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EMPLOYMENT TRIBUNALS

Claimant: Mr M Waithe
Respondent: Barts Health NHS Trust
Heard at: East London Hearing Centre
Before: Employment Judge Tobin

JUDGMENT

The judgment of the Tribunal is that:-

Having considered the Respondents application dated 16 April 2019 and the Claimants response dated 8 July 2019, the Respondents application to a cost order pursuant to rule 76 of the Employment Tribunal Rules of Procedure (Schedule 1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 succeeds. The Claimant is ordered to pay the Respondents costs in the sum of £3,087.64.

REASONS

1 The Employment Tribunal dismissed all of the Claimants claims, save as a claim in respect of contractual sick pay by an order promulgated on 5 September 2018. The Tribunal made a very clear determination that the Claimant was not an employee of the Respondent.

2 The Claimant solicitors ceased to act for the Claimant on 8 October 2018. On the 16 October 2018, the Respondent asked for this case to be listed for a hearing to resolve the outstanding contractual sick pay as parties had been unable to resolve this issue. On 3 January, the Claimant sought clarification whether the Respondent was prepared to reinstate a previous settlement offer. The Respondent answered this enquiry promptly. on 7 January 2019, stating that the previous offer to settle was no longer available and following the preliminary hearing determination it set out its reasons why it contended that the Claimants outstanding claim had no reasonable prospects of success. The Claimant was invited to withdraw his complaint and if he did not do so within seven days, the Respondent said it will make a costs application on the basis that the Claimants case had no reasonable prospect of success and he continued to say that this claim was unreasonable. The Respondent solicitor wrote to the Claimant on 18 January 2019 and 13 February 2019 to ascertain whether he was still pursuing his claim. The Claimant responded on 13 February 2019 "I don't know. Stop harassing me".

3 The hearing was due to take place on 29 March 2019 and the Respondent solicitor wrote to the Claimant later on 13 February 2019 stating that unless he hears from the Claimant to the contrary by 15 February 2019, he will assume that the Claimant wishes to continue with his claim and he would make preparation for the hearing.

4 The Claimant wrote to the Tribunal two days before the hearing asking for information about the process of withdrawing from the proceedings and he confirmed that he no longer wanted to proceed with his case the day before the scheduled hearing. This late withdrawal gave rise to an application for costs from the Respondent.

5 For the reasons stated in the Respondents solicitors letter of 7 January 2019 and also set out in the Respondents letter of 16 April 2019, the Claimants case does not have

reasonable prospects of success. It is the Employment Tribunals determination that it is clearly obvious that the Claimant had no contractual entitlement to occupational sick pay on the basis of his contract of employment or on the basis of the sick pay provisions under the NHS Agenda for Change given the circumstances.

6 In any event, the Claimant did not provide a sick note (certifying that he was unfit for work) so it was extra obvious that he could not qualify for such payments.

7 The Claimant ought to have known that his outstanding claim did not have reasonable prospects of success following the determination made at the preliminary hearing. I ascertain that it would be reasonable for the Claimant to confer with his solicitors for two weeks after the decision was promulgated before deciding to withdraw the complaint. In any event, the Claimant should have withdrawn proceedings prior to his solicitors coming off the record. Nevertheless, the Claimant pursued his claim. I can only conclude that he pursued this claim in an effort to drive his opponent's bill as there is no other proper reason why he would not accept the Respondent's solicitor invitation to withdraw. I have checked the Respondent's solicitor's correspondence and this is not harassing. I am aware that the Respondent is a public-sector body and that the Respondents have incurred considerable costs in defending this claim.

8 The Claimant says that he brought this claim in good faith. His continuation of this claim passed promulgation of the Preliminary Hearing was not in good faith.

9 Other than stating that it has cost the Claimant £11,000 to pursue this claim, the Claimant does not provide any submissions about his financial means despite being given the opportunity to do so.

10 I have scrutinised carefully the Respondents' schedule of costs and the time

claimed in respect of work in this case and the instructions of Counsel appears reasonable save as for the surprising large number of fee earners engaged by the Respondent. Most of the work had been undertaken by the Respondent solicitor with some work undertaken by a trainee solicitor and a paralegal. I have discounted the claims in respect of the senior solicitor, two associates and the legal director. This was a fairly modest claim and irrespective of whether such senior staff assisted in the preparation, it is not reasonable to pass these costs unto the Respondent therefore I deduct £284.60 (excluding VAT) from the Respondents schedule of cost. This then leaves a figure of £2,810.20 which is reasonable in respect of the period from the end of September 2018 until the Claimants withdrawal. The figure I arrive at when I include that at £284.60 is £2,525.60 and I award this sum.

Employment Judge Tobin
18/10/2019