EMPLOYMENT TRIBUNALS

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE FRANCES SPENCER

MEMBERS MRS AJ SADLER
MR N SHANKS

BETWEEN: MR T SHIFERAW CLAIMANT

AND

GUYS AND ST THOMAS' NHS FOUNDATION TRUST …..RESPONDENT

ON: 31ST AUGUST 2017

Appearances

For the Claimant: Did not attend
For the Respondent: Ms D Masters, counsel

WRITTEN REASONS

These written reasons for the costs judgment delivered with oral reasons on 31st August 2017 and sent to the parties on 22nd September 2017 are given at the request of the Claimant.

1. This was the hearing of an application for costs following the Claimant's unsuccessful claim for unpaid wages, disability discrimination and harassment related to disability. The liability hearing was heard from 13th to 17th March 2017 and the reserved judgment with full written reasons was signed on 24th March 2017 and sent to the parties on 20th April 2017.

2. On 18th May 2017 the Respondent made an application for costs (limited to £20,000) on the basis that (i) the Claimant's conduct in bringing his claims was unreasonable and vexatious and that he had presented a case which was misconceived and which he knew or ought to have known had no reasonable prospect of success and (ii) that the Claimant's conduct of the

proceedings was unreasonable and disruptive which led to excessive costs being incurred in defending the case in the light of the issues.

3. By letter dated 28th May 2017 the Claimant objected to the application for costs, said that he was about to go abroad to receive prearranged therapy and had paid for non-refundable travel. He said that he might not be back before the date of a costs hearing and asked the Tribunal to make a decision based on the papers.

4. It was not appropriate to make a decision based on the papers given the amount at stake, and a cost hearing was listed to take place today 31st August 2017. As this was some 3 months after the Claimant's letter it was hoped that by then the Claimant would be in a position to attend.

5. The Claimant did not attend today. There had been no application for a postponement. The file showed that the notice of hearing had been sent to the Claimant via his former representatives who had responded to the Tribunal that they would forward the notice of hearing to the Claimant. The Respondent had also been in touch with the Claimant via email (which we was his preferred method of communication) on 24th August reminding him of the costs hearing and enclosing the bundle. A hard copy of the bundle had been sent to his address and collected from the post office. The signed receipt suggested a signature other than the Claimant but whoever collected it would have needed the Claimant authority and ID to make the collection. The clerk also called the Claimant on his landline (we had not been provided with a mobile number) and left a message on his voicemail asking him to call the tribunal back as a matter of urgency.

6. Having waited some time to check that the Claimant was not running late, we heard from the Respondent who submitted that the hearing should go ahead in the Claimant's absence.

7. There having been no request for a postponement and pursuant to rule 47 of the Employment Tribunal Rules of Procedure 2013 the Tribunal decided to go ahead with the hearing in the absence of the Claimant.

8. We had a small bundle of documents relevant to the costs hearing and heard submissions from Ms Masters. We also read and considered the representations and submissions which the Claimant had made to the Tribunal in his letter of 28th May 2017.

Relevant law

9. The Tribunal has power under Rule 76(1) to make a costs order against a party in respect of legal costs where it considers that a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing or in conducting the proceedings or if the claim or the response had no reasonable prospect of success. If the Tribunal considers that the circumstances set out in Rule 76(1) apply it may (but does not have to) make a costs order against a party if it considers it appropriate to do so.

This involves the application of a two-stage test, requiring the Tribunal first to inquire whether the conduct in question falls within the terms of the rule and, if it does, the Tribunal then asking whether it is appropriate to exercise its discretion in favour of awarding costs against that party.

10. If a Tribunal decides to make a costs order it may either specify a sum (not exceeding £20,000) which the paying party must pay to the receiving party or may order the paying party to pay the receiving party the whole or a specified part of the cost of the receiving party to be assessed in the County Court in accordance with the Civil Procedure Rules 1998 or by an Employment Judge applying the same principles. The Tribunal may (but is not obliged to) take a party's ability to pay into account in considering whether to make a costs order or how much that order should be (Rule 84). In ***Vaughan v London Borough of Lewisham No2. 2013 IRLR 713*** the EAT (Underhill P) said that affordability is not the sole criterion for the exercise of the discretion on costs.

11. An award of costs is the exception and not the rule in the employment tribunal. In ***Barnsley Metropolitan Borough Council v Yerrakalva 2012 IRLR 78***) the Court of Appeal said that 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 was unreasonable conduct in bringing and conducting the case and in doing so, to identify the conduct, what was unreasonable about it and what effects it had. There does not have to be a precise causal link between the unreasonable conduct in question and the specific costs being claimed.

Submissions

12. For the Respondent Ms Masters said that the original application for costs had been made both on the basis that (i) the claim was misconceived i.e. had no reasonable prospect of success and (ii) the Claimant's unreasonable conduct in the way he had conducted the proceedings. However, the Respondent had now narrowed and restricted its application for costs to counsel's costs i.e. her fee for preparing and attending the hearing, which amounted to £11,000.

13. It was the Respondent's contention that the Claimant's conduct in continuing to pursue the claim after 10th March 2017 was wholly unreasonable. On 8th March 2017 the Respondent had sent a letter to the Claimant's then representatives, Fadiga & Co. "without prejudice save as to costs". (60) In that letter they set out why the Respondent considered that the Claim would fail, noted that the Respondent had incurred costs to date in the region of £30,000 and that the total costs, should the hearing go ahead, would be likely to be in the region of £48,000. The Claimant was warned that if he did not withdraw his claim by 5 pm on 10th March the Respondent would apply for costs should the Claimant's claim fail. The Claimant declined to withdraw the claim.

14. It was Ms Masters contention that once the Claimant had seen the

Respondents witness statements and the documents in the bundle it should have been apparent to the Claimant that his claim was both unreasonable and unlikely to succeed. The Claimant had been legally represented between January and March 2017 when the without prejudice letter had been sent. That letter set out in detail why the Respondent considered why the evidence (or lack of it) suggested the claim was misconceived. Further the Claimant had, at all times, been a member of Unison and had had access to their advice during the course of the events that were the subject of the claim. His trade union representative had attended the Tribunal in the capacity of a “friend”.

15. In the event the Claimant’s claims failed. Ms Masters referred to paragraph 121 of the judgment, to its finding that the Claimant was not wholly honest witness and to its key findings on each of the relevant claims. She submitted that many of the Claimant’s factual assertions were rejected and much of his claim was significantly out of time.

16. In his letter of 28th May 2017 Claimant said that he had no legal representation for much of the process including the ACAS conciliation process, ET1 preparation, the preliminary and final hearings and in the finalisation of the bundle. Unison had not provided him with support in connection with the claim. The Claimant submitted that his conduct of the litigation had not been unreasonable or obstructive, explained his difficulties with the bundle and the witness statement. In relation to the Respondent’s assertion that Claimant had brought a case that had no reasonable prospect of success the Claimant said that the Tribunal had allowed the claim to proceed to a substantive hearing despite two case management hearings and that the Tribunal would not have done so if it considered that the claim had no reasonable prospect of success. He asked the tribunal to take into account mitigating factors as to his family and financial circumstances.

<u>Conclusions</u>

17. The Tribunal agrees with Ms Masters that the claim had no reasonable prospect of success. We did not consider the Claimant to be wholly honest in the evidence which he gave to the Tribunal and, as set out in our liability judgment, we concluded that he had not, on any measure, been unfairly treated.

18. It follows that the circumstances of this case fall within rule 76 (1) and that the tribunal had discretion to make a costs order.

19. In determining whether or not to exercise discretion to make an award of costs we have borne in mind that costs are the exception not the rule in the Employment tribunal and the aim of costs is to compensate the party who has succeeded and not to punish the losing party.

20. We have also considered whether the conduct of the Claimant in failing to withdraw his claim on 10th March was unreasonable in that by then the Claimant knew or ought to have known that his claim had no reasonable

prospect of success. We acknowledge that often what is plain for all to see at the end of a lengthy court case, when all the evidence has been presented and challenged, is not so clear at the start of the process. Nonetheless, in this case we are satisfied that by 10th March the Claimant ought to have known that the case had no reasonable prospect of success. He was legally represented at that time and his representatives would have been able to understand the evidential lacunae, particularly as regards the evidence of disability. Further, (and given the availability which he had to legal advice) he should have realised that many of the complaints he made about his treatment by the Respondent could not, by any measure, be said to breach the Equality Act 2010. The Claimant was not wholly honest witness and his evidence during the liability hearing was inconsistent and shifting. The Claimant's allegations ranged over a lengthy period, from 2008 (in relation to the wages claim) to 2015, which made a lengthy hearing inevitable.

21. The Claimant's submissions in his letter of 28th May 2017 dealt mainly with his conduct during the preparation of the hearing which was no longer relied upon by Ms Masters for their costs order. However at paragraph 10 of his letter the Claimant said that his case had passed the "sift" and two case management hearings and that this demonstrated that the tribunal believed the claim had a reasonable prospect of success. This submission is to misunderstand purpose of the case management hearings which is to clarify the claim and give directions for its management to a hearing rather than to make an assessment of its merits. For the reasons set out above we conclude that the Claimant did act unreasonably in failing to withdraw his claim after the costs warning letter was sent to him on 8th March and that it would be appropriate to award costs in the amount requested by the Respondent.

22. As to means the Tribunal may, but does not have to, take this into account. We would ordinarily have wished to take this into account but the evidence that the Claimant has provided as to his means is limited and unspecific, with no evidential support. He has not attended today to give any further details. We note that the Claimant obtained a personal injury award some years ago, that he retains a good ability to earn an income. (The evidence at the liability hearing was that during his employment he had trained as taxi driver and also secured a 2nd job on days when he was not working for the Respondent). We have no evidence that the Claimant will not be able to pay this award.

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Employment Judge Frances Spencer
10th November 2017