



EMPLOYMENT TRIBUNALS

Claimant: Mr. A Chikuzah

Respondent: Leicestershire Partnership NHS Trust

Heard at: Nottingham **On:** 12th December 2017

Before: Employment Judge Heap (Sitting Alone)

Representation

Claimant: Earlier oral representations made on 5th October 2017

Respondent: Earlier oral representations made on 5th October 2017

JUDGMENT ON COSTS

The Respondent's application for costs is refused.

REASONS

BACKGROUND & THE ISSUES

1. On 5th October 2017 I struck out the Claimant's claim on the basis that the complaints that remained by that stage of the proceedings had all been presented outside the time limit provided for by Section 123 Equality Act 2010 and I determined that it was not just and equitable to extend time for them to be heard outside that time limit.
2. Following oral Judgment being given, the Respondent made an application for costs and handed up a schedule of costs in support. There was insufficient time to deal with the application at the hearing as the Claimant had to leave because of childcare commitments. I therefore heard oral representations from the parties and gave leave for them both to make any further written representations that they may wish to make after the hearing. No further representations were received and therefore I have made this determination based on the information and representations made at the hearing.

THE LAW

3. Rules 74 to 84 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("The Regulations") deal with the question of when an Employment Tribunal may make an Order for costs.

4. Rule 76 sets out the relevant circumstances in which an Employment Judge or Tribunal can exercise their discretion to make an Order for costs, the relevant portions of which provide as follows:-

“When a costs order or a preparation time order may or shall be made

76.—*(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.

5. In short, therefore, there is discretion to make an Order for costs where a party or their representative has acted vexatiously, abusively, disruptively or unreasonably in either the bringing or conducting of the proceedings or where the claim or part of it had no reasonable prospect of success.
6. Vexatious conduct was considered in **ET Marler Ltd v Robertson [1974] ICR 72** and was determined to be the bringing of *“a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive”*. It is against that background that a Tribunal should therefore consider vexatious conduct.
7. With regard to unreasonable conduct it is necessary for the Tribunal to consider *“the whole picture of what happened in the case and to ask whether there has been unreasonable conduct and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had.”* (**Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78**)
8. There is a presumption of unreasonable conduct (albeit a rebuttable one) if a Deposit Order has been made and the Tribunal later goes on to dismiss a claim or part of it for substantially the same reasons as given in the Order itself. This is provided for by Rule 39(5) Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013. Rule 39(5) provides as follows:

“If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a)the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b)the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.”

9. It should be noted that merely because a party has been found to have acted unreasonably, vexatiously or where a claim or part of it has no reasonable prospect of success, it does not automatically follow that an Order for costs should be made. Once such conduct or issue has been found, a Tribunal must then go on to consider whether an Order should be made and, particularly, whether it is appropriate to make one. Particularly, when deciding whether an Order should be made at all and, if so, in what terms, a Tribunal is required to take any relevant mitigating factors into account.
10. In accordance with Rule 84, a Tribunal is entitled to have regard to an individual's ability to pay any award of costs both in relation to the making of an Order at all, or the amount of any such Order. However, it is not a mandatory requirement that such consideration must automatically be given.

THE COSTS APPLICATION

11. Whilst I have taken into account all submissions, both written and oral, made on behalf of the Respondent, I have only summarised here the basis of the application as further details appear in my conclusions below.
12. Firstly, the Respondent contends that the Claimant has pursued the claim for a vexatious purpose and there was no reasonable prospect that it would succeed. It was said that the Claimant had previously been warned that the Respondent considered his claim to be vexatious, unreasonably pursued and lacking merit and that he would be at risk of a costs application being made if he pursued the matter (see pages 41, 42, 90, and 96 of the hearing bundle).
13. It is pointed out that the Claimant was made to pay a number of Deposits as a condition of pursuing the claim and that he was warned that he stood little reasonable prospect of success on both the merits of the claim and on the issue of jurisdiction. In respect of that latter point, the Respondent contends that Rule 39(5) Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 should bite in this case given the imposition of an earlier Deposit Order by Employment Judge Clarke.
14. Following the imposition of the Deposit, the Respondent sent the Claimant a costs warning letter (see page 90 and 91 of the hearing bundle) inviting him to consider his position and suggesting that he take legal advice. That too is relied upon by the Respondent as demonstrating that the Claimant acted unreasonably in pursuing the claim.

15. It is submitted by the Respondent therefore that the Claimant pursued the claim vexatiously, that it had no reasonable prospect of success and/or that it was unreasonable to pursue the claim.

THE CLAIMANT'S POSITION

16. The Claimant's position is that he has not pursued the claim vexatiously, his conduct has not been unreasonable and that the claim cannot be said to be without merit as the substance of the same had never been determined by the Tribunal.
17. Although no evidence as to his means has been provided, it is also the Claimant's position that he could not afford to pay the level of costs claimed by the Respondent.

CONCLUSIONS

18. I deal firstly with the question of whether the claim has been pursued vexatiously. The central contention of the Respondent in this regard is that the Claimant has retained patient records and that he has inappropriately approached the question of disclosure by focusing on documents that are no longer relevant to the proceedings and which he may have wanted to use for other purposes.
19. Dealing firstly with the issue of patient records, the Claimant has not done anything at all with those records that I am aware of that could lead me to conclude that he has brought these proceedings with ill motive or ill will or for a purpose other than having the complaints determined by the Tribunal. Whilst it is abundantly clear, as I remarked to the Claimant at the last hearing, that he should not be in possession of patient records and should return them to the Respondent, that in itself does not suggest that he has brought or conducted these proceedings vexatiously.
20. Turning then to the disclosure point. I have dealt with this under the ambit of unreasonable conduct below and having concluded that that conduct was not unreasonable, I am also satisfied that it was not vexatious.
21. I then turn to deal with the question of unreasonable conduct and begin with the Respondent's contention that Rule 39(5) Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 is engaged and that there is, in effect, an automatic presumption of unreasonable conduct. I am not satisfied that Rule 39(5) is engaged on these facts.
22. In order for Rule 39(5) to bite, I would have to have dismissed the Claimant's remaining allegations for substantially the same reasons given in the Deposit Order made by Employment Judge Clark. I struck out the remaining allegations on jurisdictional grounds only. Whilst it is clear that the issue of the remaining complaints being "out of time" featured in part in the decision to make the Deposit Order (see paragraphs 23 and 24 of the Judgment of Employment Judge Clark sent to the parties on 21st April 2017) it is too far a stretch to suggest that my determination was substantially the same as that which caused the Deposit Order to be made. It is clear that Employment Judge Clark had in mind a number of

other issues which caused him to make the Deposit Order (see for example paragraphs 21, 22 and 24 of his Judgment) and that the time point was merely one factor, and perhaps it seems a peripheral one, which was taken into account in the overall assessment. It cannot be said that I have dismissed the claim on substantially the same grounds, therefore, as those upon which the Deposit Order was founded. Therefore, I am satisfied that Rule 39(5) is not engaged in this case.

23. I turn then to the other bases on which the Respondent contends that the Claimant has acted unreasonably. In this regard, the Respondent's position is that the Claimant has also acted unreasonably in failing to comply with Orders made by the Tribunal for disclosure and in continuing to pursue requests for documents in respect of complaints which are now no longer before the Tribunal.
24. Had this been the actions of a professional representative then I would have been minded to agree with the Respondent. However, the Claimant has at all material times acted as a litigant in person and some leeway for a lack of understanding or adherence to the process is required. In respect of the issue of disclosure requests, it is not unusual for a litigant in person faced with proceedings that hold great importance to them (and I have no doubt that this is the case for this Claimant) to lose sight of the wood for the trees. I do not therefore accept that the Claimant's failure to comply with the Tribunal's Order for disclosure or his rather dogmatic and perhaps misguided approach in respect of disclosure requests amounts to unreasonable conduct.
25. Alternatively, the Respondent contends that the Claimant acted unreasonably in pursuing the claim following the making of the Deposit Orders. I do not agree. The Claimant paid deposits in respect of two allegations and abandoned others. Whilst the Respondent may consider the two allegations selected by the Claimant to be relatively arbitrary, the Claimant is entitled to choose those complaints which he felt most strongly needed to be determined by the Tribunal and I am satisfied that that is what he did. He clearly gave some thought to the gravity of a Deposit Order having been made given that he elected not to pursue a considerable number of the original complaints. I therefore make no finding that the Claimant's conduct was unreasonable in view of those matters and the significant importance to the Claimant of having the Tribunal determine the allegations of discrimination he made against the Respondent.
26. Finally, and linked in part to the position set out immediately above, the Respondent contends that it was unreasonable for the Claimant to have continued with the claim after the costs warnings that were sent to him. Again, had the Claimant been professionally represented I might well have agreed with the Respondent on this point. A great deal of time was obviously taken in those letters to set out the position as the Respondent saw it to be. However, it is abundantly clear from the Claimant's submissions and also documentation within the hearing bundle (see for example pages 97 and 106) that he has a deep mistrust of the Respondent – he has gone so far as to accuse them of having killed a patient - and I have no doubt that that has filtered through to those who they instruct.

27. I am therefore not satisfied that the Claimant's conduct in continuing with his claim against the representations of the solicitors of an organisation that he inherently mistrusts and who he considers have subjected him to serious mistreatment, does not amount to unreasonable conduct. The Claimant believed strongly in his claim and coupled with his inability to see matters in a detached way and the deep mistrust of those recommending that he withdrew, was such that his conduct cannot objectively be viewed as unreasonable.
28. Turning then to the question of whether the claim had no reasonable prospect of success. The Respondent invites me to find that the claim would not have succeeded if it had reached a full hearing and that it had no reasonable prospect of success. I cannot make that determination given that no evidence in respect of the substance of the claim has been heard and the case has therefore not been tested before a full Tribunal and no findings of fact or conclusions on the merits have been made. I remind myself also that that question was considered at the previous Preliminary hearing before Employment Judge Clark where the Respondent's application to have the claim struck out under Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 was refused. Nothing has changed between that point and now and I cannot make any determination that the merits of the claim were such that it had no reasonable prospect of success.
29. However, I should observe that even had I found the Claimant's conduct to have been unreasonable or that the claims were without merit, I would not have made a Costs Order in all events. It was very clear that the Claimant felt extremely strongly about his perceived treatment by the Respondent of which he complained to the Tribunal. He had no other option to seek redress for such matters other than to have them determined by the Tribunal. He has at all times acted as a litigant in person and the same standards and objectivity cannot reasonably be expected of him as they would a professional or detached representative. Those are mitigating factors which I consider would have in all events rendered it inappropriate to make a Costs Order.
30. For all of those reasons, the Respondent's application for costs is therefore refused.

Employment Judge Heap

Date: 29th December 2017

JUDGMENT SENT TO THE PARTIES ON

13/01/18

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FOR THE TRIBUNAL OFFICE