EMPLOYMENT TRIBUNALS

Claimant: Mr H Hassan

Respondent: Incommunities Group Limited

Heard at: Leeds **On:** 7 January 2019

Before: Employment Judge D N Jones
Mr R Stead
Mr G Corbett

REPRESENTATION:

Claimant: In person
Respondent: Mrs S Shaw, solicitor

JUDGMENT

1. All claims of discrimination and harassment relating to the protected characteristics of race, religion, age and sexual orientation, and the complaints of victimisation and less favourable treatment of a fixed time worker are dismissed upon withdrawal.

2. The claimant conducted the proceedings unreasonably in the circumstances in which the claims came to be withdrawn and shall pay the respondent's costs, assessed at £15,336.05.

3. The deposits paid by the claimant as a condition of being permitted to pursue the claims of direct race and religious discrimination shall be refunded to him, because the Tribunal has not dismissed the claims on the same or similar reasons to those which led to the Order being imposed.

REASONS

1. The respondent applies for costs following the withdrawal of all claims by the claimant on the first day of this hearing, which was scheduled to last for 12 days.

2. The respondent's representative wrote to the claimant on 19 November 2018 to put him on notice that it would apply for costs if he pursued the proceedings and

was unsuccessful. In that letter the respondent's representative set out the relevant rule, which is rule 76, and set out in bullet point form six grounds for pursuing the contention that the claims were misconceived, had no reasonable prospects of success and that the proceedings had been pursued vexatiously, abusively, disruptively or otherwise unreasonably.

3. The claimant brought the following complaints: 34 allegations of direct race discrimination, 1 continuing, repetitive act of racial harassment, 5 allegations of direct religious discrimination, the fourth of which was pursued in the alternative as harassment or direct discrimination by reason of sexual orientation, 5 allegations of harassment in relation to the protected characteristic of religion and 1 in relation to a continuing act relating to age, and 3 allegations of victimisation; a total of 51 complaints.

4. This matter came before Employment Judge Cox at a preliminary hearing on 10 July 2018 when she made an order for the claimant to pay a deposit of £200 as a condition of being permitted to pursue the allegations that he had been discriminated against on the grounds of his race. At a further preliminary hearing on 6 September 2018 Employment Judge Cox made an order that the claimant should pay a deposit of £20 as a condition of being permitted to pursue his allegation that he had been directly discriminated against on the grounds of religion by Ms Lowren, an employee of the respondent. On that occasion the claimant withdrew 6 complaints and all allegations made against Ms Saidy.

5. The claimant has paid both deposits and it is not necessary for these purposes for the Tribunal to set out why Employment Judge Cox considered those claims had little reasonable prospects of success.

6. The circumstances in which these claims came to an end were that the claimant sought a postponement of the case on the first day of the hearing on the ground that there had been a failure adequately to disclose information and documentation by the respondent. That application was refused, but before the Tribunal deliberated, Mr Hassan informed the Tribunal that he had obtained new employment and would have difficulty making himself available for the remainder of the scheduled hearing. The Tribunal considered the application in respect of the documents and refused the postponement; moreover we were not prepared to postpone the case on the basis that Mr Hassan was not available for the remainder of the hearing. We gave reasons for those decisions.

7. The circumstances in which Mr Hassan has obtained new employment, we are told, are that a week before the letter relating to costs was sent he was offered a job with a Business Consultancy for the sum of £15,000 per annum and he commenced that on 19 November 2018. He had not previously informed the respondent that he was not able to attend for the remainder of this hearing, nor has he sought to postpone this case before this morning on the ground that his new employment makes that difficult. He says that he is new in this employment and does not believe that he can ask his employers for such a significant period of time off, although he has not actually raised it with them.

8. The claimant informed us that he had joined a trade union in December 2017 but they had not lived up to what he expected and what they promised, namely to provide telephone advice in respect of this claim, and he has made attempts to

obtain legal advice through Merseyside Employment Services, which is a free service but does not have qualified lawyers.

9. Pursuant to rule 76, the Tribunal may make an 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 proceedings (or part) for the way the proceedings (or part) have been conducted; or b) any claim… had no reasonable prospect of success.

10. We are satisfied that there has been unreasonable conduct in the pursuit of this litigation by means of a withdrawal at the eleventh hour at a time the respondent has been put to the cost and expense of preparing the case for a full and final hearing. That is an extensive exercise in the light of the numerous allegations which have been made against a significant number of the claimant's former work colleagues. The respondent is not in a position to establish what they assert in their letter of 19 November, namely that the claimant's complaints had no reasonable prospect of success, because he brought them to an end. Furthermore, for the same reason we are not in a position to evaluate the opinion of Employment Judge Cox that some of the claims had little reasonable prospect of success.

11. It was incumbent upon the claimant to let the Tribunal and the respondent know as soon as possible if there was any difficulty in attending the final hearing. To leave the matter until the first day of the hearing, when he must have known of his dilemma for weeks, was not acceptable and is unreasonable conduct.

12. The threshold of rule 76 having been established, we must consider whether we should make an order for costs, and we have regard to the overriding objective that we must deal with cases justly. We have regard to the fact that we should seek, as far as practicable, to ensure that parties are on an equal footing, deal with cases which are proportionate to the complexity and importance of the issues, avoid unnecessary formality and seek flexibility, avoid delay, so far as is compatible with proper consideration of the issues and saving expense.

13. Mr Hassan makes the point that he has not had the benefit of legal advice although he has sought assistance from a union and a legal resource, and that he has done his best to obtain new work with a new employer. He maintains that his claims are good and it is only the fact that he had to choose between his new employment and pursuit of this litigation which led to the withdrawal of this claim.

14. We recognise that the claimant has not been able to obtain legal representation. He was on notice, however, that some of the claims were regarded as weak, because Employment Judge Cox imposed a deposit order and explained why she had done that. When the claimant challenged that in the Employment Appeal Tribunal, in dismissing the appeal His Honour Barklem ruled that the decision had been explained with exemplary clarity. In addition the solicitors for the respondent had written explaining the cost rules and making it clear that the claimant was at risk if he pursued his claims. We are satisfied the claimant he pursued this case in the knowledge that he may have to pay costs.

15. In respect of the merits of the claim, the Tribunal is not able to determine whether they were well-founded or had no, or little reasonable, prospect of success. We heard no evidence. That is because of the claimant's decision not to proceed.

We recognise that the claimant believed there was a dilemma with his employer but he has taken no steps to raise it with them and to seek to obtain time off so that he could attend the hearing. It remains to be seen whether accommodation could have been reached with his employer and the Tribunal to find suitable dates to hear this case, if the claimant had made an application six weeks ago.

16. We are required to have regard to the claimant's ability to pay, in respect of whether to make any order and, if so, in what amount. He earns £15,000 per annum and most of that, if not more than that, is spent in daily living, which we accept. The claimant has a property in which he resides in which the equity is £100,000. We are satisfied that the claimant could raise the costs sought, albeit not without difficulty. We are not satisfied that it would be just to refuse to make an order because of the claimant's limited income and liquid capital.

17. Taking all factors into account we consider it is just and equitable to make an order for costs against the claimant. The respondent provides social housing for a local authority and has finite resources for that purpose. It has been put to the cost trouble and expense of defending a case which was abandoned at the last minute, by a claimant who had been put on notice of the risk of pursuing such a course. The claimant kept to himself the knowledge that this 12 day hearing could not possibly go ahead.

18. We have considered whether we should make an order for only part of the costs, but have decided that would not be appropriate. Firstly the respondent pays a retainer for legal advice which has limited the costs which are being sought against the claimant and secondly, and most importantly, had this case being heard the respondent would have been in a position to seek its full costs, which would have been substantially more, if they had shown it to have no reasonable prospect of success. It would not be just for the claimant to take advantage of that, given the circumstances in which he brought the claim to an end.

19. The respondent has submitted a schedule in the sum of £15,987.05. In the letter giving the claimant notice of an application for costs he was warned the costs would be £7,000 plus VAT up to that date, with a further sum £15,000 – £20,000 if the claim was to be defended at a hearing. We have considered the schedule, which includes costs of hotel, meals and accommodation, which is because the solicitor for the solicitor does not live in the immediate locality but in Cheshire. Mr Hassan says that the respondent could have instructed a local firm of solicitors. Mrs Shaw says that the costs are modest because the sum which the respondent pays them on a retainer to give legal advice has reduced the sum which is being sought against the claimant.

20. We were satisfied that the sum of £15,987.05 was reasonable and necessary for a case of this type. We have had regard to the breakdown of how the sums were expended on the schedule. We not consider that the choice of this particular firm of solicitors can be criticised. A local firm may have chosen to instruct counsel and the costs would have not had the substantial deduction which arose from the retainer. In other words the costs would have been higher had the respondent not used this firm, such that the accommodation and subsistence expenditure was reasonably necessary and proportionate. After delivering our judgment the respondent notified the Tribunal that it has received a refund for the cancellation of accommodation for the remainder of the hearing, and the revised figure it seeks is £15,336.05.

21. The claimant is entitled to be refunded the deposits he has paid of £220.

Employment Judge D N ones

Date 14 January 2019

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