Case Number: 3334097/2018

MK

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	Respondents
Mr A Adams	1 Kettering General Hospital NHS Trust
	2 Northern Lincolnshire and Goole Hospitals NHS Foundation Trust
and	
	3 Lincoln County Hospital

JUDGMENT ON COSTS

Held by CVP on 22 October 2021

Representation	Claimant:	Mr L Varnam, Counsel
	Respondents:	Mr J Gidney, Counsel

Employment Judge Kurrein

JUDGMENT

The Respondents' applications for costs are dismissed.

REASONS

Background

1 This judgement and the reasons for it must be read in conjunction with all earlier orders and the judgement I gave following the open preliminary hearing ("OPH") and sent to the parties in April 2020.

2 On 11 May 2020 the Respondents made applications for costs in very similar terms. They all contended that the Claimant had:-

2.1 acted vexatiously, disruptively or otherwise unreasonably in the bringing or conducting of the proceedings; and

2.2 his claims had no reasonable prospects of success.

in breach of Rule 76(1) Employment Tribunal Rules of Procedure 2013.

The Evidence

3 I heard the evidence of the Claimant on his own behalf. I considered the documents in a bundle of over 400 pages and heard the parties' submissions. I make the following further findings of fact.

Findings of Fact

4 The Claimant having learned that members of Matrix Chambers dealt with cases similar to those he wished to consider bringing telephoned them and was advised to consult solicitors. He instructed Bindman & Co, a longstanding well known specialist in equality and human rights law.

5 The Claimant clearly instructed them on the nature of his case and received a client care letter. His grounds of claim were presented on 10 October 2018 and were set out in 39 detailed paragraphs over 7 pages.

6 The Claimant's solicitors instructed experienced specialist Counsel who gave an advice on the merits on 20 November 2018. In summary, she said,

> My opinion on the basis of the evidence before me is that there are reasonable prospects of success for a claim of post termination victimisation in the region of 55%. I advise that a further review of the merits takes place upon receipt of defence, disclosure of documents and exchange of witness statements and that settlement in advance of a full hearing is seriously explored.

7 The Respondents' presented detailed responses in early January 2019.

8 The Claimant's solicitors again instructed Counsel to give an advice on the merits, which she provided on 23 January 2019, in which she said,

> In my opinion this remains a difficult borderline case, in the region of 51- 55%. I advise that this matter is reviewed following any preliminary hearing on time (if it occurs) and at disclosure of documents. A conference with the Claimant would also be of great assistance in particular due to the nature of the attacking defence that is likely to be advanced in this matter by the three Respondents.

9 Following a Preliminary Hearing on 11 April 2019 the Claimant provided Further and Better Particulars on 18 May 2019 and the Respondents presented Amended Responses as a result.

10 On 12 September 2019 the Respondents made their application for the claims to be struck out, which I upheld at the Open Preliminary Hearing. Those applications included costs warnings.

11 On 7 November 2019 the Respondents set out, over 8 pages of an email to the Claimant's solicitors, their detailed case on why the Claimant's claims should be struck out. It dealt with each of the allegations raised by the Claimant and identified at the PH at length and in detail. I accept that the reasoning in that email was prescient: the findings I made are very similar in many respects.

12 On 16 December 2019 the Claimant attended a conference with Counsel. I have to assume that the email of the 7 November formed part of her instructions. No formal written advice followed that conference, I have only had sight of a note of what took place. I have not traced a reference to that email in that note. At that time no bundle had been agreed for the OPH. Counsel clearly took the view that the Claimant's case was such that the

principles in cases such as Anyanwu v South Bank Student Union [2001] UKHL 14, [2001] ICR 391 and Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330, [2007] ICR 1126 would be applied by the Judge at the OPH and the case would proceed to a full hearing.

13 I accepted that in the course of preparation for the OPH there were arguments about disclosure and the relevance of documents.

14 On 7 April 2020, after the hearing but before Judgment was given, the Claimant made an offer to settle in the sum of £198,000 in which the pressures on the NHS, at the time of the COVID-19 pandemic, were referred to.

Grounds of Application

15 The Respondents relied on the following grounds:-

Ground 1: The Claimant knew or ought reasonably to have known that his claims had no reasonable prospect of success, but continued with his claim in circumstances that amounted to unreasonable conduct in the litigation, following receipt of a well- reasoned costs warning email sent to him on 7th November 2019 [246-254] that the Claimant and/or his legal team elected to ignore;

3.2 Ground 2: The Claimant's approach to discovery and disclosure of documents amounted to disruptive and unreasonable conduct of the litigation;

3.3 Ground 3: The Claimant unreasonably singled out and made serious allegations against individual clinicians with potentially far reaching consequences for their professional status and reputations, based on speculation and assumption only and no real evidence;

3.4 Ground 4: On 7th April 2020 (within days of the first coronavirus national lockdown and one week before all of his claims were struck out by the Tribunal) the Claimant made a wholly unrealistic offer that he would accept a settlement payment of £198,000.00 to end the litigation, praying in aid of the 'current climate and the pressures being faced by hospitals and health and care professionals' and the 'savings in relation to both time and costs' [372]. Thus it appeared that the Claimant was seeking to profiteer from national pandemic by offering the Trusts the chance to focus on saving the lives of the national instead of defending his, what he knew or ought to have known to be, misconceived claims.

The parties submissions

16 It is neither necessary nor proportionate to set these out.

The Law

17 I was referred to and considered the Employment Tribunal Rules of Procedure 2013 and the following authorities.

McPherson v BNP Paribas [2004] IRLR 558

Barnsley MBC v Yerrakalva [2011] EWCA Civ 1255

Raggett v John Lewis plc [2012] IRLR 906, EAT

E T Marler Ltd v Robinson [1974] ICR 72

A-G v Barker [2000] 1 FLR 759

Peat & Others v Birmingham City Council [2011] UKEAT/0503/11

Roldan v Royal Salford NHS Foundation Trust [2010] IRLR 721

Radia v Jeffries international Ltd [2020] IRLR 431

Further findings and Conclusions

Ground 1

18 The Claimant sought and heeded the advice of solicitors and Counsel who were experienced specialists in the relevant area of law. In my view even a 50% chance of success is a far higher probability than 'no reasonable prospect', and that was the lowest figure of which he was advised.

19 I find as a fact that the Claimant did not know that his claims had no reasonable prospect of success at any stage in the proceedings.

20 I accept that the costs warning of 7 November was well reasoned and detailed. The Respondents have not identified the time it took the relevant fee earner to draft that letter, but I suspect it to have been many hours. I also accept that the conclusions it reached were similar to those I reached in my Judgment.

21 However, I only reached my Judgment after hearing evidence and considering very substantial indexed and cross-referenced documentation and submissions over two days, and further consideration in Chambers over another three days.

22 However, I have to consider the position of the Claimant as it was known to him at the time, i.e prospectively, not in hindsight.

23 The Respondents, individually and collectively, have far deeper pockets than the Claimant, and were far better placed to afford and carry out such a lengthy and detailed analysis.

24 I accept the Claimant was insured, but it is clear that the extent to which he would be indemnified was in dispute at the time of the conference. The cost to him of his solicitors and Counsel analysing all the points made in the costs warning letter so as to assess them would have probably exceeded the cost of proceeding to the hearing.

25 I also accept the Claimant's Counsel's position, that it was lunlikely that the claims would be struck out at the OPH, to be reasonable: some EJs would have been persuaded that Anyawu and Eszias should be applied.

26 I therefore find that there were no grounds on which the Claimant ought reasonably to have known, at any stage, that his claims had no reasonable prospect of success.

27 In light of all the matters put before me the Respondents have failed to persuade me on the balance of probabilities that the Claimant's conduct of the litigation was unreasonable.

Ground 2

28 I thought this allegation to be at least as applicable to the Respondents conduct: they alleged the Claimant had disclosed many irrelevant

documents, and sought an explanation of their relevance, without identifying the documents they alleged to be irrelevant.

29 This was not unreasonable conduct on the part of the Claimant.

Ground 3

30 I did not accept that the Claimant's identification of specific clinicians to be unreasonable. Had he not done so the Respondents would, quite reasonably, have sought particulars of their identities.

Ground 4

31 I did not accept that this was unreasonable conduct of the litigation: parties to litigation are entitled to seek advantage from another parties' circumstances in their negotiations.

32 In any event, this was after the hearing and had no causal connection whatsoever with the costs now sought by the Respondents.

Conclusions

33 I have therefore concluded that the Respondents have failed to establish that the costs threshold has been crossed.

34 In any event, even had I been of the view that at some point after receipt of the costs warning the Claimant might have been alerted to the flaws in his claims, this is not a case in which I would have exercised my discretion to award costs. My reasons are as follows:-

34.1 The costs warning came very late in the day, over a year after the proceedings were instituted.

34.2 It was made only shortly before a hearing requested by the Respondents to deal with the issue set out in the costs warning.

34.3 It was not unreasonable for the Claimant to expend his resources on contesting the hearing, rather than analysing the costs warning.

34.4 The summary OPH procedure is designed to weed out those rare cases

which have no reasonable prospect of success. The Respondents invoked it successfully. Another EJ may not have acceded to their

35 In all the circumstances of the case the Respondents' applications are not well founded and must be dismissed.

Employment Judge Kurrein

11/11/2021

Sent to the parties and
Entered in the Register on

19/11/2021

N Gotecha : :

……..

For the Tribunal