EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE FRANCES SPENCER**

MEMBERS: **MS M FOSTER NORMAN**
MS H BHARADIA

BETWEEN: **Mr B COLE** **CLAIMANT**

AND

SEVENOAKS DISTRICT COUNCIL (1) **RESPONDENTS**
DARTFORD BOROUGH COUNCIL (2)

ON: **6th June 2019 and (in chambers) 31st January 2020.**[1]

Appearances
For the Claimant: In person
For the Respondents: Mr C Rajgopaul, counsel

RESERVED COSTS JUDGMENT

The unanimous Judgment of the Tribunal is that the Claimant is ordered to pay the Respondents £20,000 towards the costs incurred by them in the conduct of these proceedings.

[1] The tribunal apologises for the length of time it has taken to send this Judgment. One of the members was unavoidably unable to attend the planned in chambers on 25th June 2019 and since then there has been considerable difficulty in finding a suitable alternative date.

REASONS

1. This was a hearing to consider the application for costs made by the Respondents following the judgment of this Tribunal sent to the parties on 28th June 2018 in which the Claimant's claims of disability discrimination, direct race discrimination, harassment related to disability, victimisation and unfair dismissal were dismissed.

2. Following the Judgment, the Claimant applied for a reconsideration of the Judgment. This was refused on 7th September 2018. The Claimant was simply seeking to re-argue a case that had already been heard. A subsequent request to reconsider the refusal to reconsider the judgment was also refused. Appeals to the EAT against (a) the Judgment and (b) the refusal to reconsider the judgment were dismissed on the sift.

3. The Tribunal had a detailed written application from the Respondents, which was supplemented by relevant documentation. The Claimant submitted extensive written submissions after business hours on the evening before the hearing. Those ran to 60 pages of submissions and 115 pages of documents.

4. Both parties made further submissions orally on 6TH June 2020 and the Claimant gave evidence as to his means.

The Law

5. Rule 76(1) of the Employment Tribunal Rules of Procedure provides (so far as relevant) that:

   "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 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; or…"

6. If the Tribunal considers that the circumstances set out in rule 76(1) apply, then it may (but does not have to) make a costs order against that party if it considers it is appropriate to do so.

7. If a Tribunal decides to make a costs order then Rule 78 of the ET Rules of Procedure provides that the Tribunal may either (a) specify a sum (not exceeding £20,000) which the paying party must pay to the receiving party or (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party to be assessed either by the Employment Tribunal or by the County Court in accordance with the civil procedure rules 1998

8. Rule 84 ETR 2013 provides that "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".

9. This wording indicates that a Tribunal is not obliged to take account of the paying party's means; though if it decides not to do so, the reasons for this decision should be explained: *Jilley v Birmingham & Solihull Mental Health NHS Trust* EAT 0584/06.

10. It is well known that in the Employment Tribunal costs do not routinely follow the event. This is ordinarily a cost-free jurisdiction and something special or exceptional is required before a costs order will be made, in whole or in part.

<u>The basis of the application for costs and the Claimant's reply</u>

11. The Respondents make this application on the grounds that:

    a. The Claimant acted unreasonably in bringing the proceedings /the way that the proceedings were conducted; and

    b. The claims had no reasonable prospect of success.

12. They have asked the Tribunal to make an order under Rule 78(1)(a) that the Claimant pay £20,000 towards their legal costs in defending the proceedings. They do not seek full taxed costs under Rule 78(1)(b), in order to avoid further costs. We accept that the total costs of dealing with this litigation since the first claim was issued in 2016 is £126,406.80.

13. The Respondents sent a "without prejudice save as to costs" letter to the Claimant on 3rd April 2018 following the exchange of witness statements with a "drop hands offer," stating that should the Clamant withdraw they would not pursue an application for costs. The letter explained the legal tests and set out the weaknesses in the Claimant's case, including a lack of evidence to support his case. The Claimant rejected that offer.

14. The Claimant has submitted that the Respondents were only able to secure a favourable judgment because they successfully misled the Tribunal. He says that the Tribunal did not take account of material evidence available during the trial. He took us to two documents in the bundle (484 and 502.1). He also said that significant documents were deliberately and wrongfully withheld by the Respondents. He took the Tribunal to some documents that he got "from the website last week".

<u>Conclusions</u>

15. <u>No reasonable prospect of success</u>. As will be apparent from the Tribunal's judgment after the full merits hearing, the Tribunal found that the evidence did not support the Claimant's case. We found no unreasonableness on the part of the Respondents.

16. On the contrary we found that the Respondents had acted fairly and reasonably throughout. We found that there was no material before us from which we could

infer less favourable treatment on a proscribed ground. Many of the Claimant's assertions were not made out on the facts. Other complaints related to normal management decisions, well within the Respondents' reasonable prerogative and which did not amount to any form of detrimental treatment. Where there were conflicts of evidence, we preferred the evidence of the Respondents' witnesses which was supported by the documentation in the bundle. We were not impressed, during the hearing, with the Claimant's evidence and noted that the Claimant's unjustified sense of grievance against his team and his managers had led him to be somewhat careless with the truth.

17. In respect of the Claimant's arguments that we had not taken into account documents available to us, we had looked at and taken into account the documents at 484 and 502.1, which in any event were of marginal relevance to the core issues (and related to the appointment of the principal auditor in 2015).

18. We do not accept that the Respondents have withheld material relevant documents. The Claimant had complained about non-disclosure before the hearing, and his application for specific disclosure was heard, and refused, by EJ Kurrein at a Preliminary Hearing on 19th March 2018. This was also the basis of the Claimant's earlier application for reconsideration which we rejected on the same basis. In respect of the documents provided today which he had printed from the website the Claimant accepted that many of these had been available before the hearing, and in any event the Tribunal was unable to understand the relevance or how they would have changed any part of the outcome.

19. In short, the Claimant's case had no reasonable prospect of success. The outcome was not affected by missing or withheld documents. The Claimant was a senior manager who had been dismissed. We accept that he genuinely felt aggrieved by his treatment and that, at the time of his dismissal, he genuinely believed that there was one great conspiracy against him. However, that was not a reasonable belief. In any event, it should have been clear by 3rd April 2018, when the "drop hands" offer was made, and after disclosure and exchange of witness statements, that the evidence did not support his claims.

20. Conduct of the litigation. The Respondents also submit that the Claimant's conduct of the litigation was unreasonable. They submit that in the run-up to the hearing the Claimant took an unreasonable approach to the issue of disclosure and bundles. The Claimant does not accept this and says, and still says, that the Respondents have withheld documents, and this is why he lost his case.

21. The Respondents also submit that the Claimant's conduct was unreasonable in that, as late as February 2018, he sought to substantially amend the list of issues which had been agreed for some time, and that application was refused.

22. This tribunal was not involved in discussions about disclosure, but documents attached to the Respondents' application, do indicate that the Claimant's approach was neither reasonable nor proportionate. For example, on 22

January 2018 (less than 2 months before the date of the hearing) the Claimant asked the Respondents to carry out searches for 45 different categories of documents. (His subsequent application for specific disclosure and the application to amend were dealt with by EJ Kurrein in March, less than a month before the hearing.)

23. The Claimant also sent frequent and very lengthy letters accusing all those professionally involved on behalf of the Respondents of lying, concealing evidence and obstructing justice. He has done so without any proper basis for these assertions.

24. We have concluded that Claimant's approach to disclosure, his lengthy often unfocused and accusatory correspondence, was unreasonable conduct of the proceedings. (Although the late application for amendment caused additional expense, we have not placed any weight on this alone.) We acknowledge that the Claimant is a litigant in person, but litigants in person must still have regard to the overriding objective and consider whether demands made of the other side are objectively reasonable.

25. We therefore conclude that both threshold tests in Rule 76 are met. Rule 76 involves the application of a two-stage test requiring the Tribunal first to enquire whether the prospects of the claim or the conduct in question fall within the terms of the rule and, if so, whether it is appropriate for the Tribunal to exercise its discretion in favour of awarding costs.

26. As regards unreasonable conduct, in determining whether to make an order, the Tribunal should take into account "the nature, gravity and effect" of the party's unreasonable conduct see *McPherson v BNP Paribas (London Branch)* [2004] ICR 1398.

27. The party seeking a costs order does not need to establish a direct causal link between the unreasonable conduct and the costs in question; the Tribunal has a broad discretion in this respect: In *Sud v Ealing London Borough Council* [2013] ICR D39, the Court of Appeal emphasised that the process did not entail a minute assessment in terms of causation, rather that the Tribunal should adopt a broad brush approach against the background of the relevant circumstances. In any event in this case we are also satisfied that the claim itself had no reasonable prospect of success, and the order sought is for a limited amount.

28. In considering whether or not to make a costs order we note that this was lengthy and expensive litigation, lasting over 11 days with an additional 4 days in chambers. Despite the Claimant's arguments about disclosure the most relevant documents were available to him before he issued the claim. We refer in particular to the Dignity at Work process (including the appendices) and the material available to him during the disciplinary process. We found in our Judgment that his dismissal was inevitable, (although of course dismissal was not the only issue). The Claimant was warned about the risk of costs at a late stage. The Respondents are public bodies and seek only a fraction of their

costs. The Claimant has unreasonably persisted in a hopeless case, and we conclude that this limited costs order is appropriate.

29. In respect of means the Claimant has lost his job, but is in receipt of a pension. His wife works. He has a house with a mortgage, to which he and his wife contribute. The mortgage has 2 years left to run and the Claimant has a significant equity interest in the house. Although the Claimant is not as well off as he was, his means are not so insignificant that we should not award costs.

Employment Judge Spencer
31st January 2020