THE EMPLOYMENT TRIBUNAL

Claimant: Mr P Sridhar

Respondents: Kingston Hospital NHS Foundation Trust (1)
Kevin Cheatle (R2)

REASONS
Requested by the Claimant on 19.10.22

1. These are the reasons for the costs judgment, sent to the parties on 12 October 2022, ordering the claimant to pay £20,000 towards the first respondent's costs.

2. On 21 February 2022, the Tribunal sent the parties the liability Judgment and Reasons dismissing all of the claimant's complaints. On 15 March 2022, the first respondent made a written application for costs. This hearing was to consider that application.

3. The application is made under rule 76(1)(a) and (b) of the Employment Tribunal Rules of Procedure 2013. Rule 76 provides that if a party against whom an application for costs is made is considered by the tribunal to have either, in bringing the proceedings or in conducting them, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the claim or response had no reasonable prospect of success, then the tribunal must consider making a costs order against that party.

4. The claimant gave evidence as to his means. We also heard evidence from the respondent's instructing solicitor on billing. We were provided with separate cost bundles from the claimant and the respondent. In addition, both parties provided written closing submissions. All of these have been taken into account.

5. Prior to the hearing, the claimant had made an application for me to recuse myself. However, his counsel confirmed at the start of the hearing that the application was no longer pursued.

6. There was a separate application by the claimant for the matter to be postponed on grounds that he had an outstanding appeal against liability. This was refused as the Tribunal did not consider this sufficient reason for a postponement. It was also pointed out to the claimant that any issues relating to enforcement of any costs award were matters that he could raise in the county court, if necessary.

7. As a starting point, it is important to point out that costs do not follow the event in this jurisdiction and are discretionary. Where they are awarded they are intended to be compensatory, not punitive.

8. There are 3 stages to the task before us: 1) whether the threshold for a costs order has been met 2) whether a costs order should be made and 3) if so, in what amount

Has the threshold for a costs order been met?

9. The application was made on grounds that a) the claimant acted otherwise unreasonably in bringing or conducting the proceedings, or a part of them and b) that the claim had no reasonable prospect of success.

10. In relation to "no reasonable prospects of success" the test is:

    a. whether objectively the claim had no reasonable prospects
    b. whether at the stage the claim had no reasonable prospects, the claimant knew this to be the case
    c. If the claimant did not know, should he have

11. There is an overlap between these so I will address them collectively.

12. In determining these issues, our key focus has been on our Judgment and Reasons. The claimant brought 3 types of claims – direct discrimination, indirect discrimination and harassment. He had the initial burden of showing a prima facie case in respect of them all. Taking them in turn:

Direct discrimination

13. The essence of most, if not all, of the claimant's allegations was that the respondent did not treat him as a consultant and this was because of his race. We found that the respondent did not treat him as a consultant for the simple reason that he was not a consultant. We found that he was not a consultant, not because of race discrimination but because he was not prepared to take the well-established and recognised path to consultancy that every other consultant had taken.

14. In the vast majority of incidents the claimant knew that this was the reason because he had raised these matters through grievances and been told as much. Those reasons were clarified even further in the respondents' witness statements. Indeed much of what the respondent said about its reasons for treating the claimant as it did were accepted by the claimant. For example, Adrian Fawcett, Consultant, was said to be one of the perpetrators of the discrimination. However, at paragraph 87 of our judgment, we state that his explanation for not putting the claimant on the emergency on call rota at consultant level was accepted by the claimant at the time. That explanation had nothing to do with race and the claimant knew, or should have known, that his complaint relating to the on call rota had no reasonable prospects of success.

15. Even though the claimant had identified a number of the respondent's witnesses as perpetrators of the discrimination, he displayed a marked reluctance to put the allegation of discrimination directly to them. For example, Peter Wilson was said to have discriminated against the claimant by not allocating him trainees to supervise. This is dealt with at paragraphs 90-91 of our Judgment. When asked to put the

allegation of race discrimination to the witness, the claimant would not do so. In our view, that was because he did not believe that Peter Wilson had discriminated against him. As indicated in our judgment, Peter Wilson had been supportive of the claimant during his employment and had stayed in touch with him afterwards. We are satisfied that the claimant knew that he had not been discriminated against but if we are wrong about that, we are satisfied that he ought to have known that this was not the case.

16. We find that the direct discrimination complaints had no reasonable prospect of success.

Indirect Claim

17. The claimant contended that he was indirectly discriminated against on grounds of race in not being able to apply for management posts. He relied on a PCP that only consultants could apply for management posts, when it was clear that he knew this not to be the case, for the reasons set out in paragraph 107 of our judgment.

18. The claimant contended that he was indirectly discriminated against because of the requirement to have consultant supervision when operating on children. The claimant had the burden of showing group disadvantage and made no attempt to do so. Also, for the reasons set out at paragraph 111 of our judgment, there was no actual disadvantage to him. It should have been obvious to the claimant that this complaint had no reasonable prospects of success.

19. In relation to the use of private treatment facilities, again there was no attempt to show group disadvantage and, based on our findings at paragraph 115 of the judgment, there was no actual disadvantage.

20. We find that the claimant should have known that these complaints had no reasonable prospect of success.

Harassment

21. Many of the direct discrimination allegations are also pleaded as allegations of harassment and in relation to those, we also find that they had no reasonable prospects of succeeding as harassment claims.

Conclusion on costs threshold

22. We are satisfied objectively, that the claims had no reasonable prospect of success and that the threshold for a costs order has been met.

Should a costs order be made?

23. It was submitted on behalf of the claimant that no order should be made as the respondent did not send the claimant a costs warning letter. It is commonplace for such a letter to be sent though not essential. The purpose of the letter is to alert the recipient party of the weaknesses in their case and to give them an opportunity to end litigation at that point by withdrawing or settling, as the case may be. It also acts as a warning of cost consequences if they do not do so. Where the receiving party is unrepresented, it can act as a prompt for them to seek some professional advice on

their case. For these reasons, such a letter is good practice. The respondent submitted that the earliest such a letter could have been sent in this case was after exchange of statements as it was only at this point that the issues became clear. It was said that to send such a letter then, so close to the hearing, would have been oppressive. We disagree. A costs warning letter can be sent at any point in the proceedings and it is entirely possible to send one in a manner that is not oppressive.

24. Having said all of that, the claimant was seeking over £2 million by way of lost earnings and we consider it unlikely that a costs warning letter would have persuaded him to withdraw such a substantial claim or settle for a moderate sum. Further, given that the respondent's position had already been put to the claimant through the grievance process and rejected by him, we consider it unlikely that a costs warning letter would have deterred him from pursuing his claim.

25. The respondent has incurred considerable costs in defending an unmeritorious claim and we consider it just that a costs order should be made.

What amount should the costs order be for?

26. Rule 84 of the Rules provides that in deciding whether to make a costs order, the Tribunal may (my emphasis) have regard to the paying party's ability to pay.

27. We heard some evidence from the claimant as to his means though all of it was unsupported by any documentary evidence, even though he produced a separate bundle for the hearing. We have taken most of what he told us on face value.

28. The claimant told us that he has a current and savings account with Lloyds bank. He said that he had £1357 in one account and £376 in the other. He also has bank accounts in India and in Portugal but we were not told the balance in these.

29. The claimant has a family property in Bromley, bought in 2003 and owned jointly with his wife, which he values at £1 million. The outstanding mortgage is £550,000 and the monthly mortgage payment is £3245.40, split equally with his wife, who is an NHS consultant earning £100,000 per annum.

30. The claimant also owns a property in Portugal with his wife. It is a holiday rental which, pre-Covid, was let out for up to 40,000 euros per year. The property is valued at 630,000 euros and has an outstanding mortgage of 300,000. The monthly mortgage payment is 1500 Euros, again shared with the claimant's wife.

31. We were not told about any other outgoings.

32. The claimant owns a company – Adithya Enterprises Limited - through which he runs his various income earning activities, including his private clinical work. The claimant is a shareholder, along with his wife, daughter and mother-in-law, all owning an equal 25% share. While employed by the respondent, the claimant undertook private work at a clinic in Harley street. He has continued to do so, working 2 days a week. The claimant contends that the expected annual dividends from the company are £47500 and that his annual earnings after May 2022 will be £12,500. We did not see any company accounts.

33. The claimant's earning figures seem on the low side. The claimant told us that told us that he was in the process of trying to build up his practice. Aside from that, we consider that there is also plenty of locum work available for a doctor of his experience. In our view, there is every reason to believe that the claimant's earning capacity is high.

34. In 2019, the claimant purchased a family Volvo car for £70,000, paid for outright. His wife has a separate car under her employer's leasing scheme. To spend £70,000 on a high-end family car suggests to us a certain level of financial lifestyle enjoyed by the claimant.

35. Based on the limited information provided, we are satisfied that the claimant can meet a costs order.

36. The respondent is seeking costs of £20,000 covering the period 3 November 2021 (date of exchange of statements) to 16 December 2021, the last day of the liability hearing. The costs incurred for this period were £29250. This figure does not include counsel's brief fee of £25,000.

37. We heard evidence from the respondent as to how the costs were made up and we are satisfied that they were reasonably incurred and reasonable in amount.

38. We considered whether to award a sum below the £20,000 sought but given that this was already a fraction of the actual costs incurred, we have decided not to reduce it further.

Judgment

39. The claimant is ordered to pay the respondent £20,000 towards its costs.

Acting Regional Employment Judge Balogun
Date: 15 November 2022