatiously.

26. The third matter relied on by Mr Smith related to attempts to settle the litigation on a "drop hands" basis. We were referred to the correspondence, and although the claimant seems to us have been ill advised in rejecting offers of settlement, we do not consider that we have sufficient information to make any finding as to whether by doing so he committed unreasonable conduct.

27. The first stage of the costs test is therefore fulfilled.

28. At the second stage we have to consider as a matter of discretion whether it is in the interests of justice that a costs award should be made at all, and in addressing the tribunal on this matter, Mr Smith referred to Vaughan, and to the evidenced difficulty of the tribunal when considering whether to make a costs award against a party known to be out of work, and with debts certainly of around £30,000.00 or more.

29. Mr Smith referred at length to Vaughan and to Oni, in particular to the discussion in Vaughan of the difficulties experienced by a tribunal when faced with a very substantial application for costs.

30. Mr Smith drew to our attention some striking parallels as he considered them, between this case and Vaughan. There was the same broad range of allegations against a large number of colleagues; but in this case (and strikingly unlike Vaughan) the claimant had been put on notice of a costs application; the claimant was professionally represented by specialist counsel; the claimant did not suggest that the litigation was driven in its conduct by mental illness; and a significantly large award was requested.

31. Mr Smith conceded that despite the wording of Rule 84, it would be an exception not to take account of ability to pay, and that the tribunal which took that course would have to give reasons for doing so. He did not ask us to do so.

32. Mr Smith read at length paragraphs 28 and 29 of Vaughan and we do not repeat them here in full. We note that the EAT said that ability to pay should not mean ability to pay forthwith, and that the costs power is not limited to sums immediately payable:

> "If there was a realistic prospect that the appellant might at some point in the future be able to afford to pay a substantial amount it was legitimate to make a costs order in that amount so that the respondents would be able to make some recovery when and if that occurred… there is no reason why the question of affordability has to be decided once and for all by reference to the party's means as at the moment the order falls to be made…
>
> The question for the tribunal… was essentially whether there was indeed a reasonable prospect of [the claimant] being able in due course to return to well paid employment and thus to be in a position to make a payment of costs."

33. Mr Smith drew to our attention the factors in the claimant's favour: he is aged 35, highly educated and qualified, and in the public sector has a working life ahead of him of 30 years or more.

34. In reply to the tribunal's questions, which were as to the information available before dismissal of the claimant about his health, Mr Smith read briefly from an occupational health report of 31 August 2017. It stated that the claimant had recently begun a course of specialist psychological therapy (which we interpret as that envisaged in the last two sentences of RJ79) and been certified as fit to return to all duties, subject to recommendations as to management systems. Mr Smith submitted therefore that we should not consider this as a case of a claimant on long term sickness without any prospect of being well enough to return to work.

35. He pointed out, correctly, that the claimant had not produced a first person witness statement for this hearing, and that the tribunal therefore had no evidence of how the indebtedness had been incurred or was being managed; no evidence of mitigation; and curiously, in the financial information provided, no evidence about accommodation costs, either of rental or mortgage or other property overheads costs.

36. Most compellingly, Mr Smith submitted that whatever the claimant's indebtedness, there was no reason why this respondent, a public authority, should regard the claimant's liabilities to it as in any way enjoying lesser priority or importance than his liabilities to finance providers. He submitted that in light of the tribunal's findings, it was not in the interests of justice that the claimant should put the respondent to significant resource in defending these proceedings, and, having lost the case comprehensively, walk away from it unscathed. As an instance of that point, but no more, Mr Smith informed the tribunal (which did not know of it) that the claimant has issued further proceedings in relation to his suspension, and it is not unpredictable that he will issue a further claim relating to his dismissal.

37. We accept Mr Smith's submissions and we find that it is in the interests of justice that a costs award should be made. We accept that the claimant has decades of earning capacity ahead of him, and we accept that he has put forward to the tribunal no medical or psychological evidence to suggest that he will be unable to fulfil that earning potential. It does not seem to us in the interests of justice that the case which we described in our reserved judgment should be brought, fought and determined without the claimant being required to take some responsibility for the resource implications of the litigation on his opponent. We regard the alternative – namely that this wholly successful respondent should have no recourse to costs because of the present impecuniosity of the claimant – as not in the interests of justice.

38. Mr Smith's application was for an award of £20,000.00. We have made an award of £10,000.00 in light of the serious but incomplete information about means provided by the claimant.

39. As the claimant was not present in the tribunal, we think it right to record two matters which do not form part of this decision-making process but which were mentioned at the hearing. Upon being told that the claimant has brought a fresh claim, which is listed for preliminary hearing in January, the present judge suggested that if a party has a view as to whether that matter should or should not come before him, the parties should notify the tribunal office at the earliest possible opportunity, as otherwise it may well be allocated to him by process of normal random allocation. The morning of the preliminary hearing may well be too late to change the listing arrangement.

40. The second was that although enforcement is not a matter for the tribunal, but for the County Court, Mr Smith indicated that the respondent would seek to enforce any award through reasonable co-operation, and in accordance with the supervision of the County Court, and that it recognised that enforcement was a process which will require further management in future.

41. Judge Lewis adds the following note: when finalising this Judgment, I saw, for the first time, an email from the claimant to the tribunal of 16 December. The claimant seemed to ask to add fresh evidence to our consideration. That has not happened. The correct course open to the claimant will be to apply for reconsideration of this Judgment in accordance with rule 71, and I record that that course remains open to him, and has not, in my view, been triggered by the email of 16 December.

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Employment Judge R Lewis

Date: ……15/1/18……..

Sent to the parties on: .....

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For the Tribunal Office