



Case No: 2304086/2017

# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH ( BY CVP VIDEO CONFERENCE )

**BEFORE:** EMPLOYMENT JUDGE BALOGUN

**BETWEEN:**

Mr R Choudhury

**Claimant**

And

London Borough of Southwark

**Respondent**

**ON:** 21 April 2023

**Appearances:**

**For the Claimant: In Person**

**For the Respondent: Mr A Line, Counsel**

## **RESERVED COSTS JUDGMENT**

The claimant is ordered to pay the respondent £5000 towards its costs.

## **REASONS**

1. This was a hearing to consider the respondent's costs application of the 19 February 2020, following the Tribunal's judgment on liability in this case, sent to the parties on 24 January 2020.
2. The application was made under rule 76(1)(a) and (b) of the Employment Tribunal's Rules of Procedure 2013 (the "Rules"). 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.

3. The respondent pursues its application on grounds of the claimant's unreasonable conduct and that the claims had no reasonable prospect of success.

Issues

4. The issues that I have to determine are:
  - a. whether the threshold for a costs order has been met;
  - b. whether a costs order should be made; and
  - c. if so, in what amount
5. In dealing with these issues, I have taken into account my findings on liability and the parties' written and oral representations.
6. For the hearing, the respondent produced a costs bundle. References in square brackets in the judgment are to pages in that bundle. On the afternoon before the hearing, the claimant sent an email to the Tribunal with 15 separate attachments which he wanted added to the bundle. Some of the documents were already in the bundle, others were new. The new documents of relevance were a witness statement for the costs hearing and a document headed: Projected Forecasted Means. There were also some medical records, which included a further version of a psychiatric report of 26.3.23, already in the bundle, with the claimant's first name and date of birth redacted.

**Has the threshold for a costs order been met?**

Unreasonable conduct

7. There were 3 aspects to this ground:
  - (i) The respondent contended that it was unreasonable for the claimant to pursue his automatic unfair dismissal claim, which relied on one alleged qualifying disclosure (the other 3 having been struck out). The said qualifying disclosure was an email dated 4.4.17. I deal with this issue in my conclusions at paragraphs 31-32 of the liability judgment. There, I found that the email was virtually identical to one dated 29.3.17, which the claimant's solicitor had, at an earlier preliminary hearing, conceded was not a qualifying disclosure. Further, I found based on this and on a proper reading of the email that the claimant did not have a reasonable belief that there had been a breach of a legal obligation [57]. The claimant contended that he was misadvised by his Solicitor. Firstly, there is no evidence of this but in any event, that is a matter for him to pursue elsewhere and does not affect whether the threshold for a costs order has been met. I am satisfied that the claimant's continued pursuit of the automatic unfair dismissal claim was unreasonable.
  - (ii) The respondent submitted that the claimant acted unreasonably by giving dishonest evidence at the liability hearing. They rely on a number of credibility findings, at paragraphs 32, 33, 37,39 and 47 of the judgment [57-60]. Although I did not expressly find that the claimant was lying, I am satisfied from my findings that the claimant could not have reasonably believed the truth of the matters about which he testified.

- iii. The respondent contended that the claimant persistently failed to comply with case management orders. The respondent made 2 applications for unless orders. The first was on 29.8.19 due to the claimant's failure to comply with disclosure orders, despite several chasing emails [66-67]. This was renewed on 10.10.19 [69-70] The second application was made on 25.11.19 due to the claimant's failure to exchange witness statements. No satisfactory explanation was given at the time for the non compliance. The claimant did not exchange statements until 3 working days before the final hearing. That statement included new allegations, which were pertinent to the issues but not part of the pleaded case nor ever previously raised. This required the respondent, at short notice to call 2 additional witnesses and incur additional legal costs associated with this.
8. The claimant has produced a detailed written response to the application, which appears to have been professionally drafted. I have taken it into account and make reference to it further on in the judgment. [75-80].
9. In a separate witness statement, the claimant refers to a recent diagnosis of ADHD and contends that the Tribunal needs to determine whether the symptoms associated with that condition have a bearing on whether or not his conduct during the proceedings was intentional.
10. I have reviewed the claimant's psychiatric report dated 26.3.23, prepared by Dr Rostamipour, Consultant Psychiatrist. The report diagnosis ADHD with some symptoms of hyperactivity/impulsivity having been present since the claimant's childhood. However, the report does not address at all what, if any, effect the condition would have had on the conduct of the claimant in these proceedings. The claimant was legally represented throughout the proceedings ( though he appeared for this hearing). Although the claimant contended that he had problems with listening and conveying information to his representative, that is not something that I was prepared to accept on face value given my previous credibility findings. In any event, the statement was too general to be of evidential value.
11. I am satisfied that the matters at paragraph 7( i-iii) above amount to unreasonable conduct.
- No reasonable prospects of success*
12. In addition, based on the matters at 7 (i-ii) above, I find that the automatic unfair dismissal claim had no reasonable prospect of success.
13. In all the circumstances, I am satisfied that the threshold for a costs order has been met.

**Should a costs order be made?**

14. It was submitted by the claimant that the respondent had not specified how the grounds relied on relate to its costs and that any increased costs were "de minimis" (his term). The case of Yerrakalva v Barnsley MBC 2012 ICR 420 makes clear that there does not have to be a direct causal link between the unreasonable conduct and the costs awarded.

Rather, in exercising its discretion, the Tribunal should have regard to the nature, gravity and effect of the unreasonable conduct. I am satisfied that the claimant's pursuit of a claim that had no reasonable prospects of success and his repeated non-compliance with case management orders resulted in additional work by the respondent which would otherwise not have been required, resulting in increased legal fees. I am satisfied that those fees were more than "de minimis". In all the circumstances, I consider it just that a costs order should be made.

**How much should be awarded in costs?**

15. 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. To that end and as part of the directions for this hearing, the Tribunal wrote to the Claimant on 6 March 2023, asking him to provide a statement of his means with supporting documentation.
16. Included within the list of documentation to be provided was current bank account statements for the last 12 months [90-91]. The claimant provided the said statements but with the payment type and details redacted. I was therefore unable to identify where payments in were received from and to whom payments out were made. The claimant was unable to provide a satisfactory explanation for the redactions.
17. Also requested was a breakdown of monthly income and expenditure, supported by documentary evidence. The claimant provided a document headed "Means of Income against Expenditure" which is included in the bundle at page 96. However, the day before the hearing he provided an amended copy labelled "Projected Forecast..." with the previous figures now shown as (estimated). There was no evidence to support the estimates. The document indicated an annual income of £25,068.60 and expenditure of £27,501.37, indicating a net annual deficit of £2,432.77 and a monthly deficit of £202.73.
18. The claimant gave evidence relating to his means. That evidence was unsatisfactory. The claimant stated in evidence that the income figure of £25,068.60 was from paid employment. However, there was no evidence in the bundle about that employment such as payslips, contract documentation etc. When I asked the claimant who his employer was, his initial response was that he did not want to answer that question. However, when pushed, he reluctantly volunteered that he was employed by Islington Council as a Regulatory Assistant and had been so since January 2020. He confirmed that he would have received payslips and an offer letter and his explanation for not including these as part of his evidence as to means was that "*it was a mistake*". I do not accept that evidence, it is clear from the way the evidence came out that the claimant had sought to conceal his employment.
19. Having previously raised issues about the credibility of the claimant and given his unsatisfactory evidence at this hearing, I am not prepared to accept what he says about his means on face value. For his own reasons, the claimant has chosen not to support that evidence with documentation which should exist. In the circumstances, I have decided to disregard means in considering the amount of a costs award.

20. The respondent seeks costs in the sum of £15,831.80 and has provided a breakdown of those costs. Although I have not taken the claimant's means into account, I have borne in mind that costs in this jurisdiction are discretionary, are still relatively unusual and are intended to be compensatory, not punitive.

21. In all the circumstances, I award costs to the respondent in the sum of £5000.

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Acting Regional Employment Judge Balogun  
Date: 5 May 2023