Case Number: 1806735/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Brink	v	MSI Reproductive Choices

Employment Tribunal: Sheffield **On**: 18 January 2023

Before: Employment Judge A James

Representation: None - application determined on the papers

JUDGMENT

(1) The respondent's application for costs (Rule 76 Employment Tribunal Rules of Procedure 2013) does not succeed and is dismissed.

REASONS

The issue

1 The respondent made an application for costs against the claimant, in an email dated 23 November 2022 which was copied to the claimant. The claimant was ordered by the Tribunal to provide a response to that application by Friday 16 December 2022, which he did. The issue before the Tribunal is whether the claimant should be ordered to pay some or all of the respondent's costs, because his conduct of the proceedings was unreasonable; and/or because his claims had no reasonable prospect of success.

The Law

2 The application is made under Rule 76 of the Employment Tribunal Rules of Procedure 2013 ("the 2013 Rules"), which provides, in so far as relevant here:

> *(1) A Tribunal may make a costs order … and shall consider whether to do so, where it considers that—*
>
> > *(a) a party … 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;*
> >
> > *(b) any claim or response had no reasonable prospect of success*

3 Rule 76 requires the Tribunal to adopt a two-stage approach:

> *the tribunal must first consider the threshold question of whether any of the circumstances identified in [what is now Rule 76] applies, and, if so, must then consider separately as a matter of discretion whether to make an award and in what amount."* (Vaughan v London Borough of Lewisham *(No. 2) [2013] IRLR 713* at [5])

4 In deciding whether to make an award at stage two:

> *the Tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of its discretion …*

(although the respondent is not required):

> *to prove that specific unreasonable conduct by the [claimant] caused particular costs to be incurred*". (Kapoor v Barnhill Community High School Governors *(UKEAT/0352/13/RN)*, unreported, 12 December 2013 at #15)

5 Rule 78 provides, in so far as relevant here:

> *(1) A costs order may—*
>
> > *(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;*
> >
> > *(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998 ["the CPR"], or by an Employment Judge applying the same principles…*
>
> *(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000."*

6 The relevant parts of Rule 84 provide:

> *In deciding whether to make a costs … order, and if so in what amount, the Tribunal may have regard to the paying party's … ability to pay*.

Conclusions on the issue

7 Bearing in mind the relevant legal principles, the conclusion of the Tribunal on the issue is set out below.

Alleged unreasonable conduct of the proceedings

8 The Tribunal sets out below the basis set out by the respondent in its written application for costs, together with the tribunal's response to each point.

9 First, the respondent argues that the claimant: *did not inform the Tribunal that medical treatment had been arranged at the time the hearing was due to be heard at the soonest reasonable opportunity, thus denying the Tribunal and the Respondent the opportunity to make alternative arrangements.* The Tribunal

concludes, from the information now available, that the claimant did notify the Tribunal and the respondent that he would not be available for the hearing within a reasonable period of that being clear to him, on Monday 26 September. That was when he was notified that day of a pre-assessment procedure on 27 September, with surgery likely to follow on 28 September.

10 Second, the respondent argues that the claimant: *did not inform the Tribunal that he was out of the country until the day before the hearing itself.* The Tribunal agrees that the claimant did not inform the Tribunal that he was out of the country. The claimant thought he could participate from South Africa, since it was to take place by CVP (video link). As a litigant in person, the claimant would not have been aware of the potential problems of giving evidence from abroad. In the early stages of the pandemic, that was not known by Employment Tribunal Judges to be an issue. It was only at a later stage that it became apparent that there could be diplomatic consequences if evidence was given from a country where that such actions were prohibited. The Notice of Hearing sent in March 2022 did not flag this up as a potential issue. Presidential Guidance was not issued in relation to the issue until the end of April 2022.

11 Third, the respondent argues that the claimant: *did not provide evidence relating to his medical treatment until 3 October 2022, after the hearing had concluded.* Further, that he: *did not provide any information on which the Tribunal could assess whether or not it was reasonable or necessary for him to receive medical treatment at the time the hearing was due to go ahead.* The Tribunal agrees that the claimant did not do so and that is why his claim was struck out on 27 September, the Tribunal Panel having been satisfied, on the basis of the information before it at that stage, that the claimant's actions were intentional and contumelious. Had the claimant provided to the Tribunal on or around 26 and 27 September, the information that he eventually provided on 15 December 2022, the outcome may have been different. Fortunately for the respondent (unfortunately for the claimant), he did not, and that decision therefore stands.

12 Fourth and finally, the respondent argues: *by failing to keep the Tribunal and the Respondent informed of his whereabouts and his conflicting appointments, the Claimant's conduct caused the Respondent to incur costs unnecessarily. The hearing had been initially arranged to take place from 14 to 16 February 2022 but this had been rearranged due to the lack of judicial capacity, and therefore the impact of any further delay as well as the costs and inconvenience to both parties is greater than it might otherwise have been.* The Tribunal notes that the hearing listed between 14 and 16 February 2022 was vacated because there was no panel to hear it at that stage. That would have been inconvenient, frustrating, and have incurred costs, for both parties; but neither party was responsible for that adjournment. Rule 30A requires a party to show exceptional reasons why a hearing should be adjourned, where the application is made less than seven days before the hearing. The claimant failed to demonstrate exceptional circumstances, due to the lack of detail provided to the Tribunal at the time. This lack of detail resulted in his claims being struck out. The Tribunal does not consider that this conduct should, in addition, result in a costs order against the claimant.

13 Taking all of the above into account, the Tribunal concludes that the claimant did, to a limited extent, conduct the proceedings unreasonably, by failing to provide sufficient information about his medical diagnosis when applying to

postpone the hearing. That failure resulted in the decision to strike out his claim. The Tribunal does not consider that, in all of the circumstances set out above, this is therefore an appropriate case in which the discretion to order the claimant to pay the respondent's costs should be exercised.

No Reasonable Prospect of Success

14 The Respondent further argues:

The Claimant's claim concerned 2 distinct allegations of harassment. All of the Claimant's other claims were dismissed by an earlier Tribunal at a hearing on 11 & 12 August 2021, Employment Judge Cox presiding. That Tribunal determined that the Claimant was not an employee, and accordingly his claims of unfair dismissal, for a redundancy payment, and arrears of pay were struck out.

The Claimant's surviving claims of discrimination on the grounds of race were set out at para.13 of the Tribunal's Order dated 16 April 2021. Those claims were:

> *Whether Dr Gazet's remark in May 2019 [alleged to be "you and where your people come from"] constitutes harassment related to race or direct discrimination upon the grounds of race.*
>
> *Whether the decision of the Respondent to terminate the employment on 17 July 2020 was direct discrimination upon the grounds of race.*
>
> *Whether the complaints about Dr Gazet's conduct in May 2019 were presented within the time limit provided for by section 123 of the 2010 Act or whether time should be extended to vest the Tribunal with jurisdiction to consider it.*

The Claimant's ethnicity was Afrikaans. It is the Respondent's case that the comment was not made. Dr Gazet did not know that the Claimant was Afrikaans, or South African, at the time of their conversation. The meeting related to the tone and content of the Claimant's emails to his colleagues which were seen as rude or inappropriate. It was not related to his race. At the time of the Claimant's dismissal, a number of concerns had been raised about the Claimant's conduct and behaviour by colleagues and patients. These had been documented and raised with the Claimant. Again, they were entirely unrelated to his race.

On that basis, the Respondent submits that the Claimant's claims had no reasonable prospect of success. The Claimant could not point to some thing that connected his difference in Protected Characteristic with his difference in treatment and it is highly unlikely he would have been able to establish a prima facie case such that the burden of proof would fall to the Respondent to provide an adequate explanation for its conduct. Even if he could, the Respondent did have such an explanation, and could justify the decision to terminate the contract for entirely non-discriminatory reasons. Even if the Claimant could persuade a Tribunal that the comment had been made, in our submissions it is again highly unlikely that he could establish some thing to connect this to his race. For these reasons, the Respondent seeks an Order requiring the Claimant to pay the whole of their costs since the beginning of the litigation.

15 In relation to the claims relying on employee status, the Tribunal notes from the Judgment of Employment Judge Cox dated 18 August 2021 that:

> 20. *There were several features of the Claimant's employment by the Respondent that might at first sight indicate he was the Respondent's employee. …*
>
> 24. *On the other hand, there were fundamental features of the Claimant's employment that indicated that the parties' agreement was genuinely one that the Claimant would be working as a self-employed contractor.*

16 It appears from those extracts that there were some matters in favour of the claimant being an employee; and others against that proposition. There is no indication from the judgment that the claimant's assertion that he was an employee had no reasonable prospect of success.

17 Similarly, having looked at the witness statements of both the claimant, and Dr Gazet, it is not obvious to this Tribunal that the claimant's discrimination claims had no reasonable prospect of success. The appellate courts have been at pains to stress the importance of discrimination claims being heard. It is not apparent from the witness statements referred to, that it was very likely that the claimant's claims could not have succeeded. Since the Tribunal has determined that the claims could not be said to have no reasonable prospects of success, the respondent's application for costs in this respect also fails.

Conclusion

18 For the reasons set out above, the Tribunal that does not consider that this is an appropriate case where costs should be awarded. Failure to provide sufficiently detailed information in relation to the postponement application, before the Tribunal considered the application to strike out the claim on 27 September 2022, has led to the claim being struck out. The Tribunal does not consider that in addition, this is an appropriate case where he should also be ordered to pay some or all of the respondent's costs arising out of the claims to the tribunal.

19 The Tribunal hopes that this decision will now allow both parties to put the matter behind them.

Employment Judge A James
Dated 19 January 2023