EMPLOYMENT TRIBUNALS

Claimant: Mr V Udoye

First Respondent: Lead Employer Trust (Northumbria Healthcare NHS Foundation Trust)

Second Respondent: Ms L Richards

BEFORE: Employment Judge Aspden
Ms S Mee
Ms D Winship

JUDGMENT ON COSTS

The Tribunal's unanimous decision is that the respondents' applications for a costs order against the claimant and a wasted costs order against Mr Echendu, the claimant's representative, are dismissed.

REASONS

1. Following the final hearing of this matter in November 2021 the respondents made the following applications:
    a. An application asking the Tribunal to make a costs order against the claimant under rules 75 and 76 of the Employment Tribunals Rules of Procedure 2013.
    b. An application asking the Tribunal to make a wasted costs order against Mr Echendu, the claimant's representative, under rules 75 and 80 of the Employment Tribunals Rules of Procedure.

2. The respondents' applications were made by email of 29 November 2021. Mr Echendu's written submissions on the application were invited and he responded on 8 December 2021. The respondents' representatives responded to Mr Echendu's submissions by email of 13 December 2021. EJ Aspden then asked the respondents' representative to clarify an element of their application (discussed further below) and Mr Echendu was directed that if he wished to make any further submissions before the application was considered he must do so by 4 February

2022. That deadline was extended at Mr Echendu's request as he had asked fro written reasons of the judgment and wished to see those before responding fully to the costs application. Mr Echendu subsequently filed further submissions. In the meantime, the wasted costs application had been sent directly to the claimant in accordance with the Employment Tribunal Rules. He instructed new representatives. They sent further submissions on 31 March 2022 addressing Mr Udoye's financial means.

3. The Tribunal panel met on the first available opportunity, 10 June 2022, to determine the applications in chambers.

The application for a wasted costs order against Mr Echendu

4. Rule 80 deals with orders for wasted costs against a party's representative. 'Representative' is defined at rule 80(2) as being a party's 'legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit.' There is no suggestion in this case that Mr Echendu was not acting in pursuit of profit.

5. Rule 80 provides as follows:

> *80(1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs—*
>
> *(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or*
>
> *(b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.*

6. The questions to be asked by the Tribunal are those set out in Ridehalgh v Horsefield and another [1994] Ch 205, CA ie:

a. Did the representative act improperly, unreasonably or negligently?

b. If so, did that conduct result in the party incurring unnecessary costs?

c. If so, is it just to order the representative to compensate the party for the whole or part of those costs?

7. In their application, the respondents contend that:

> *'the Claimant's representative acted unreasonably in his use of obscene language; language that was designed to harass the Respondents and/or the Respondents' representative in a vexatious manner, rather than progress the case.'*

8. Given that the application was based on Mr Echendu's 'language', on an initial reading of the application, EJ Aspden understood the application for a wasted costs order to be based solely on language used by Mr Echendu in his response to a

deposit order application. The conduct was described by the respondents' representatives in their application as follows:

> *'During proceedings, the Respondents' representative made a legitimate application for a deposit order on 28 May 2020. In response to this application, the Claimant's representative wrote to the Tribunal on 1 June 2020 and used obscene language, directed at the Respondents' representative, stating that the application was '9 f***ing days out of time'.'*

9. The respondents submit that this behaviour was intended to intimidate the respondents' representative, demonstrated disrespect to both Tribunal and the respondents' representative, and was 'wholly unprofessional… entirely inappropriate, disruptive and abusive.'

10. Bearing in mind that a wasted costs order could only be made in respect of that conduct if it had resulted in the respondents incurring unnecessary costs, EJ Aspden directed the respondents to identify what, if any, costs were incurred unnecessarily as a result of that conduct. On 4 February 2022, the respondents' representatives replied 'the Respondents accept that the amount of cost incurred solely due to Mr Echendu's abusive language will be nominal, and that they cannot surmount the causation hurdle with regard to the single incident of abusive language. However, we would kindly request that this is incident is taken into account when considering the costs application as a whole under Rule 76.' On the face of it, it appeared that this might be an acknowledgement that the application for wasted costs under rule 80 against Mr Echendu could not succeed but that the respondents still wished to pursue an application under rule 76 for an Order for costs against Mr Udoye. EJ Aspden, therefore, directed the respondents to say whether or not the application for a wasted costs order was withdrawn. The respondents' representatives replied on 28 March saying that the application for a wasted costs Order was not withdrawn.

11. If the application for wasted costs were based solely on the language used by Mr Echendu in his response to a deposit order application it would inevitably fail. That is because, although Mr Echendu's conduct on that occasion was undoubtedly unreasonable, the respondents' representatives accept that Mr Echendu's conduct on that occasion did not result in the respondents' incurring unnecessary costs.

12. On a fair reading of the respondents' application of 4 December, however, we note there is also a reference to Mr Echendu:

> *'making scathing and unprofessional comments about the Second Respondent at the final hearing, including going as far as to say she was not fit to be undertaking her role as HR Manager, and should indeed be removed from post/sacked.'*

13. On a fair reading of the respondents' application for wasted costs, we consider that the reference to '*language that was designed to harass the Respondents … in a vexatious manner, rather than progress the case'* was probably also intended to refer to the alleged comments made about the second respondent at the final hearing.

14. The Tribunal accepts that, during his closing submissions, Mr Echendu asserted that the second respondent was not fit to undertake her role as HR Manager, and should be dismissed or removed from her post. The respondents' representatives have not, however, identified any costs that were incurred unnecessarily as a result of that conduct and nor is it apparent how any additional costs would have been incurred by such comments. The onus is on the party seeking an order for wasted costs to identify the costs incurred as a result of the conduct relied on. In this case they have not done so and we infer none were incurred. Therefore, an application for wasted costs based on that conduct must fail, even if we were to consider that this conduct met the 'unreasonableness' threshold.

15. Although the respondents' representatives email of 4 December said the application for wasted costs was based on Mr Echendu's language, in their email of 13 December 2021, the respondents' representatives said:

> *'The Claimant's representative is … entirely misguided to suggest that the Respondents application for costs, and wasted costs, is made only on the basis of his use of inappropriate and offensive language.'*

16. In so far as the wasted costs application is concerned (though not the rule 76 application) it was incorrect to describe Mr Echendu's suggestion that the application was based only on his use of inappropriate as 'entirely misguided'. Far from being 'misguided' it was understandable that that is how Mr Echendu interpreted the application against him under rule 80. In their email of 13 December, however, the respondents' representatives said that other alleged inappropriate conduct referred to in the context of the rule 76 application was also relied on in relation to the wasted costs application under rule 80. It would have been better if the respondents' representatives had made this clearer in their original application of 4 December.

17. The other alleged conduct is described in the email of 4 December as follows:

> *'…during all proceedings before the Tribunal, the Claimant's representative has acted in an unnecessarily aggressive and obstructive manner, including finger pointing and talking over the Respondents' witnesses at the final hearing...'*

18. In their email of 13 December the respondents' representatives make that same submission and say that Mr Echendu's inappropriate language in response to the deposit application 'acts to paint a picture demonstrating his poor behaviour throughout.' The respondents' representatives repeated those comments in their email when responding to EJ Aspden's direction to identify the costs incurred by Mr Echendu's alleged unreasonable conduct. In that email they also said: 'The use of abusive language acts to demonstrate Mr Echendu's conduct overall which has been malicious, unprofessional and abusive throughout' and '… management of the Claimant's representative's behaviour, and his conduct overall, has led to wasted time and cost.'

19. Apart from the matters already dealt with above, the only specific instances of alleged unreasonable conduct by Mr Echendu identified by the respondents are 'finger pointing' and 'talking over the respondents' witnesses.'

20. The respondents' representatives do not identify when, at the final hearing, Mr Echendu is alleged to have pointed his finger inappropriately, and why it was inappropriate. The respondents do not say whether this happened on just one occasion, or more than once, and nor do they set out the context of the alleged finger-pointing. Nor is it clear whether this is an allegation that Mr Echendu pointed his finger at a particular individual, and given that this was a video hearing it is not altogether clear how that would be done. The panel do not recall this happening or the respondents' representative raising this as a concern during the hearing. In all the circumstances, we are not persuaded that Mr Echendu engaged in unreasonable conduct by pointing his finger at the final hearing.

21. As for the allegation that Mr Echendu talked over the respondents' witnesses, it is a feature of almost all hearings that, at some point during cross examination, the witness and the person cross-examining them end up speaking over each other. Sometimes that is accidental. On other occasions a representative interrupts a witness intentionally. The respondents' representatives seem to be suggesting that this was a case of the latter. However, interrupting a witness is not in and of itself always unreasonable, still less is it necessarily so unreasonable that it constitutes unreasonable conduct of a kind that meets the threshold for a Tribunal to consider making an award of costs or wasted costs. We do not find that Mr Echendu acted unreasonably by interrupting the respondents' witnesses.

22. That leaves the remaining broad submission that Mr Echendu's conduct throughout the proceedings was 'malicious, unprofessional and abusive' and 'unnecessarily aggressive and obstructive' and that management of his behaviour and 'conduct overall' has led to wasted time and cost. If the respondents are suggesting there was unreasonable conduct by Mr Echendu other than on the specific alleged instances we have addressed above, it is incumbent on them to identify precisely what he is alleged to have done, or failed to do, that was improper. They have not done so.

23. For those reasons, the application for a wasted costs order against Mr Echendu is dismissed.

The application for a costs order against Mr Udoye

24. The respondents submit that an award of costs should be made against Mr Udoye:

a. under rule 76(1)(a), on the grounds of Mr Echendu's unreasonable behaviour; and/or

b. under rule 76(1)(b) on the grounds that the claim had no reasonable prospect of success.

25. Rule 76(1) of the Employment Tribunals Rules of Procedure provides 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 either the bringing of the

proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) A claim had no reasonable prospect of success.

26. It is a basic principle that the purpose of an award of costs is to compensate the party in whose favour the order is made, and not to punish the party ordered to pay the costs. That said, a party seeking costs for unreasonable conduct does not have to show a causal link between specific costs and specific conduct.

Rule 76(1)(b)

27. In respect of rule 76(1)(b), the respondents submit that:

a. The Claimant (and his representative) failed to draw a link between the Claimant's race and the withdrawal of his offer of employment;

b. The Claimant (and his representative) failed to establish a prima facie case of conduct capable of amounting to victimisation; and

c. The Claimant (and his representative) failed to provide evidence to substantiate the Claimant's claims that the Second Respondent was at work and/or on the First Respondent's premises on 2 August 2020.

28. With regard to the point a, the claimant's case was that in deciding to withdraw the offer, the second respondent had been influenced by a stereotypical view of black people lacking integrity and being dishonest. The fact that the claimant may have been relying on being able to undermine the evidence of the second respondent on cross-examination to establish a prima-facie case does not mean the complaints had no reasonable prospect of success. As Judge Tayler said recently in the EAT, 'When discrimination claims succeed it is often because of material that came out in disclosure and because witnesses prove unable to explain their actions convincingly when giving evidence': Mr Parag Bahad v HSBC Bank Plc: [2022] EAT 83.

29. With regard to b, the conduct alleged to amount to victimisation was that referred to in the claims referred to in the written reasons as:

a. Complaints 2: the allegation about the email sent to the claimant on 5 August 2019 asking him for further information.

b. Complaint 3: the withdrawal of the offer of employment.

c. Complaint 4: the referral to the GMC.

30. There was a factual dispute as to whether or not the respondents knew of the claimant's earlier Tribunal claim against HEE. The success of the claimant's case was dependent upon him being able to challenge the respondents' assertions of lack of knowledge on cross examination. That does not mean the complaints had no reasonable prospect of success.

31. Turning to c, this submission appears to relate to the complaint referred to in the written reasons as Complaint 1. There were two limbs to that complaint. The first limb was a complaint that, in a meeting on 2 August 2019, Ms Wymer, an employee of the first respondent, subjected the claimant to unwarranted, intrusive and extensive questions. The second limb was a complaint that the second respondent directed Ms Wymer to ask those questions. In order for those claims to succeed it was not necessary for the claimant to establish that the second respondent was at work and/or on the first respondent's premises on 2 August 2020. Therefore, the fact that the claimant did not have any evidence to prove that was the case is immaterial and does not support the submission that the complaints had no reasonable prospect of success.

32. We reject the submission that the claimant's claims had no reasonable prospect of success.

Rule 76(1)(a)

33. We have addressed the allegations concerning Mr Echendu's conduct above.

34. We have accepted that Mr Echendu behaved unreasonably in the language he used in response to the respondents' deposit application. We have also accepted that Mr Echendu said in his closing submissions that the second respondent was not fit to undertake her role as HR Manager, and should be dismissed or removed from her post. A representative is entitled to make a party's case robustly. In some cases, that may properly involve direct or indirect challenges to the abilities, professionalism, integrity and credibility of a party or witness. We find that Mr Echendu's comments were abrasive and unnecessary. But even if we were to accept that his overblown comments met the threshold of unreasonableness for the purposes of s76, we do not consider it appropriate to make an award of costs, for the reasons that follow.

35. As we have found that the claimant's representative has acted unreasonably in the way that the proceedings have been conducted we must consider whether to make an award of costs.

36. In deciding whether to award costs, a relevant consideration in this case is that the unreasonable conduct (Mr Echendu's language used in response to the deposit application and his comments about the second respondent in closing submissions) was that of the claimant's representative and not that of the claimant himself. Clearly, that does not preclude a costs award, far from it – indeed we are required to consider whether to make an award of costs against the claimant notwithstanding that the conduct was that of the representative and not the claimant. Nevertheless, the fact that the conduct was that of Mr Echendu rather than Mr Udoye is something we consider it is appropriate to take into account. There is no evidence before us that Mr Udoye was aware of Mr Echendu's inappropriate language in response to the deposit application. Nor is there any evidence that Mr Udoye instructed Mr Echendu to make the comments he did about the second respondent in his closing submissions or that Mr Udoye could have reasonably anticipated that Mr Echendu would say such things and ought to have stepped in to prevent him doing so.

37. Furthermore, the respondents have not incurred costs as a result of the unreasonable behaviour that we have found to have occurred. Therefore, there are no additional costs for which to compensate the respondents.

38. In all the circumstances we do not consider it appropriate to make an order under rule 76(1).

39. The respondents' application for a costs order is, therefore, dismissed.

Employment Judge Aspden

14 July 2022