EMPLOYMENT TRIBUNALS

Claimant: Mr C Mallon

Respondent: Ginger Recruitment Services Limited

Heard at: Manchester **On:** 30 January 2019

Before: Employment Judge Sharkett
(sitting alone)

REPRESENTATION:

Claimant: Not in attendance
Respondent: Not in attendance

JUDGMENT ON COSTS

The judgment of the Tribunal is that:

1. The claimant is ordered to pay the respondent's costs in the sum of £2000 plus VAT

REASONS

Background

1. Having been issued with an early conciliation certificate on 9 May 2018 the claimant submitted an ET1 setting out his claim as one of disability discrimination. The claimant gave no further particulars other than at 8.2 of the ET1 where he states:

> "i applied for a role and asked for reasonable adjustments because of disability and the other party ignored them and did not make any, i cannot help my medical conditions and just wanted to be treated fairly when i apply for work." [sic]

2. The claimant's claim was accepted and a preliminary hearing listed for 1 June 2018. Prior to the preliminary hearing Regional Employment Parkin directed the claimant to provide the Tribunal and the respondent with full written particulars of his disability condition and details of the failure by the respondent to make reasonable adjustments for it, including the date. The claimant was to provide this information no later than 22 June 2018.

3. The claimant contacted the Tribunal in response to the notice of preliminary hearing to advise the Tribunal that he was unable to attend on 1 August 2018 due to the fact that he was attending at another hearing listed at the Employment Tribunal sitting in Birmingham on that date. It came to light at this stage that the claimant had a number of other Employment Tribunal claims listed within various Employment Tribunals in the UK.

4. On 6 July 2018 the respondent submitted an ET3 setting out the details of its position in relation to the claimant's claim against it. In particular the respondent explained that on 21 January 2018 the claimant had applied for a job of Production Scheduler via the CV library. The respondent explained that the CV library is an independent online platform where candidates can upload their CVs and apply for jobs. The claimant had uploaded a comprehensive CV in applying for this position of Production Scheduler. The respondent, as an independent recruitment consultant, was facilitating the recruitment process for this position. The job description for this particular position was very detailed and prescriptive. Amongst other things a candidates were required "with a minimum of five years' experience in a planning role within the pharmaceutical industry or FMCH manufacturing environment".

5. The respondent explained that it was clear from the comprehensive detail set out in the claimant's CV that he lacked the specific experience that their client sought. The respondent further explained that the position was only short-term and the client required somebody with specific experience, both in the operation and their processes. On this basis the respondent concluded there was no prospect of the claimant being successful at interview. The claimant was notified by email of 26 January 2018 that his application had been rejected. The claimant responded to the email by stating:

> "can I ask why you refused – ignored by reasonable adjustment request? stated in bold and caps on my cv when i applied for you role?" [sic]

6. In response to the claimant's email the consultant responsible for filling the vacancy replied by email of the same date outlining the reasons for rejecting the claimant's application. The respondent stated:

> "Hi Christian, please can you provide me with details of relevant experience of having worked in a production scheduling role within an FMCG manufacturing environment and I will be very happy to reconsider your application? Unless I am mistaken I did not see any prior experience of this nature within your career history? As this is a temporary contract role for 3-6 months the client requires applicants that would be able to perform the role with specific knowledge of their processes and systems and there would be minimal training available. However, should you be able to provide me with details of relevant experience then I will consider your application again without any prejudice. Feel free to contact me on [telephone number]."

7. The claimant replied almost immediately, stating:

> "what does oral application mean? why did you refuse this before rejecting me?"

8. The consultant responded to the claimant advising him that he had referred the matter to their legal adviser to check he had reviewed and responded to the claimant's application fairly and appropriately, and that he was unable to provide further comment or feedback at that time. He asked the claimant to bear with him and that he would contact him again as soon as he had received further advice.

9. The claimant responded in this way:

> "you can bring your legal counsel to the pending employment tribunal and a judge will decide why you refused/ignored the adjustments as disabled people have legal right too!" [sic]

10. The matter was then escalated to the director of the respondent who emailed the claimant on 29 January. The director advised the claimant that:

> "We take these accusations seriously and I have reviewed the file as part of my investigation. Additionally I have checked the client's requirements. As Mr Russell pointed out, the position was a temporary one which required not simply the relevant job experience but relevant experience of client specific processes. Given that you do not have any relevant experience or knowledge of the particular client's processes it was right that your application was rejected."

11. The respondent went on to explain that the claimant continued to email the respondent with threats regarding to take legal action including:

> (1) i have a legal right to be treated fairly and we can meet it court and discuss all with employment. i have warned you I will not be going away.
>
> (2) i just had acas on the phone so expect their call asap.
>
> (3) See you in court hopefully before Christmas and you can explain all to the employment tribunal judge." [sic]

12. On 24 July 2018 Regional Employment Judge Parkin directed a preliminary hearing to be heard to determine whether the claimant's application should be struck out or whether a deposit order should be made before the claimant was allowed to continue pursuing his claim against the respondent.

13. By email of 28 July 2018 the claimant wrote to the Tribunal in the following terms:

> "i have decided to close this case and now wish to withdraw this claim
>
> its looks like there is not enough evidence to prove exclusively disability discrimination
>
> thanks and sorry for wasting everybody's time so please cancel everything

cheers Christian." [sic]

14. By email of 31 July in response to a request from the Employment Tribunal the claimant confirmed his withdrawal of the six cases he had submitted before the Employment Tribunal. He explained in the email:

> "i was down in London last week and was informed by a helpful judge and other parties lawyer of the flaws in a similar case
>
> I do not want to waste anybody's time and many thanks for understanding
>
> thanks, Christian" [sic]

15. The case was duly dismissed upon withdrawal by the claimant in a Judgment dated 31 July 2018.

16. Following the claimant's withdrawal, on 29 August 2018 the respondent made an application for costs to be awarded against the claimant which had been incurred by the respondent as a result of having to defend the litigation pursuant to rule 76(1) of the Rules of Procedure. It was the respondent's case that the claimant had no reasonable prospects of success and withdrew the claim late in the day after costs had been incurred despite a warning from the respondent of their intention to pursue a costs order against him. The application contained a letter of 12 July 2018 from the respondent to the claimant setting out their intention to make an application for costs should he continue to pursue his claim. The respondent set out in the letter the reasons why they considered the claimant's claims had no reasonable prospect of success, and suggested that he had acted vexatiously, abusive, disruptively and unreasonably in bringing his claim for the following reasons:

(1) There was no evidence whatsoever to indicate that the respondent had discriminated against the claimant on the grounds of disability or at all, nor was there any inference of discrimination.

(2) That the claimant had failed to particularise the legal basis of his claim.

(3) That the claimant had failed to particularise the legal basis of his alleged disability;

(4) That he had failed to particularise the factual basis of his claim.

(5) That it was obvious from his abusive and unreasonable tone of his emails that his intentions were purely for financial gain only.

17. The respondent notified the claimant that it was aware that he had previously and unsuccessfully brought similar claims against other organisations, in particular the respondent referred the claimant to a case that the claimant had issued in the Employment Tribunal in Northern Ireland which was based on very similar facts and in which he was unsuccessful. The respondent at that time notified the claimant that if he was to withdraw his claim in full within the next seven days it would not pursue a costs order against him despite significant amount of costs that had already been incurred at that stage. The claimant did not withdraw his claim until some 12 days later.

18. The respondent's request in order to minimise the amount of further costs incurred was that the application for costs should be heard on the papers, and by a letter of 24 September 2018 the Tribunal invited the claimant to state whether he agreed to the application being dealt with on paper, and if he agreed to it being dealt with on paper on what grounds he resisted the respondent's application.

19. By email of 28 September 2018 the claimant responded as follows:

> "i am happy for the court to deal with as a paper exercise as i so not want to waste any more valuable court time on this issue of costs as i did not get legal representative to advise as i did not have job/money to pay for this info, new adjusted cv attached and evidence of my medical condition and i thought i was correctly standing up to my legal right of a fair recruitment process
>
> people with my medical condition have a different perception and taken from the dyspraxic website, I am not reckless and only confused on the amount of evidence I would need to win this employment case" [sic]

20. In support of the respondent's application for a costs order and in response to the claimant's email of 28 September 2018 the respondent drew the Tribunal's attention to:

(1) The letter from the Manchester Tribunal confirming that another case arising out of the same set of facts (Mr C Mallon v Core Talent Recruitment Limited – case number 2410468/2008) has already been transferred to the Birmingham Tribunal;

(2) Joint application submitted by Aston University (case number 1301709/2018); Core Talent Recruitment Limited (case number 2410468/2018); Authorising House Limited (case number 3306937/2018); Morgan Ryder Associated Limited (case number 2410469/2018); and Electus Recruitment Solutions Limited (case number 1401528/2018) for a combined preliminary hearing to determine whether the claimant's claims should be struck out as vexatious and without reasonable prospects of success; and

(3) The Judgment of the Northern Ireland Fair Employment Tribunal.

21. It is the respondent's case that for the claimant to assert that he was simply confused with regard to the amount of evidence that he would require to establish that (1) he was disabled as per the Equality Act 2010; and (2) he had been discriminated against, is fictitious. The respondent also submits that the claimant brings this claim against the background that he is an experienced claimant and moreover litigant in person, which it submits is evidenced by the Northern Ireland Judgment and the other claims that he has lodged in the Tribunal in 2018 and prior to this. It is the respondent's case that the claimant is well aware of the various steps involved in proving that he was disabled for the purposes of the Equality Act and for establishing that he had been discriminated against.

22. The respondent reminded the Tribunal that the Tribunal had taken the claimant through the duty to make reasonable adjustments test, and that from a very early stage the claimant had served on the respondent medical reports in an attempt

to persuade the respondent that he is disabled for the purposes of the Equality Act. It is the respondent's case that the claimant is very well versed in the Employment Tribunal system and moreover the evidence and detail required to successfully prove discrimination. It is on this basis that the respondent asks the Tribunal to make an award of costs against the claimant.

23. The Tribunal notes that by letter of 12 July 2018 the respondent notified the claimant that the costs to 12 July were approximately £1,500 plus VAT. At the time of the claimant's application the amount of costs was notified as £2,449.20 plus VAT, and at the time of today's hearing the Schedule of Costs submitted amounts to £3,728.90.

The Law

24. Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2017 Schedule 1 provides that:

> (1) A Tribunal may make a costs order or a preparation time order and should consider whether to do so where it considers that:
>
> (a) A party (or that party's representative) has acted vexatiously abusively, disruptively to otherwise unreasonably in either bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;
>
> (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.

25. Under rule 77 a party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the Judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

26. Under rule 78 a Tribunal may:

> (a) Order the paying party to pay the receiving party a specified amount not exceeding £20,000 in respect of the costs of the receiving party;
>
> (b) Order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party with the amount to be determined in England and Wales by way of a detailed assessment carried out by either a County Court in accordance with the Civil Procedure Rules 1998 or by an Employment Judge applying the same principles or, in Scotland, by way of taxation carried out either by Auditor of Court in accordance with Act of Sederunt (fees of solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;

(c) Order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee by the receiving party.

27. Under rule 84, in deciding whether to make a costs (preparation time) or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or where a wasted costs order is made the representatives) ability to pay.

28. In **Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255, [2012] IRLR 78**, the Court of Appeal held that when exercising its discretion to order costs a Tribunal must look at the whole picture and ask not only whether the party in question behaved unreasonably in bringing or conducting their case but also identify the relevant conduct, what was unreasonable about it and what effects it had.

29. In accordance with **Saka v Fitzroy Robinson Limited UKEAT/0241/00** the EAT held that a Tribunal may take into account previous failed claims when considering whether to make a costs order against the claimant depending upon all the circumstances and the claimant's understanding of his claim.

30. In accordance with **Lodwick v Southwark London Borough Council [2004] ICR 884 CA** the purpose of an award of costs is to compensate the party in whose favour the order is made and not to punish the paying party. It is therefore necessary to examine what loss has been caused to the receiving party.

31. In **Yerrakalva** the Court of Appeal held that costs should be limited to those reasonably and necessarily incurred. The Tribunal should have regard to the proportionality and reasonableness of the cost incurred and any award made should be limited to those reasonably and necessarily incurred.

32. Under rule 75(1) an order in respect of costs incurred by the represented party means fees, charges, disbursements and expenses incurred by or on behalf of that party, and the amount of the order must obviously reflect that. In addition, as noted by the EAT in **Sunken (UK) Limited and Another v Raghavan EAT 0087/09** the Tribunal must state:

(1) On what basis and in accordance with what established principles it is awarding any sum of costs;

(2) On what basis it arrives at the sum; and

(3) Why costs have been awarded against the party in question.

It is not appropriate to just simply pluck a figure out of the air without giving any adequate explanation as to why the Tribunal chose this figure.

Conclusions

33. In this particular claim, it is clear from the requirements of the vacancy advertised by the respondent that the claimant could not have realistically expected to have secured the position because he simply did not have the relevant experience. Even if he was not aware of this from the outset it was made quite clear to him in the correspondence that followed both from the person dealing with the

recruitment and the director who took up the matter when the claimant started to threaten legal action. The Tribunal is aware and has regard to the fact that the claimant has submitted numerous claims of a similar nature and arising from similar circumstances. The Tribunal accepts that respondent's position that none of these claims have been successful and most have been dismissed or withdrawn. The Tribunal also note that the claimant, whilst not legally represented has appeared before the Fair Employment Tribunal in Northern Ireland where he was made fully aware of why his claim of disability discrimination could not succeed. The Tribunal does not accept that the claimant was not aware of what was required of him in bringing his claims because as stated above he has experience of bringing the same claims arising out of similar or almost identical facts.

34. On the basis that it was unrealistic of the claimant to expect that he had any possibility of securing the position advertised by the respondent, for the reasons stated above, it is reasonable to assume that his reason for applying was so that he would be rejected by the respondent and thus open the door for him to bring a claim. In the circumstances the Tribunal find that the claimant has behaved unreasonably in bringing his claim, and on the basis of the previous experience he had in bringing similar claims does not accept that he was simply confused about what was required of him.

35. The Tribunal finds that in bringing his claim the conduct of the claimant was unreasonable because he would have known from the outset that his application would not be successful because he knew did not have the skills or experience required for the position. Having submitted his claim by letter of 12 July 2018, the respondent gave the claimant an opportunity to withdraw his claim within the next 7 days without risk of a cost application being sought against him. At this time the respondent alerted the claimant to the lack of evidence to support his claim, his failure to set out the basis of his claim and fact that it was aware of the claimant's previous unsuccessful claims. At that time the respondent estimated its costs to be in the region of £1500 plus vat.

36. The claimant did not withdraw his claim until 28 July, some 16 days later. He withdrew a further six cases which had been transferred from the Manchester Tribunal to Birmingham 3 days later on 31 July 2018.

37. In reaching a decision that it is appropriate to recompense the respondent for some of the costs incurred in defending this claim the Tribunal has regard to the nature of the claimant's unreasonable conduct and also the level of costs that has reasonably been incurred. The Tribunal has not been provided with any detail of the claimant's means as although the Tribunal has been informed the claimant has secured alternative employment no detail of remuneration or outgoings has been included. The Tribunal has however had regard to the claimant's email of 2 October 2018, placed before the Tribunal for this application.

38. Having had regard to all the circumstances of this case and the respondent's cost schedule up to and following 12 July 2018 the Tribunal do not find that all costs incurred were reasonable for the defence of the claim and there has been some repetition of work carried out. In the circumstances the Tribunal find that an award of £2000 plus vat is appropriate.

Employment Judge Sharkett

Date 3 April 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

5 April 2019

FOR THE TRIBUNAL OFFICE