EMPLOYMENT TRIBUNALS

Claimant: **Mr Jeffrey Osagie**

Respondents: **(1) Serco Limited**
(2) Andrew Miller
(3) Wendy McKenzie

Heard at: **London South (Croydon)**

On: **12 April 2019**

Before: **Employment Judge John Crosfill**
Ms B C Leverton
Mrs C Upshall

Representation

Claimant: In person

Respondent: Mr C Edwards of Counsel

COSTS JUDGMENT

1. The Claimant is ordered to pay the Respondents £5000 as a contribution to their costs.

REASONS

1. Following from our decision on liability in this matter, which was sent to the parties on 30 July 2018, the Respondents made an application for costs by letter dated 16 August 2018. The Claimant was invited to comment in writing on that application and did so promptly disputing the Respondents' entitlement to any costs. The matter was therefore listed before the same tribunal to deal with the application.

Bias/Recusal

2. The Claimant had suggested in his written representations that the matter should not be heard by the original tribunal as we were biased against him. His initial objections appeared to be based generally on the fact that we had not determined the proceedings in his favour. At the outset of the hearing he

developed that and made an application that the Tribunal recuse itself on the grounds that we had shown actual or apparent bias towards him on the grounds of his race. We should record that the submission was made clearly and courteously.

3. The Claimant's submission was, in part, founded upon paragraph 62 of our judgment which read as follows:

   'When the Claimant cross examined Stephan McLean he asked him whether he used the expression 'house master' in reference to himself. We as a tribunal were confused by this but Stephan McLean was able to explain that what the Claimant was suggesting was that he described himself using a term for a black slave who considered himself too good to work in the cotton fields. A version of the more modern insult 'coconut'. He then said emphatically that he had never used that expression about himself or anybody else. We consider that the Claimant's attempt to attribute a racist epithet to Stephan McLean rebounded on his case. It was clear to us that what the Claimant was trying to suggest was that Stephan Mclean considered himself above ordinary black people and sided with 'the white man'. We accepted Mr Mclean's evidence that he did not use a derogatory term about himself. It is difficult to see why he would.'

4. The Claimant argued that our use of the expression 'the white man' coupled with the fact that all three of us were white showed that we held racially biased views. He said that we were 'judges in our own cause'. The Claimant directed the tribunal to the proper approach to an allegation of bias set out in In ***Magill v Porter*** **[2002] 2 AC 357** where the House of Lords said that the question was "*whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*". The Respondents position was that there was nothing in our judgment or conduct that would lead any fair minded observer to conclude that there was any possibility of bias.

5. The Claimant further argued that the Employment Judge had during the hearing described his schedule of loss as unrealistic. He said that this was a further demonstration of bias against his case. He expanded upon that explaining that as the Respondents' application for costs referred to the fact that he had made excessive claims the fact that the Employment judge had suggested that was the case meant that there was a risk that one element of the costs application was prejudged. As a matter of fact the Respondent's application for costs is not predicated on the schedule of loss but relied upon the findings in our liability judgment.

6. We gave our oral judgment on the Claimant's application prior to hearing the Respondent's application. We dismissed the application.

7. In general the Tribunal determining any application for costs should be composed of the judge and members who had decided the substantive case see ***Riley v Secretary of State for Justice*** **[2016] ICR 172 EAT**. That general proposition would have no application where there was actual or apparent bias in respect of the costs application. By itself, the mere fact that the substantive proceedings had been determined against the Claimant by the Tribunal would provide no foundation for the Tribunal to recuse itself. Something more would be necessary to give rise to the possibility of bias.

8. We do not accept that there is anything in paragraph 62 of our judgment that would cause a fair minded observer to for a view that there was a possibility of bias. What we do at paragraph 62 is to set out the suggestion that the Claimant put to Stephan McLean and then we set out in our own words the explanation that Stephan McLean gave us of his understanding of the phrase. That being a person who sided with the white slave owners. We do not find that in giving that explanation we have shown that we ourselves take sides against black people or that we, as opposed to the Claimant who we find used the phrase, condone 'taking sides' at all. The reality is that we were criticising the Claimant for seeking to attribute to Stephan Mclean a racist phrase when in fact the Claimant was accusing Stephan McLean of siding with the white managers.

9. As to the second argument raised by the Claimant, it was common ground that in the early stages of the substantive hearing the Employment Judge raised with the Claimant the fact that his schedule of loss was unrealistic. The context is important. The Claimant had prepared a schedule of loss which claimed an award for injury to feelings several times greater than the highest awards generally made. The matter was raised by the Employment Judge in the context of discussions about the timetabling of the hearing which was subject to some time pressure. The Claimant had indicated that he wanted a great deal of time to cross examine the Respondents and their witnesses. The Employment Judge reminded the Claimant about the need for proportionality. The Claimant was directed to the presidential guidance on injury to feelings awards. That was repeated when the Claimant's cross examination strayed over the time that had been allocated. In the end the Claimant was given considerable latitude and additional time to complete his cross examination.

10. When the matter is taken in context we do not consider that a fair minded observer would have concluded that there was a real possibility that the Employment Judge (or members) was/were biased against the Claimant during the liability hearing. The Claimant's schedule of loss was unrealistic and a properly informed fair minded observer would have recognised that. It does not show bias to point out the proper approach to the assessment of compensation. The context demonstrates that the references to an issue of quantum were made to remind the Claimant of the need for proportionality where there was a risk of the matter going part heard.

11. We do not think that, having remarked that the compensation sought was unrealistic, means that there is a real possibility of bias in determining the application for costs. Whilst the amount that had been claimed by the Claimant is a matter mentioned by the Respondent in their application it was not the basis upon which costs were claimed.

12. The Tribunal frequently see schedules of loss that bear no relation to the true value of the claim. Many litigants complete such schedules with no knowledge of the guidance given by the courts and the President of the Employment Tribunal. The mere fact that a litigant in person's schedule of loss does not reflect such guidance would by itself not be determinative in any costs application. The Tribunal would need to make findings as to whether any inflation of loss was occasioned by unreasonable behaviour or simple ignorance. We had expressed no concluded view on these matters and were not invited to do so in the costs application made by the Respondent.

13. The Claimant relied upon ***Oni v NHS Leicester City*** **UKEAT/144/12/LA** and

Hussain v Nottinghamshire Healthcare **NHS Trust UKEAT/0080/16/DM** for the proposition that the test in ***Magill v Porter*** will be satisfied where an employment tribunal prematurely expressed a concluded view on a matter which had yet to be decided. That proposition was uncontroversial.

14. We do not accept that a in pointing out that a schedule of loss was out of line with established guidance there is any real possibility that we could be perceived as having prejudged the outcome of an application for costs and particularly an application made on a very different basis. It is clear from ***Oni*** that a tribunal will not be bound to recuse itself because it has exercised its case management powers in a manner which it is then invited to take into account on an application for costs. In this case the Tribunal said and did nothing that would indicate that it had predetermined the costs application.

15. In the circumstances we declined to recuse ourselves and proceeded to hear the Respondent's costs application.

Costs

16. The Respondent had set out its costs application in its letter to the Tribunal dated 16 August 2018. The Respondent set out passages in our judgment where we had criticised the Claimant's evidence. The Respondent's position was that there were findings of dishonesty that went to the heart of the Claimant's case. Mr Edwards argued that the Claimant had been found to have been dishonest and that such dishonesty must have been deliberate and cynical and justified an order for costs. The Respondent said that it had incurred costs of £74,480 excluding VAT and sought an order for the whole of those costs assessed by the County Court or by an Employment Judge.

17. Mr Edwards accepted that we were entitled, but not obliged, to take the Claimant's means into account. He argued that we were not limited to looking at the Claimant's means at the point of time the application was heard but could and should have regard to his future potential earnings. He said that as and when Mr Osagie qualified as a lawyer he would have considerable earning potential.

18. The Claimant's submissions were essentially that our findings did not amount to findings of deliberate dishonesty. He said that in those circumstances the fact that he had not succeeded in any of his claims did not mean that the threshold for costs had been met. He reminded the Tribunal that costs orders were very much the exception.

19. In relation to his means Mr Osagie told the Tribunal that he was no longer working. He said that his marriage had failed and that he no longer lived with his wife and children but was in separate rented accommodation. He said that he had insufficient means to meet any costs award of the magnitude suggested by the Respondent. He told us that he maintained his ambition to qualify as a barrister at some point in the future.

The relevant law

20. The jurisdiction to make an order of costs is found in schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) 2013. Rule 76 provides:

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

(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) have been conducted;

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

21. There is essentially a 2 (or perhaps 3) stage test. Other than in defined circumstances, before there is any jurisdiction to award costs at all the tribunal must be satisfied that one or more of the threshold conditions set out in Rule 76(1) has been satisfied. If, and only if, it has should the tribunal move on to consider whether, in the circumstances of the particular case, it is right to make a costs order. Finally, it is necessary to decide what amount, if any to award. Notwithstanding the existence of the jurisdiction to award costs the exercise of that jurisdiction remains exceptional ***Gee v Shell Ltd*** **[2003] IRLR 82**.

22. A 'deliberate' and 'cynical' lie may amount to unreasonable conduct of proceedings – see ***Daleside Nursing Home Ltd v Mathew*** **UKEAT/0519/08** but there is no general rule that that will always be the case. In ***Arrowsmith v Nottingham Trent University*** **[2012] ICR 159** Rimer LJ endorsed the judgment of the EAT in ***HCA International Ltd v May-Bheemul*** **UKEAT/0477/10/ZT** where Cox J had said: *"Thus a lie on its own will not necessarily be sufficient to found an award of costs. It will always be necessary for the tribunal to examine the context and to look at the nature, gravity and affect of the lie in determining the unreasonableness of the alleged conduct".*

23. Rule 84 of the procedure rules provides that when deciding whether to make a costs order and if so in what amount the Tribunal may have regard to the means of the paying party. The rule is permissive rather than mandatory although it would be an unusual case where the means of the paying party were not a material factor. In ***Vaughan v London Borough of Lewisham*** **[2013] IRLR 713** the Employment Appeal Tribunal, following ***Arrowsmith v Nottingham Trent University*** **[2012] ICR 159** held that an assessment of means was not necessarily limited to the ability to pay at the time that the order is made but can have regard to the future prospects of the paying party.

Discussion and conclusions – costs

24. Our starting point was to remind ourselves that an award of costs in the employment tribunal is exceptional. Parties are generally free to present their differences to an employment tribunal for adjudication without any concern that they will have to pay the opposing parties costs if their case fails. That principle is particularly important in discrimination cases.

25. We further reminded ourselves that there is a very clear distinction between a tribunal concluding that a party is wrong about some fact or another and a finding that a party had been dishonest. We took care to review our judgment with that in mind.

26. Whilst there are numerous matters where we have not accepted the Claimant's

account we consider that in two respects the Claimant had given evidence that was not simply mistaken or not a matter that he had convinced himself of despite having no foundation to do so but were matters that he knew were untrue. That is, we did find that he had been dishonest. Those matters were:

26.1. Whether the Claimant was or was not wearing his uniform below his fleece. Our findings are set out at paragraphs 50 and 51 of our liability judgment. That was intended to be and was a finding that the Claimant was being deliberately dishonest.

26.2. The second instance related to the hearing of the Claimant's appeal on 12 October 2017. We have set out our findings in respect of this at paragraphs 88 to 90 of our liability judgment. We have emphatically rejected the allegations made by the Claimant of Kirsty Hawkes and in particular the allegation that she 'went ballistic' something said to be victimisation. We accept that a skewed perspective can mean that events are recalled inaccurately but our finding was that this was not such a case but that the Claimant had consciously said something he knew to be untrue.

27. Before assessing whether these matters meet the threshold of unreasonable conduct we make some general observations about how the Claimant's discontent with his employer unfolded. We have found that the Claimant was particularly disappointed when he was not permitted to act as a dock officer on the murder trial. We accept that the Claimant may have become mildly irritated at the manner in which parking spaces were allocated as he was not always able to park. Finally we have found that he took exception to the enforcement of the rules in relation to his uniform, laptops and mobile telephones. We would accept that in respect of all of those matters the Claimant had a genuine belief that he had been singled out for unfavourable treatment. He later came to believe that his race was a factor in that. We have disagreed with him about the extent and reasons for that treatment but accept that his beliefs were genuine.

28. Equally we would accept that the Claimant believed that when he was sent to Wimbledon that was because he had complained about his treatment. His belief that that was improper would have been reinforced by the Respondent's own policy. Some (but not all) of his other victimisation claims flowed from that. Whilst we have found that there were perfectly proper reasons for the Claimant's treatment we would not say that all of his claims of victimisation were not properly arguable and some required an explanation from the Respondents.

29. It follows from the matters that we have set out above that there were some parts of the claims that can be dissociated from the instances of deliberate dishonesty that we have found. Not all of the claims were tainted by that dishonesty. That said the incident relating to the fleece was a matter from which other complaints flowed and was very much at centre stage during the hearing before us. The fact that the Claimant maintained an account that we have found to be false, and knowingly so, caused him to challenge the integrity of his colleagues.

30. In relation to Kirsty Hawkes the Claimant's allegations about her behaviour were a foundation for one claim of victimisation. His allegations went to the very

heart of that particular matter. We have found that the Claimant has deliberately lied about that.

31. We have reached the conclusion that the Claimant has not told the truth in two material respects. He has put matters that he knew to be untrue to the Respondents witnesses and he invited the Tribunal to find those witnesses dishonest. We have reached the conclusion that that was dishonesty of a sufficient gravity that it amounts to unreasonable conduct for the purposes of Rule 76. We therefore have a discretion whether or not to make an costs order.

32. The effect of that unreasonable conduct was that the case was enlarged and as a consequence the Respondent put to additional cost. In respect of Kirsty Hawkes had the Claimant not maintained a false account of the meeting she would not have needed to give evidence. That is not the most significant matter but is a matter we take into account. The Claimant's account of the 'fleece' incident was as we have said above a matter of prominence before us. The Respondent was entitled to and did call a number of witnesses whose evidence went directly or indirectly to rebut that false account. The proceedings were significantly extended because of this.

33. Taking the nature and gravity of the unreasonable conduct of the Claimant together with the fact that the proceedings were needlessly and improperly enlarged to deal with what were false allegations, we have concluded that we should exercise our discretion to make a costs order. As such the second part of the test set out above is satisfied.

34. We consider that it is appropriate for us to have regard for the Claimant's means. We accept that he has neither income nor savings at the present time. Whilst the Respondents have sought to suggest that the Claimant's qualification in law means that he will have a good income we are less optimistic. The reality of the legal jobs market is that many people with law degrees will struggle to enter the legal professions. We do not base our assessment of the claimant's future income on the possibility of him working as a barrister. We do find that he has secured work in the past at an average income and consider that he is likely to be able to do so again. That said he has responsibilities towards his children and we find that he is unlikely to have the means to pay a significant costs aware anytime in the foreseeable future.

35. We have set out above our conclusions that not all of the Claimant's claims were tainted with the dishonesty that we have found and it follows that not all of the costs incurred by the Respondent would have been saved if the Claimant had acted reasonably. It is therefore appropriate for us to order the Claimant to make a contribution towards the Respondents costs rather than ordering him to bear the entirety of the costs. Given our conclusion that the Claimant's militate

36. Having regard to the extent to which the proceedings were improperly enlarged and having particular regard to the Claimant's limited means (now and we find in the future) we consider that the proper amount of any costs order should be £5,000 and that is the order that we make.

Employment Judge John Crosfill

Date: 14 June 2019.