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THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE HALL-SMITH

MEMBERS Mrs C A Swetenham
Ms E Thompson

BETWEEN:

Mr A Mott

Claimant

AND

(1) Manpower UK Ltd

Respondents

(2) Crawley Borough Council

JUDGMENT ON AN APPLICATION FOR COSTS

THE UNANIMOUS JUDGMENT OF THE TRIBUNAL is that:

The application by the first named Respondent, Manpower UK Ltd, for an award of costs against the Claimant is refused.

REASONS

1. In a Reserved Judgment sent to the parties on 15 November 2016 the Employment Tribunal determined that the Claimant's Tribunal complaints of age discrimination and harassment were not well founded and were accordingly dismissed. The Employment Tribunal also dismissed the Claimant's complaints of victimisation.
2. The Tribunal hearing was heard by the Tribunal over two days in September 2016. The Tribunal spent two days in Chambers before reaching its decision.
3. The Claimant's Tribunal claims were directed against Manpower UK Ltd, an employment business and Crawley Borough Council. The Claimant had been

placed on an assignment by Manpower with Crawley Borough Council. The Claimant's complaints were founded upon his working relationship as a contract worker with Crawley in circumstances where his employment relationship with Manpower was that of an employee.

4. In a letter to the Tribunal dated 12 December 2016 Manpower's representatives wrote to the Tribunal applying for an order for costs against the Claimant pursuant to Rule 76(1)(b) of the Employment Tribunal Rules of Procedure namely that the Claimant's claim had no reasonable prospect of success as against Manpower, alternatively the bringing of the claim by the Claimant amounted to unreasonable conduct.
5. In broad terms Manpower alleged that the Claimant's pleaded claim had been misconceived and had no reasonable prospects of success in circumstances where Crawley with whom the Claimant had a direct working relationship had been instrumental in removing the Claimant from a particular working assignment involving gardening work to a less congenial assignment, involving litter picking duties.
6. The Claimant alleged that Manpower had directly discriminated against him because of age by its failure to adequately attempt to rectify the matter. The Claimant further alleged harassment against Manpower which involved his contention that it had been unwilling to adequately investigate or address the Claimant's concerns about age discrimination. There was a further allegation of victimisation which involved the Claimant's allegation that following his complaint of age discrimination Manpower had failed to offer him sufficient suitable new employment assignments after the Claimant had made his complaint of age discrimination on 11 May 2015.
7. In its application for costs Manpower pointed out that its response which had been entered on 31 December 2015 should have alerted the Claimant to the fact that his claim had no reasonable prospect of success. Manpower restricted its application for costs from the date that it had placed the Claimant on notice as to costs on 27 July 2016. Manpower had annexed a schedule of costs to its application and the amount of costs it sought from 27 July 2016 inclusive of VAT amounted to the sum of £4,896.
8. The Claimant's Solicitors, Thompsons, wrote to the Tribunal on 19 December 2016 opposing Manpower's application for costs. On behalf of the Claimant Thompsons contended that the parties had agreed a list of issues and submitted that just because the Employment Tribunal had preferred the witness evidence of the Respondent's witnesses to that of the Claimant, it did not follow that the Claimant's claims had been doomed to fail at an early stage.
9. Further there had been an offer to withdraw the claim of direct age discrimination and that the claim of victimisation had turned on the number of assignments the Claimant had been offered following his allegation of age discrimination. It was the Claimant's belief that more work had been available than he was offered. The Claimant had been offered eight day's work in three months.

10. In the Tribunal's reasons, the Tribunal determined that the Claimant's complaint that Manpower had been unwilling to adequately investigate or address the Claimant's concerns about age discrimination to be wholly without foundation and in relation to harassment the Tribunal determined that the allegations of harassment were entirely unjustified.
11. In relation to victimisation the Tribunal did not conclude as the Claimant's Counsel had submitted that the burden of proof had shifted, and we considered that the endeavours undertaken by Manpower had been wholly inconsistent with the situation which supported a contention that he subjected the Claimant to a detriment namely by offering few assignments because of the protected act.
12. For the reasons referred to by the Tribunal in its reasons the Tribunal preferred the evidence of the Respondent's witnesses to that of the evidence of the Claimant.

The Law

13. Rule 76 of the Employment Tribunals Rules of Procedure 2013 provides

- (1) ***A Tribunal may make a cost order or Preparation Time Order, and shall consider whether to do so, where it considers that –***
- (a) ***a party (or that parties' 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.***

14. In their letters to the Tribunal the parties' representatives referred the Tribunal to the following authorities, namely

- ***Barnsley Metropolitan Borough Council-v-Yerrakalva [2011] EWCA Civ 1255; [2012] IRLR 78;***
- ***Saka-v-Fitzroy Robinson Limited [UKEAT/0241/00], EAT.***

15. In **Saka** the EAT pointed out that a costs order against the Claimant in a discrimination case is always likely, in the absence of misconduct, to be made only in a very rare, even exceptional case.

16. We were referred to the guidance of the Court of Appeal in **Barnsley Metropolitan Borough Council**, namely

the vital point in exercise of the discretion to order costs is to look

at the whole picture of what happened to the case and to ask whether there has been unreasonable conduct by the Claimant in brining and conducting the case and, in doing so, to identify the conduct what was unreasonable about it and what effects it had.

Conclusions

17. In the circumstances of this application for costs we considered that there was some force in the submission of the Claimant's representatives namely that there is rarely if ever direct evidence of discrimination and that accordingly the role of the Employment Tribunal is to draw inferences which realistically is only in a position to do once it has heard all the evidence.
18. There were essentially two allegations involving Manpower namely the allegation of being unwilling to adequately investigate or address the Claimant's concerns about age discrimination which although alleged as harassment differed little in my judgment from the Claimant's allegation of direct age discrimination namely the allegation of not adequately attempting to rectify the matter. The allegation of victimisation involved not offering the Claimant sufficient suitable new employment assignments after he had made his complaint.
19. In the circumstance of this case there was no issue that there was a protected act and the Claimant had only been offered a few assignments over the period of three months amounting to an offer of eight day's work.
20. Further, in our judgment, it does not necessarily follow that in circumstances where the Tribunal preferred the evidence of the Respondent's witnesses to that of the Claimant, it follows that there has been unreasonable conduct on the part of the party whose evidence was not accepted in significant respects.
21. The Claimant's case against the first named Respondent was certainly a very weak case. The weaknesses were clearly pointed out in Manpower's letter to him dated 27 July 2016 which pointed out the following:
 - i. **The decision to terminate the assignment lies indubitably at the door of the Second Respondent and the Second Respondent has the right to do that.**
 - ii. **That decision was made without the knowledge of the First Respondent and**
 - iii. **The First Respondent nevertheless sought to challenge this informally, via Joe Johnson contacting the second Respondent on your client's behalf.**
 - iv. **The First Respondent investigated your client's grievances fully as possible.**
 - v. **The First Respondent did offer your client alternative**

assignments which he turned down.

22. There was no application by Manpower for a deposit order, which in our judgment would have reinforced the contentions relating to the weaknesses in the Claimant's case in the letter of 27 July 2016. Claimants in discrimination cases are inevitably faced with denials by those against whom the allegations are directed. The role of the Tribunal is to analyse the evidence having regard to the judicial guidelines and to the statutory framework of the burden of proof provisions.
23. We consider that the costs issue on the basis of unreasonable conduct of no reasonable prospect of success is finely balanced, but we are not persuaded, that this is a case where the threshold has been crossed by the Claimant either in relation to unreasonable conduct on his part or that this was a case that had no reasonable prospect of success before the Tribunal was in a position to have considered the evidence.
24. In such circumstances it is the judgment of the Tribunal that the Respondent's application for costs is refused.

Employment Judge Hall-Smith
Date: 4 January 2018