



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: Miss S Bello

Respondents: (1) Surrey and Sussex Healthcare NHS Trust
(2) Ms Fiona Crimmins

Heard at: London South

On: 08, 09, 10 November 2017

Before: Employment Judge Freer
Members Ms N A Christofi
Ms J Bird

Representation

Claimant: Ms F Babalola, Solicitor
Respondents: Ms S Ramadan, Solicitor

RESERVED JUDGMENT ON COSTS

Further to the judgment of the Tribunal sent to the parties on 07 December 2017, it is the judgment of the Tribunal that the Respondents' application for costs is refused.

REASONS

1. The Respondents made an application for costs under Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and that the Claimant acted unreasonably in either her bringing of the proceedings, or the way that the proceedings have been conducted, and/or the claim had no reasonable prospect of success.
2. There is a two-stage process to an assessment of costs, first for the Tribunal to conclude whether or not the circumstances fall within Rule 76 and, if so, to consider whether or not to exercise its discretion and make an order for costs.
3. Well-established main principles are that an order for costs is the exception rather than the rule and costs do not follow the event (see **Gee -v- Shell UK Ltd** [2003] IRLR, 82, CA). An award of costs should be compensatory, not

- punitive. Ordinary experience of life frequently teaches us that which is plain for all to see once the dust of battle has subsided was far from clear to the combatants once they took up arms. (See **Marler –v- Robertson** [1974] ICR 72, NIRC).
4. Tribunals have a wide discretion to award costs where they consider that there has been unreasonable conduct in the bringing or conducting of proceedings. Every aspect of the proceedings is covered. Unreasonable conduct includes conduct that is vexatious, abusive or disruptive.
 5. When making a costs order on the ground of unreasonable conduct, the discretion of the tribunal is not fettered by any requirement to link the award causally to the particular costs incurred as a result of the unreasonable conduct (See **McPherson –v- BNP Paribas (London Branch)** [2004] ICR 1398, CA).
 6. ‘No reasonable prospect of success’ is given a similar meaning to that used in strike out considerations under Rule 37.
 7. Where a party makes an offer to settle a case, which is refused by the other side, costs can be awarded if the tribunal considers that the party refusing the offer has thereby acted unreasonably (**Kopel v Safeway Stores plc** [2003] IRLR 753, *EAT*). In **Kopel**, it was held that a tribunal must first conclude that the conduct of a party in rejecting the offer was unreasonable before the rejection becomes a relevant factor in the exercise of its discretion.
 8. A costs warning letter will not necessarily result in an order for costs being made, even where the party giving the warning is ultimately successful in obtaining a judgment in their favour. A failure by a party to engage properly with the points raised in a costs warning letter may amount to unreasonable conduct if the case proceeds to a hearing and the other party is successful for substantially the reasons contained in the letter. Whether it will do so will depend on the facts.
 9. The Respondents rely principally upon a costs warning letter sent to the Claimant on 02 November 2017 with an expiry date for acceptance of 06 November 2017. The Tribunal hearing commenced on 08 November 2017.
 10. The letter refers only to the First Respondent in its title, but it clearly relates to the whole action. The solicitors represented both Respondents.
 11. The letter provided details of a ‘drop hands’ offer (i.e if the Claimant withdrew her case the Respondents would not pursue their costs) and set out why, in the view of the Respondents, the Claimant had no reasonable prospects of success. The main part of that explanation was that the Respondents considered the Claimant would not be able to persuade a Tribunal that the treatment occurred and/or was influenced by race as alleged.
 12. The decision of this Tribunal, oral reasons having been given to the parties at the hearing, included as a substantial element the conclusion that many of the allegations lacked the ‘something more’ causal nexus required for the Claimant to establish a successful direct discrimination claim (the direct discrimination claims forming the main allegations under review).

13. Due to time restraints at the main hearing the decision regarding costs was reserved.
14. Upon consideration the Tribunal concludes that the Claimant's non-compliance with the costs warning letter does not lead to an order for costs. The Claimant was entitled to argue the basis of her claim. The Claimant lost. She was unable to demonstrate the required causal connection with her pleaded race. That is an evidential matter that may have resulted in a successful claim by implication from primary findings of fact. To decline an offer of a complete withdrawal of all claims in exchange for no claim for costs during a period immediately before the hearing, in the Tribunal's conclusion, does not fall to be described as unreasonable conduct under Rule 76.
15. Further, because the Claimant's claims mainly included ones of direct discrimination to be decided from the evidence upon primary findings of fact and with the potential of the required causal nexus being established by implication, the Tribunal concludes that the claim cannot be categorised as having no reasonable prospect of success under Rule 76. The Tribunal notes that the Respondent had not pursued an application to strike out on that ground prior to the main hearing.
16. Although the Respondent obtained what transpired to be a strong defeat of the Claimant's claims and the application for costs being put with some force, when considering the matter as a whole and all of the relevant circumstances the Tribunal concludes that the Respondent has not established a basis to make an order for costs and the application is unsuccessful.

Employment Judge Freer

Date: 20 February 2018