



# EMPLOYMENT TRIBUNALS

**Claimant:**  
Mr M Shaba

v

**Respondent:**  
Oxford University Hospital NHS  
Foundation Trust

**Heard at:** Reading

**On:** 6 December 2019

**Before:** Employment Judge Gumbiti-Zimuto  
Members: Mrs CM Baggs and Ms HT Edwards

## Appearances

**For the Claimant:** In person

**For the Respondent:** Mrs H Winstone of Counsel

## JUDGMENT

1. The claimant's application for a postponement of the costs hearing to a date in February or March 2020 to enable the claimant to be represented at such hearing is refused.
2. The claimant is ordered to pay to the respondent costs in the sum of £10,000.00.

## REASONS

1. At a hearing that took place on 18, 19 and 20 March 2019 the Tribunal decided that:
  - i. The claimant's application for a postponement is refused.
  - ii. The claimant's application to recuse the Employment Judge from considering his case is refused.
  - iii. The claimant's complaints of direct race discrimination and harassment related to race made in claim number 3325723/2017 have been presented out of time and the employment tribunal does not have jurisdiction to consider the claims. It is not just and equitable to extend the time for presentation of the claims.
  - iv. The claimant's complaints of direct race discrimination, harassment related to race and victimisation made in claim number 334336/2018 are not well founded and are dismissed.

- v. The claimant's complaint about holiday pay is not well founded and is dismissed.
2. The claimant has again asked that the Employment Judge recuse himself from hearing the case on the grounds that he is a relative and therefore a person with an interest in the proceedings. The Tribunal rejected this application. The matter has previously been considered by the Tribunal. The claimant is not a relative of the Employment Judge.
3. The claimant made an application for a postponement of this costs hearing. The claimant stated that he had an appointment with a solicitor on 12 January 2020 (the claimant had earlier stated that he was due to go into hospital for treatment on the same day). The claimant went on to clarify that he had a telephone appointment with a solicitor on that day. The claimant stated that he wished to be represented in the costs hearing and that he required a consultation with the solicitor to take place before the solicitor could act for him. The claimant did not clarify whether the consultation with the solicitor was in relation to these employment tribunal proceedings against the respondent or some other contemplated proceedings against this respondent (e.g. for personal injuries): what is clear is that the claimant is currently unrepresented in respect of these proceedings before this Tribunal and in the Employment Appeal Tribunal. The claimant stated that he would be ready for hearing in February 2020 or March 2020 and then later went on to say that any future hearing of the cost application could be listed in April 2020. We understood the claimant's suggestion of listing the case in February, March or April 2020 to be in order to give time for the claimant's appeal before the Employment Appeal Tribunal to be concluded.
4. We rejected the claimant's application for a postponement. There is no clear indication that the claimant has a solicitor ready willing and able to act for him in these proceedings, there was no prior indication from the claimant that he sought a postponement to consult a solicitor, there is no correspondence from any solicitor stating that they require time to take the claimant's instructions on this issue or any other matter. The Tribunal formed the view that the claimant's request to postpone the hearing to enable him to consult with a solicitor, coming as it did well into the claimant's lengthy submissions, was a spontaneous application made impromptu as an afterthought while the claimant was in the course of replying to the respondent's application for costs. If the claimant had made an appointment with a solicitor to take place on 12 January 2019, we would have expected to see something confirming such an appointment.
5. Further there was no prejudice to the claimant's appeal by the Tribunal making a decision on the costs application, the claimant has the ability to challenge any costs order we make and to the extent that it is parasitic to the claims under appeal, if the claimant's appeal is successful any costs order would go the same way.

6. The respondent's application for costs is set out in a document dated 7 June 2019. The respondent seeks costs in the sum of £33,273.00. These are only part of the cost incurred by the respondent in dealing with this case. The amount set out in the schedule of costs does not include the respondent's costs after the 10 June 2019. The grounds for the application were that the claimant acted vexatiously, abusively, disruptively or otherwise unreasonably both in bringing his claims and in the way in which he concluded the proceedings and/or that his claims, in particular his second claim, had no reasonable prospect of success. The matters relied on are summarised in the application for costs document dated 7 June 2019.
7. The claimant arrived for the costs hearing late, having failed to inform the Tribunal he was running late. The claimant on arrival was offered the opportunity to discuss matters with the respondent's counsel but refused to do so. The claimant confirmed that he had received the respondent's costs application.
8. Having heard the respondent's application, the claimant replied to the application at length and without notes. The points he made are summarised as follows:
  - a. The claimant began by stating that the Employment Judge should recuse himself and stated that the Judge was a relative (it was not clear whether this was a development on the previous position which was based on the fact that his sister "*was married to the Gumbiti family*".)
  - b. The claimant stated that he had appealed the Tribunal's decision and the cost application should not proceed pending appeal.
  - c. The claimant stated that he had not previously put forward his case on the claims and that the reason he had not done so is because he is unwell.
  - d. The claimant stated that the incident on the 3 April 2018 was captured on CCTV and that not all this footage has not been provided to him. The claimant accepted that CCTV footage had been provided but stated that it was "*edited*". The claimant went on to give a version of events that took place on 3 April 2018.
  - e. The claimant alleges that he suffered injuries at the hands of the respondent's employees on the 3 April 2018, that thereafter he was subject of a ban from the respondent's premises and refused treatment by the respondent. The claimant alleges that he had to seek treatment outside the county and that he continues to suffer from injuries sustained.
  - f. The claimant contended that despite its denial he suffered race discrimination from the respondent and the Tribunal has failed to "*look*

*into it*”; the Tribunal should have *“requested more information”* from the respondent. The claimant stated that the Tribunal should *“look into it”* that it was *“not for me to get them<sup>1</sup> from hospital”*, and that had we done so we would *“discover the respondent lying and covering up when they committed a crime against my body.”*

- g. The claimant stated that he is unable to find work. The claimant stated that he is unable to lift, bend or walk properly. The claimant stated *“I cannot lift my hands up; I cannot walk like anyone else.”* The claimant stated: *“I cannot play football with my children because of the assault of 3 April 2018.”*
  - h. The claimant stated that he is not working and that he is not in receipt of any state benefits. The claimant is married he lives in accommodation rented from the council with his wife and three children. The claimant’s wife is in employment she is employed as a business analyst for a charity. The claimant’s children are aged 9, 13, and 18. The 18-year-old goes to school abroad when he is not living at home with the family. The 18-year old’s education was sponsored by the claimant’s late father and his late step father. The claimant states that he has debts of around £3000 to friends which he is not currently paying back.
  - i. The claimant states that he does not know if he will be able to find work. He has been looking from administrative work. Before his dismissal by the Trust the claimant had hoped to end his career with the respondent (we note that the claimant was 49 when he commenced the first claim, 50 when he commenced the second claim and is 51 at the date of this costs hearing. There are 16 years before the claimant reaches state retirement age. The claimant stated that he has worked as a lecturer, in teaching, as an outreach worker, and in recruitment. The claimant stated that he is open to working in any role he is capable of performing. The claimant explained that he continues to look for work but when he explains to people his limitations he is turned down: *“When I go for a job I am asked about my previous job and when I tell them about that they turn me down. I have to tell them the truth. Some ask me if I am on medication for depression etc I tell them the truth that is why I am here today.”*
9. Having heard from the claimant and the respondent the Tribunal took time to consider its decision. We came to the conclusion that the claimant should make a contribution to the respondent’s costs in the sum of £10,000.00. We set out below our reasons.

---

<sup>1</sup> Referring to CCTV footage and other evidence.

10. In bringing the second claim the claimant acted vexatiously or unreasonably because the claimant knew the claim was mendacious (i.e. he acted vexatiously) or, having regard to the what he knew occurred on 3 April 2018 it was a claim that he must have known could not succeed (i.e. he acted unreasonably). We set out in our judgment sent to the parties on the 16 May 2019 (hereafter referred to as “the Judgment”) that “(a) the claimant has deliberately chosen to lie; or (b) the claimant’s ability to recall and accurately relate the events is severely impaired.” There is no evidence before us that the claimant’s ability to recall and accurately relate events is affected by any impairment.
11. The claimant’s conduct of the proceedings on 18 March 2019 as set out in the Judgment, in particular the manner in which the claimant tried to obtain a postponement of the hearing was in our view an unreasonable conduct of proceedings. The claimant applied for a postponement, this was refused. The claimant then made the spurious contention that the Employment Judge should recuse himself because his sister had married and divorced a member of the Judge’s family. This was not only untrue, but the claimant must have known that it was untrue.
12. There was also a tactical deployment of a specious allegation of bias relating to earlier proceedings. The claimant knew that he had previously been before the Employment Judge in an earlier case (on which occasion there had been no suggestion from the claimant that he had any connection with the Employment Judge which should result in the Employment Judge being recused), but waited until a decision on the application to postpone had been made before raising any objection to the Employment Judge.
13. The claimant’s conduct of writing his letter containing the untrue contention about his connection with the Employment Judge and then refusing to enter the Tribunal room to speak to its contents or be questioned about its contents was in our view a disruptive form of behaviour which was deliberately contemptuous. We note that at the costs hearing when given the opportunity to explain why he was continuing to maintain an untruth when it was explained to him that it was wrong the claimant refused to explain merely stating, “its true”.
14. At the hearing on the 18 March 2019 the claimant was making complaints about his infirmity, allegedly caused by the respondent’s employees. We noted that the description of his infirmity was inconsistent with the way the claimant presented before the Tribunal. The claimant said he could not represent himself because he was suffering depression, however he was able to present his arguments forcefully, eloquently and at length. The claimant while making his submission to the Tribunal was at times standing and at other times sitting. He displayed no indication of being unwell. He said he could not raise his arms higher than his shoulders but then proceeded to do

so by waving his arms around on a number of occasions so that his arm went clearly over his shoulders.

15. All these points contribute to the overall impression formed and conclusion reached by the Tribunal that the claimant was willing to deploy an argument or point to secure a postponement regardless of its veracity.
16. Rule 76 (1) of the Employment Tribunals Rules of Procedure 2013 provide that: "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." The claimant has behaved unreasonably in the conduct of the claims. The claimant has behaved unreasonably in bringing the second claim and further the second claim had no reasonable prospect of success.
17. We have gone on to consider whether in the light of that conclusion we should in this case make an order for costs against the claimant.
18. We have taken into account the claimant's means and note that he states that he cannot pay an order for costs. Notwithstanding that we consider that this is a case where we should make an order for costs. The second claim in our view was mendacious. The CCTV evidence shows clearly that much of what the claimant complained of was not true.
19. The respondent is a public body which is part of the NHS. It is dependent on public funds. The funds are limited. Such funds as it has have to be deployed to meet all aspects of his functions including the care of ill people and the conduct of legal proceedings. The claimant's unmeritorious case has resulted in considerable expense to the respondent in spending money on legal costs to fight a wholly unjustified claim. We also mention that there were several employees that whose time was taken up with attending the employment tribunal proceedings on 18 and 19 March 2019 instead of undertaking the duties they are employed to carry out. This too would have resulted in the limited resources of the respondent being diverted away from the trusts primary functions to contesting these proceedings.
20. The claimant's argument appears to be that had we heard his case with him in attendance he would have been able to demonstrate that the respondent's witnesses lied and that he was assaulted on 3 April 2018. The claimant goes further and says that had we asked the right questions of the respondent and made further enquiry of the respondent's witnesses we would and should have discovered that they were lying. The claimant goes on to say that we did not hear him because he did not participate in the proceedings after lunch-time on 18 March 2019. For these reasons he says we should not make a costs order against him.

21. We reject that because:
22. (a) We heard evidence from the respondent's witnesses which included what appeared to be lengthy passages of unedited recordings which showed the claimant's interactions with the respondent's employees and they directly contradicted what the claimant says in parts of his written case as set out in his claim form. We saw CCTV footage that was not edited in respect of what we saw. We did not see everything, there were gaps in the chronology of what we saw but the key footage that we were shown was unedited footage. All of which was made available to the claimant before the hearing on the 18 March 2019 and should have led to him withdrawing his case as it showed his second claim was untenable.
23. (b) The claimant at the costs hearing did not say there was evidence from which we should reach an alternative conclusion that the respondent witnesses lied. What he says is that had the Tribunal made further unspecified enquiries we would have proved his case. We do not consider this a basis to impugn our own decision.
24. We have come to the conclusion we should exercise our discretion to make an order for costs. The claimant has not presented a basis for us to conclude that it would be an erroneous exercise of discretion on the facts of this case to make an order for costs. In reaching this conclusion we take into account the claimant's means. In the circumstances here where the claimant has brought a mendacious claim and acted unreasonably in the conduct of those proceedings against this respondent, an NHS Trust, the claimant's current apparent impecuniosity should not be a bar to an order for costs.
25. The claimant gave limited information as to his means. He says he has no income from work or from any state benefits. He lives with his wife who works and with his 9-year old son, 13-year old daughter and 18-year old son (when he is not studying overseas). The claimant and his family live in accommodation rented from the council. The claimant's wife is in employment as a business analyst for a charity. The claimant did not tell us what the family income was. The claimant has £3,000 debt to friends which he is not repaying.
26. The claimant is seeking employment. The claimant's evidence on this was not always clear but the position appears to be that despite various ailments he is not incapable of employment. The reason the claimant has been able to secure employment is that prospective employers having been told of the claimant's circumstances (i.e. his health and the circumstances in which his employment with the respondent came to an end) do not take his applications further or offer him employment. The claimant has not been in employment since leaving the respondent. The claimant continues to seek employment.

27. We take into account that we are not required to limit costs to an amount that the paying party can afford to pay<sup>2</sup>. We note that the claimant is looking for work and that he has not abandoned hope of finding employment. In so far as we have been able to understand the claimant's evidence his physical or mental health issues do not prevent him from being able to work, rather it is the way he reports the circumstances in which his employment with the respondent came to an end that prevents him from being able to secure employment. The claimant accepted that his physical limitations in walking and lifting are not serious impediments to the claimant's ability to carry out work of the type he is seeking and has done in the past.
28. We consider that it is appropriate we take these circumstances into account to decide what amount, if any, to make in an order for costs against the claimant. The claimant's conduct was such that it would not be in the interest of justice not to make an order for costs. The claimant has brought a knowingly unmeritorious claim which has resulted in the respondent a NHS Trust spending in excess of £33,000.00 in costs fighting the case.
29. We consider that justice requires the claimant make some contribution towards the costs incurred by the respondent. In view of his means the reality, at present, may be that there is no immediate prospect of recovering any costs by the respondent from the claimant. We do not consider that it would be in the interests of justice to interpret the Employment Tribunals Rules of Procedure as giving a claimant who has knowingly commenced a false claim, prosecuted it unreasonably to be forever absolved from making a contribution to the costs incurred as a result of his unreasonable conduct simply because he is at the time the cost application is considered impecunious.
30. In this case we have come to the conclusion that a contribution to the respondent's costs should be made by the claimant and we make an order that the claimant pay to the respondent the sum of £10,000.00

---

**Employment Judge Gumbiti-Zimuto**

Date: 11 December 2019

Judgment and Reasons

Sent to the parties on:

.....07.01.20.....

.....

---

<sup>2</sup> Arrowsmith v Nottingham Trent University [2012] ICR 159



For the Tribunal Office

**Public access to employment tribunal decisions**

All judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.