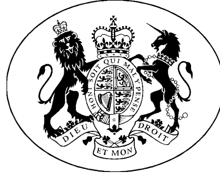

EMPLOYMENT TRIBUNALS

Claimant: **Mr K Niouman**

Respondent: **Barts Health NHS Trust**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **17 November 2023**

Before: **Employment Judge Brewer**

Representation
Claimant: In person
Respondent: Ms D van den Berg, Counsel

JUDGMENT

The judgment of the Tribunal is that the respondent's costs applications succeed, and the claimant shall pay to the respondent the following sums:

1. the sum of £5, 023.00 in respect of the costs incurred in relation to the second preliminary hearing,

2. the sum of £4,099.00 in respect of the costs incurred in relation to the final hearing, and

3. the sum of £1,250.00 in respect of the costs incurred in relation to the costs hearing.

REASONS

Introduction

1. This case came before me for a substantive final hearing on 31 January 2023. I gave written reasons for my judgment and those written reasons were sent to the parties on 3 February 2023.

2. The respondent made an application for the costs of the final hearing on 21 February 2023 having previously made an application for costs in respect of costs incurred up to 18 March 2022. The respondent's costs application also included an application for the costs incurred preparing for and attending today's hearing.

3. The claimant attended the hearing and immediately asked for a postponement. This was something of a surprise given that this hearing was listed around 8 weeks ago, the claimant said he continued to be represented by solicitors and at no point previously was it suggested that the hearing may need to be postponed. The solicitors acting for the claimant had not themselves applied for the hearing to be postponed. We spent some time therefore discussing why a postponement was needed and if it was, why we were only hearing about it this morning.

4. The claimant said that his barrister was not available for today. Given that this is the same barrister who had represented him at the final hearing and given that this hearing has been listed for around 8 weeks, that is somewhat surprising. This costs hearing was listed taking account of everyone's availability including mine.

5. On further discussion, although the claimant confirmed that he was still represented by solicitors, Ms van den Berg confirmed that although correspondence had been sent by her instructing solicitors to those representing the claimant, they had received no correspondence in return whatsoever including no agreement on the bundle of documents and no suggestion that today's date caused them any difficulty.

6. The claimant then seemed to suggest that the reason he was not represented by a barrister today was one of cost which of course is not the same as unavailability. Furthermore, it is clear from what he said to me that he has had some difficulty paying his solicitor which may explain why they have not corresponded with the respondent and why they have not attended today.

7. The claimant said that he was aware several days ago that his barrister would not be available today which begs the question why the Tribunal was not informed of this before this morning.

8. Having listened very carefully to what the claimant said, my conclusion was that in fact no barrister was instructed to attend today and therefore the issue of unavailability did not arise. Furthermore, the fact that the firm of solicitors who are purportedly representing the claimant did not attend today suggests to me that they are no longer actively representing him although they have not formally come off record.

9. This case has been ongoing since 2020. Today's hearing was set down to consider the respondent’s costs applications, with the agreement of the parties, some 8 weeks ago and given the limited remit of this hearing I can see no good reason why, if solicitors were still acting on behalf of the claimant, they were not here today. I did not accept the claimant’s explanations about his need for a postponement and I consider that he has had plenty of time to arrange representation and for those reasons, and in accordance with the overriding objective, I determined that the hearing could and should go ahead.

Issues

10. There are in effect three costs applications before me, the first dated 18 March 2022, the second dated 21 February 2023 and third concerning the costs of today’s hearing.

11. The issues for me to determine are first whether the threshold for an award of costs is made out and second, if so, whether in fact it is appropriate for costs to be awarded.

Law

12. Rule 76 of the Employment Tribunal Rules 2013 provides as follows:

“***When a costs order or a preparation time order may or shall be made***

76.—(1) A Tribunal may make a costs order or a preparation time 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) any claim or response had no reasonable prospect of success; or

(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party”

13. In accordance with Rule 78 a summary assessment can be carried in respect of costs orders not exceeding £20,000.

14. The term ‘vexatious’ was defined by the National Industrial Relations Court in **ET Marler Ltd v Robertson** 1974 ICR 72, NIRC which held that

“If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously”

15. In **Attorney General v Barker** 2000 1 FLR 759, it was held that:

“the hallmark of a vexatious proceeding is... that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process”

16. The term ‘unreasonable’ is to be given its ordinary English meaning and is not to be interpreted as if it means something similar to ‘vexatious’ (see **Dyer v Secretary of State for Employment** EAT 183/83).

17. A persistent failure to provide information may be held to be unreasonable (see for example **Kaur v John L Brierley Ltd** EAT 783/00 in which the claimant and her advisers persistently failed to identify the unlawful deduction they were alleging had been made from her wages. This was despite repeated and reasonable requests from the employer’s solicitors. Although she was not able to provide any explanation for this failure, the claimant pursued the proceedings, causing the employer to incur additional and wholly unnecessary costs.

18. When considering whether to exercise the discretion to award costs I must look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. But I need not determine whether or not there is a precise causal link between the unreasonable conduct in question and the specific costs being claimed (see **Yerrakalva v Barnsley Metropolitan Borough Council** 2012 ICR 420). The Court of Appeal in **Sud v Ealing London Borough Council** 2013 ICR 39 held that when making a decision as to costs, an employment tribunal needed to consider whether the claimant’s conduct of the proceedings was unreasonable and, if so, it was necessary to identify the particular unreasonable conduct, along with its effect. This process did not entail a detailed or minute assessment. Instead, the tribunal should adopt a broad-brush approach, against the background of all the relevant circumstances.

19. Finally, by virtue of Rule 84 of the 2013 Rules,

> *“**Ability to pay***
>
> *84. In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party’s (or, where a wasted costs order is made, the representative’s) ability to pay”*

Findings of fact

20. I set out here the findings which are key to the decision I have to make on costs. I adopt the findings of fact I made at the hearing heard on 31 January 2023. I reiterate some matters.

21. The claimant remains employed by the respondent.

22. The respondent is an NHS Trust and is therefore funded from the public purse.

23. The claim form was presented on 10 December 2020. The claimant made a number of claims which were abandoned or struck out during the preliminary stages of the litigation leaving only the claims for unauthorised deductions from wages which I heard and determined in January this year.

24. The case was listed for a final hearing and case management orders were made which included that the parties should prepare and send to the Tribunal an agreed list of issues on 1 July 2021. The respondent's solicitors endeavoured to agree list of issues, but the claimant's representatives failed to comment on the draft list or indeed engage meaningfully with the respondent's solicitors.

25. A case management hearing took place on 26 July 2021, at which the employment judge noted that the claimant was in breach of the Tribunal's orders and in the case management summary it was made clear that the claimant's solicitors had not sought to comply with the Tribunal's orders and had failed to correspond with the Tribunal or the respondent. Further case management orders were made. The claimant was ordered to pay deposits for pursuing a number of his claims. In the event he paid deposits totalling £300.00 in respect of some of the allegations he wished to pursue.

26. The further case management orders included the requirement to further particularise certain claims, provide details of comparators and produce a detailed schedule loss. The claimant did lodge documents purporting to comply with these orders but did so late and the documents did not in fact comply with the orders.

27. In the event a second preliminary hearing was listed and heard on 11 February 2022.

28. The lengthy summary of that hearing includes the comment by the judge that there had been a series of delays and failures in the preparation of the claims by the claimant which was the main reason for the second preliminary hearing.

29. One of the issues dealt with at the second preliminary hearing was a lengthy application by the claimant to amend the claim by adding a large number of new allegations. That of course had to be dealt with by the respondent's solicitors thus incurring further costs.

30. None of the proposed amendments were allowed. It was also noted by the employment judge that there were no details of comparators, that the schedule of loss provided did not comply with the order for the schedule of the loss, no particulars of the race discrimination claim had been provided. A number of claims were struck out and the employment judge made it clear that there was an argument that the claimant's representatives had conducted his claims unreasonably by reason of the delays and failures to comply with the Tribunal's orders.

31. Following that hearing the claimant decided not to pursue his claim for race discrimination which left the three claims I dealt with in January 2023 being claims for unauthorised deductions from wages in relation to holiday pay, overtime pay, and the London Weighting Allowance (LWA).

32. I need not repeat my findings here, suffice it to say that on hearing the evidence it was quite clear that in relation to holiday pay the claimant was not arguing that he did not receive the correct holiday pay on each occasion he took holiday, in fact his argument was that he should have been entitled to more holiday but that

is not a claim for unauthorised deductions from wages and should never have been pursued as such.

33. The claim in relation to overtime pay was also doomed to fail because the claimant could not point to a right to receive anything other than a flat rate payment for overtime pay. He was relying on one occasion in which it was agreed that for that particular episode of overtime he would be paid time and a half.

34. In relation both to holiday and overtime pay, the claimant had raised a grievance and had been given a detailed response explaining why he was wrong about what it was he was seeking.

35. Finally in relation to the LWA, at the final hearing the claimant conceded that he had never been entitled to receive the allowance, what he was seeking to do was argue that he should be in receipt of it but that is not a claim for unauthorised deductions from wages.

36. Following the final hearing, the second cost application was made.

Discussion and conclusion

Was there vexatious or unreasonable conduct?

37. In the first application, the respondent makes an application for £5,023 for costs incurred in respect of the Preliminary Hearing on 11 February 2022. The basis of this application is what is argued to be unreasonable conduct in the lead up to that hearing which included:

    a. that the further Preliminary Hearing on 11 February 2022 was necessitated by the claimant's persistent failure to comply with Tribunal's orders,

    b. the persistent failure to properly engage with the respondent in clarifying the claims and agreeing a list of issues, and

    c. the failure to comply with the orders for further information and a Schedule of Loss and instead producing a lengthy application to amend the claim (none of which was allowed).

38. The respondent argues that it was self-evidently unreasonable for the claimant to fail to comply with the Tribunal's orders (which were crucial to the respondent being able to progress its defence) and simultaneously submit a lengthy and detailed application to amend his claims which ultimately had no merit and did not succeed but which nevertheless required a significant amount of preparation by the respondent.

39. The second costs application is for £4,099 (plus £1,250 in respect of Counsel's brief fee for this costs hearing) in respect of costs incurred from the date of the 11 February 2022 Preliminary Hearing to the date of this costs hearing.

40. The second application is made on the basis that the claimant's continued pursuance of the unauthorised deductions claims was unreasonable because he

knew (or ought to have known) that his claims had no legal basis and thus no prospects of success.

41. All of the claims were dismissed at the final hearing on 31 January 2023.

42. The respondent says that this outcome was inevitable because there was no proper basis on which the Tribunal could have found in favour of the claimant. The respondent says that the hopelessness of the claims had been explained to the claimant in the grievance appeal hearing outcome (dated 22 September 2016), in the respondent's Grounds of Resistance dated 19 February 2021, and in the costs warning letter dated 3 March 2022. It was or should have been clear that he had no entitlement to any of the sums claimed.

43. Having considered the content of the grievance outcome, the ET3 and the costs warning letters, I agree with the respondent.

44. It was in my judgment clearly unreasonable to commence and pursue claims for unauthorised deductions from wages for the reasons I set out in my judgment given at the final hearing which are congruent with the respondent's defence to the claims, the grievance outcome and the costs warning letter.

45. I note in particular the claimant's concession at the final hearing that in effect the holiday pay claim had no merit and the total lack of evidence in relation to the overtime pay claim. As to the claim for LWA the basis for that remains totally unclear and appears to have amounted to no more than the claimant seeking to argue he ought to receive the allowance because some of the respondent's other employees receive it and not that he was in fact entitled to receive it but had not been paid it.

46. I have no doubt that the claimant whether himself or by his solicitors acted unreasonably in bringing and pursuing all three claims.

Should costs be awarded for unreasonable conduct?

47. In determining whether to make an order under this ground, a Tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct (see **McPherson v BNP Paribas (London Branch)** 2004 ICR 1398, CA). However, the Tribunal should not misunderstand this to mean that the circumstances of a case have to be separated into sections such as 'nature', 'gravity' and 'effect', with each section being analysed separately (see **Yerrakalva** above).

48. The vital point in exercising the discretion to order costs is to look at the whole picture. The Tribunal has to ask whether there has been unreasonable conduct by the paying party in bringing, defending or conducting the case and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had.

49. I accept that costs are the exception rather than the rule in the Employment Tribunals.

50. I have heard from the claimant about his ability to pay which I may take into account and have done so, but in doing so I have to weigh that in the balance with the other factors I refer to here.

51. I consider it relevant that costs warnings have been given and is a factor that can be taken into account when considering whether to exercise the discretion to make a costs order (see, for example, **Oko-Jaja v London Borough of Lewisham** EAT 417/00*,* where the EAT confirmed that an employment tribunal was entitled to take into account the fact that in a previous, similar claim made by O against the same respondent the tribunal had given a costs warning).

52. I also consider it potentially relevant that the claimant has had legal advice and legal representation throughout, but he did not disclose, as is his right, what advice he had been given so I cannot say whether he was acting on advice or whether he persisted in his claims against legal advice and therefore make no finding about that.

53. I do note that having had a costs warning, knowing the respondent's position from that warning, from the grievance and from the ET3, the claimant still rejected the respondent's 'drop hands' offer to the claimant, that is to say they agreed not to pursue costs if the claimant withdrew before the final hearing. With hindsight that looks like a generous offer which was rejected without any reason being given.

54. In relation to the first application, that succeeds. The claimant by his actions failed to reasonably prosecute his case, ignored the Tribunal's orders, prolonged the case only to drop almost all of his claims prior to the final hearing. The second preliminary hearing was only necessary because of the unreasonable conduct of the proceeding by the claimant. The hearing could have been avoided had the Tribunal's original case management orders been complied with. They were not. In the circumstances, *absent* any mitigating circumstances, I have no hesitation in awarding the costs sought by the respondent.

55. In relation to the second application, in short, as pleaded and based on the evidence all of which was available to the claimant well before the final hearing, the claims were clearly doomed to fail and to continue to pursue them was unreasonable. All things considered, and again, *absent* any mitigation, I again have no hesitation in awarding the costs sought by the respondent.

56. Finally, in relation to the costs incurred in respect of the costs hearing itself, I agree with the respondent. Such a hearing was only made necessary by the unreasonable conduct of the claimant in pursuing hopeless claims. I again have no hesitation in awarding the costs sought by the respondent.

Employment Judge Brewer
Date: 17 November 2023

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