EMPLOYMENT TRIBUNALS

Claimants: Mr Gregory Kalu & Dr Onome Ogueh

Respondent: Brighton and Sussex University Hospitals NHS Trust

Heard at: London South (in chambers) **On: 8 March 2024 (in chambers)**

Before: **Acting Employment Regional Judge Khalil** sitting with members
Ms J Jerram
Mr P Adkins

JUDGMENT UNDER RULE 76

UNANIMOUS DECISION:

- The first claimant's claim for Costs against the respondent under Rule 76 fails. The application is dismissed.

Reasons

Relevant Findings for the claimant's Costs application

1. By a Judgment sent to the parties on 27 February 2021, all of the claimants' claims for Race Discrimination, automatic Unfair Dismissal and Detriment (for allegedly making protected disclosures) were unanimously dismissed. The claim for ordinary Unfair Dismissal succeeded for procedural reasons but any consequential award was reduced by 100% to reflect the ***Polkey*** chance that this would have made no difference, alternatively for contributory fault.

2. The Judgment was reached after hearing 7 days of evidence, submissions thereafter and 4 days of deliberation.

3. In total, the claimants asserted 99 detriments although these were essentially 33 detriments asserted on a concurrent basis in respect of the Direct Race Discrimination claim, Victimisation claim and the Protected Disclosure claim.

4. The burden of proof did not shift to the respondent in respect of the discrimination or protected disclosure detriments. That means the claimant did not establish a prima facie complaint.

5. None of the alleged protected disclosures were found to be protected disclosures. The case was decided in the alternative too however but the Tribunal concluded none of the alleged detriments were causally linked to any protected disclosure (or any protected act).

6. The claimants asserted various grounds of appeal to the EAT. The appeal failed. Only 2 asserted grounds of appeal were permitted to a full Hearing but the appeal failed. Although the EAT identified a procedural error in respect of the Tribunal's determination that one of the protected acts was disqualified from being so, the EAT did not disturb the additional finding on causation i.e. that this did not significantly influence the respondent's treatment of the claimants in respect of the asserted detriment (s).

7. The respondents applied for its costs by a letter dated 25 March 2021. As a result of the outstanding appeal, the Costs Hearing was not scheduled to be heard (and had been postponed) until 28-29 September 2023. The earlier Hearing in January 2023 was postponed as although the claimant's appeal to the EAT had failed, the claimants had said they were seeking leave to appeal to the Court of Appeal.

8. In its application for costs the respondent referred to and relied on a Deposit Order made by EJ Webster in relation to the discrimination and victimisation allegations made against Henrietta Hill QC. That Deposit order was appealed unsuccessfully, though the EAT did accept that the Order had not dealt with the victimisation aspect of the complaint. The Deposit Order was upheld in relation to the direct discrimination and time limitation reasons without any caveat.

9. The respondent also sought to rely on the pursuit of the claim as a whole in its application for costs. It said twenty of the respondent's leadership team and its NEDs were alleged to be systematic discriminators and racists with the list including every individual to have had dealings in the matter including individuals the claimants had not met. The respondent cited the Tribunal's comments on the claimants' credibility in paragraphs 122 and 123 of its Judgment. The respondent almost placed reliance on the Tribunal's conclusions on the vast majority of allegations where the burden of proof did not shift as the facts were wholly insufficient from which the Tribunal could conclude an act of discrimination. Illustratively, the respondent referred to the baseless attack on Mr Viggers (paragraph 166 of the Judgment) and further that the complaints about him should never have been an issue in the case (paragraph 189 of the Judgment).

10. Thus, the respondent said, the claims had no reasonable prospects of success, alternatively the claimants had acted unreasonably in the bringing or conducting of claims without any evidence at all.

11. On 17 August 2023, the respondent withdrew its pursuit of Costs. It did not provide any reasons. The Hearing was thus vacated. Reasons were subsequently provided during the course of correspondence upon the direction of the Tribunal to both parties.

12. By an email dated 25 September 2023, the claimants wrote to the Tribunal applying for their Costs of the respondent's application for costs.

13. By an email dated 21 December Mr Ogueh, withdrew his application for costs.

14. Mr Kalu submitted evidence of Counsel's fee note which showed that a brief fee was incurred on 5 July 2023 in the sum of £3500 plus vat of £700 on 5 July 2023 and a conference fee was incurred on 1 April 2021 in the sum of £2250 plus vat of £450. Thus, the total fees sought were £6,900 inclusive of VAT.

15. Pursuant to the Tribunal's directions, Mr Kalu eventually confirmed that fees sought were those he had incurred exclusively and that the fees of Mr Ogueh were distinct and separate – a separate fee note for Mr Ogueh was provided.

The parties' submissions on the claimant's Costs application

16. The respondent said its withdrawal of the Costs application was not unreasonably late. It was 6 weeks before the Hearing. It also argued that the withdrawal saved, rather than wasted, costs and Tribunal resources and it should not be penalised for that.

17. The respondent repeated in more concise terms the basis of its application when made relying on the Deposit Order and the whole claim (as already set out above).

18. The respondent articulated its reasons as not wanting to spend further costs and management time on the matter and a desire to draw a line under the long running litigation along with the inevitable question of whether a Costs Order would be paid by the claimants and costs of enforcement.

19. In his answer to the above reasons, the claimant asserted that a withdrawal 6 weeks before the Hearing was unreasonable when the claimant had incurred Counsel's brief fee. Counsel's fee note was attached which stated that counsel's brief fee had been incurred on 5 July 2023.

20. The claimant said the lack of reason and timing of withdrawal should be taken into account and relied upon ***McPherson v BNP Paribas (London branch) 2004 ICR 1398 CA*** and ***National Oilwell Varco (UK) Ltd v Van de Ruit EATS /0006/14.***

21. The claimant then asserted that the reason why the claims were not successful had nothing to do with the Deposit Order made (by EJ Webster). He stated EJ Webster did not deal with merits of the claim but was only about the discrimination claims being out of time. In addition, the claimant said the reason why the victimisation claim against Henrietta Hill QC did not succeed was because of the evidence this Employment Tribunal had 'manufactured' (the claimant had also referred earlier to the Tribunal's 'idiosyncratic, racist and

unfair' conduct of the proceedings). The claimant also relied on the respondent's consent to the return of the Deposit as a concession that there was no correlation or causation between the Deposit Order and its application for costs.

22. The claimant further asserted that the respondent's reliance on the claimant's pursuit of the claim as a whole being unreasonable was based on the Tribunal's 'racist, idiosyncratic and unreasoned judgment'; further that Judgment was written in a way which was 'biased' and encouraged the respondent to make its application.

23. In relation to timing, the claimant argued that the respondent should have considered its decision to pursue costs when the Costs Hearing was relisted in January 2023 and the recoverability of costs should have been considered before August 2023.

24. Finally, the claimant referred again to the respondent's reliance on the Deposit Order and the reason why the victimisation claims against Ms Hill QC did not succeed was because justifications for her conduct were put in this Tribunal's Judgment 'not advanced by anyone, which were simply made up'.

Applicable law

25. Rule 76 of the ET Rules of procedure 2013 says:

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.

26. The claimant also seeks reliance on the authorities cited above.

Conclusions and analysis

27. In ***Mcpherson***, the Court of Appeal confirmed the key question was whether in deciding to withdraw (in that case, the claimant's withdrawal of his claims), the claimant had conducted the proceedings unreasonably and not whether the withdrawal itself was unreasonable.

28. Withdrawal can leave to a saving in costs and it would be unfortunate if a party was deterred from doing so by an Order for costs on withdrawal which might not

have been made if they had fought on to a full Hearing and failed. Tribunals should not adopt a practice on costs which deter a party from making sensible litigation decisions.

29. In ***McPherson***, Costs were Ordered in circumstances where Orders had not been complied with; the claimant had been asked for documentation he had been loathed to supply; he had given the impression he was pursuing his claim up to the date of withdrawal of his claim; there was evidence unbeknown to the respondent that the claimant had been contemplating abandoning his claim. This was against the context of the earlier postponement of the Hearing on the claimant's medical grounds some 8 months earlier.

30. In ***National Oilwell Varco***, the claimant withdrew his claim a day before a Pre-Hearing review (Preliminary Hearing). The Tribunal rejected the respondent's application for Costs which was upheld on appeal by the EAT, Lady Stacey presiding. The EAT referred to ***McPherson*** and the balance to be struck between a party taking a hard look at a case very close to the time it is to be litigated and withdrawing on the one hand and on the other side what was described as a 'speculative action'. In this case, the claimant was found to have withdrawn for the sake of his health and family life and following threats of Costs from the respondent. This was notwithstanding the claimant's Solicitors view in written submissions that notwithstanding the withdrawal, the claim had reasonable prospects of success. It was not considered to be a speculative claim. The EAT also reaffirmed that whole conduct should be considered. In paragraph 11 of the EAT's Judgment, reference was made to the use of the word 'conducting' the proceedings which looks at overall behaviour and the logical corollary of that is that it might even be possible there is one piece of behaviour which is in itself unreasonable but overall, the behaviour is not unreasonable. This case was decided under the 2004 Rules; the 2013 Rules however preserve the use of the word 'conducted'.

31. In assessing the overall conduct of the respondent, the Tribunal concluded, unanimously, that the respondent's conduct was not unreasonable, alternatively the respondent did not pursue an application for costs which had no reasonable prospects of success and/or which was a speculative application. There were several reasons for its conclusion.

32. First, the Tribunal concluded that the respondent's conduct in its pursuit of costs was not unreasonable based on the Tribunal's findings and conclusions reached. Save for the Tribunal's conclusion on the ordinary Unfair Dismissal claim which in any event was subject a 100% reduction on ***Polkey*** and/or contributory fault, all of the other claims failed and did not get to the stage of shifting the burden of proof to the respondent, alternatively the respondent had a cogent non-discriminatory reason for all of its actions. The respondent's application was wider than the issues identified in EJ Webster's Deposit Order. This was not a speculative or strategic application, the respondent's application was made on 25 March 2021 before the claimants' had lodged their notice of appeal on 9 April 2021.

33. Second, the decision of the respondent to withdraw its application for Costs (on 17 August 2023) was retrospectively explained to be based on its desire to not spend further costs and management time on the matter and its desire to draw a line under long running litigation along with a question mark over recoverability/enforcement of any Costs Ordered to be paid. The Tribunal took Judicial notice of the chronology since the respondent submitted its application for costs including a Hearing before the EAT, a subsequent application for Costs determined by the EAT and a subsequent application for permission to appeal made to the Court of Appeal. The Tribunal understood that the Court of Appeal refused permission in March 2023. The respondent did not act unreasonably, by some distance, in taking stock of its position and the outstanding Costs application in this context in deciding to withdraw it. There was no non-compliance with any Orders by the respondent or any misleading impression conveyed that Costs application was definitely being pursued during the course of the postponements. The withdrawal was not in unreasonable close proximity to the Costs Hearing and a party should not be criticised for opting out of prosecuting the litigation and saving cost, where its decision to withdraw its application is reasonable.

34. Third, the claimant had, throughout the litigation had the support of his legal team, including counsel. With the context of the chronology summarised in the foregoing paragraph in mind, the claimant could reasonably have alerted the respondent to the incurment date of Counsel's brief fee in advance of 5 July 2023, but he did not do so. It was known that the Costs Hearing had been listed three times pending the claimant's outstanding appellate proceedings and the Tribunal considers that in not informing the respondent of the brief date, he acted unreasonably. A part of the claimant's reasoning for this application is the alleged lateness of the respondent's withdrawal of its costs application but a much earlier withdrawal say, on 6 July 2023, would have made no difference.

35. Fourth, the claimant place significant weight and reliance, as cited above, on its belief that the respondent's application was based on the Tribunal's racist and/or idiosyncratic and/or unreasoned and/or biased Judgment which included manufactured or made-up evidence. None of this formed any part of a ground of appeal and/or a successful ground of appeal. These were assertions without any substance or evidence which the Tribunal concluded were wild allegations to try a back door attempt at bypassing the Tribunal's Judgment and/or the failed appeal before the EAT and Court of Appeal, none of which can be visited on the respondent's conduct.

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Acting Regional Judge Khalil

19 March 2024