EMPLOYMENT TRIBUNALS

Claimant: Mr J Samra

Respondent: The London Borough of Islington

Heard at: Watford

On: 09 March 2023

Before: Employment Judge R Lewis
Mrs J Hancock
Mr P Miller

Appearances
For the claimant: In person
For the respondent: Mr L Davidson (Counsel)

RESERVED JUDGMENT

The respondent's application for an order for costs succeeds. The claimant is ordered to pay to the respondent costs of £15,000.00.

REASONS

Introduction

1. The hearing of this case came before the tribunal in January and February 2022. Judgment was given orally on the final day, and sent in writing on 26 February. Written reasons were sent on 12 April 2022.

2. The respondent submitted a written application for costs on 23 March 2022, in a 4-page letter which set out the eight points which formed the basis of Mr Davidson's submissions today.

3. At the start of the hearing, the tribunal set out a number of points on which the hearing would proceed. They were broadly the following: -

   - That the findings of fact set out in our judgment of April 2022 stood as final and correct unless and until the EAT changed that position,

and therefore that it was not open to the claimant, in resisting a costs application, to submit that our previous findings were mistaken. The claimant confirmed that his appeal awaits listing under rule 3(10).

- That information about other events at work, which did not form part of the case in our earlier judgment, was highly unlikely to assist us, and should not be introduced;

- That information about events at work since the full hearing was unlikely to assist and should not be included;

- That the tribunal would not accept submissions from either side based on what had been said or done at a judicial mediation which we understand took place in September 2021. The reason for that was that judicial mediation takes place in complete confidentiality. The judge explained that there was no objection, after an unsuccessful judicial mediation, to an offer being put in separate "without prejudice" correspondence, provided that the proposal did not refer expressly to the mediation. That was precisely what Ms Parker had done in a without prejudice letter of 27 September 2021, to which we were referred (38).

The legal framework

4. At the first stage of a costs application, the tribunal must consider whether as a matter of fact the test set out at rule 76 has been met, namely whether 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; or.. any claim.. had no reasonable prospect of success."

5. The tribunal would be called upon to make a finding of fact to the effect that the claimant had acted in a manner which fell within the above framework.

6. At the second stage, in the exercise of its discretion, the tribunal would have to consider the interests of justice. In particular, the question for it would be whether a costs award was in the interests of justice. In considering that question, the tribunal should weigh up the competing demands on the interests of justice. One is that every claimant should have access to workplace justice, without incurring a fee, without need of lawyers, and using a system which is readily accessible to the public. That must be weighed up secondly with the tribunal's duty to safeguard respondents of all kind from the burden of defending unmeritorious claims; which in turn leads to a third interest, namely that of the tribunal system itself in making sure that its finite resources are used to determine valid and meritorious claims rather than the reverse.

7. The tribunal should bear in mind that unlike in the civil courts, the unsuccessful party is not required to pay the costs of the successful party

as a matter of course or routine, and although the rules do not refer to a test of exceptionality, the default position in this jurisdiction is that each side pays their own costs, and an order for costs is, at least, unusual.

8. At the third stage, the tribunal may consider whether to award a fixed sum by way of costs, in which case its powers are capped at £20,000; or whether to make an order for costs to be assessed, in which case there is no fixed cap.

9. Rule 84 states;

> "in deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the tribunal may have regards to the paying party's.. ability to pay."

This hearing

10. The respondent had prepared a bundle of 220 pages, of which the important portions were a copy of our judgment and reasons; the respondent's application; the claimant's replies; some preparatory materials; and without prejudice correspondence. The only documentation about the claimant's means were payslips, showing a net monthly income of about £2,400.00.

11. In addition to the respondent's bundle, the claimant asked the tribunal to consider one loose document. That was an email from the respondent's HR function sent to the claimant in February 2023, informing him that his application for voluntary redundancy had been refused. That could have no bearing on this case, although it was obvious that the claimant felt strongly about it, and we were aware of what appeared to be a contradiction between that email and Ms Parker's email of 27 September 2021, in which the respondent offered a settlement which included agreed severance and determination of the claimant's employment.

12. Mr Davidson's submissions lasted about 35 minutes. We then adjourned for about 35 minutes to give the claimant the opportunity to finalise his reply. His reply lasted just over 30 minutes, after which Mr Davidson commented on one point.

13. We asked the parties if they preferred to wait to be told the outcome of this application later the same afternoon, and both expressed a preference that the tribunal should send a reserved judgment.

Our approach

14. The respondent's application had approached costs through 8 points which it submitted constituted unreasonable conduct (32 – 34). While we follow the 8 points, we group them. Points 1, 2 and 5 focus on the unmeritoriousness of the claim. Points 3 and 4 deal with a particular aspect of lack of merit, namely the focus on Mr Muir. Points 6 and 7 address the

claimant's refusal to settle and point 8 is a general category of unreasonable conduct in preparation and pre-trial matters.

Questions of merits

15. We deal first with points 1, 2 and 5. We must do so in the light of our earlier findings and the language in which they were expressed.

16. The claimant was by April 2019 an employee close to completing four decades of then unblemished service. There were then four events which led to the hurt of a written warning. They were that the claimant wrote to X; that he failed to carry out the instruction to apologise to X; that he potentially breached the privacy rights of A; and that he failed to process the complaint from Z. Separately, he let himself down badly at a promotion interview.

17. These five events had in common that the claimant was entirely responsible for all of them.

18. When these events triggered adverse consequences, notably a disciplinary enquiry and hearing, and of course a failure to promote, the reality was that the claimant had only himself to blame. It was obvious at the hearing in January 2022 that the claimant struggled to accept that reality, and when he addressed us today, it seemed to usthat he still struggles to do so.

19. Viewed objectively, the claimant may well have had points to raise about process. The actions of any manager in any context can always be faulted. He had however no objective basis whatsoever on which to attribute any of these matters to race, which is what he began to do in 2019. We agree with Mr Davidson's comment that having done that, he then "trawled" past events, found events which now seemed adverse, and attributed them to race.

20. Our finding is that the claimant had absolutely no objective or evidential basis on which to do so. We accept Mr Davidson's comment that on the contrary, the evidence showed that for each adverse event there were material reasons unrelated to race, of which the most significant was the claimant's own actions. We paraphrase our earlier judgment slightly with the comment that in relation to each of the four events, he had choice: he could have decided not to write to X; he could have done as instructed, and apologised to X; he could have been more prudent in relation to A; he could have processed Z's report.

21. Mr Davidson invited the tribunal to find that the claimant had been "cynical" in alleging race discrimination. If by that, Mr Davidson implied that the claimant made allegations of race discrimination, knowing them to be untrue, we reject the allegation. It seems to us that the claimant has convinced himself of the truth of the race discrimination allegations, and believes them. We nevertheless agree with Mr Davidson that it was unreasonable to pursue them.

22. The “forgery” allegation is perhaps the most extreme instance of all of these factors. We do not repeat what we have said in our previous judgment about the claimant’s letter to X and the complaint letter from X. We accept that the claimant has convinced himself that a forgery took place, despite its inherent implausibility, the absence of supporting evidence, and the circumstantial evidence against. We also accept also that the claimant showed no insight whatsoever into the gravity of the language which he used about colleagues, notably Mr Muir; or that he appeared at times fixated with Mr Muir as an individual; or that his conduct of the case appeared highly personalised.

Settlement attempts

23. We now turn to points 6 and 7. On 25 August 2021 the respondent sent the claimant a “without prejudice save as to costs” email inviting the claimant to agree to a ‘drop hands’ deal, on the basis that the case preparation would reveal that he was bound to fail. The claimant did not engage with the proposal but forwarded the letter to the tribunal, complaining of victimisation.

24. Judicial mediation took place unsuccessfully on 20 September and on 27 September the respondent wrote to the tribunal to offer a settlement. It included termination of employment on 31 December 2021, the claimant to be on gardening leave until that date; an agreed reference; and, without admission, a severance figure of £30,000. We accept Mr Davidson’s comment that this was a commercial offer.

25. We could not in the circumstances of this case agree that the claimant’s failure to engage with those offers was unreasonable. The August offer made no proposal to the claimant, and the September offer proposed the loss of his lifetime employment. We accept in light of our objective analysis of the merits, that any opportunity to bring the litigation to an end should have been pursued, but we cannot accept that either point 6 or point 7 constituted unreasonable conduct within the meaning of rule 76.

Case preparation

26. Point 8 was an iteration to the effect that the claimant was, in practice, a particularly challenging litigant in person as opponent. However, the difficulty with that submission is that we had no evidence, just correspondence extracts; that the claimant was both ignorant of and inexperienced in the law and procedure applicable to his case; and that problems in preparation were caused in some part by the tribunal’s failure to engage with the application for a handwriting expert; and by the loss of access to the claimant’s history of appraisals. We do not accept that point 8 constituted unreasonable conduct within the framework of rule 76.

Discussion

27. Drawing all of the above together, we find that the first step of the test is met. The claimant brought and pursued these proceedings unreasonably, by bringing claims of race discrimination of which there was no evidence

whatsoever. The claims were misconceived, and had no reasonable prospect of success.

28. When we ask secondly whether a costs award is in the interests of justice, we have no hesitation whatsoever in finding that it is. This was a substantial case, with a heavy demand on the resources of the respondent and of the tribunal. There was no compelling interest of justice in it being heard, and the claimant's unevidenced convictions do not create such an interest.

29. Mr Davidson submitted a schedule of costs which was in the region of £130,000. He invited the tribunal to order assessment. We accept that costs of that order were incurred, and that they came out of a service budget.

30. The tribunal asked the claimant if he wished to give information about ability to pay. He said that it would be difficult for him to pay any order for costs. He confirmed the take home pay mentioned above, and said that he has savings of about £4000 and shares worth about £500. He is part responsible for a mortgage on his and his partner's home. He mentioned that he has accrued full pension, and the tribunal understands that that may well include lump sum arrangements in future.

31. The claimant remains employed by the respondent. There were references in what the claimant put before us to what appeared to be live unresolved disputes, some of which appear to have spun off from the present proceedings. The delay and complexity of the assessment procedure did not seem to us proportionate to the circumstances of this case, or a proportionate use of the tribunal's resource.

32. In making an award of £15,000, we make an award which we have made represents a modest proportion of the respondent's costs. We note that it represents approximately 6 months net pay for the claimant at the present rate.

33. In making the award, we have regard to the arrangements which may have to be made between the parties (but are not a matter for this tribunal) relating to time and method of payment. We hope and trust that the parties can be relied on to co-operate in a reasonable manner in that regard. We note the existence of equity in a property, and of the future prospect of a pension, and it is of course a matter for the parties as to whether either or both of these is the source of an ability to pay within a reasonable time of the completion of this hearing.

Employment Judge R Lewis

Date: 21 March 2023

Sent to the parties on: 24 March 2023

For the Tribunal Office