



EMPLOYMENT TRIBUNALS

Claimant: Mr M Ibeziako

Respondent: 1. York Teaching Hospitals NHS Foundation Trust
2. Locum Placement Group Ltd

Heard at: Hull **On:** 29 November 2018

Before: Employment Judge Davies
Dr D Bright
Mrs S Scott

Representation

Claimant: In person

Respondents: 1. Mr A Webster (counsel)
2. Did not attend

RESERVED JUDGMENT

1. The Claimant shall pay the First Respondent £2000 by way of costs.
2. This Judgment is stayed (put on hold) until the Claimant's appeal to the Employment Appeal Tribunal has been finally determined. The parties must notify the Tribunal when that takes place.

REASONS

Introduction

- 1.1 This was an application for costs made by the First Respondent. The Claimant represented himself. The First Respondent was represented by Mr Webster of counsel. The First Respondent had made a detailed written application that was sent to the Claimant in an email dated 27 June 2017. Mr Webster produced a brief skeleton argument for the costs hearing and sent it to the Claimant at 2:30pm on Tuesday 27 November 2018.
- 1.2 At the outset of the hearing, the Claimant renewed a request he had made the previous week for the hearing to be postponed. He referred to my reasons for refusing that postponement and said that the medical evidence he had previously provided referred to an appointment in March 2018. He also explained that the reason his GP reported that he was not on medication was that he had chosen to try a talking therapy first. He said that he had only been sent Mr Webster's skeleton argument yesterday and that he had not slept because he had been working to respond to it. He said that his anxiety levels were high.
- 1.3 The Tribunal decided to go ahead with the hearing. There was no medical evidence that the Claimant is currently unfit to participate. The reference to an

appointment on 28 March 2018 did not provide information about his current state of health. We recognised that he had chosen to try a talking therapy rather than medication, but there was still no medical evidence that he is currently unfit (or undertaking any talking therapy). We accepted that his anxiety levels were high and that he had not slept well, but he was able to make a cogent application to postpone the hearing. The Tribunal felt that he was able to participate effectively. No doubt the hearing was contributing to his state of anxiety, but that would remain the case at any postponed hearing. The Tribunal accepted that Mr Webster's skeleton argument had been emailed to him on Tuesday. It was sent, having regard to the Claimant's health, to give him advanced notice of Mr Webster's arguments. Otherwise, Mr Webster would simply have made them orally at the hearing. This was to assist the Claimant. In any event, a detailed application for costs was made in June, so the Claimant knew the arguments and had ample chance to prepare for the costs hearing. In all the circumstances, it was consistent with the overriding objective to go ahead with the hearing.

The issues

- 2.1 The issues to be determined were:
 - 2.1.1 Did the Claimant act unreasonably in bringing or continuing with his claim or did it have no reasonable prospect of success?
 - 2.1.2 If so, should the Tribunal make a costs order?
 - 2.1.3 If so, for how much?

The Facts

- 3.1 The Claimant gave detailed evidence, supported by documents, of his difficult financial circumstances. The Tribunal accepted that he has no significant assets and no significant money in the bank. He has been working night shifts through an agency, doing a varying number of shifts and earning modest sums. He has very significant debts, including rent arrears, tax arrears, legal costs and arrears of child maintenance. It is not necessary to set out his position in any greater detail. The Tribunal found that he is not currently in a position to pay a costs order.
- 3.2 We also accepted that he has suffered mental ill health and has tried CBT. He has not yet tried medication, and that remains an option for him. The Tribunal found that there was no reason to suppose that the Claimant's mental health will not improve in a reasonable timeframe. With that, his ability to secure a regular income will also improve. He works as a carer and prefers to do night shifts. There is locally and regionally a demand for people to do such work. The Tribunal considered that there are good prospects that in a relatively short timescale the Claimant's income will have improved and he will then be in a better position financially. He will still have significant debts, but he is likely to be in a position to contribute a modest sum regularly towards any costs order.

Legal Principles

- 4.1 Rules 76 and 84 of the Employment Tribunal Rules of Procedure 2013 provide, so far as material, as follows:

76 When a costs order or a preparation time order may or shall be made

(1) A Tribunal may make a costs 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) have been conducted; or

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

...

84 Ability to pay

In deciding whether to make a costs ... order, and if so in what amount, the Tribunal may have regard to the paying party's ... ability to pay.

- 4.2 The Tribunal had regard to principles derived from some of the cases, in particular:
- 4.2.1 Unrepresented parties are not to be judged by the standards of a professional representative - the Tribunal must make an allowance for inexperience and lack of objectivity: see *AQ Limited v Holden* [2012] IRLR 648 EAT.
 - 4.2.2 The Tribunal must identify the unreasonable conduct, say what was unreasonable about it and say what its effect was: see *Yerrakalva v Barnsley MBC* [2012] ICR 420 CA;
 - 4.2.3 The mere fact that a party has lied in the course of its evidence is not necessarily sufficient to found an award of costs. The Tribunal has to have regard to the context, and the nature, gravity and effect of the untruthful evidence in determining the question of unreasonableness: see *Arrowsmith v Nottingham Trent University* [2012] ICR 159 CA.

Application of the law to the facts

- 5.1 The first question is whether the Claimant acted unreasonably in bringing or continuing with the claim. The Tribunal found that he did.
- 5.2 The basis for that was the detailed findings of fact in our judgment dated 6 June 2018. The Tribunal made extensive findings that the Claimant's evidence was not credible and was not to be believed. Essentially, the Tribunal found that he had invented an account of being racially abused by a patient and of complaining about that *after* patients made complaints about him that were to be investigated. We found that he had a tendency to construct his evidence in the light of the events that followed rather than giving an account of what he actually remembered. He had invented the suggestion that he made complaints to Ms Milne and Ms Allen after the preliminary hearing before EJ Maidment. A central premise of the case he had advanced to the Tribunal was that the First Respondent had invented patient complaints about him because he had complained of race discrimination, when in fact the opposite was true. He had invented the suggestion that he made such a complaint because of patient complaints about him. Bringing and pursuing a claim on that basis was fundamentally unreasonable.
- 5.3 The effect of the unreasonable behaviour was that the First Respondent had to defend this claim in a 4 day Tribunal hearing, bringing ten of its employees to give evidence about the wide-ranging allegations. It also led the First Respondent to incur very significant legal costs. The schedule provided by the First Respondent indicated that its legal costs are more than £20,000. Without carrying out any close scrutiny of the figures, the Tribunal accepted that the legal costs reasonably incurred in preparing for and attending the hearing were likely to be in the region of £15,000 - £20,000.
- 5.4 The Tribunal therefore considered whether it should make a costs order. We decided that it was appropriate to do so. The First Respondent is a public body spending taxpayers' money. It has reasonably incurred significant legal costs in defending a claim that was unreasonably brought and pursued. It wrote a costs warning letter to the Claimant after witness statements had been exchanged,

setting out in detail why the claim should be withdrawn. The Claimant dismissed that out of hand. The Claimant's financial circumstances can be taken into account in deciding how much to award, but they do not mean that the Tribunal should not make an award at all.

- 5.5 The Claimant suggested that the First Respondent had failed to comply with the Civil Procedure Rules and that its costs application should be refused on that basis. The Rules to which he referred do not apply in Employment Tribunal cases. He also said that the costs application should be struck out or that summary judgment should be issued. The Tribunal Rules only allow for a party's claim or response to be struck out, not a costs application. They do not allow for summary judgment. The appropriate course of action is to deal with an application for costs on its merits, which the Tribunal has done. The Claimant relied on a number of matters relating to the events that gave rise to his claim. Those matters were decided by the Tribunal at the liability stage. He cannot re-open them in a costs hearing. He pointed out that he has made an appeal to the Employment Appeal Tribunal. That can be dealt with by staying the effect of the costs order (putting it on hold) until the appeal has been finally determined.
- 5.6 The Tribunal therefore considered how much the Claimant should be ordered to pay. We took into account his financial position, in particular that he is not currently in a position to make any payments but that there are reasonable prospects that his health, employment position and financial position will improve in the relatively short term. Given the level of the Claimant's debts, his lack of assets and his potential earning capacity, the Tribunal did not consider that there was any realistic prospect of his ever being able to pay a costs order in the region of £20,000 and we did not consider that it would be in the interests of justice to make such an order. The Tribunal considered it just and proportionate to order the Claimant to pay a sum that he had a realistic prospect of paying, by instalments, within a reasonable timeframe. The Tribunal considered that £2,000 was such a sum.
- 5.7 The Claimant also said that he was making an application for the First Respondent to pay his costs. He did not identify any unreasonable conduct by the First Respondent that could form the basis for such an order. His application appeared to relate to the underlying events, but the Tribunal rejected the Claimant's version of events in its liability judgment. The Claimant's application for costs against the First Respondent is refused.

Employment Judge Davies

7 December 2018