CASE NO: 2600398/17

EMPLOYMENT TRIBUNALS
At a Costs Hearing

Claimant: Esther Babalola

Respondent: Nottinghamshire County Council

Joined for the purposes of the costs hearing: Mr P Ihebuzor / Midlands Solicitors.

Heard at: Nottingham

On: Thursday 21 February 2019

Before: Employment Judge Britton
Members: Mr R Jones
Mr W J Dawson

Representation
Claimant: No attendance
Mr Ihebuzor/ Midlands Solicitor No attendance
Respondent: Ms E Hodgetts of Counsel

JUDGMENT

The costs application of the Respondent succeeds as follows:

1. The application for wasted costs against the Claimant's former Solicitor Mr P Ihebuzor of Midlands Solicitors succeeds to the extent of 2 days of the main hearing before us having been thrown away. Thus, Mr Ihebuzor/Midlands Solicitors will jointly or severally pay the Respondent's costs in that respect in the sum of £3,000.

2. The claim for costs against the Claimant (Esther Babalola) succeeds to the extent that she will pay £15000 towards the Respondent's costs.

REASONS

The costs application against the Claimant

1. The tribunal heard this case over a number of days last year and published its judgment and full reasons on 22 October 2018.

2. On 29 October, the Respondent applied for first costs against the Claimant and second wasted costs against Mr Ihebuzor or, more specifically, Midlands Solicitors.

3. Stopping there, it raised them against Midlands Solicitors because it was the legal practice that named itself as representing the Claimant on or about 1 May 2018. As it is clear from the costs bundle prepared by the Respondent and which is before us, it held itself out to be Midlands Solicitors, 42 – 46 Hagley Road, Birmingham B16 8PE; that it was regulated by the Solicitors' Regulatory Authority and under SRA number 6311485. Finally, that Thelma Ihebuzor (who is probably the partner of Mr Ihebuzor or otherwise a close relative) was the Principal. As made plain before us today, checks by the Respondent have established that as regards the Law Society and the SRA this remains the case. Mr Ihebuzor is not therefore registered as a partner of Midlands Solicitors. Thus, we work on the premise that if it continued to hold him out as working for it, that it is liable for the costs that we make. Of course, if it says that Mr Ihebuzor had nothing to do with it, then it will have to make that clear in which case the judgment will be against Mr Ihebuzor only. It will have difficulty given the email that the tribunal received today at 11:47 from Midlands Solicitors making plain by implication that Mr Paschal Ihebuzor was an employee or otherwise working for it as a lawyer in some capacity.

4. In any event, the costs application having been received by the tribunal, this Judge made directions. First, he joined Midlands Solicitors/Mr P Ihebuzor to this claim for costs. Secondly, he directed that the Respondent serve a skeleton argument in support of its costs applications and also a proposed bill of costs. This it duly did, copying the same to both Midlands Solicitors and Mrs Babalola. The overall costs are £48,000. Given the scale of the litigation; the number of preliminary hearings; the preparation including the extensive bundles and witness statements; and the justified employment of counsel that figure is wholly reasonable and would have been much higher except for the in house fee earner charge our rates for the instructing solicitor and para legals which are well below market rates.

5. Stopping there, on 27 November the tribunal sent out notice of the listing of this costs hearing for today. Unfortunately, it did not send a copy to Mrs Babalola herself. The reason why that became necessary is because on 1 November (so swiftly after the costs application) Midlands Solicitors wrote to the tribunal making plain it no longer acted for the Claimant. However, on 27 November (in other words the same day that the cost notices went out) Mrs McFadyen (the senior solicitor having conduct of this case for the Respondent) spotted this shortcoming and so straightaway forwarded with a covering email to Mrs Babalola at the email address for her and her husband the notice of the said hearing.

6. In due course the Claimant, and of course separately Mr Ihebuzor/Midlands Solicitors, by 21 January 2019 had submitted in each case a written objection to the costs applications.

7. So, today this tribunal assembled for the hearing. The Respondent was here in good time. We were presented with a bundle of documents. But we had no Claimant or her husband who is clearly now acting for her. We so observe because he submitted her submissions objecting to the application for costs. That is significant because before Midlands Solicitors started to represent the Claimant, he had represented her throughout, including several preliminary hearings, all of which was covered in our detailed reasons. As to Midlands Solicitors, a clerk made enquiries. He established incidentally that the business now seemed to have moved itself to 169 Sandon Road, Smethwick, West Midlands B66 4AA. But, that perhaps does not matter because using those 'phone numbers he was able to make contact with what was Midlands Solicitors. The person who answered the telephone call seemed to not know the whereabouts of Mr Ihebuzor. The person did not say that they were anything to do with the firm.

8. So, the case got underway having waited a goodly time to see if Mr or Mrs Babalola or Mr Ihebuzor would appear. We then started to hear the submissions of Ms Hodgetts. As it is at that stage with the help of the clerk, a telephone number was actually found for Mrs Babalola, which had first not been apparent from the tribunal's file. In the presence of the assembled tribunal, that telephone number was 'phoned by the clerk and Mr Babalola picked the telephone up. He was then put on speaker 'phone, so that essentially in accordance with the overriding objective, he could first address the issue of his and his wife's non-attendance.

9. He purported to suggest they had had no notice of the hearing. When it was pointed out to him that he had sent in the submissions to which we have now referred, he was evasive limiting himself to saying they had not had "the notice". Once it was pointed out to him that there was the email from Mrs McFadyen, all he would say was that they had not had "notice". Thus it therefore appeared to the tribunal (and was part of the submissions of Ms Hodgetts), that if he was seeking to allege lack of notice, then it was on the technical point that there had not been proper notice. We were taken by Ms Hodgetts to rule 91 of the Tribunals 2013 Rules of Procedure.

10. Suffice it to say, having had confirmation from Ms McFadyen that she had sent the email to which we have referred (and which we saw) and that it was not bounced back, that we are satisfied that the Claimant did indeed have notice of this proceeding.

11. Mr Babalola otherwise was asked by Ms Hodgetts if he wished to provide any further evidence as to his wife's means. He was asked as to where Mrs Babalola might be and initially he said that she was indisposed. The presiding judge, with the leave of his members, thinking that therefore she might have taken to her bed, asked if she was at home. To which the reply was that she was not. Mr Babalola (who could be described as Reverend Babalola) refused

then to provide any particulars as to where she might be and essentially declined to take any further part in the proceedings pleading that he was stressed.

12. The tribunal reminds itself that in its very extensive judgment in this case, it made abundant references to the credibility of Mr and Mrs Babalola having been completely undermined by the evidence presented to the tribunal; the evasiveness of Mrs Babalola; and that in all respects essentially the case was persisted with when it was beyond doubt that it was doomed to failure; finally that furthermore it was persisted with in a dishonest and vexatious manner. We say dishonest in the sense of inter alia dealing with the history of the evasiveness and resistance to the earnings issue via agency work which eventually required the tribunal to make an order during the hearing for the relevant agencies to attend if they did not produce the documentation and which, when they did, proved beyond peradventure that the Claimant had been working throughout the period of material events and which completely undermined her "*enslavement*" argument.

13. It can be readily seen, taking this matter very short, that if we take the events post the costs order and couple it with the findings of fact that we made in our judgment, that we are wholly satisfied that Ms Hodgetts is correct in saying that the Claimant meets the costs threshold set out in rule 76 of the 2013 Rules of Procedures in that this proceeding has been vexatiously and unreasonably conducted and in circumstances where it never had any realistic prospect of success.

14. The issue then becomes as to whether we exercise our discretion (her having met the costs threshold) to actually order her to make a payment of costs. We factor in the length of time this proceeding took to get to final hearing and that the preliminary hearings were by and large entirely occasioned by failures to comply with directions by the Claimant. Once Mr Ihebuzor came on stream the conduct of the proceeding was little better. This was despite the proactive approach of the employment judges and in particular this judge at the last preliminary hearing. Even going to the extent of persuading Mr Ihebuzor to go and see the Respondent's paperwork if he really felt there was a shortfall in discovery and which it is abundantly clear there was not. Furthermore, the Claimant was urged to consider whether it was reasonable to require an additional five employees of the Respondent to give evidence when on the face of it they would not assist her. Then having failed to interview them as suggested by this Judge of Mr Ihebuzor at that last preliminary hearing, we get the wholly unnecessarily requiring them of to give evidence at considerable expense to the Respondent which had to provide agency cover. In all respects, far from assisting the Claimant, these honourable and credible witnesses undermined her case even further. It is demonstrative of the Claimant (and we have to say her husband) being wilfully disregarding of the need to present proceedings in a reasonable way and take heed of their shortcomings. It is compounded by the dishonesty before us within the hearing.

15. It follows that in that respect, we do exercise our discretion in saying that it is just that the costs should be paid. But we then come to means. Put simply, we may have regard to means. Of course it follows from that wording, that we do

not have to. But as far as the tribunal is concerned it is distinctly unwise to proceed to make an award to actually pay costs without having regard to those means insofar as the tribunal can reasonably be expected so to do. The Claimant obviously knew that her means would be in issue because in the submissions which were put in on her behalf by somebody who clearly has legal competency, but who Mr Babalola refused to disclose the identity of this morning, we can see that reference is made to that her means are limited to her ability to earn as a care assistant and that she has to maintain her husband and her three children. We are distinctly sceptical about that. Mr Babalola has formed and traded limited companies in the past. In fact, one of them still seems to be active. He seems to have been able to engage in entrepreneurial activities looking at the accounts put before us last time in a supplemental bundle by the Respondent. He seems to own his own private church, although it may not be active. He came across as a remarkably resourceful and energetic man, certainly one with considerable earning potential as far as this tribunal is concerned. As to the 3 children, we made comment about that in our judgment last time. We were wholly unpersuaded that they had to care for their mother as suggested. The same applies to a similar assertion by Mr Babalola and as supported by the very substantial claim for costs of care for the future as per the schedule of loss seeking overall compensation of £440,000. The medical evidence flew in the face of her having serious medical problems that required care not only then but for the future.

16. In fact, we remind ourselves that as per the evidence one son had delayed going to university because he had been working and from his earnings had been able to purchase a rather swish second-hand German motorcar. The other brother had not gone to university because he had to take resits. Finally the daughter was already at university and undertaking nursing training. So past the objectively realistic need to be supported as children by their mother or just on the cusp of self-sufficiency.

17. As to assets it would seem from the research of the Respondent that the property that the Claimant and her husband and children live in is a Housing Association rented property. It may be speculative, but the evidence from last time and company searches do not therefore suggest that she or her husband have assets of substance. But she is a remarkably hard-working woman. On the statistics that we have of her earnings post the dismissal in the supplemental bundle, suffice it to say that we can realistically assess her ability to earn at about £40,000 gross. As to how long, however, she will be able to keep up the pace so to speak in what is caring work is another matter, but it would be for the Claimant probably backed by credible medical evidence to provide a reasonable cut off point. She has of course failed so to do. Thus factoring in her remarkable work ethic we consider she has the same earning capacity for the foreseeable future

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18. What is means is that having taken into account that earning capacity, we come to the next point. If the Claimant was in any doubt that she was at risk of costs in this case, then it could not have been made clearer than it was in the costs warning letter sent by the Respondent to Midlands Solicitors on 28 June 2018. Yes, it gave a 48 hour deadline for reply but we are well aware, as an experienced tribunal, that if Midlands had taken instructions and come back and

if it had meant that the time be extended outwards, it is highly probable that the deadline would have been extended by the Respondent if there was a willingness to consider to proposal to drop the case in return for no application for costs by the Respondent. As it is there was no response whatsoever.

19. On the other hand, we must be realistic and not make a costs award which is highly unlikely to ever be met. But we take into account the unreasonableness of bringing the claim for reasons we have gone to. We do factor in that there was not any application prior to the hearing for strike out on the basis of no reasonable prospect of success or that there ought to be a deposit ordered, it having only limited reasonable prospect of success. Of course, if a deposit order had been made, that would have put this Claimant on the clearest possible notice that she was at risk of costs. But we are well aware that many Respondents do not make these applications and in particular apply for strike out given the jurisprudence making that very difficult. Furthermore it has to be said that the Judges hearing this case at different stages did not themselves diagnose the case as needing to be gone down that route. It was probably too late by the time of the last preliminary hearing before this trial Judge because that was in the imminent period before the trial. We weigh that in the balance but then we factor back in the costs letter and then we go back to our overall findings. It follows that those observations do not weigh in the balance against making the costs order.

20 Accordingly, what we have decided is to make an award, that the Claimant will pay towards the costs of the Respondent the total sum of £15,000.

The wasted costs application

21. When the case commenced following the reading in day and bearing in mind that the Respondent had repeatedly sent the trial bundle to the Claimant. And even after the meeting with Mr Ihebuzor in the run up to the trial post this Judge's directions when he went to see what they had by way of discovery, the Respondent sent him a further copy of the up to date bundle. Yet when he arrived breathless at the hearing without a bundle purporting to suggest that he had not received one, the proceedings had to stop while he was provided with the same. It is indicative of his approach

22. We have commented on his abilities, or lack of them, during the hearing in our judgement. There was incompetence displayed. There was a lack of preparation. There was an inability to focus questioning despite the entreaties of the tribunal.

23. Putting that to one side for one moment in terms of the wasted costs order application apropos rule 80 of the 2013 Rules of Procedure, he was working for a strident, vociferous and obviously determined Claimant backed wholeheartedly by her husband. They were clearly in control of the proceedings and were so obviously directing him throughout. Thus, on several occasions we urged the Claimant to take stock on whether inter alia the harassment or the direct race discrimination claims could seriously continue, them having been so undermined. We gave adjournments to think about it overnight on one occasion, but the following morning nothing had changed and so the case

proceeded. We do not lay that at the door of Mr Ihebuzor. We do not go behind the veil. We are well aware of the jurisprudence to that effect.

24. We therefore focus on the incompetency in terms of the presentation of the case before us. We are of the view that it needlessly protracted this case by at least two days. The point Ms Hodgetts makes is self-evident. Had the timetable been kept to, and it would have been but for this unnecessary delay caused by incompetency in part and the attitude of the Claimant as well, then submissions could have been made before us. Ms Hodgetts would not have needed to write the most comprehensive and helpful of submissions and then have to reply to the Claimant's submissions as we directed.

25. What it means is in that respect, is that Mr Ihebuzor acted unreasonably in terms of that costs threshold by reason of incompetency. He cannot deploy in his aid Francois[1]. That was a case where a solicitor of most limited legal experience acting pro bono made heavy wind of what should have been a very straightforward short case. Contrast Mr Ihebuzor who was being paid.[2] This is a solicitor who, according to the documentation put before us, has been practising for some years as a solicitor. However in this respect, and which only adds to the observation about incompetency, we note that he has been subject to SRA restrictions over the last few years. It must have been serious because he was restricted to practising employment law only and only to the extent that he obtained prior approval from the SRA. That restriction was lifted for the practising certificate year in which he was retained to act in this case. From the details posted by the SRA (and we have no more to go on) this was apparently because he demonstrated exceptional reasons why the restriction should be removed. We do not know what they were. We have already referred to the fact that he now seems to work for a sole practitioner business the only practice holder as registered with the Law Society / SRA appearing by name to be either a relative or his wife.

26. That brings us back to the application by e-mail sent this morning at 11:47 by Thelma Ihebuzor, Midland Solicitors.. This is only after the tribunal clerks had made the telephone calls to which we have referred and at which stage whoever was answering the telephone never revealed their identity. This e-mail purports to tell us: "*dilemma as to attendance in court today Mr Paschal Ihebuzor who had of the substantive matter is unavoidably absent because he is currently out of the country*". As Ms Hodgetts has pointed out, Midlands Solicitors had notice of this hearing as long ago as 27 November. It is highly unlikely that he would have had to go out of the country for say a holiday or a business trip say back to Nigeria without preplanning, and he could therefore have informed this tribunal long ago. If this is supposed to be some recent traumatic absence, ie a sick relative, there is no such detail in this email. It is wholly unsatisfactory.

27. We then come to the second limb: "*There was a miscommunication between our insurers and ourselves regarding representation today in court but*

[1] Mr J François v Castle Rock Properties Ltd t/a Electric Ballroom UKEAT/0260/10/SM per HH Richardson: see paragraph 20 onwards for resume of wasted costs jurisprudence.

[2] The Claimant suggesst £10,000.. This is disputed by Midland solicitor albeit it has not given a figure.

unfortunately that was not facilitated". No specifics whatsoever. We do not know who the insurers are, no such detail is given. We do not know when they were first placed on notice about the potential wasted costs application and we do not know what arrangements may have been made for representation before this Tribunal today. No particulars whatsoever have been provided. Finally, we look at the timing of that email: 11:47, one and a half hours approximately after the tribunal had first been making enquiries of Midlands with no Mr Ihebuzor present and no explanation why not.

28. In those circumstances, it follows that we refused the adjournment for both the Claimant and now of course for Midlands. This is a law practice holding itself out to be as such. Regulated by the Law Society and therefore of course needing to have been able to provide the required insurance so to do. It has a registered sole practitioner who is registered with the Law Society and the SRA. We agree with Ms Hodgetts that it can be taken as read that a practising law firm should have the means to pay the costs that we have in mind. Those costs are as follows. We have already said that we have decided that at least two days of this proceeding was needlessly wasted because of the incompetency of Mr Ihebuzor. Using the bill of costs before us and as to the costs of the last 2 days, it is primarily Counsel's refresher which is £1,000 per day, and her extra work as to the submissions and reply which, we repeat, was only necessary because the tribunal ran out of time because of the needless delay to which we have now referred.

29. We have therefore decided that the appropriate amount of costs that Midlands/Mr Ihebuzor either jointly or severally shall pay is £2,500 plus VAT equals £3,000.

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Employment Judge Britton

Date: 19 March 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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