EMPLOYMENT TRIBUNALS

Claimant: **Mr A Elballal**

Respondent: **Mid Essex Hospitals Services NHS Trust**

JUDGMENT

It is the judgment of the Employment Tribunal that the Respondent's application for costs is refused.

REASONS

1. Rule 76 of the Employment Tribunal Rules of Procedure 2013 provides that:

> "**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 have acted vexatiously, feasible, 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. The making of a costs order therefore requires a two stage approach: has the threshold been passed and, if so, is a costs order appropriate.

3. The lead authority in deciding whether to award costs in the Employment Tribunal is **Yerrakalva v Barnsley Metropolitan Borough Council** [2011] EWCA CIV 1255, in particular the judgment of Mummery LJ. The Tribunal should consider the whole picture of what had happened in the case and ask whether there had been unreasonable conduct by the Claimant in bringing and conducting the case. If so, it should identify the conduct, what was unreasonable about it and the effect it had. The Tribunal should also take into account any criticisms made of the employer's conduct and its effect on the costs incurred.

4. By a claim form presented to the Tribunal on 29 April 2017, the Claimant complained of unfair dismissal from his job as a consultant with the Respondent. The Tribunal wrote to the Claimant asking him to explain why the Tribunal had jurisdiction to hear the claim as he had less than two completed years of service. The Claimant replied that he relied upon health and safety and whistleblowing reasons and asserted

that he had been automatically unfairly dismissed such that no qualifying service is required.

5. In its Response presented on 9 June 2017, the Respondent asserted that the Tribunal lacked jurisdiction to hear the claims because of length of service and because the Claimant had not been an employee. It denied all claims.

6. At a Preliminary Hearing on 30 July 2017, Employment Judge Gilbert identified the issues arising in the claims as unfair dismissal and detriment because of a protected disclosure. She directed that there be an open Preliminary Hearing to determine whether the Claimant had been an employee of the Respondent in respect of the unfair dismissal claims.

7. At the Preliminary Hearing on 20 October 2017, Employment Judge Foxwell decided that the Claimant was not an employee and therefore the Tribunal had no jurisdiction to hear his complaint of unfair dismissal. One allegation that the Claimant was subjected to a detriment for making a public interest disclosure was struck out and the remaining detriment claims were permitted to proceed conditional upon payment of a deposit by 23 November 2017. Judge Foxwell gave full reasons his decision which were sent to the parties on 2 November 2017. The Respondent made no application for costs at that stage.

8. On 21 November 2017, the Claimant wrote to the Tribunal withdrawing all claims. In his withdrawal letter, the Claimant maintained that he had been subject to bullying and harassment and expressed his great disappointment that the Tribunal had decided not to allow the main aspects of his claim to proceed. After carefully reviewing Employment Judge Foxwell's preliminary hearing decision and taking advice, the Claimant wrote that he had concluded that there was little prospect of success, hence the withdrawal. Judgment dismissing all claims upon withdrawal was sent to the parties on 13 December 2017.

9. On 3 January 2018, the Respondent wrote to the Tribunal making an application for costs. It submitted that the Claimant had behaved in a vexatious, abusive, disruptive and unreasonable manner in bringing proceedings. In the alternative, the Respondent asserted that the claims (in particular those of automatic unfair dismissal and detriment for raising a health and safety complaint) had had no reasonable prospects of success. In its application, the Respondent submitted that the unfair dismissal claims were entirely without merit because the Claimant was not an employee. It said that the Respondent had been put to significant costs (in excess of £24,000 plus VAT) and relied upon a costs warning letter sent to the Claimant on 20 July 2017 which had invited him to withdraw at that stage. The Respondent relied upon Judge Foxwell's decision that the Claimant was an agency worker and sought at the very least costs incurred in the sum of £11,061.50 plus VAT in respect of that Preliminary Hearing (although I note that some £1,800 plus VAT was for the attending of the solicitor at a hearing at which the Respondent was represented by Counsel).

10. The Respondent submits that it is an NHS employer and that it is incumbent upon them to spend their resources on patient needs. The Respondent been put to significant cost to defend the Claimant's unmeritorious claims and it would be wrong for the tax payer to foot that bill. The Respondent asserts that the Claimant is a professional Consultant, currently in employment whose earnings are not insignificant.

Finally, the Respondent asked for the costs of this application estimated in the sum of £4,000 plus VAT.

11. The Claimant was required by the Tribunal to provide any objections to the application by 31 January 2018. The Claimant applied for an extension of time as he was overseas; this was granted and objections were required by 1 March 2018. On 28 February 2018, the Claimant sent an email expressing his "strong objection to the Respondent's unreasonable application for costs." The Claimant asserted that he had decided to withdraw after meticulous review of his prospects of success and that there had been no mention of costs at that stage.

12. On 23 March 2018, the parties were asked to state by 3 April 2018 whether a hearing was required to determine the application. The Respondent has confirmed that it wishes the application to be dealt with on paper. On 4 April 2018, the Claimant asked for an extension of time to decide whether he wishes to request a hearing. I refuse to grant that extension of time. The question is a simple one – have a hearing or deal with the application on paper. It does not require extensive time for consideration. The Claimant is an educated, professional well able to provide a response in time even if he is outside the UK. The determination of the application has already been delayed and further delay is not in the interests of justice.

13. I have therefore decided the application based upon the papers. The Respondent states that the Claimant has raised no merit worthy objection. I do not agree – the Claimant's objection is that he assessed the merits in the light of the Foxwell judgment and acted properly in withdrawing at that stage. In other words, that his conduct was not unreasonable. In any event, whether or not the Claimant had objected, costs do not follow the event and it is still for the Tribunal to decide whether the threshold for a costs order has been passed and whether an order is appropriate.

14. I am not satisfied that the Claimant has acted in the manner required by rule 76(1)(a) in the bringing his claim or in pursuing it in the manner which he did. The Respondent essentially argues that the fact that the Claimant lost the employment status point at the Preliminary Hearing meant that he had had no reasonable prospects or had acted unreasonably. I do not agree. Employment status is a complex matter which raises issues of law and of fact including, as here, where there is a tripartite arrangement but the agency worker appears to be no different to an employee. Evidence had to be heard and tested before employment status could be determined. The Claimant lost the point but it does not follow that he should therefore be liable to costs.

15. Contrary to the Respondent's assertion in its costs warning letter dated 20 July 2017, employment status did not automatically conclude the proceedings as the detriment claims were able to proceed as the Respondent conceded the broader "worker" point. Only one part of the claim was struck out by Judge Foxwell as having no reasonable prospect of success, the others were allowed to proceed even if they were assessed as having "little" reasonable prospect.

16. A deposit order provides a claimant with an objective assessment of the likely merits of their claim on the information then available to the Tribunal, it is intended to make the claimant consider whether they should proceed and to put them on notice of the costs consequences of deciding to do so. Here, the Claimant reflected upon Judge

Foxwell's assessment of his claim and decided to withdraw. In doing so, I am satisfied that he did not act unreasonably or as otherwise described in rule 76(1)(a). Nor am I persuaded on the evidence available to me and having regard to the reasons of Judge Foxwell, that these claims had no reasonable prospect of success.

17. Looking at the whole picture of the case, both in terms of the Claimant's conduct and its merits, I am not satisfied that a costs order is warranted. The application is refused.

Employment Judge Russell

25 April 2018