



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Kelly

**Second Respondent:** South West London & St George's Mental Health NHS Trust

## JUDGMENT

The application for costs is successful. The claimant is ordered to pay the sum of £1,140 to the second respondent.

## REASONS

1. At the preliminary hearing on 29/11/2019 R2 made an application for costs. It subsequently submitted a costs schedule on 6/12/2019. The file was not referred to the Employment Judge until 4/3/2020.
2. At the hearing, evidence regarding the claimant's means was heard. R2 also confirmed that no without prejudice subject to costs correspondence had been sent to the claimant. It was R2's case that it was implicit in sending the strike out application and that should have triggered reflection on the part of the claimant as to the merits of his claim. There was also a reference to the fact the claimant's representative had candidly admitted the lack of prospects of success and the late withdrawal of the bulk of the claimant's claim. Notwithstanding the concessions the claimant had made and even in the absence of an express costs warning letter, R2 said there has been notice to the claimant.
3. The difficulty with that is, in the absence of any express costs warning, how was the claimant to know R2 intended to make a costs application? It does not necessarily follow that if R2's strike out application was successful that it would follow that up with a costs application.
4. It is correct to say that there is no requirement that a costs warning be made, but in view of the general principal in the Employment Tribunal that costs are the exception rather than the rule; if a party intends to make a costs application, it is sensible to put the other party on notice of that. The costs warning should set out why the costs order application will be made

and more importantly, tell the other party why the underlying application will be successful (in this case the strike out application), the amount of costs which will be sought and explain to the other party the consequences of continuing.

5. It is also sensible to serve at least a costs schedule upon the proposed paying party in advance of the hearing as if there is time, then all matters can be dealt with at the hearing.
6. The Tribunal considers that the claimant's claims against R2 had no reasonable prospects of success and hence the threshold is met in respect that the Tribunal shall consider whether to make a costs award. That does not necessarily mean that a costs award will be made. The Tribunal then still has to consider whether exercise its discretion and to go on to make a costs order.
7. It is relevant that the claimant had legal advice at the outset of his claim. He was represented prior to and at the hearing. A review of the claimant's claims would have shown that the claims against R2 had no reasonable prospects of success and they should have been withdrawn in advance of the hearing, with the result that R2 would not have needed to be represented at the hearing.
8. The Tribunal is minded to make a costs award in favour of R2 and is prepared to allow the cost of Counsel's brief fee in respect of his attendance at the hearing on 29/11/2019 of £950 + vat. The claimant is directed therefore to pay to R2 the sum of £1,140 inclusive of vat.

Employment Judge Wright

Date: 5/3/2020