EMPLOYMENT TRIBUNALS

Claimant: **Mr H Wise**

Respondent: **Leicestershire Partnership NHS Trust**

Heard at: **Leicester** **On:** **Tuesday 28 January 2020**

Before: **Employment Judge Britton**

Members: **Mrs B Tidd**
Dr G Looker

JUDGMENT ON COSTS

The Employment Tribunal Judge gave judgment as follows:-

1. The Respondent's application for costs is dismissed.

REASONS

Background to this hearing

1. The Tribunal gave its full judgment in this matter following its reserved decision making on 9 August 2019. The judgment dismissing the Respondent's claim of race discrimination was issued to the parties on 31 August 2019. As this was a reserved judgment it contained the full reasons for the Tribunal's decision.

2. On 27 September 2019 the Respondent applied for its costs. It was in time for doing so pursuant to rule 77 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The application contained detailed grounds of the application together with a schedule of costs sought which in due course was revised to take account of the fact that the brief fee for the original hearing which was cancelled due to lack of judicial time could not be fairly asked of, of the Claimant. The brief fee for the actual hearing of 5 and 6 August 2019 of course remained. As to the procedure the Respondent asked that its application be dealt with on the papers. In other words without the need for an attended hearing. Rule 77 in fact provides that the Tribunal can deal with it in that way. The Claimant was in due course notified that that would be our intention unless we heard to the contrary and a costs hearing was listed for today, confined to the tribunal considering the application and any objections but without the presence of the parties.

3. The Tribunal did not hear from the Claimant until he wrote in on 21 January 2020 setting out briefly why he should not be made to pay the costs, essentially:

> "I was not fully aware the Tribunal can also charge me on the costs incurred by the Respondent if my case is dismissed.
>
> I accept the reserved judgment in my case and appreciate the help provided by the Tribunal during the two days of hearing in August 2019 for not being legally represented."

He then provided the details of why he would be unable to pay such costs in any event and has now also provided to us at the direction of the presiding Judge further details of his income and means.

4. It follows, we take it, that the Claimant is objecting to the costs essentially because he was unrepresented and did not understand that the Tribunal was in fact a costs forum if indeed it is in the full sense of that word.

5. The Respondent's application is based on the following and is by reason of rule 76, that is to say:

> "(1) A Tribunal may make a costs order.. and shall consider whether to do so, where it considers that:-
>
> > (a) a party… 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…"

6. As is perhaps self-evident it is a two stage test. First of all the Tribunal has to decide, with the onus of establishing the position being upon the Respondent of course, that the Claimant has come within 26(a) or (b). If it so decides, then it has the discretion of whether or not to actually make the costs order, although it must consider whether to do so.

7. The core point in this case of course being, does the Claimant first come within 1(a) or 1(b)?

8. In reaching our decision we have carefully considered the submissions of the Respondent. We have cross referenced of course to our published judgment and reasons. We have also cross referenced to the notes of evidence taken in this case and the procedural history. Finally of course we have considered the representations of the Claimant such as they are.

9. The following are self-evident:-

> 9.1 When the claim was presented to Tribunal the scenario as set out by the Claimant did not make clear why race discrimination was engaged.

It could however be deduced from the scenario that it had to do with his being offered, albeit conditionally[1], the podiatry role with the Respondent and thence in due course this being withdrawn, and inter alia the failure of the Respondent to grant him an appeal. The Claimant of course is unrepresented and from what we have observed during the hearing has little or no legal knowledge.

9.2 A response was put in fully setting out the defence and as it turned out correctly.

9.3 However the Respondent did not plead that this case had no reasonable prospects of success or such little reasonable prospect of success that a deposit should be ordered. Albeit to dismiss a claim of race discrimination is an exceptional act there is not such a restriction on the making of a deposit order provided of course that on the papers it has only little reasonable prospect of success. And of course the importance of ordering a deposit order is it then means that the Claimant is at risk of paying costs if he fails in his claim at the hearing, because the deposit order means that if that occurs, then this first stage of the costs analysis is already made out. In other words that the claim from the deposit order onwards has been pursued unreasonably.

10. The Tribunal and in particular this Employment Judge with his many years of experience sees the use of deposit orders in particular as therefore a very useful tool as long as used appropriately. Then if we turn to the Preliminary Hearing which was referred to in our judgment at paragraph 2 and which was a case management discussion by telephone, the Judge set out what she deduced to be the basis of the claim and that it was therefore one of direct race discrimination. Clearly not advanced before her by the Respondent was that the claim should be struck out as having no reasonable prospect of its success or a deposit ordered. And she herself did not analyse the case as being one which fell within that category. Finally at paragraph 2, she did not order any further and particularisation of the claim and indeed this had not been asked for in the case management agenda by the Respondent. This is important because requiring further and better particularisation, an example being to set out each act said to be one of race discrimination and why, the Claimant having had set out for him the definition at section 13 of the Equality Act 2010, tends to crystallise the mind of a Claimant and particularly one who is not legally represented and in turn can then engender an amended response and of course at that stage an application if not made before for strike out or a deposit.

11. Well none of that occurred. All we know is that the Respondent in its submissions pleads that it sent a costs warning letter to the Claimant on 5 December 2018 but we do not know what the contents were. The Respondent has not provided us with a copy despite it was sent to the Claimant very shortly after the publication of the telephone case management discussion before Judge Moore. So if the Respondent concluded that the Claimant did not have any reasonable prospect of success then why did it not then make an application? Why we spell this out is that therefore we accept that the Claimant being a litigant in person did not appreciate the implications of continuing with his case and the risk of costs before this hearing.

[1] This was a finding by us.

12. As to the hearing before us, although the Claimant made the allegations against Mr Wright to which we referred in our judgement, he did not conduct conduct himself in an aggressive or discourteous manner. He did take guidance from the Tribunal. That is to say once his own evidence, explored in cross examination, showed as a matter of law pursuant to section 13 that there could not have been race discrimination by first Mrs Holland and Ms Kelly at the interview of him on 7 March 2018 and because they conditionally offered him the job and knew that he was a black person, he accepted that and withdrew that claim. The same seemed to be the case in relation to Mr Wright in terms of him offering the Claimant the enhanced job albeit still subject to the conditional element as per the Respondent's applicable policy on 3 April 2018. The other point is that the Claimant tended, as often is the case with litigants in person, to have difficulty in crystallising his questions thus requiring intervention and assistance by the presiding Judge and indeed the members to get him to focus; and although he overran towards the end of the hearing in his cross examination of Mr Wright he nevertheless accepted the "guillotine" as extended and then stopped his questions. But he had by then had a full opportunity to put his case.

12. The problem is of course the late raising of the "engineering" accusation against Mr Wright as to which see paragraph 31 of our judgment and our findings in relation thereto and that this accusation was "clutching at straws as his case fell apart before us". And then there was the very late raising of a further serious accusation against Mr Wright as to which see our paragraph 39 and which again we dismissed out of hand as there was no evidence to support it. So as per our paragraph 41 we concluded "the Claimant unfortunately brought up these serious allegations against Mr Wright without a shred of evidence to support them". He had excluded all other players so to speak from any form of racial discriminatory behaviour as to which see our paragraph 42. So as to why continuing against Mr Wright we observed:

> "For reasons which are really not clear other than perhaps it was because Mr Wright was a person in the witness box who he could attack in this respect given any contention against Mrs Holland was untenable; but of course he had a hurdle of trying to get over Mr Wright's offer of 3 April 2013".

13. So in the Respondent's submissions the core point that emerges to us is that these late accusations against Mr Wright are says the Respondent vexatious. As to what is vexatious, this was reaffirmed by their Lordships in **John Scott v Sir Bob Russell MP** [2013] EWCA Civ 1432 and by way of approving the dicta of Lord Bingham in **LCJ v AGV Barker** [2000] 1FLR 759 (19) thus:

> "The hallmark of a vexatious proceeding is… that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the Claimant, that it involves an abuse of the process of the Court meaning by that a use of the Court process for a purpose or in a way which is significantly different from the ordinary and proper use of the Court process."

14. But the facts of a case are clearly highly relevant in that respect. In the case that their Lordships were dealing with in **Scott,** the Claimant he was seeking to manipulate the Court process really by way of a vendetta without any substance to it. And he was attempting to circumvent the restriction on bringing a claim for unfair dismissal where there is no qualifying service.

15. So there was the vexatiousness.

16. This case is different. The Claimant was entitled to have a sense of injustice. Thus as is clear from our judgment the Claimant could reasonably have understood himself to have had the job in the bag subject to references. He had disclosed the process that he had been through on the three occasions before the HCPC. Nevertheless he had been told that he had the job. It seems to us not appreciating the significance of "conditional" given a context where he had been telephoned by Mrs Holland who accepted that she had informed him that he had got the job and congratulated him subject to the conditional procedure. Then of course Mr Wright had done nothing to dissuade his belief in terms of the letter in April to which we have referred, in the interim the Claimant having attended at her request the person in recruitment, Katrina Wingfield, on 22 March; and he had again taken with him documentation relating to the HCPC as to which see our paragraph 21. And of course in the meantime he had received the letter of 15 March being the conditional offer of employment.

17. Then factor in that from his point of view, of course out of the blue because he had no realisation it was going to happen, being informed on 25 April that the offer was withdrawn, then receiving a generic letter which gave no reasons. Finally factor in that when he sent in his detailed grounds of appeal to Mr Norbury on 31 May, the short reply he got was to the effect that there was no procedure by which his appeal could be entertained given he was not an employee.

18. In all those circumstances the Claimant being a black man and with his perception rightly or wrongly that the HCPC was institutionally racist, which is what he said before us, could reasonably be seen to have had a perception that he was being treated in this way because he was black. He used the words "discriminated against" in his appeal letter and of course had there been a hearing, albeit the Respondent was not procedurally obliged to hold one, then doubtless that would have been more fully explored and understood; and likewise we come back to the case management discussion and what the Respondent did not ask for and how it was left that this was diagnosed to be a direct claim as per paragraph 2 in our reserved reasons.

19. What it means is that the Tribunal unanimously concludes that to therefore bring his proceeding through to the hearing and in respect of which in passing we observe he had cooperated with directions and prepared a witness statement, was not unreasonable. And it was not as per the definition vexatious. This is very much the kind of case which the Tribunal is used to dealing with in the context of such as race discrimination. The Claimant would be entitled to a hearing albeit on the evidence before the Tribunal no part of the treatment of him was because of his race. It may well be that if he had been legally represented that in conference he would have been advised as to the weaknesses of his case and perhaps he might have withdrawn it. On the other hand he might have very well required that it still be tested in Court.

20. Given the circumstances we therefore repeat that it was not unreasonable conduct for him to continue with his claim into Tribunal and in passing it means that in that sense that the costs that the Respondent was put to, nearly all of which of course would be in terms of bundle or witness preparation and instructing Counsel etc before the commencement of the two day hearing would have been spent.

21. That brings us however to the vexatious element. Once the Claimant's case was in effect obviously hopeless as originally advanced and which would be midway through at latest the evidence of Mr Wright, the Claimant of course changed tack and brought in the accusations to which we have referred. But he did not advance them in a hostile or aggressive way. The Tribunal repeats that its impression was that he was clutching at straws. He should not have continued to advance those accusations without any evidence at all to support them. They in fact had no prospect of success. In that sense he behaved unreasonably. However in the scheme of things the impact that had upon the costs of the hearing are de minimis.

22. What it means is that although in that very small element of the claim the Respondent does show that the Claimant behaved unreasonably, we exercise our discretion to not award costs on the basis that it is de minimis. The late allegations took up very little time before the Tribunal.

23. In those circumstances the application for costs is dismissed.

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Employment Judge Britton

Date: 31 January 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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