



EMPLOYMENT TRIBUNALS

Claimant: Mr O Ogunjimi

Respondent: Dr Tania Syed

Heard at: Manchester

On:

21 May 2019

Before: Employment Judge Whittaker

REPRESENTATION:

Claimant: Unrepresented and did not appear before the Tribunal

Respondent: Miss M Guilding, Solicitor

JUDGMENT ON COSTS

The judgment of the Tribunal is that the claimant shall pay costs to the respondent in the sum of £7,500 including VAT.

REASONS

1. The Tribunal sat to consider an application made by the respondent pursuant to Rules 74, 75, 76, 77 and 78 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, schedule 1.
2. The costs which had been incurred by the respondent as a named single individual related to the claim lodged against her by the claimant under case number 2411365/2018. That claim was lodged by the claimant with the Employment Tribunal on 28 May 2018. By a Judgment sent to the parties on 6 November 2018, claim number 2411365/2018 lodged against the single named respondent, Dr Syed, by the claimant was struck out on the basis that the claim was an abuse of process and amounted to vexatious conduct on the part of the claimant. Those conclusions were set out in paragraphs 63, 64 and 65 of the Reserved Judgment of Employment Judge Whittaker. The Tribunal had therefore in that Reserved Judgment not only struck out the claims against Dr Syed but had also found that to have issued those claims was an abuse of process and was conduct on the part of the claimant which amounted to "a very clear example of vexatious conduct". Those conclusions were made clear, particularly in paragraphs 64 and 65 of the Reserved Judgment.

3. The respondent had at all times been legally represented by Mills & Reeve Solicitors who instructed them in her personal capacity as a named personal respondent to the claims registered against her by the claimant. The Respondent was also represented by counsel at the hearing on 8 October 2018, that counsel having been instructed by Mills & Reeve Solicitors on behalf of the respondent.

4. The claimant was told by Miss Guilding on 21 May 2019 that the respondent, Dr Syed, had instructed Mills & Reeve in her personal capacity and on a standard solicitor/client basis. The Tribunal was told that the claimant remained primarily responsible for the fees of Mills & Reeve Solicitors and of counsel under the terms of her engagement of Mills & Reeve. The Tribunal was satisfied, therefore, that the respondent had incurred costs while being legally represented by Mills & Reeve and by counsel.

5. The Tribunal was told on 21 May 2019 that there was an agreement between Dr Syed and her NHS employer that they would reimburse Dr Syed for any legal costs that she incurred as a result of her engaging both Mills & Reeve and counsel to defend the claims which had been registered against her by the claimant. The Tribunal was, however, fully satisfied that the primary and contractual responsibility for the legal costs incurred by Dr Syed was her personal liability and responsibility. Furthermore, the Tribunal was told that to date only approximately 50% of the total legal costs incurred by Dr Syed had in fact been reimbursed by her employer, although it was anticipated that full reimbursement would be made by her employer in due course.

6. Turning the language of Rule 76 of the 2013 Rules of Procedure, the Tribunal had already concluded in its Reserved Judgment that by issuing and pursuing claim number 2411365/2018 against Dr Syed that the claimant had acted both vexatiously and otherwise unreasonably in bringing the proceedings and continuing to conduct those proceedings against Dr Syed up to and including the hearing which took place at the Manchester Employment Tribunal on 8 October 2018. The reasons for that conclusion had already been set out in detail at paragraphs 63-65 of the Reserved Judgment sent to the parties on 6 November 2018.

7. The Tribunal reminded itself very carefully of the language of Rule 76 which provides that an order for costs “may” be made. There is no obligation or requirement for any costs order to be made, even in circumstances where a party has been found to have behaved vexatiously and unreasonably as was the case of the claimant in this matter. Following the hearing in October 2018 the solicitors acting on behalf of the claimant had, pursuant to Rule 77, applied for a costs order against the claimant, and the claimant had been given every reasonable opportunity to make representations in writing and at the hearing on 21 May 2019 in response to that application.

8. On 21 May 2019 the Tribunal was told that the claimant had appeared in person and that his wife was also present at the Tribunal. Furthermore, the Tribunal was told that the claimant would be represented, as he had been in October 2018, by Mr Ogunyanyo. Mr Ogunyanwo had represented the claimant under the banner of Alpha Shindara Legal.

9. By a letter dated 15 May 2019 Mr Ogunyanwo on behalf of the claimant had submitted a detailed written objection and response to the application for costs which had been made on behalf of the claimant. Furthermore, the claimant had, presumably with the assistance of Mr Ogunyanwo, prepared a witness statement comprising some

83 paragraphs which the claimant had then signed on 18 May 2019, some three days prior to the hearing. The Tribunal received and considered each of those documents before the hearing began on 21 May 2019.

10. At the very beginning of the hearing the Tribunal noticed that the claimant was not present in the Tribunal room. The claimant had already told the Tribunal clerk that he “had an issue with” the Judge who had conducted the hearing in October 2018. The Judge conducting the hearing in October 2018 and then conducting the costs hearing on 21 May 2019 was the same Judge, Employment Judge Whittaker. The claimant had not provided any details of the alleged “issues”. He had however told the Tribunal clerk that he would not participate in the hearing and would instead wait in the waiting room.

11. At the beginning of the hearing Mr Ogunyanwo told the Tribunal that he had been told by the claimant not to represent him now at the hearing because of the “issues” that the claimant had with Employment Judge Whittaker. Mr Ogunyanwo provided no details at all of what these alleged issues were. Mr Ogunyanwo was therefore asked whether or not the claimant would appear and represent himself in person if, as he had now indicated, Mr Ogunyanwo was no longer instructed to represent him. Mr Ogunyanwo indicated that the claimant would not participate. Mr Ogunyanwo then left the room after making no further representations on behalf of the claimant, and the claimant did not appear before the Tribunal to represent himself and neither did his wife, who had also told the clerk that she was present in the Tribunal building.

12. In effect, therefore, the hearing proceeded in the absence of the claimant and in the absence of his representative. The Tribunal did, however, consider the witness statement to which the Tribunal has already referred and the letter of objection and response which had been submitted by Alpha Shindara Legal dated 15 May 2019 to which it has referred above. Furthermore, the claimant had submitted a bundle of documents comprising some 199 pages which purported to be relevant to the costs hearing. The Tribunal was not referred to any specific page of this bundle at all. The Tribunal therefore did not consider the individual documents but did consider carefully the index. The conclusions of the Tribunal were that the documents were not relevant to the issues to be considered at the hearing on 21 May 2019 and were, with respect to the claimant, a further attempt to re-litigate the allegations which the claimant had made against the respondent which had been the subject of clear and concise decisions by Employment Judge Horne and which had been the subject of a Judgment of Employment Judge Whittaker sent to the parties on 6 November 2018. These documents, and almost the entirety of the witness statement of the claimant, appeared to be a further attempt to argue the merit of his claims even though they had been rejected by the Tribunal on two separate occasions by two separate Employment Judges.

13. In the claimant's witness statement dated 18 May 2019 the claimant alleged in paragraph 80 that the Judgment of Employment Judge Whittaker “was successfully appealed” and that his case “was going to be re-heard”. There was no truth to that allegation.

14. The issues therefore to be decided by the Tribunal at the hearing on 21 May 2019 were as follows:-

- (a) Whether or not, following the vexatious and unreasonable conduct of the claimant, the Tribunal felt that it should make an order for costs, in whole or in part, in favour of the respondent; and
- (b) If so, the amount of the costs order which should be made in favour of the respondent against the claimant.

15. Having considered the witness statement of the claimant and the letter dated 15 May 2019 from Alpha Shindara Legal, the Tribunal considered a 13 paragraph written submission which had been prepared by Mills & Reeve. That was headed "Respondent's Submissions 21 May 2019".

16. Reference was made by the claimant in his written representations to correspondence which had been sent by Mills & Reeve to the claimant through his representatives in July 2018. There was significant criticism made by the claimant of the approach which had been made by the respondent's solicitors, Mills & Reeve. The Tribunal carefully considered an email dated 9 July 2018 sent to the claimant's representative on 9 July 2018 at 15:02 and the original costs threat letter which had been sent to the claimant on 29 June 2018. That letter had been sent to the claimant's representatives by email and the Tribunal saw and accepted a note of Miss Guilding, the solicitor appearing before the Tribunal on behalf of the respondent on 21 May 2019, that she had on 9 July 2018 spoken to the claimant's representatives who had confirmed that letter had been safely received. A note of that telephone call was included in a bundle of documents submitted by the respondent which was not paginated. That document appeared at tab 4. The costs letters appeared at tab 3 and tab 2.

17. In the opinion of the Tribunal there were no grounds for criticising the tone or content of that correspondence. Indeed the tone and content of that correspondence mirrored almost exactly the conclusions of the Employment Tribunal which were expressed in its Reserved Judgment sent to the parties in November 2018. The claimant was being advised that the respondent's solicitors believed that the issue of the claim was an abuse of process, and that was the exact conclusion of the Employment Tribunal in October 2018. The solicitors expressed the view that to have issued the claim under claim number 2411365/2018 was vexatious conduct, and that indeed was the very conclusion of the Employment Tribunal in its Reserved Judgment. In the opinion of the Tribunal, therefore, the tone and content of the correspondence sent to the claimant's representatives was fair, reasonable and balanced and gave the claimant and his representative a proper opportunity, some three months or more before the hearing on 8 October 2018, to reflect on the claim which had been issued and to reflect on the circumstances in which it had been issued against the existing Judgment of Employment Judge Horne.

18. At paragraph 78 of his witness statement dated 18 May 2019 the claimant suggested that he had had "no option" but to issue proceedings against the named respondents. The Tribunal rejected that as any reasonable proposition. To issue the current proceedings against Dr Syed was an abuse of process and it could never be properly or reasonably argued that a claimant had "no option" but to issue proceedings which were an abuse of process and which amounted to vexatious and unreasonable conduct.

19. The obvious risk of personal liability to Dr Syed was something which the Tribunal properly took into account. Clear reference to that was made at paragraphs 6, 20, 22, 23 and 23 of the Reserved Judgment of Employment Judge Whittaker sent to the parties in November 2018. She was named as a personal respondent and she had therefore, perfectly reasonably, instructed solicitors separate to those who were representing the other respondents as proceedings had been issued against her as a named private personal individual.

20. Miss Guilding submitted to the Tribunal that although there was a clear indication that the costs of Dr Syed would be met by her NHS employer, that it was appropriate for the Tribunal to remember that her employer was a publicly funded organisation spending taxpayers' money and that it would not be appropriate for the Tribunal to refuse to make an order for costs in favour of Dr Syed simply on the basis that those costs were very likely, almost certainly, to be fully reimbursed by the NHS. Miss Guilding indicated that this was particularly the case bearing in mind that the Tribunal had found that to issue the proceedings against Dr Syed under the current claim reference had been an abuse of process amounting to vexatious and unreasonable conduct. Miss Guilding submitted that it would be quite wrong for taxpayers' money to effectively be wasted by that conduct on the part of the claimant.

21. The Tribunal noted that the letter of the claimant's representative dated 15 May 2019 and the claimant's witness statement dated 18 May 2019 amounted to further efforts not to address the issues relating to costs, for which the hearing had been set on 21 May 2019, but were a further unreasonable and unjustified attempt on behalf of both the claimant's representative and on behalf of the claimant to seek to persuade the Tribunal that there was merit in the claims of the claimant. All relevant legal issues had been considered carefully by both Employment Judge Horne and Employment Judge Whittaker and had been rejected in two detailed written Judgments. Nevertheless the claimant took this opportunity to once again seek to address the merits of his claims despite the fact that they had been refused/struck out by two separate Employment Judges.

22. The Tribunal therefore carefully considered all the above matters in order to decide whether or not it should make an order for costs against the claimant. The conclusion of the Tribunal was that an order for costs should be made. The conduct of the claimant in issuing and then pursuing the claims against Dr Syed had been an abuse of process and was vexatious and unreasonable conduct. The claimant had been put on notice that this would be the approach of the solicitors representing Dr Syed, and had been put on notice in late June/early July 2018. Nevertheless, the claimant had pursued those claims up to and including appearing at the hearing on 8 October 2018. In the opinion of the Tribunal the claimant could and should have reflected much more carefully on the legal issues which were raised in that correspondence, and the only reasonable conclusion of the claimant should have been that he was doing nothing more than seeking to repeat allegations which had already been refused by Employment Judge Horne and was deliberately seeking to avoid appealing to the Employment Appeal Tribunal and was instead determined to lodge a fresh application based on the same allegations and the same facts under the current claim number. Bearing in mind the conclusions of the Tribunal expressed so clearly, particularly at paragraphs 63-65 of the Reserved Judgment, the conclusion of the Tribunal was that this was a case where it was proper for an order for costs to be made against the claimant.

23. The Tribunal then went on to consider the amount of the costs which should be paid by the claimant to the respondent. The Tribunal received a schedule of costs from Miss Guilding. However, that schedule was significantly lacking in detail. It was nothing more than a mathematical exercise indicating the number of hours/units which had been recorded and the amount of money which had therefore been incurred. The only settled figure was the brief fee of counsel in the sum of £1,500 plus VAT which appeared perfectly fair and reasonable to the Tribunal bearing in mind the unusual nature of the issues which were addressed at the hearing on 8 October and then subsequently in chambers on 9 and 10 October 2018.

24. Employment Judge Whittaker, using his experience of a number of years of conducting litigation, took the view that it was common for reductions to be made in solicitor/own client bills when orders were being made by Courts/Tribunals for the payment of those costs by the other party. In the experience of Employment Judge Whittaker it was certainly common for reductions to be made in the amount of 10% and slightly less common for reductions to be made between 20% and 25%. The Tribunal sitting on 21 May 2019 had nothing more than a schedule of mathematical calculations from the respondent's solicitor without any detail to indicate what work had been done, who had it had been done by and with a provision of sufficient detail to enable the Tribunal on 21 May 2019 to consider whether or not the amount of time which had been spent was fair and reasonable.

25. The total claim for costs, including VAT, amounted to £9,850. A reduction of 10% would have given a figure of £8,865. A reduction of 20%, unusual, would have produced a figure of £7,880. The judgment of the Tribunal was that the claimant should pay a figure of £7,500 inclusive of VAT. This amounted to a reduction of over 20% in the costs which were payable to Mills & Reeve and to counsel by the claimant under the terms of her personal liability to counsel and to her solicitor, Mills & Reeve. In the opinion of the Tribunal this produced a just and equitable amount taking into account the conduct of the claimant and taking into account the absence of the details which the Tribunal felt should have been included in the schedule of costs produced for and on behalf of the respondent.

26. The Tribunal also took into account the financial circumstances of the claimant, although the information provided by the claimant was extremely limited. Not surprisingly the respondent had requested comprehensive current financial information from the claimant about his financial circumstances. That information had not been forthcoming and so an order was made by Employment Judge Whittaker in a letter sent to the claimant on 16 May 2019 "ordering the claimant to produce complete written records and copies of all relevant documents to substantiate his financial circumstances including all income and expenditure and any savings or investments he has by no later than 9.15am on Tuesday 21 May 2019". In response to that order from the Tribunal the claimant produced one single wage slip which was dated February 2019. That was not the most up-to-date and relevant financial information about his income, but it was the only detail which was provided by the claimant. It showed that he had a net monthly income of £3,892. No information was given whatsoever about the income or employment of the claimant's wife, even though the claimant submitted details of a credit card in the claimant's name which showed a substantial outstanding balance. The only other financial information submitted by the claimant was further copies of other credit cards which indicated that the claimant had outstanding balances on those credit cards. No other information whatsoever was

supplied by the claimant about his income, his employment, his employment prospects, details of his family expenditure and details of the employment and income of his wife, as clearly the Tribunal would have taken into account the income of the family not just the income of the claimant bearing in mind that the Tribunal was being asked to take into account a credit card debt of the claimant's wife.

27. In the opinion of the Tribunal the claimant had failed to comply with the order which had been sent to him which had been expressed in clear language. The Tribunal was therefore left to consider the merits and amount of any costs order based on the limited financial information supplied by the claimant. By contrast the claimant had at paragraph 40 of his witness statement set out a glowing description of what he felt were his qualifications, achievements and capabilities. Accepting that as an accurate description put forward by the claimant, this suggested a continuing ability on the part of the claimant to have well paid ongoing employment reflecting the wage slip which the claimant had submitted for February 2019 showing net monthly pay of £3,892 per month.

28. The judgment of the Tribunal therefore is that the claimant will pay to the respondent the sum of £7,500 representing the legal costs, charges, disbursements and/or expenses incurred by the respondent in defending claim number 2411365/2018 brought by the claimant against Dr Syed.

Employment Judge Whittaker

Date____31st May 2019_____

JUDGMENT AND REASONS SENT TO THE PARTIES ON
10 June 2019

FOR THE TRIBUNAL OFFICE

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