Case Number: 3400502/2016

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr B Plaistow	v	Secretary of State for Justice

Heard at: Cambridge

On: 16 May 2019
17 May 2019 (no parties in attendance)

Before: Employment Judge Ord

Members: Mrs M Prettyman and Mr B Smith

Appearances
For the Claimant: Ms N Braganza, Solicitor
For the Respondent: Mr J Allsop, Counsel

RESERVED JUDGMENT ON COSTS

1. In accordance with the Judgment delivered on 18 May 2018 when the claimant's application to strike out the respondent's response was refused but an order for costs was made, the respondent is to pay the claimant's costs of the 5th, 6th, 7th and 8th days of the Merits Hearing (14 – 17 May 2019 inclusive) on an indemnity basis to be assessed if not agreed.

2. The respondent is to pay a one third of the remainder of the claimant's costs of the claim on the standard basis to be assessed if not agreed.

3. No order is made on the claimant's application for a wasted costs order which is dismissed.

REASONS

1. By Judgment dated 5 February 2019, the claimant's complaints that he was the victim of direct discrimination, harassment on the protected characteristic of his sexual orientation, that he was victimised within the

meaning of the Equality Act 2010 (including when he was disciplined and dismissed), and that he was unfairly dismissed, succeeded.

2. That Judgment was delivered after a hearing lasting some 21 days and a further six days for deliberations (and further time spent on Judgment writing).

3. As can be seen from the Judgment delivered following the hearing, significant criticism was made of the respondent's conduct of the proceedings. Indeed, the respondent's failure to properly deal with the issue of disclosure of documents, including the repeated piecemeal disclosure of documents in the early days of the Full Merits Hearing led to the claimant making an application to strike out the response part way through the hearing.

4. That application was refused on 18 May 2018 but an order for costs was made. The Tribunal determined that the respondent's conduct in relation to the issue of disclosure during the hearing had led to the effective loss of four days of Tribunal time. The respondent was ordered to pay the costs of those four days of lost time on an indemnity basis, to be assessed if not agreed.

5. The claimant has made an application for his entire costs of the case to be paid on an indemnity basis and for a wasted costs order against the respondent's solicitors, the Government Legal Department.

6. As a preliminary matter, the respondent says that the Judgment of 18 May "draws a line in the sand" in relation to events up to that date as an order was made and the matters raised by the claimant in relation to the application to strike out are effectively the same as those now under consideration so that the issue of costs in relation to those matters cannot now be revisited.

7. We do not accept that to be the case. At the time the application to strike out was considered, there had been a waste of four days of Tribunal time. That time had been lost as a direct result of the respondent's piecemeal disclosure of documents, some of which had previously been said not to exist and / or some of which were a requirement of either of the respondent's own internal processes (e.g. Use of Force forms, required to be completed by every Officer who was witness to the use of force by an Officer) or the general Law (e.g. reports to the Health and Safety Executive of an incident which led to time lost by an employee).

8. The Tribunal was told by Counsel, on instructions from the respondent, that the documents relating to an internal investigation did not exist, yet the following day they began to appear, without explanation as to who found what, where and how.

9. At that time the question was whether the respondent's case had no reasonable prospect of success and / or whether a fair trial of the issues was still possible. The order for costs was made because the respondent's conduct had been disruptive and unreasonable regarding the piecemeal disclosure of documents and issues regarding witness availability during the hearing. The order was made purely on that basis and on the basis of the extended length of the hearing which had been thereby immediately caused, the loss of 4 days of the hearing and on no other basis.

10. Accordingly, we consider that the claimant's application for costs in relation to the period up to and including the 13 May 2018 falls to be considered as part of the applications now made, although clearly the costs of 14 – 17 May 2018 inclusive have already been the subject of an order.

The claimant's application for costs

11. Under Rule 76 of the Employment Tribunal Rules of Procedure 2013,

(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) had been conducted; or

(b) any claim or response had no reasonable prospect of success.

(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.

12. The claimant points to certain aspects of the Judgment delivered on 5 February 2019 as being sufficient of themselves to warrant consideration of an order for costs due to the unreasonable conduct of the respondent. In particular the claimant points to:

12.1 The very late concessions made by the respondent including as to the "statutory defence" under Section 109 of the Equality Act 2010 (abandoned at the commencement of the hearing) and the respondent's position expressed in closing submissions that it had no positive case to advance on the fairness or otherwise (including the question of procedural fairness) of the claimant's dismissal (see paragraphs 8, 9 and 14 of the Judgment);

12.2 The delays to the hearing caused by the issues of disclosure and the conduct of the witnesses, several of whom had not been made aware of the allegations made by the claimant and had not been directed to any of the relevant parts of the substantial bundle of documents to which their evidence related, including the conduct of all but one of the respondent's Senior Officers called to give evidence (Governor Kerr). With Governor Kerr as the sole exception, they were guilty of obstruction and evasion during cross examination, including in one case engaging in verbal jousting with the claimant's Counsel and challenging her as to how she questioned him when she was doing so appropriately and properly.

12.3 The claimant further points to the refusal by the respondent to make any concessions in the face of admissions, on oath, by the respondent's own witnesses (paragraphs 11 – 14 of the Judgment);

12.4 The evasive and unreliable evidence of the respondent's witnesses such as Custody Manager Laithwaite (paragraphs 34, 35 and 50 – 52), Prison Officer Puttock (whose evidence was contradictory, paragraph 41), the exaggerated nature of some evidence (e.g. Governor Marfleet claiming both during internal processes and before us, that the claimant had involved 15 people in his complaints and application for transfer when she could in fact only identify 4), the failure by Senior Officers who knew that certain documents should be available, to make any enquiry regarding obvious gaps in the investigation into the claimant's alleged misconduct (the dismissing officer, Governor Griffin, repeatedly stating that the inadequacy of the investigation was "not his remit"), the reference in cross examination to "unwritten practices" not previously relied upon and in respect of which not one shred of evidence existed leaving aside the question of the fairness or otherwise of such an "unwritten policy" being applied to people who knew nothing of it – paragraph 62 – 66; the tampering with an email from the Governing Governor, the unacceptable redaction of documents (see paragraphs 72, 78, 109 – 110, 112 – 116, 162 – 163, 168 and 335) and the misleading nature of pleadings (paragraph 164);

12.5 The fact that the Officer instructed in relation to the claimant's grievances did not know he was conducting a grievance enquiry (paragraph 200); and

12.6 Perhaps most seriously, given the identity of the respondent, the forgery by late production and back dating of documents (paragraphs 168 and 170 – 171) designed to "plug gaps" (paragraphs 372 – 373) or to confuse and mislead (paragraph 77).

13. It is by no means the case that all of this was apparent by 18 May when our Judgment was delivered on the strike out application and as we have said, that Judgment dealt with specific delay, i.e. the loss of 4 hearing days caused by the respondent's conduct, and no other findings were made.

14. We do not consider it necessary to repeat in this Judgment the many findings which we made as to the respondent's conduct of the proceedings. Put shortly, they have treated the Orders of the Tribunal, in relation to disclosure in particular, with contempt. They have conducted themselves in a way which has in part been an attempt to mislead not only the claimant but the Tribunal (see paragraphs 50 – 52, 112, 164 and 170 –
171 of the Judgment). This has put the claimant to unnecessary cost and has caused delays in the process and has extended the time spent in this matter beyond the four days subject of the earlier Judgment.

15. Having said that, we do not accept that the respondent was, throughout, conducting a case with no reasonable prospect of success. Indeed, the claimant did not succeed in all of his claims. The claimant was bound to be put to costs in the pursuit of his case however reasonable the conduct of the respondent and irrespective of the respondent's position on documents. It was his responsibility to establish facts from which the Tribunal could conclude that he had been the victim of discriminatory conduct. What we are satisfied about, however, is that his task was made unnecessarily difficult and time consuming due to the respondent's failings.

16. In addition, a substantial part of the findings which were made in the claimant's favour related to the rejection of the evidence of the respondent's witnesses. Their evidence was, properly, tested under cross examination and through that process their failings and the lacunae in the respondent's case became apparent.

17. We also reflect upon the fact that the parties agreed, after the hearings in May 2018 (and before the hearing resumed in October 2018) to engage in Judicial Mediation from which the claimant then withdrew. That is a relevant factor, although equally relevant is the fact that previously the claimant had expressed a willingness to consider Judicial Mediation and the respondent had refused. As we have no evidence as to the reason for the change in mind which each party went through, we cannot say that they acted unreasonably in their refusal of mediation.

18. We have reflected upon the authorities put to us, in particular:

    18.1 HCA International Ltd. v May-Bheemul (EAT/447/10), as approved in Arrowsmith v Nottingham Trent University [2012] ICR 159, stating that a party lying on oath is not of itself necessarily sufficient to

amount to vexatious, abusive, disruptive or otherwise unreasonable conduct, even if a central allegation is founded on a lie;

18.2 That all the circumstances of the case must be considered (Kapoor v The Governing Body of Barnhill Community High School EAT/035/13);

18.3 That in determining the extent of any costs order, the Tribunal should approach the matter on a broad basis but must have regard to the principals of relevance and causation (Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78) and the case of McPherson v BNP Paribas [2004] IRLR 558, which restated the position that costs are to be the exception rather than the rule;

18.4 That costs awards are compensatory, not punitive (Lodwick v Southwark London Borough Council [2004] IRLR 554.

19. We are satisfied that the respondents conduct of these proceedings has been unreasonable. Their disregard of the basic rules of disclosure, their corruption of documents by conflation, amendment or post dated creation demonstrates in our view a clear desire to obstruct the claimant's presentation of his legitimate claims, to place themselves above the rules of procedure and to mislead not only the claimant but also the Tribunal.

20. Further, witnesses were ill prepared, obstructive in their conduct and have given evidence which has been unreliable, including the giving of evidence based on a document which gave the impression that the claimant was asking to transfer to HMP Littlehey when he was not – see paragraph 76 of the Judgment. This was untrue. Even if the conflation of two different applications by two individuals for transfer onto one form was not designed to mislead, it did so because it misled more than one of the respondent's own witnesses and forced the claimant to give evidence and to cross examine those witnesses and challenge the voracity of their evidence based on the document.

21. That is but one example of how the claimant has been put to unnecessary extra work and costs due to the failings of the respondent. Those failings go beyond error. They have been wholly unreasonable and have been disruptive to the proceedings. They have not arisen by accident but by design as the wholesale denial of the existence of documents which subsequently appeared, the post-dated creation of documents designed to "plug the gaps" and the alteration of documents does not, and we find in this case did not, happen by inadvertence.

22. We have reflected upon the order for costs already made, the impact of the respondent's conduct on the proceedings as a whole and the fact that the claimant was bound to incur substantial costs in preparing his claims irrespective of the aggravating features of the respondent's conduct.

23. Our duty is to exercise our discretion and to consider to what extent the respondent's conduct has increased the costs the claimant has incurred or, to put it another way, how it has impacted on the case generally and the costs which the claimant has thereby been put to.

24. We are satisfied that had the respondent conducted itself properly and not been guilty of the vexatious, disruptive and unreasonable conduct which we have indicated in this Judgment, in addition to the four days lost during the course of the hearing, the claimant would have incurred no more than two thirds of the costs he did incur. On the basis of the evidence before us, and reflecting on those matters we found in the merits judgment, that is our assessment of the degree to which the respondent's unreasonable conduct has increased the cots and time spent by the claimant in this matter.

25. Accordingly, in addition to the costs that are already made, the respondent shall pay to the claimant one third of the remainder of the claimant's costs of the matter to be assessed if not agreed.

The appropriate basis for assessment of costs

26. The claimant seeks an order on the indemnity basis. Such an order (Howman v The Queen Elizabeth Hospital Kings Lynn EAT/509/12) should only be made where the conduct of the paying party has taken the situation away from the limited number of cases where a costs order is appropriate.

27. We have considered this aspect most carefully. The conduct of the respondent has been reprehensible. Documents have been corrupted and even forged. Documents have been hidden from the claimant. Even the most basic processes have not been followed. Documents were seen by the Dismissing Officer which were not only withheld from the claimant but the existence of which he was totally unaware of.

28. In addition, witnesses have been obstructive and evasive as set out in the Judgment and they have sought to challenge Counsel for the claimant and her legitimate and entirely proper questioning of them, creating in our minds a clear impression that they considered any questioning or criticism of their conduct and approach to be wholly inappropriate. Many witnesses were not even aware of the allegations the claimant was making, including those which involved them personally.

29. The making of an order for costs is already substantially the exception and not the rule. It is only in very exceptional cases that costs should be awarded on the indemnity basis and having regard to all of the matters we have set out above, notwithstanding the very clear criticisms which we make of the respondents in this case, we consider the appropriate basis for assessment of costs is the standard basis. That is particularly the case

where we do not make an order for the whole of the costs of the case in any event.

30. The exception to this is those costs covered by the Judgment of 18 May 2018 which have already been ordered on the indemnity basis.

Wasted costs

31. Under Rule 80 of the Employment Tribunal Rules of Procedure 2013,

(1) A Tribunal may make a wasted costs order against a representative in favour of any party where that party has incurred costs –

(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or
(b) which, in the light of any such act or omission the Tribunal considers it unreasonable to expect the receiving party to pay.

32. The leading Judgment in this area is Ridehalgh v Horsefield [1994] Ch205, requiring a three stage test to be applied to any application for wasted costs, specifically:

32.1 has the respondent acted improperly, unreasonably or negligently?

32.2 if so, did that conduct cause the party seeking an order to incur unnecessary costs? And

32.3 if so, is it just to order the representative to compensate that party for the whole or part of the relevant costs?

33. In KW Law Ltd. v Wincanton Group Ltd., & Others (EAT/43/18), it is necessary for the legal representative to have been shown to breach a duty to the Tribunal if it is to be liable for wasted costs.

34. The claimant points to the respondent's objection to the admission of a supplementary statement from the claimant (presumably on instructions, there is no evidence to the contrary). Under the Tribunal's own orders such supplementary evidence could only be admitted with the leave of the Tribunal, and the respondent's objection, whilst it was ultimately withdrawn, cannot be considered to be improper, unreasonable or negligent.

35. The claimant also points to late disclosure, both before and after the strike out application, in respect of which there is evidence that the respondent's representatives were regularly seeking documents, without success, from their clients.

36. The claimant relies on redactions to documents, corruption of documents or the post-dated creation of documents, all of which appear to have been made by the respondent, not their representatives and in respect of which there is no evidence at all that the respondent's representatives were party to such activities.

37. The claimant also points to the failure to provide proper transcripts of an interview with Prisoner A, which we understand were prepared by the respondent and not their solicitors.

38. As can be seen from our commentary on those matters, the fault, as we find it, was with the respondent and not with their lawyers. On the evidence we have, and accepting that the respondent and their representatives have not waived any legal professional privilege, it appears to us that the respondent's solicitors were seeking documents from the respondent and on that with the same degree of delay obfuscation as the claimant and the Tribunal faced. The fault therefore, lay with the respondent and there is no evidence that the Government Legal Department, their solicitors, were in breach of their duties to the Tribunal.

39. The claimant also relies on the respondents issuing a costs warning and what is said to be a failure to properly proof or prepare witnesses and their alleged failure to make "sufficient basic enquiries", which if they had been made, or properly made, the claimant's claims would have demonstrated that "a number of witnesses must have been blatantly lying and that there was further withheld disclosure of core documents all supporting [the claimant's] case…"

40. We again, are bound to assume that the respondent's solicitors made the costs warning against the claimant on instructions. Whilst such a costs warning, in circumstances where matters were clearly disputed and in part relied on the oral evidence of parties, is to be discouraged (such threats of costs, particularly in an environment such as the Employment Tribunal where costs do not follow the event) should be limited to those cases where there is an obvious failure to grasp the relevant merits of a case and/or its unlikely prospects of success, we again cannot find that there was any breach of a duty to the Tribunal when the representatives – on instructions as we have said – gave the costs warning.

41. Further, we do not find and did not find in our Judgment of 18 May 2018 that the conduct of the respondent's representatives was sufficient to give rise to the making of a wasted costs order.

42. Having made those comments, however, it is right to draw attention to our concerns that lawyers involved in this matter on behalf of the respondent have not conducted their role with appropriate diligence. They did not pursue, as they should have done, the blanket denials of the availability of documents which they received from their client and their analysis of their

client's position and its sustainability was sadly lacking. The duty of a solicitor to act in the best interests of their client and to put their client's best case forward to the best of their ability does not include the simple, unenquiring acceptance of what a client says. The obvious gaps in the respondent's documentation and their evidence appears not to have been questioned, but the real fault for this lies with the respondent itself who, by the senior people involved in this case, failed to have any or any proper regard to their duties of disclosure, falsely created documents and inappropriately redacted or conflated others.

43. The failings of the respondent's representatives to question the instructions they were given is clearly demonstrated in their letter of 3 October 2018 regarding the redaction of the CPU intelligence report. Having established (and set out clearly in that letter) that the document in question was disclosable, the solicitors sought instructions as to whether the client was "content… to disclose that report". That is not in any way part of the process of disclosure. The lawyers established that the document was disclosable and it is not a matter for the client to then decide whether or not they are 'content' for the document to be seen by the other side.

44. The solicitors then took advice from the Head of Corruption Prevention and Counter Terrorism who "discussed the issue with the Governor [of Woodhill, Governor Davis]" and advised that "the intelligence report itself was graded B4 and as such should not be disclosed".

45. B4 means that the contents are "mostly reliable" and "emanate from a single source". How that impacts on the question of whether or not the document should be disclosed as relevant to the proceedings before the Tribunal has not been explained nor commented upon.

46. To suggest as was then done, that "the integrity of the reporting system is likely to be compromised if intelligence gathered is disclosed", might give rise to some questions, but, the "intelligence" here was simply a note that the matters referred it to in the document were a serious management issue and that they had been referred to Governor Kerr for action.

47. The second half of that statement was wholly untrue as Governor Davis knew and there was no risk to the integrity of the Anti-Corruption Unit or its processes if that was not redacted. The solicitors failed to be responsive to the fact that the document was properly disclosable and blindly followed the instructions given, however incorrect, by the respondent.

48. We consider that to be an example of what we categorise of the "post-box" mentality which appears to us to have prevailed in this case. There has been no proper analysis or questioning of the instructions received which have simply been followed, parrot fashion.

49. That conduct, although we consider it to be far from ideal, does not cross the high threshold required for a wasted costs order. The primary fault for the extra work and delay in this case is with the respondent itself and not those instructed by it. That is how it appears to us on the evidence which has been presented to us.

50. We are conscious that (as per Ratcliffe Deuce and Gamer v Binns (t/a Parc Ferme and Others) absent the waiver of privilege, it would be a very exceptional case where the Tribunal would be able to infer that there was abuse of the process to warrant the making of a wasted costs order.

51. We have no evidence before us to enable us to make a wasted costs order, the fault for the difficulties which have been experienced in this case we find lie with the respondent and not with the respondent's solicitors.

Summary

52. No order is made on the application for a wasted costs order. The Respondent is to pay one third of the remainder of the claimant's costs of the claim on the standard basis to be assessed, if not agreed (in addition to the order to pay the costs of 14 – 17 May 2018 inclusive on an indemnity basis).

CASE MANAGEMENT ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure 2013

1. The parties shall endeavour to agree the extent of the costs to be awarded by not later than 31 July 2019.

2. In default of agreement the claimant shall prepare and submit to the Tribunal and the respondent a fully itemised bill of costs by 31 August 2019, unless the parties agree to the use of County Court form N260, in which case the costs sought should be set out in accordance with that form rather than an itemised bill.

3. In any event the respondent shall prepare a schedule of those items of costs which are in dispute, both as to principle and detail and serve a copy on the claimant and a copy to the Tribunal by not later than 30 September 2019.

4. The claimant shall reply to that schedule setting out his comments on an item by item basis, provide a completed copy of the schedule to the respondent and the Tribunal by 31 October 2019.

5. The assessment of costs shall take place before Employment Judge Ord, sitting alone on 2 December 2019 at The Law Courts, Walden Road, Huntingdon, Cambs., PE29 3DW. One full day has been allowed.

Note

6. The parties may agree to an extension of time for compliance with any stage of these Orders by up to 14 days provided no delay to the final assessment of costs is thereby caused, without reference to the Tribunal.

7. The parties must advise the Tribunal immediately if they reach agreement on the question of costs and / or if they consider the time estimate for the final assessment to be inappropriate.

_____
Employment Judge Ord

Date: 11 June 2019

Sent to the parties on: ..12 June 2019...

.....
For the Tribunal Office