EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mrs G Oladoke	South West Yorkshire Partnership NHS Foundation Trust

Heard at: **Leeds Employment Tribunal** **On: 20 September 2024**
In chambers

Before: **Employment Judge Davies**
Mr L Priestley
Mr W Roberts

JUDGMENT

1. Pursuant to Employment Tribunal Rule 76 the Claimant shall pay the Respondent costs of **£6000**.

REASONS

Introduction

1. This was the hearing of an application for costs made by the Respondent following the dismissal of the Claimant's complaints of direct race discrimination. The costs application was determined in chambers by the Tribunal on the papers, in the following circumstances:
   1.1 The Claimant has been legally represented throughout these proceedings.
   1.2 The Tribunal heard the Claimant's claims of race discrimination at a hearing on 28, 29 and 30 November 2023. Oral judgment dismissing all the claims was given at the conclusion of the hearing and a written judgment was sent to the parties on 5 December 2023.
   1.3 The Respondent made an application for costs on 28 December 2023.
   1.4 The Claimant requested written reasons for the judgment, and they were provided on 24 January 2024.
   1.5 There was some delay in referring the costs application to the Judge. On 6 February 2024 when that was done the Tribunal wrote to the parties, requiring the Respondent to send to the Claimant and the Tribunal a PDF file containing all the documents it relied on in its costs application by 19 February 2024. The Claimant was then ordered to send to the Tribunal and the Respondent by 4 March 2024 a PDF file containing her written response to the costs application and any evidence she relied on in responding to it, including evidence of her ability to pay a costs order if made. The parties were told that a costs hearing would be listed.

1.6 On 14 March 2024 the parties were told that a costs hearing had been listed for 4 July 2024. The Respondent promptly applied for a postponement, on the basis that it was not available on that date.

1.7 The Respondent provided a PDF file as ordered but the Claimant did not provide any file or any response to the costs application. The Tribunal therefore wrote to her on 27 March 2024 requiring her to comply with the order to provide a response. The Claimant again did not respond at all.

1.8 On 17 May 2024 the Respondent wrote to the Tribunal informing it as a matter of courtesy that the Claimant had attempted to initiate an appeal against the liability judgment and seeking an update on its postponement application.

1.9 The Tribunal agreed to postpone the hearing and re-list it on the first available date from September 2024. The Tribunal noted that the Claimant had by now appealed against the liability judgment but determined that it was consistent with the overriding objective to deal with the costs application in any event. We noted that any costs judgment could be stayed if appropriate. The Tribunal also noted that the Claimant still had not provided any response to the costs application. In those circumstances, we directed that if the Claimant did not do so by 17 June 2024, the Tribunal would assume that she did not want to respond to or participate in the costs hearing. In those circumstances, the Tribunal considered that it would be consistent with the overriding objective to determine the costs application on the papers and notified that parties that, in the absence of any response from the Claimant, that is what the Tribunal would do.

1.10 The Claimant did not provide any response. On 16 July 2024 the Tribunal therefore notified the parties that the costs application would be dealt with on the papers by the Tribunal on 20 September 2024.

1.11 The Claimant still has not provided any response or communication to the Tribunal about the costs application.

2. This judgment should be read in conjunction with the liability judgment of 5 December 2023 and written reasons of 24 January 2024, which are not repeated here.

3. The basis of the costs application is:

3.1 That the claims had no reasonable prospect of success and the Claimant acted unreasonably or vexatiously in bringing and pursuing them; and

3.2 That the conduct of the proceedings was also unreasonable in relation to the bringing of an unfair dismissal claim when the Claimant had not been dismissed and the making of repeated requests for documents that the Claimant had been told did not exist during the disclosure process.

4. The issues for the Tribunal to decide are:

4.1 Did the claims have no reasonable prospect of success or did the Claimant act unreasonably or vexatiously in bringing or pursuing them?

4.2 Was the conduct of the proceedings unreasonable in relation to the bringing of the unfair dismissal claim and the making of repeated requests for documents that did not exist?

4.3 In either event, if the threshold is met, should a costs order be made?

4.4 If so, for how much?

Legal principles

5. Rules 76 and 84 of the Employment Tribunal Rules of Procedure 2013 provide, so far as material, as follows:

   76 When a costs order or a preparation time order may or shall be made
   (1) A Tribunal may make a costs 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;
   > (b) any claim or response had no reasonable prospect of success; or
   > …

   …

   84 Ability to pay
   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.

6. The Tribunal had regard to principles derived from the cases, in particular those set out by the Court of Appeal in *Yerrakalva v Barnsley MBC* [2012] ICR 420 CA and *Arrowsmith v Nottingham Trent University* [2012] ICR 159 CA. The Tribunal must decide whether one of the thresholds for making a costs order in Rule 76 is met. If it is, the Tribunal must separately exercise its discretion and decide whether to make a costs order. In considering whether to make an award of costs, the Tribunal must identify the unreasonable conduct, say what was unreasonable about it and say what its effect was. Further, the mere fact that a party has lied in the course of its evidence is not necessarily sufficient to found an award of costs. The Tribunal has to have regard to the context, and the nature, gravity and effect of the untruthful evidence in determining the question of unreasonableness: see *Arrowsmith v Nottingham Trent University* [2012] ICR 159 CA.

7. Failure to engage with the substance of a costs warning letter may itself amount to unreasonable conduct of proceedings. It is not necessary for the claims to have had no reasonable prospect of success in order for such unreasonable conduct to be made out: see *Peat and others v Birmingham City Council* [2012] UKEAT 503_11_1004.

Costs warning letter

8. The Tribunal noted that the Respondent's representative wrote a careful and detailed costs warning letter to the Claimant on 23 August 2023, after there had been a preliminary hearing in June 2023 at which the Judge identified the 8 complaints of direct race discrimination that were being brought. The letter invited the Claimant to withdraw her claims on the basis that they had no reasonable prospect of success and that it was unreasonable to bring or pursue them, having the benefit of legal advice. The letter pointed out that the Claimant would need to show that the acts complained of took place. If they did, the Tribunal would need to be satisfied that there was less favourable treatment compared with an actual or hypothetical comparator and that the treatment was because of race, rather than, for example, qualifications, regulations or errors.

The letter pointed out that the Claimant was fully aware of the steps taken by the Respondent to support her in obtaining the necessary visa, having been involved in the process throughout. The letter then went through each of the 8 complaints in turn, in particular:

8.1 Claim 1: It pointed out that, as the Claimant was aware, no CoS could be issued until the Claimant had obtained her PIN. It referred to the contact between the Claimant and the Respondent between October and December 2022 about the Claimant completing her placement and then applying for her PIN. It said that it had emerged that the Claimant no longer had sufficient undefined COSs and that the Respondent had considered other options to support the Claimant, including paying to expedite a further application.

8.2 Claim 2: The letter said that Ms Blackburn had not told the Claimant that she needed to leave the UK immediately. She had raised this as a last resort option should the Claimant need to be issued with a defined CoS. This was an attempt to find a way for the Respondent to employ the Claimant as a nurse.

8.3 Claim 3: The letter said that the Respondent's letter inviting the Claimant to a meeting on 16 January 2023 was handed to her on 15 January 2023 because the Respondent reasonably believed that the Claimant's right to work expired on 16 January 2023 (although the Claimant, unbeknown to the Respondent, was by now aware that she had a continuing right to work following her application with Cygnet). The Claimant took leave unexpectedly so the letter could not be given to her on 13 or 14 January 2023. The Respondent tried to deliver the letter to the Claimant's home address but was told she had moved some months previously. The Respondent's only remaining option was to invite the Claimant to collect the letter at work.

8.4 Claim 4: The letter said that the Claimant was accompanied by Ms S Smith at the meeting after she was unable to secure union representation at short notice. The Respondent did consult lawyers during an adjournment in the meeting. This followed the Claimant's last-minute assertion that she in fact now had a continuing right to work. The purpose of the advice was to find out whether the Respondent could now continue to employ the Claimant and the Respondent confirmed to the Claimant, having taken advice, that it could indeed continue to employ her.

8.5 Claim 5: The letter said that the Respondent's employees did engage with the Claimant's representations. The Respondent reasonably considered that it was obliged to dismiss the Claimant if she did not have a right to work and explained that to her. As soon as the Claimant notified the Respondent that she had in fact made an application, the Respondent took legal advice. As soon as it became apparent that the Claimant did have a continuing right to work, the Respondent confirmed that it would continue to employ her.

8.6 Claim 6: The letter said that Ms Hartland did not make the comment alleged and that this would be confirmed by her and the two witnesses who were present.

8.7 Claim 7: The letter said that Mrs Eastwood did not tell the Claimant that she had already dismissed her. It pointed out that as a matter of fact the Claimant was not dismissed, once she had informed the Respondent of

her application. The letter said that this too would be confirmed by Mrs Eastwood and the two witnesses who were present.

8.8 Claim 8: The letter said that none of the Respondent's actions were designed to truncate her preceptorship in order that she be re-allocated to a lower banding. It referred again to the difficulties in relation to the Claimant's right to work and the steps taken to address that. It said that the suggestion that the Respondent took steps because it wished a colleague to be allocated to a lower banding had no reasonable basis in any evidence.

9. The Tribunal's attention was not drawn to any response (reasoned or otherwise) to that costs warning letter.

10. It is apparent that the Claimant put forward a settlement proposal via ACAS on 24 November 2023, very shortly before the final hearing. The Respondent replied on 24 November 2023 rejecting the proposal and offering, again, not to pursue the Claimant for costs if she withdrew her claims. It forwarded another copy of the initial costs warning letter and it said that the position was now even clearer following disclosure and the exchange of witness statements. It said that the documents and statements demonstrated the ongoing willingness of the Respondent to support the Claimant in her employment (notwithstanding a number of errors), in particular by paying for the Claimant's visa.

11. The Tribunal's attention was not drawn to any response (reasoned or otherwise) to that costs warning letter either.

Unreasonable or vexatious conduct or no reasonable prospect of success

12. The Tribunal started by considering whether it was unreasonable or vexatious for the Claimant to bring or pursue her claims. We concluded that it was. In particular:

12.1 The contention that the Respondent failed to deal with the Claimant's visa and/or immigration requests "at any time" before telephoning her on 13 January 2023 and meeting with her on 16 January 2023 was, and must have been known to the Claimant to be, wholly incorrect. As the findings of fact in the written reasons make clear, the Claimant raised the issue on 25 October 2022, and she was then copied in on email correspondence showing the Respondent's attempts to assist her with the issue throughout November and December. The Claimant also knew that the Respondent was not physically able to apply for a CoS for her before she had her PIN. We considered that it was unreasonable to pursue a complaint that the Respondent treated her less favourably because of race by failing to deal with the visa/immigration issue before 13 January 2023 in circumstances where the Claimant knew that the Respondent was trying to progress the issue before that, and where she knew at the time of presenting her claim that nothing could have been done until she obtained her PIN. We noted that the Respondent's costs warning letter drew specific attention to the contact between the

Claimant and the Respondent between October and December 2022 and to the situation regarding the PIN.

12.2 As the findings of fact in the written reasons make clear, the Tribunal found that Ms Blackburn did not tell the Claimant that she needed to leave the UK immediately and we found the Claimant's evidence about this lacking in credibility. Ms Blackburn was telling her that a last resort option for her would be to make an out of country application, for a different type of CoS. We noted that the Claimant embellished this complaint further at the Tribunal hearing, suggesting that Ms Blackburn had threatened her that the Home Office had called the Respondent, asked her to leave immediately, and were coming for her. The Respondent specifically set out its account of the conversation and explanation of what had been said in its costs warning letter, inviting the Claimant's legal representative to confirm the position about out of country applications with his immigration colleagues. Even with the benefit of the doubt that the Claimant innocently misunderstood or misconstrued the conversation at the time, it seemed to the Tribunal that persisting in this complaint after that letter, and again after the exchange of evidence and then witness statements, was unreasonable. Instead of reflecting on the rational explanation and evidence that had been put forward, the Claimant embellished her account with untrue allegations of threats.

12.3 The Tribunal found that was not unreasonable for the Claimant to present a Tribunal complaint at the outset about having to attend work on 15 January 2023 to collect the letter inviting her to a possible dismissal meeting the next day. At that time, she did not have access to the documents or witness statements setting out why this had come about so late in the day and what had been done to try to get the letter to her before that. However, in the original costs warning letter, the Respondent explained that the Respondent had been unable to deliver the letter as initially intended because the Claimant took last minute leave and that it had then made an unsuccessful attempt to deliver it to the Claimant's former address. The Claimant subsequently received the documentary and witness evidence explaining those matters. The Tribunal found that it was unreasonable to persist in a complaint that the Respondent had deliberately delayed giving her the letter as an act of direct race discrimination once she knew the explanation, knowing as she did what had been done before and after this to try to support her in respect of her visa/immigration issues.

12.4 As the findings of fact in the written reasons make clear, the Claimant knew that the Respondent had asked Ms Smith to attend specifically to support the Claimant and she knew that the conversations with the legal representative occurred only after (and because) the Claimant belatedly told the Respondent about her application with Cygnet. She knew that they had called the lawyers while the Claimant and Ms Smith were out of the meeting having a break but had come through with the lawyers still on the phone to ask some clarification questions. And she knew that the whole purpose of consulting the lawyers was to try and avoid dismissing the Claimant, which succeeded. These points were specifically identified in the original costs warning letter. It was wholly unreasonable for the Claimant to present and pursue a complaint of

race discrimination based on the contention that, despite being aware that she had no support in the meeting, Mrs Eastwood, Ms Hartland and Ms Smith conversed with their legal representatives in front of the Claimant during the 16 January 2023 meeting.

12.5 It was unreasonable to present and pursue a complaint based on the contention that the Respondent's employees did not engage with the Claimant's representations and had the set intention to dismiss her on 16 January 2023. We refer again to the findings of fact. The Claimant must have known when presenting her complaint that she had spoken at length in the first part of the meeting, mainly about other issues, and had been warned about her behaviour by the Respondent's employees. She clearly knew why the Respondent's employees had then told her that they would have to dismiss her, namely because it would not be lawful for them to continue to employ her if she did not have the right to work. She also knew that as soon as she had informed them that she did in fact have the right to work they sought advice and confirmed, to her advantage, that they did not have to dismiss her. That is the very opposite of failing to engage with her representations and having the set intention to dismiss her. This was pointed out in the costs warning letter. The Claimant also knew that she had gone into the meeting knowing that she did now have the right to work, but that she had not informed the Respondent of that at any point from 13 January 2023 onwards, nor did she do so at the outset of the 16 January 2023 meeting. The Tribunal found it unreasonable to present and pursue this complaint in all those circumstances.

12.6 The Tribunal did not find that it was unreasonable to present or pursue this complaint, given that there was evidently some discussion about the Trust not normally employing nurses who were international students, already in the UK and on dependent visas. As we explained in the findings of fact, we could see how there might have been a misunderstanding or selective recollection on the Claimant's part, although we were quite satisfied having heard the evidence that Ms Hartland did not tell the Claimant that the Trust did not employ "people like you."

12.7 Referring again to the Tribunal's findings of fact, the Claimant must have known when she presented her claim that Mrs Eastwood did not tell her that she had already dismissed her during the 16 January 2023 meeting. That was inconsistent with the fact that Mrs Eastwood confirmed to her, after she had revealed that she did now have the right to work, that she did not have to dismiss her. The Claimant must have known that she was being told that the Trust had no choice but to dismiss her if she had no right to work, not that she had already been dismissed. Again, this was specifically pointed out in the original costs warning letter. It was unreasonable to present and pursue a complaint based on the contention that Mrs Eastwood had told her that she had already dismissed her in those circumstances.

12.8 The Claimant knew about the steps that had been taken in relation to her visa/immigration status, including that Mrs Eastwood had agreed to fund the £5,000 cost from her budget. She knew that, as soon as she revealed that she now had a right to work, steps to dismiss her were halted and she was told that she could continue to work. This was

pointed out in the costs warning letter, which said that the Claimant had no basis for advancing this complaint of race discrimination. The Tribunal agreed. It was unreasonable for her to present and pursue it in those circumstances.

13. Having reached those conclusions, the Tribunal did not go on to deal in detail with the secondary argument, about the unfair dismissal complaint and disclosure application. In general terms, there appeared to be elements of unreasonableness in the approach of the Claimant or her legal representative, but the more fundamental issue was in presenting and pursuing complaints of race discrimination which, for the most part, the Claimant must have known to be factually inaccurate or baseless.

Discretion to make a costs order

14. The nature of the unreasonable conduct is set out above. The Tribunal found that this was significant and serious. It was unreasonable to present and/or pursue seven of the eight complaints. The consequence was that it was necessary for the Respondent to defend those complaints, and to prepare for and participate in a three-day hearing, calling four witnesses and preparing a 750 page file of documents, the burden of which fell on the Respondent. If the only complaint had been about Ms Hartland's alleged comment on 16 January 2023, this could have been dealt with in a one-day hearing with a very streamlined file of documents.

15. The Tribunal considered that it was appropriate to make an order for costs in those circumstances. That was particularly so given that the Claimant had the benefit of legal advice throughout, and that the Tribunal's judgment turned in many respects on precisely the points that had been identified by the Respondent in the costs warning letter in August 2023. We considered that the Claimant's ability to pay could be considered in determining the amount of any costs order, but should not prevent an order being made at all. If and to the extent that any of the unreasonable conduct relates to fault on the part of the Claimant's legal adviser, that is a matter between them.

Amount of costs order

16. The Respondent has provided a detailed schedule of costs. Its solicitors' costs amount to almost £40,000 and counsel's fees increase that by around £8,000. These were serious allegations of discrimination faced by a public body and it was entirely reasonable for them to engage the services of reputable solicitors and, for the final hearing, counsel. The solicitors' costs are, in the Tribunal's view, on the high side for proceedings that culminated in a three-day Employment Tribunal hearing. However, it is not necessary or proportionate to conduct any detailed assessment or consideration of the costs schedule. With our experience and knowledge, the Tribunal approaches this on the more general basis that we are quite satisfied that the reasonable costs of defending these proceedings at standard rates would be at least £25,000.

17. The Claimant has not provided any evidence of her ability to pay a costs order. As set out above, she has been given every opportunity to do so. The only information available to the Tribunal is that the Claimant is a qualified nurse, and as such likely to be in employment and earning a nurse's salary. In addition, we know that the Claimant engaged the services of a solicitor throughout these proceedings. We consider that it is appropriate to take into account what we know about the Claimant's ability to pay a costs order and we do so.

18. The Tribunal concluded that it would not be appropriate to order the Claimant to pay the Respondent's full costs, nor what the Tribunal regarded as a reasonable maximum figure of around £25,000. First, we found that it was not unreasonable to present and pursue one of the eight complaints. It is likely that it would have been necessary to defend that complaint and prepare for and participate in a one-day hearing. The costs of doing so might well have amounted to £10,000. We also noted that, while entirely satisfied that there was no discrimination, we have identified failures of communication and shortcomings on the Respondent's part in its dealings with the Claimant. Furthermore, the Tribunal found in this case that it was appropriate to award a sum that the Claimant, as a nurse, would have a reasonable prospect of paying within a reasonable timeframe. We did not consider it appropriate to award a sum that she would have no prospect of repaying at all, or within a reasonable time. On the other hand, we found the unreasonable conduct serious and its consequences for the Respondent, as a public body, significant. It was not appropriate to order the payment of a minimal or notional sum in those circumstances. Taking those factors into account, we concluded that £6,000 was the appropriate sum.

Employment Judge Davies
20 September 2024
Sent to the parties on

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For the Tribunal:

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