Case No: 1401738/2015

EMPLOYMENT TRIBUNALS

Claimant: Dr B Oshin

Respondent: Public Health England

Heard at: **Exeter (in chambers)** **On: 04 October 2018**

Before: Employment Judge Housego
J N Martin
S Long

Representation
Claimant: Written submissions only
Respondent: Written submissions only

JUDGMENT

The claimant's application for costs is dismissed.

REASONS

1. The claimant brought a claim for race discrimination, which we heard on 3, 4, 5, 6 & 7 October 2016 and on 01 November 2016. The claim succeeded, and in May 2017 the Tribunal awarded the claimant over £50,000. The claimant now applies for costs. The claimant acted in person before and during the remedy hearing, but received legal advice before the claim was lodged, and was legally advised for the remedy hearing. He has opted to apply for a costs order and not a preparation time order, the Tribunal having power to award one or the other, but not both. The application is phrased as seeking a preparation time order as an alternative. There is no difference in principle between the two types of order, but the circumstances for the hearings were different so that it is logically possible that costs could be awarded for one hearing but not another.

2. When the application was first made it was for both costs and preparation time orders. When this was raised the solicitor for the claimant indicated that it was a costs order that was sought. It was not suggested by the solicitor for the claimant that the application was for a costs order and if that was unsuccessful that a preparation time order would be sought as an alternative. Accordingly only a costs application is before the Tribunal.

3. The claimant's application of 12 March 2018 states that a preparation time order is sought in the alternative, but without dealing with the earlier statement that only a costs order was sought. For this reason the Tribunal considered only the application before it, for a costs order for the reasons given above. There is no application for a preparation time order.

4. Rule 76(1)(b) in the Schedule 1 to The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 states:

> **When a costs order or a preparation time order may or shall be made**
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> **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; or
>
> (b)any claim or response had no reasonable prospect of success.
>
> (2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.
>
> (3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—
>
> (a)the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and
>
> (b)the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.
>
> (4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.
>
> (5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

5. This application is based upon the costs warning issued by the respondent on 30 October 2015 and upon the revelation in the liability hearing that there were important emails sent and received by a key witness of the respondent that had not been disclosed, and the finding that that key witness had not given truthful evidence about an important part of the claim. The claimant asserts that the first was abusive and vexatious, and the second was unreasonable conduct of the litigation and relies on Rule 76(1)(a).

6. There was a preliminary hearing on 27 October 2015 at which the claimant was ordered to provide further and better particulars by 17 November 2015. The costs warning letter was written on 30 October 2015, and said that the respondent would be seeking costs. The hearing on 16 February 2016 was about 3 issues – whether it was out of time, whether there could be a constructive dismissal claim given an election to take a severance package and whether the claims had no, or little, reasonable prospect of success. The respondent lost on three of those points, winning on the little reasonable prospect of success point. That Judge did not award the costs of that hearing to the respondent. It did order the claimant to pay a deposit of £2,500 as a condition of continuing, which the claimant paid.

7. The difficulty with the claim for costs relating to the hearing of 11 February 2016 is that the Judge agreed that there was little reasonable prospect of success and so from that point on the claimant was at risk of costs by reason of that order. Since the Judge made a deposit order which put the claimant at risk of costs, it cannot be said to be unreasonable for the respondent to have said that they would ultimately seek costs if his claim was dismissed. The costs warning letter also related to the costs of the hearing of 11 February 2016, but as they were proved right (at least as to a deposit order being made) the letter itself was not unreasonable.

8. The Tribunal then considered the costs of the liability hearing. The Tribunal did not find attractive the submission of the respondent's solicitor that the unreasonableness should not in some way reflect on the respondent as an organisation.

9. The difficulty with the liability hearing is that this was after the behaviour complained of. The Tribunal is no doubt that this was unreasonable conduct of the proceedings by the respondent. That means the Tribunal must consider making a costs order, and may make one. However (and while the Rule does not so specify) the Tribunal must find there to be some connection between the unreasonable conduct of the proceedings and the costs sought. The unreasonableness was a factor in the liability decision, but the position as to remedy was no different to the circumstance where a respondent admits liability but quantum remains in dispute. There is no causative connection between the conduct complained of and the costs of the remedy hearing. For this reason the Tribunal does not feel that a costs order is appropriate for the remedy hearing.

10. There is a request for the fees. This is not appropriate given that the claimant can make application for a refund of the fees from the government.

11. The Tribunal entirely understands that the Claimant feels strongly that the unreasonable conduct of the respondent should mean that they ought to pay costs. The difficulty with this is attributing any particular costs for the two hearings for which costs have sought to that unreasonable conduct.

Employment Judge Housego

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Date 04 October 2018

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

24 October 2018

FOR EMPLOYMENT TRIBUNALS