



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE BALOGUN

MEMBERS: Ms E Whitlam
Mr S Goodden

BETWEEN:

Miss C Poku

Claimant

And

NHS Croydon Clinical Commissioning Group

1st Respondent

Ms A O'Grady

2nd Respondent

Ms R Colley

3rd Respondent

ON: 5 November 2019

Appearances:

For the Claimant: In Person

For the Respondent: Mr C Kennedy, Counsel

COSTS JUDGMENT

The Claimant is ordered to pay the first Respondent £20,000 towards its costs.

REASONS

1. This was a hearing to consider the costs application of the first respondent dated 29 May 2019, following our judgment on liability in this case, sent to the parties on 1 May 2019.
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. As a starting point, it is important to point out that costs do not follow the event in this jurisdiction and are still relatively unusual. Where they are awarded, they are intended to be compensatory, not punitive.

Issues

4. The issues that we 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, we have taken into account our findings on liability and the parties' written and oral representations. The Claimant gave evidence as to means but for reasons explained below, we have not taken that evidence into account.

Has the threshold for a costs order been met

6. At paragraphs 16 of the liability judgment, we say that the Claimant was totally lacking in credibility and that her allegations were untrue. For avoidance of doubt, by untrue we mean that they were lies. Those conclusions were based on our findings at paragraphs 14 and 15 of the judgment, which are generally findings about the Claimant's credibility in relation to a number of disputed matters.
7. The Claimant's lies were significant and went to the heart of her race discrimination claim. The allegations were of a serious nature - assault and racial harassment. Had the Tribunal accepted the Claimant's evidence, it would have resulted in her claim being upheld. That in turn would have had reputational and financial consequences for the Respondents. We also bear in mind that this case involved individual Respondents and their reputations and, potentially, their careers could have been severely damaged by a discrimination judgment against them personally. The claimant must have made the allegations knowing them to be untrue and to present a claim on a false premise and persist with it was in our view wholly unreasonable. That unreasonableness was compounded by the Claimant's refusal to heed the two cost warning letters sent to her by the Respondent's representatives on 13 August 2018 and 15 August 2018. On both occasions, the Claimant was invited to withdraw her claim without any cost consequences. In the final letter she was advised that the costs to date were £6000 plus VAT and that the costs to the full hearing were likely to be £48,000, which she may be

ordered to pay. Her submission to us that she brought the claim in good faith and that there was no ill intent is not accepted. Further, her submission that the Respondents acted unreasonably by incurring the cost of defending the claim rather than settling with her was an unattractive one in the circumstances.

8. We are satisfied that the Claimant acted unreasonably in bringing and pursuing the claim. We find that the threshold for a costs order has been met.

Should a costs order be made

9. 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 20 July 2019, asking her to provide evidence as to her means. At the hearing, the only document produced was a one page Nationwide account statement summary showing a starting balance of nil and no transactions between 13/1/19 and 13/8/19. There was no information outside that date range.
10. The Claimant gave oral evidence as to her means. The evidence was, sketchy, confusing and inconsistent under questioning. Overall it was totally lacking credibility. She told us that the Nationwide account, referred to above, was her only bank account and that she had withdrawn the last £500 in or around August/September 2018. Of that sum, she donated £100 to the church and lived on the remaining £400, spending the last £5 of that sum on the day of this hearing, on an Oyster card. When asked how she had managed to support herself on £400 for 14 months, she said that she had been living rent free and utility free at a friend's house for the last 11 months. There was no evidence, written or otherwise, from this so-called friend and the Claimant very reluctantly revealed her name after being directed to do so.
11. We are aware from documents produced for the liability hearing that the Claimant had an account with Natwest Bank. When she was asked about this in cross examination, she said that the account had been dormant and was closed it in May 2018. No documentary evidence was produced in support of this.
12. Despite the fact that, on her own evidence, the Claimant has been living on, effectively, £1 a day, for the last 14 months, she told us that she had not applied for any benefits. When asked why not, she gave a number of answers. She said that she intended to go abroad for medical treatment, to be paid for through crowd funding (this has not happened). She said that she did not claim benefits because she was self-litigating and looking for a job. She also said that she was too stressed to claim benefits because of the litigation and because she was depressed. Incidentally, the Claimant has made a number of references to health issues during the course of these proceedings but has produced no evidence in support. We did not consider any of these reasons to be plausible.
13. The Claimant told us that she has been unemployed since her termination and has been actively looking for work since then, without success. However, her evidence on her job search was sketchy and inconsistent.
14. Having already concluded that the Claimant is not a credible witness, we were not prepared to accept her evidence on face value. Given the lack of any supporting

documentation and the general implausibility of her evidence, we have decided to disregard the evidence in its entirety.

15. In the absence of satisfactory evidence as to means, we have assumed that the Claimant is able to meet a costs award. Even if we are wrong on that, it is clear from Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797; Vaughan v London Borough of Lewisham & Ors UKEAT/0533/12/SM and Chadburn v Doncaster & Bassetlaw Hospital NHS Foundation Trust & Ors UKEAT/0259/14/LA; that costs may be awarded even if the Claimant cannot currently afford to pay.
16. We bear in mind that the first Respondent is an NHS Trust and that the costs that have been incurred come ultimately from the tax payer. We therefore consider it just and equitable that they should be able to recoup some of this expense.
17. In the circumstances, we consider it appropriate to make a costs order in this case.

Amount of costs award

18. The Respondent's costs schedule sets out costs totalling £50,411.30. However, for the purposes of their application, they are limiting their claim to £20,000, representing about 40% of the schedule. In those circumstances, any potential arguments relating to excessiveness and proportionality fall away.
19. Given that the sum claimed is a fraction of the total costs incurred, we see no reason to reduce it further.
20. We award costs to the Respondent of £20,000.

Employment Judge Balogun
Date: 4 December 2019