



EMPLOYMENT TRIBUNALS

Claimant: Mrs C Innerarity
Respondent: Leeds Teaching Hospitals NHS Trust
Heard at: Leeds **On:** 9 November 2018
Before: Employment Judge Davies
Mr Q Shah
Mr K Smith

Parties did not attend

JUDGMENT

1. Pursuant to Rule 76 Employment Tribunal Rules of Procedure the Claimant shall pay the Respondent £2,000 in costs.
2. The Tribunal anticipates that the parties will reach agreement for the payment of that sum by instalments.

REASONS

Introduction

1. Following the Tribunal's judgment dated 27 September 2018 the Respondent made an application for costs against the Claimant. The parties agreed that this should be dealt with by written representations and that the Tribunal would determine the application on the papers.
2. The Tribunal received a written application by the Respondent, two witness statements with associated documentation from the Claimant, and a response by the Respondent. We considered those documents carefully, alongside our original judgment and reasons.

Legal principles

3. 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; 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.

4. The key principles of relevance in this case are:
 - a. In the Tribunal an award of costs against the losing party is the exception rather than the rule.
 - b. If the ground relied on in an application for costs is unreasonable conduct, the Tribunal must first be satisfied that there was unreasonable conduct and must then consider whether it is appropriate to make a costs order.
 - c. If it is, the Tribunal must consider the amount of the costs order.
 - d. The Tribunal may take into account ability to pay both when deciding whether to make a costs order and when deciding the amount of any such order.
 - e. Litigants in person are not to be judged by the standards of a professional representative - the Tribunal must make an allowance for inexperience and lack of objectivity. There may be cases where the threshold of unreasonable conduct is crossed not because of conduct that arises because of the party's lack of experience as a litigant, but because of his or her fundamentally unreasonable appreciation of the behaviour of the employer and colleagues: see *Vaughan v London Borough of Lewisham* [2013] IRLR 713.
 - f. The fact that a party has not been given a costs warning, for example in a costs warning letter, warning from the Tribunal or deposit order, is not decisive in deciding whether the party acted unreasonably. It may be relevant. That is a question for the Tribunal in the individual case: *Vaughan*.
 - g. The Tribunal must identify the unreasonable conduct, say what was unreasonable about it and say what its effect was: see *Yerrakalva v Barnsley MBC* [2012] ICR 420 CA.
 - h. The Tribunal may in principle make an award that the Claimant cannot in her present financial circumstances afford to pay where it has formed the view that she might be able to meet it in due course: *Arrowsmith v Nottingham Trent University* [2012] ICR 159.

Issues

5. The issues are therefore:
 - a. Did the Claimant act unreasonably in bringing, pursuing or continuing with her claim of race discrimination?
 - b. If so, should the Tribunal make a costs order against her?
 - c. If so, for how much?

Facts and reasons

Unreasonable conduct

6. The Claimant presented a claim of race discrimination on 5 November 2017 and the Tribunal finds that she acted unreasonably in doing so. We find that she had a fundamentally unreasonable appreciation of the behaviour of the Respondent and the individuals involved. We have made detailed findings of fact in our original judgment and we do not repeat them here. As set out at paragraph 3.55 of the judgment, the Tribunal concluded that the Claimant's perception that Ms Bishop,

Ms Dowson, Ms Murden and Ms McClelland treated her less favourably because she is black was fundamentally flawed. It was based on the false premise that the Claimant was performing extremely well until placement four. As the detailed findings of fact in the original judgment make clear, the Claimant was not doing extremely well until placement four. Concerns had been raised about her in every single placement; she had missed the hand-in deadline three times in year one; and she had passed the minimum number of competencies permissible in that year. The Claimant was well aware of this at the time and cannot reasonably have perceived that she was doing extremely well until placement four. That flawed and unreasonable perception was essentially the basis for the suggestion that what took place during and after placement four happened because of the Claimant's race.

7. A substantial element of the discrimination complaint related to the verification of the Claimant's written evidence. The Tribunal referred to that at paragraph 3.25 and later of its judgment. The very extensive drafts and comments had been provided to the Tribunal. The Claimant had them all at the time. It is entirely clear on the face of the emails and drafts that the approach of Ms Dowson (and Ms Murden when she was involved) was efficient, fair and meticulous. Ms Dowson was plainly making comments that were appropriate and justified. The documents cannot conceivably support the contention that Ms Dowson's approach was in some way discriminatory. The Claimant must have known that at the time.
8. As set out in the original judgment, once the Claimant had made allegations of race discrimination the Respondent repeatedly pressed her for information so that it could investigate her complaint but she never provided any. We noted that she did not actually complain of discrimination in her witness statement, and even when asked by the Tribunal why what she thought the reason for her treatment was, she did not suggest that it was her race.
9. It was unreasonable to present a complaint of race discrimination to the Tribunal in those circumstances.
10. The claim as originally presented on 5 November 2017 was not clear. The Respondent put a holding response in on 21 December 2017. In its agenda for the preliminary hearing that took place on 6 April 2018 it suggested that the unfair dismissal claim had no reasonable prospect of success and should be struck out or a deposit ordered. It did not say the same about the race discrimination claim. Employment Judge Jones identified the nature of the complaints of race discrimination, ordered the Claimant to provide some further particulars and fixed a hearing. There is no suggestion that he gave any indication that the race discrimination claim appeared weak at that stage.
11. The Claimant provided further particulars and the Respondent responded to them in June 2018. It did not say that the race discrimination claim as now articulated had little or no reasonable prospect of success.
12. A further preliminary hearing took place on 1 August 2018 before Employment Judge Lancaster. He dealt with an application by the Claimant to strike out the response for non-compliance with case management orders. No application was made for the claim of race discrimination to be struck out or a deposit ordered. The

parties continued to prepare for the final hearing and witness statements were exchanged on 31 August 2018.

13. On Wednesday, 12 September 2018 the Respondent wrote the only costs warning letter to which the Tribunal was referred. In that letter it said that it had reviewed the witness statements and formed the view that the Claimant's race discrimination claim was without merit. It gave one example of an allegation it said had been answered in the Respondent's evidence. It invited the Claimant to withdraw her race discrimination claim to reduce the time and costs of the hearing and warned her that if she did not withdraw the claims it might make an application for costs.
14. Very sadly, the Claimant's mother had recently passed away and her funeral took place the day after the letter was sent, Thursday, 13 September 2018. The Claimant explained that she was naturally deeply upset at the time she received the letter and did not fully understand what was being implied. She then had the funeral to cope with and she was in London, so getting legal advice was not an option. The day after the funeral she had to travel back to Bradford, arriving late in the evening. She then had the weekend, and the Tribunal started on the Monday morning.
15. The costs warning letter came late in the day. The Tribunal did not consider that the Claimant acted unreasonably specifically in relation to that letter. For the reason she explained, she did not have the time or capacity to process and deal with it before the hearing started.
16. However, she had acted unreasonably in bringing the race discrimination claim based on a fundamentally unreasonable appraisal of the Respondent's behaviour and she continued to pursue that claim. That too was unreasonable. There may be many reasons why a Respondent does not apply for a deposit order. In this case, for example, proceedings were already well advanced by the time the Claimant provided proper particulars of her discrimination complaint and in those circumstances a Respondent might well take the view that further applications were to be avoided. The absence of a deposit order does not particularly assist the Claimant in those circumstances. It is right that no costs warning letter was written until late in the day. However, in this case the Tribunal did not consider that the absence of such a warning from the Respondent made it reasonable for the Claimant to advance and pursue a discrimination claim that was fundamentally unreasonable from the outset. By 31 August 2018 the Claimant had the evidence and the witness statements. She knew then what the evidence would be. She could have, but did not, take the opportunity to withdraw the race discrimination claim at that stage.
17. The Claimant's unreasonable conduct was therefore in advancing and pursuing a race discrimination complaint based on a fundamentally unreasonable appreciation of the behaviour of the relevant individuals.
18. The effect of that unreasonable conduct was plainly to increase the time and cost of preparing for the hearing and to increase the length and expense of the hearing. The unfair dismissal and wages claims alone would have required around three days of Tribunal time. Instead, the hearing took at least twice that long. The vast majority of documents in the hearing files related to the discrimination claim, in

particular the documents relating to the verification of the Claimant's written evidence. The evidence of Ms Dowson and Ms Murden would have been very significantly reduced and Ms Walker's attendance might have been entirely unnecessary. It is not necessary for the Tribunal to descend into the detail of assessing the costs that related solely to the discrimination complaint. The Respondent says that its costs presently stand in the region of £62,000 but that it is happy to be bound by the Tribunal's limit of £20,000. The Tribunal accepts that the costs reasonably arising from the discrimination complaint would have been substantial, and certainly in excess of £10,000.

Should costs be awarded?

19. The Tribunal finds that it is appropriate and in the interests of justice to make a costs order. The unreasonable conduct did cause the Respondent very substantial expense and it is appropriate to order the Claimant to make a payment. Her ability to pay can be taken into account in the amount of the order. It is not such as to prevent an order being made at all.

Ability to pay and amount

20. The Claimant provided detailed evidence about her means, which was not challenged by the Respondent. The Tribunal accepted in the light of that evidence the Claimant is currently of limited means. Her current salary is just over £19,000 per annum. Her take-home pay averages around £1540 per month. Her outgoings include a mortgage, substantial personal loan repayments, utility bills and insurance. In addition she has day-to-day household expenses. She said that she has very little money left to live on after all her outgoings and leads a very meagre existence. The written evidence supports that.
21. However, some of the Claimant's outgoings relate to repaying arrears on some of her debts, which arose during the period when she was out of work. Those arrears will be paid off in the relatively short-term and the underlying loans will eventually be paid off too. In addition, the Respondent points out that the Claimant's salary will increase to just over £21,000 by 2020/2021 as a result of annual increments. It suggests that she could also register for agency or bank work to boost her income and the Tribunal agrees that this would be a possibility. As noted in our original judgment, the Claimant has a degree and it seems to the Tribunal that she has potential to increase her earnings. Her property is mortgaged she may have some equity in that.
22. In those circumstances, while accepting that the Claimant is currently of limited means, the Tribunal considered that her financial position is likely to improve over time.
23. Further, the Tribunal considered that it was appropriate to take into account the Claimant's ability to pay in determining the amount of the costs order. Costs orders are compensatory not punitive. The Tribunal considered it just to seek to identify a sum that the Claimant had a realistic prospect of repaying within a reasonable time frame. It did not consider that it would be just to order a very substantial sum that she had no realistic prospect of repaying. Such an order would be of little if any benefit to the Respondent either.
24. Taking into account the Claimant's current financial circumstances and the

likelihood that they will improve to some extent over the coming months and years, the Tribunal considered that the Claimant should be ordered to pay the sum of £2000. That is a sum that the Claimant has a realistic possibility of being able to pay by instalments within a reasonable time.

Employment Judge Davies

Date: 9 November 2018