EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr C E N Kazoka	v	**Sheffield Health & Social Care NHS Foundation Trust**

Heard at: **Leeds** **On:** **27 March 2017**

Before: **Employment Judge A M Buchanan**

Members: **Mr D Embleton**

Mr J Adams

Representation:

For the Claimant: **Mr B Chimpango - Solicitor**

For the Respondent: **Mr S Sweeney of Counsel**

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The application of the claimant to adjourn this hearing is refused.

2. The deposit of £250 paid by the claimant shall be refunded to the claimant.

3. By consent the claimant is ordered to pay to the respondent the sum of £150 in respect of the costs of an application for disclosure made by the respondent against the claimant in February 2015.

4. The application by the respondent for the claimant to pay the costs of the adjournment of the liability hearing set to begin in March 2015 is refused.

5. The late application by the claimant for the respondent to pay the costs of the adjournment of the liability hearing set to begin in March 2015 is refused.

6. The claimant is ordered to pay to the respondent the sum of £2500 in respect of costs pursuant to Rules 76 and 78 of the 2013 Rules by reason of the unreasonable conduct of the proceedings by the claimant.

7. The late application by the claimant for the respondent to pay costs in this matter on the basis of the unreasonable conduct of the proceedings by the respondent is refused.

REASONS

1. The Tribunal assembled in order to determine various outstanding applications from the parties. The applications were as follows:-

1.1 To consider how to deal with a deposit in the sum of £250 paid by the claimant by virtue of an Order of Employment Judge Brain on 28 March 2014 ("the Deposit Order").

1.2 To consider an application by the respondent for costs against the claimant of £150 in respect of an application for disclosure made by the respondent in February 2015. In the event this application was conceded by the claimant and our above mentioned Judgment reflects that position.

1.3 To consider an application by the respondent for the costs of the adjourned hearing on 9 March 2015 - that being a hearing in Sheffield at which a panel comprising Employment Judge Little and Mr L Priestley and Mr D Fell ("the Little Tribunal") recused itself by reason of the fact specific allegations were made for the first time in the claimant's witness statement against a non-legal member of the Sheffield Employment Tribunal namely Susan Rodgers ("SR"). SR was the Vice Chair of the board of the respondent Trust at the material times and allegations were made against her by reason of her actions in that capacity.

1.4 To consider a cross application from the claimant in relation to the costs of the adjournment of the hearing before the Little Tribunal.

1.5 To consider an application by the respondent for costs of the proceedings being an application made on 13 November 2015 and considered but adjourned at a hearing on 16 November 2015.

1.6 To consider an application by the claimant in respect of costs of a hearing which came before Employment Judge Brain on 28 March 2014 to deal with applications made by the respondent on 23 January 2014.

1.7 To consider an application by the claimant that this hearing be adjourned in order to call SR before this Tribunal to explain her knowledge of and involvement with Employment Judge Brain at any Tribunal sitting or Tribunal training event or seminar.

Application to adjourn in order to hear from SR (application numbered 7 above)

2.1 Given that this application could result in the adjournment of this hearing, we decided to deal with it first. We listened to the submissions of the parties and then adjourned to deliberate. Having done so, we announced our Judgment orally

Submissions

2.2 On behalf of the claimant Mr Chimpango made oral submissions which were supplemented by submissions from the claimant himself. The claimant submitted that SR did not declare that she was a member of the Sheffield Employment Tribunal. She may have sat with Employment Judge Brain or attended training meetings with him but she did not volunteer that information. She needs to explain that position and she should be brought before the Tribunal to do so. These were the same reasons as the Little Tribunal recused itself in March 2015.

2.3 For the respondent, Mr Sweeney objected to the application as it would necessitate the hearing being aborted and rearranged and that was not in accordance

with the overriding objective. The application of the claimant was said to be nothing more than a fishing expedition. It should not be forgotten that the reason the application for costs is being made arose out of a very late introduction by the claimant of allegations involving SR which first saw the light of day in witness statements exchanged on 23 February 2015. To suggest that there is any risk of bias of Employment Judge Brain when he made his orders some 12 months prior to the first involvement of SR is absurd. There is no appearance of bias and in any event any application for recusal should be made to Employment Judge Brain himself.

2.4 In response the claimant submitted that it was in the public interest for SR to explain why she did not volunteer the fact that she was a member of the Sheffield Employment Tribunal when she knew the claimant was bringing a claim to the Tribunal. The claimant had no idea that SR was a member of the Sheffield Employment Tribunal although accepted that he knew SR was a member of the Employment Tribunals generally. The letter of resignation sent by the claimant on 23 May 2013 was copied to SR. The matter potentially engages the claimant's rights to a fair hearing and Article 6 of the Convention on Human Rights.

Conclusion

2.5 The application from the claimant is effectively for an adjournment and the issue of a witness order to bring SR before the Tribunal. The basis of the application is that SR, the Vice Chair at the relevant time of the respondent Trust, was also a member of the Sheffield Employment Tribunal non legal members' panel at the time when Employment Judge Brain ordered the claimant to pay a deposit at a hearing on 28 March 2014 and thus that Employment Judge Brain should have recused himself from that hearing as the Little Tribunal did some 12 months later. The claimant asserted that his Article 6 right to a fair trial had been compromised.

2.6 The application was framed on the basis that in March 2015 the Little Tribunal had recused itself from hearing the trial on liability on the basis that there was a risk that a fair minded and informed observer could conclude that there was a real possibility of apparent bias if it continued to deal with the matter given that it would then be hearing allegations against and, very likely, oral evidence from and cross examination of SR. We note that the Little Tribunal was in fact sitting in Sheffield at the time and as a result of that decision, the liability hearing was moved to the Leeds office and this panel (which is based at the Newcastle Tribunal) was assigned to hear the case as it did in June 2015. The application related to the fact that a year earlier, on 28 March 2014, this matter had come before Employment Judge Brain on a Preliminary Hearing and on that occasion Employment Judge Brain, sitting alone in Sheffield, had made various orders including an order that the claimant pay a Deposit of £250 as a condition of continuing with his allegations of direct race discrimination and harassment related to race on the basis that they had little reasonable prospect of success.

2.7 At the time the matter came before Employment Judge Brain, SR was not referred to in the pleadings at all and indeed the first reference (save as mentioned below) to her involvement in the matter came in the claimant's witness statement exchanged on 23 February 2015 in readiness for the hearing before the Little Tribunal in March 2015 which did not proceed for the reasons already explained. The only reference that the claimant says there was to SR at the hearing before Employment Judge Brain comes from his letter of resignation which it is said was referred to by Employment Judge Brain at the hearing in March 2014. The Judgment arising from that preliminary hearing does not make reference to the letter of resignation but we accept what the

claimant says, namely that it was referred to during the hearing itself. That letter is a very long letter and at the end of the letter (page 1192 of the liability hearing bundle), there is reference to a carbon copy being sent to Susan Rogers, Vice Chairman of the respondent Trust: that is the only reference to SR in the letter. It is upon that basis that the claimant says that there is a real risk that Employment Judge Brain was apparently biased in respect of the decision to make a Deposit order. The claimant also states that as a result his Article 6 right to a fair hearing is compromised.

2.8 Against that the respondent effectively says that the application which we have heard this morning is no more than a fishing expedition on the part of the claimant and that there is no risk that the informed and fair minded observer would conclude that there was any element of apparent bias on the part of Employment Judge Brain in making the order that he did in March 2014.

2.9 We have considered this matter and we have noted the documents to which we have been referred and we conclude that a fair minded and informed observer would not have any concern at all of risk of apparent bias in relation to the making of the order by Employment Judge Brain in March 2014. The circumstances which led the Little Tribunal to recuse itself are very different indeed for that Tribunal was faced with seeing specific and serious allegations against SR and potentially hearing oral evidence from SR who would very likely be cross examined (as indeed she was at the hearing before this Tribunal in June 2015). Given that serious allegations were made against a member of the Sheffield non legal member panel, the Little Tribunal, based as it was in Sheffield, understandably and rightly recused itself from the liability hearing.

2.10 In March 2014 the situation was very different indeed and we conclude that a fair minded and informed observer would not have had any concerns at all in respect of bias. There were at that time no allegations of any kind against SR in the lengthy pleadings and other than a reference to a letter having been copied to SR, no reference to her at all. The fair minded and informed observer would think it most unlikely that the matter was picked up by Employment Judge Brain at all or, even if he noted that a copy of the latter of resignation had been sent, that he would appreciate that the Sue Rodgers referred to was one and the same person as SR. The fair minded and informed observer would note that Employment Judge Brain was doing nothing more than reviewing the allegations made by the claimant on a broad basis at a preliminary hearing and did not delve into the finer detail of the case. In our judgment, the fair minded and informed observer would have no concerns of bias at all in this matter.

2.11 In those circumstances, we reject the application to adjourn and we conclude that the Article 6 rights of the claimant to a fair trial were and are not compromised in relation to the matters which have been raised before us this morning. Therefore we will continue to deal with the remaining applications which are now before us.

The Law

3. In considering the various applications before us, the Tribunal has taken account of the following provisions of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 Schedule 1 ("the 2013 Rules").

Rule 39 (5) – If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order –

a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purposes of Rule 76 unless the contrary is shown and

b) the deposit shall be paid to the other party (or if more than one to such of the parties the Tribunal orders)

otherwise the deposit shall be refunded.

Rule 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…

Rule 77 – A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the tribunal may order) in response to the application.

Rule 78(1) – A costs order may order the paying party to pay the receiving party a specified amount not exceeding £20,000 in respect of the costs of the receiving party…

Rule 84 – In deciding whether to make a costs preparation time or wasted costs order and if so in what amount the Tribunal may have regard to the paying party's…ability to pay.

Rule 5 - The Tribunal may, on its own initiative or on the application of a party extend or shorten any time limits specified in these Rules or in any decision whether or not (in the case of an extension) it has expired.

Written Submissions

4. The Tribunal had before it, and took account of:-

4.1 Written submissions on behalf of the respondent prepared in respect of the hearing on 16 November 2015.

4.2 The claimant's written representations extending to some 55 paragraphs and having annexed to it an application from the respondent to the Tribunal 23 January 2014.

4.3 Further written representations from the claimant extending to 13 paragraphs and 3 pages.

4.4 Copies of the Annual Report and Accounts of the respondent Trust for 2009/10, 2010/11 and 2011/12.

4.5 A copy letter from the Ministry of Justice to the claimant in respect of a Freedom of Information request No.110267 dated 7 March 2017 (3 pages).

4.6 The Tribunal also made reference to a bundle prepared for the Remedy hearing on 16 November 2015 and within the main Liability hearing bundle to the claimant's letter of resignation dated 23 May 2013, addressed to Kevin Taylor and copied to three other people including Susan Rogers, Vice Chairman for the respondent Trust (pages 1174 – 1193 of the Liability hearing bundle).

Oral Submissions

Respondent

5.1 On behalf of the respondent it was submitted that the application for costs by the respondent was first made on 16 November 2015. The Tribunal decided that there had been insufficient notice of that application and declined to deal with it at that time. The Tribunal was referred to various costs warnings given to the claimant during the course of the litigation culminating with a costs warning in a letter dated 4 March 2015 after the witness statement of the claimant (running into 296 pages) had been received on 23 February 2015. This followed two previous costs warnings, one on 25 February 2014 and the second on 28 March 2014. Despite those warnings the claimant had not taken any action to temper his allegations.

5.2 It was submitted that the Tribunal had decided that the allegations against the claimant for substantially the reasons given by Employment Judge Brain in his Deposit Order Judgment of 28 March 2014 and that therefore there was no question but that the deposit ordered should be paid to the respondent and that fact also means that the threshold for an award of costs under Rule 76 was passed without the Tribunal having to consider the matter further. The only way round that for the claimant was for him to show that he did not act unreasonably in pursuing his allegations and he has not done so. The burden lies on the claimant in that regard. The claimant persists to this day in his allegations.

5.3 The allegation made against SR of using the words "*playing the race card"* was made very late in the day and was a wholly gratuitous allegation against her which the Tribunal found had not been made out. In any event the claimant had behaved unreasonably pursuant to Rule 76(1) of the 2013 Rules. In relation to the claimant's applications for costs these are out of time pursuant to Rule 77 and time should not be extended pursuant to Rule 5.

Claimant

5.4 For the claimant it was submitted that nothing in the liability judgment showed that he had brought claims unreasonably and indeed the liability judgment had made it plain that the matters advanced were important matters which had engaged the Tribunal for some time.

5.5 It was in the public interest for the claims advanced by the claimant to be brought and for them to be adjudicated upon by the Tribunal. These were serious allegations of discrimination. The allegations were not bound to fail and only failed after a long hearing and vigorous examination by the Tribunal. The claimant denied that he had acted unreasonably in any way. The claimant asserted that he should be entitled to the return of his deposit and no award for costs. In relation to his own application for costs, the claimant submitted that it was the respondent which acted unreasonably and had caused the recusal of the Little Tribunal and not the claimant. It should have been known through SR that there was a potential conflict of interest and she ought to have made it known even before any allegation was specifically made against her. As a person with a judicial role, having been appointed in 1999, she should have flagged up the potential conflict of interest but she did not.

Respondent

5.6 In reply Mr Sweeney replied that his own applications for costs were not out of time but, if they were, an application for an extension of time pursuant to Rule 5 of the 2013 Rules was made. The claimant had not filed any schedule for costs and his own

application for costs was simply "tit for tat" and lack any specificity and merit. The costs of this matter have been very significant for the respondent. The respondent does not seek full recovery but simply a reasonable contribution in relation to the matter.

Claimant

5.7 For the claimant Mr Chimpango finally responded that if the application for costs made by the claimant was out of time an application under Rule 5 was made for an extension of time and should be granted. The allegation against SR was not a gratuitous allegation.

Conclusions

Application in relation to the Deposit

6.1 We have first considered whether in our Judgment on Liability we rejected the allegations made by the claimant for substantially the reasons given by Employment Judge Brain in the Deposit Order as set out in Rule 39(5) of the 2013 Rules.

6.2 We have considered the Judgment of Employment Judge Brain (pages 5 – 7 of the remedy bundle) which led to the Deposit Order. That judgment covers several matters. The reason that Employment Judge Brain did not strike out the claims of discrimination was that fact sensitive discrimination allegations should generally be heard and not struck out. It was noted that the claimant had at no time during his employment (save only at the end of a lengthy interview on 15 October 2012 and then only in response to a leading question), alluded in any way to the possibility of race discrimination. It was pointed out that it was not a necessary prerequisite for a claimant to raise matters during his employment but the Employment Judge was troubled by the evidential difficulty that that would give rise to. Accordingly we interpret that Judgment as saying that the reason the Deposit Order was made was the absence of any allegation of discrimination prior to the claimant's filing of the claim with the Tribunal in July 2013.

6.3 We have considered in detail our liability judgment and in particular the reasons why we rejected the allegations made by the claimant. We set out at the initial paragraph of our conclusions on liability (paragraph 11.1 page 94 of the remedy bundle) the absence of any reference to those matters during the employment though we do particularly refer to the fact that Dean Wilson did in July 2012 (some 10 months prior to the claimant's resignation) raise an issue in an internal memorandum about the question of race discrimination. We have considered the reasons why we rejected each allegation. In some of the allegations of direct discrimination and harassment, we found that the burden of proof did shift to the respondent and we looked to the respondent for an explanation. In respect of some other allegations we found that the events complained of did not occur at all. In other allegations we found that the allegation of less favourable treatment did not arise by reason of the absence of appropriate comparators. Whilst the fact that the claimant had not raised these matters at any time during his employment (save as mentioned above) was a factor in our deliberation, it was by no means the governing factor or the only factor which led us to reach a conclusion against the claimant. We had to assess the allegations carefully and there were matters of real concern which had to be fully investigated as we say in paragraph 15.1 of our judgment (remedy bundle page 117) and we conclude that it is not right to say that we rejected the allegations made by the claimant for substantially the reasons given in the Deposit Order by Employment Judge Brain.

6.4 The allegations made were serious allegations and were rejected for a variety of reasons but by no means limited to that given by Employment Judge Brain. We

therefore conclude that the condition for considering the question of the payment of the Deposit to the respondent has not been fulfilled and therefore the Deposit of £250 which the claimant has paid should be returned to the claimant. Furthermore the unreasonable conduct which would have automatically followed if that condition had been made out is not established. Accordingly, any application for costs must depend on our construction and application of Rule 76 in isolation from Rule 39.

6.5 Accordingly we order that the deposit of £250 paid by the claimant in this case is returned to the claimant.

Application for costs of £150 in respect of an application for disclosure

7. This application was conceded by the claimant at the outset of the hearing this morning. We therefore order that the claimant pay to the respondent by consent the sum of £150 in respect of the application made by the respondent for disclosure in February 2015.

The application for costs made by the respondent in respect of the costs of the adjournment of the hearing by the Little Tribunal in March 2015 and a cross application by the claimant.

8.1 We have considered the application of the respondent for costs by reason of the adjournment of the proceedings on 9 March 2015 by the Little Tribunal. We note that the respondent's position in respect of the costs of that adjournment was reserved.

8.2 In order to find liability it is necessary for us to consider the provisions of Rule 76. We have considered whether the claimant acted unreasonably on 9 March 2015. We accept that on 23 February 2015 and for the first time the claimant raised allegations against SR. This necessitated the respondent making an application for SR to file a late witness statement and orders were made on 15 April 2015 by Regional Employment Judge Lee. We conclude that that conduct on the part of the claimant was unreasonable and sufficient in itself to ground an award of costs pursuant to Rule 76 of the 2013 Rules. There had been detailed case management orders in this case which had resulted in lengthy pleadings and the provision by the claimant of a very lengthy and detailed Scott Schedule wherein there was no reference to allegations against SR personally. These only appeared very late in the day in the claimant's witness statement which extended to some 1321 paragraphs and 313 pages. That statement also contained numerous other allegations which had not appeared anywhere in the pleadings. To bring new and serious allegations at that stage of the proceedings is unreasonable. The gateway for an award of costs referred to in Rule 76 of the 2013 Rules is passed. We will deal below with whether to award any costs.

8.3 The claimant made a cross application this morning that the respondent should be ordered to pay his costs of the March 2015 adjournment by reason of the fact that SR had not disclosed at an earlier stage her involvement with the Employment Tribunals – irrespective of any specific allegation being levelled against her and before it was known that she would have to take an active part in the proceedings. That application for costs was made very late in the day and well outside the time limit set by Rule 77 of the 2013 Rules. There was no meaningful case advanced as to why time should be extended and we decline to do so. Time limits are meant to be observed. In any event the claim for costs was not accompanied by any schedule of costs claimed and it lacked specificity of any kind. We do not consider it appropriate to consider the application as it is out of time but in any event, absent any allegation against SR, we do not consider the failure to disclose her involvement with the Tribunals earlier than March 2015 to have been unreasonable conduct by the respondent.

The application for costs by the respondent on the basis of the unreasonable conduct of the claimant generally.

9.1 We have considered whether the claimant behaved unreasonably in pursuing his allegations in the face of two cost warning sent by the respondent and dated 28 February 2014 and 31 March 2014. Those warnings related to the allegations made by the claimant generally and for the reasons we set out at paragraphs 6.3 and 6.4 above in particular, we do not consider that the claimant behaved unreasonable in pursuing the allegations he did to a full hearing before this Tribunal. The fact that a claimant pursues allegations and fails is not of itself evidence of unreasonable conduct of litigation. The allegations were serious matters and engaged the Tribunal in deliberations for a considerable time.

Should an Order for costs be made?

10.1 We have considered whether an application for costs should be made by reason of the unreasonable conduct of the proceedings by the claimant identified above. We have taken account of the means of the claimant. We are satisfied that the claimant is without capital assets and that his household income is just sufficient to cover his household expenditure.

10.2 We note that we ordered the claimant to be paid by the respondent the sum of £6723.83 as an award for unfair dismissal. We understand that that sum has not yet been paid pending the resolution of these applications. Thus the claimant does have some capital available to him.

10.3 We conclude that it is right that the claimant should pay some costs towards the respondent for his unreasonable conduct of the proceedings. We note that the amount ordered need not reflect the costs arising from the unreasonable conduct identified and that the amount to be paid is within the discretion of the Tribunal. We have noted the Schedule of Costs submitted by the respondent and we accept that the costs incurred amount to some £92,415.20 in total including some £34,299.51 from 9 March 2015 until the remedy hearing in November 2015.

10.4 We conclude that it would not be appropriate to order the claimant to pay anything like the sums claimed. We consider the appropriate amount to order to be paid is £2500 as a contribution towards the costs of the respondent – such sum inclusive of VAT.

10.5 Accordingly we order the claimant to pay the sum of £2500 to the respondent in respect of costs pursuant to Rules 76 and 78 of the 2013 Rules on the basis of the unreasonable conduct of the proceedings set out above.

The application for costs by the claimant

11.1 We have considered the applications made by the claimant for costs. We conclude that these applications are out of time. The applications were not made until the submissions of the claimant in readiness for the hearing today were filed namely on 2 March 2017. That is outside the time limit set out in Rule 77 of the 2013 Rules by some 16 months.

11.2 Even if the application was not out of time, it would not have been granted. The application was made first on the basis of the respondent's asserted unreasonable behaviour in respect of the failure by the respondent to make known the involvement of SR with the Employment Tribunals and secondly on the basis that the application made by the respondent on 23 January 2014 which came before Employment Judge Brain on 9 March 2014 did not succeed.

11.3 We have dealt at paragraph 8.3 above in relation to the involvement of SR and we repeat that conclusion. In respect of the allegation that the January 2014 applications by the respondent amounted to unreasonable conduct of the proceedings by the respondent, we reject that application. The applications made by the respondent in January 2014 broadly succeeded before Employment Judge Brain on 9 March 2014 and there is no evidence there that the respondent acted unreasonably. In any event the claimant did not file any details of costs claimed and we have no evidence of the details of the retainer between the claimant and his solicitor. The respondent was quite unable to respond to those applications.

11.4 Accordingly even if the applications from the claimant for costs had been in time, neither of them would have succeeded.

Final comment

12. Accordingly the deposit of £250 is to be returned to the claimant. The claimant is to pay £2500 and £150 to the respondent in respect of costs. There seems no reason why the total sum of £2650 should not be deducted from the sum owing to the claimant by the respondent and the net amount paid over in order finally to conclude this litigation.

Employment Judge A M Buchanan

Date: 10 April 2017