



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Warburton

v

Hertfordshire Constabulary

Heard at: Watford via CVP

On: 21 May 2021

Before: Employment Judge Bartlett, Mrs Brosnan and Mrs Bhatt

Decided on the papers

JUDGMENT

1. The claimant is ordered to pay the respondent costs in the amount of £12,000.

REASONS

Background

1. A substantive hearing took place between 1 and 5 February 2021. In a decision promulgated on 21 February 2021 all the claimant's claims were dismissed. The claimant had alleged that he suffered disability discrimination and harassment arising from the rejection of his application to become a police constable in the respondent's force.
2. Prior to the substantive hearing a number of preliminary hearings took place on 12 September 2018, 15 January 2020 and 19 June 2020.
3. On 25 March 2021 the respondent made an application for costs.
4. On 30 April 2021 the claimant made written submissions in response to the respondent's application for costs.
5. The respondent stated that it was happy for the application to be considered on the papers and the claimant did not object to this.
6. In the circumstances the tribunal considered that it was in the interests of overriding objective to determine the application on the papers.

The Tribunal Rules relating to costs

7. The Employment Tribunal's Rules of Procedure 2013 as subsequently amended up to 8 October 2020 at rules 74 to 78 set out the principles and processes that must be applied in relation to costs orders.
8. Paragraph 77 sets out "A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgement finally determine the proceedings in respect of that party were sent to the parties."
9. Paragraph 76 sets out:

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

76.—(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; or

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

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

Decision

10. We find that the claimant acted unreasonably in pursuing the claims for disability discrimination for the following reason:

10.1 The claimant's case placed reliance on comments he had made to Dr Juncker who was a doctor in the respondent's Occupational Health Department. The claimant attended a meeting with Dr Juncker as part of the respondent's recruitment process for the role of police constable. However he did not agree for this report to be disclosed to the respondent and he did not disclose it in the course of proceedings. The claimant's reasons for not disclosing this report were that he did not trust the respondent with the personal and confidential information it contained in light of the respondent's previous actions towards the claimant. This is not a reason for the document not to have been disclosed under the usual disclosure rules. We are unclear why this document was not disclosed, given the claimant's case and evidence, and it would appear to be a disclosable document. The failure to disclose the document was unreasonable conduct: not only was it disclosable but it was also relevant to the claimant's assertion that the respondent had actual or constructive

knowledge of the claimant's disability. The disclosure of this document could potentially have substantially shortened the hearing length.

11. Further, we find that the claimant had no reasonable prospects of success of establishing that the respondent had knowledge (actual or constructive) of his disability for the following reasons:

11.1 His case placed very significant weight on an unreasoned comment by a junior HR employee who had had limited but challenging interactions with him. By the time of the hearing he also placed very significant weight on the tone and content of his communications from which it was alleged that the respondent should infer he had a disability. However, in his witness statement the claimant stated "I do not accept that, during the life of my application, that I was ever rude to Ms Saunders or any of the respondent's other staff." Prior to his oral evidence very little emphasis was placed on the tone and content of the communications at all. We found that there could be many other explanations for the tone and content (particularly given the context of a recruitment process with very limited face-to-face interactions) and this would have been evident to the claimant as a qualified legal professional; and

11.2 His own evidence was that he did not recognise that he suffered from a diagnosable condition until after the events in question. He only received a diagnosis of depression and anxiety in August 2017 which was after his interactions (relevant to this claim) with the respondent ceased.

11.3 All of the above must be considered in the context that he had a meeting with Dr Juncker of the respondent's Occupational Health Department and the respondent was not informed that there were any concerns about the claimant's mental or physical health after the meeting. This was a formal step in the recruitment process of Police Constables and was part of the process used to identify mental or physical issues experienced by recruits. As was the health questionnaire which all prospective recruits were required to complete and the claimant completed without identifying any possible disability. We find that there was no prospect of success of the argument that the respondent should not have relied on its recruitment process which had processes in place such as the health questionnaire and a meeting with occupational health and instead be alerted by informal comments from a junior HR employee and the tone and content of emails which very plausibly had other reasonable explanations; and

11.4 when all the circumstances of the case are taken together the disability claims had no reasonable prospect of success.

12. We have decided that there is limited relevance of the deposit order made at the preliminary hearing on 12 September 2018. This is because the deposit order was made in respect of the causative link between the disability and the alleged discriminatory behaviour. As the tribunal decided that the respondent

did not have knowledge of the claimant's disability there could be no causative connection.

13. We recognise that costs awards are exceptional in the Employment Tribunal and that we have a discretion to award costs.. In all the circumstances of the case we have decided to exercise that discretion.
14. We recognise that the claimant has limited financial means but he is currently in work and receiving income. This maybe at a lower level than he earnt some years ago however it is employment income. We note that he alludes to potential difficulties in the future however circumstances in the future are unknown to all.
15. It was the respondent's choice to instruct a QC for management and representation of the case however we consider that it was unnecessary given the issues in this case. We do not consider that it is fair or reasonable for the claimant to meet all of these costs and we consider the costs incurred, particularly in relation to preliminary hearings, briefing of new counsel and the final brief fee, to be unwarranted in the circumstances.
16. In conclusion we have decided to make a costs order in the amount of £12,000.

Employment Judge Bartlett

Date: 24 May 2021

Sent to the parties on: 25 May 21

For the Tribunal Office