Case: 1802062/2016

EMPLOYMENT TRIBUNALS

Claimant: **Mr J Farmer**
Respondents: **(1) JWP Creers LLP**
(2) Nigel Clemit
(3) Stephen Headley
(4) Russell Smith
(5) Andrew Johnson

AT AN ADJOURNED COSTS HEARING

Heard at: **Hull** **On: 29th March 2018**
Before: **Employment Judge Lancaster**
Members: **Mrs J Blesic**
Mrs S Richards

Representation
Claimant: Not required to attend
Respondents: Not required to attend

Employment Tribunals Rules of Procedure 2013 rule 78 (1) (b)

JUDGMENT

The Claimant is ordered to pay to the Respondents 80 per cent of their costs, with the amount to be paid being determined by a detailed assessment carried out by the County Court in accordance with the Civil Procedure Rules 1998.

REASONS

1. After giving oral judgment at the conclusion of a 5 day hearing on 15th December 2017 the successful Respondents applied for costs.

2. That application was adjourned part heard to be considered after the further submission of written representations from both sides, but without the parties being required to attend further.

3. The application is made under rules 76 (1) (a) and (b) of the Employment Tribunals rules of procedure 2013. It is alleged that the bringing and conducting of these proceedings has been both vexatious and unreasonable and that the claim had no reasonable prospect of success.

4. Having heard the evidence in this case we are satisfied that except in one respect the claims in fact had no reasonable prospect of success. Having reflected upon our findings of fact made upon the substantive issues we are satisfied that this is not merely a case where there were disputes on the evidence which could only properly be determined at a hearing. Rather these were matters which when the evidence was considered there could , in our view , only have been one outcome. That is reflected in the Reasons for the judgement on liability where we identify our certainty as to our conclusions on the key issues and identify where there is a total absence of evidence to support the Claimant's case.

5. On the first harassment claim there was no evidence in respect of that Mr Clemit's comment in June or July 2016 to indicate that in context this remark (even though we accepted the Claimant's evidence on the disputed issue of whether it was made or not) related to age.

6. On the second harassment claim we accepted unequivocally the evidence of Mr Smith as to the true context in which he made the comment about being unable to know what peoples capabilities would be after they each 65. We are satisfied that the Claimant must at the time have been fully aware of that context, knowing Mr Smith and knowing the sad history of the sudden onset of Mr Pavey's Alzheimer's. There was no evidence to suggest that this was objectively conduct which could have had the necessary effect to constitute harassment.

7. On the third harassment claim we found that the alleged comment was not said at all at the meeting on 21st September 2016. It is also significant that there is no reference to this at all in the Claimant's witness statement.

8. In so far as the meeting on 21st September is concerned, which is the occasion of both the second and third alleged instances of harassment, we expressly disbelieved the Claimant's account of how that meting was conducted. We are satisfied that he in fact misrepresented the content and character of that meeting to assert that he specifically raised an issue about the retirement provisions as they applied to him and about the alleged agreement in 2011 that clause 29.3 was to be disapplied in his case. He did not in fact do either of those things.

9. On the claims of direct age discrimination that relate to clause 29 (3) of the LLP Agreement we found that it was "self-evidently" justifiable that the LLP preserved the right in appropriate circumstances to compel retirement in order to facilitate the progression of others into the partnership. As this provision had never in fact been applied to the Claimant, and could not be because he was not yet in any event 65, there was never any actual discrimination towards the Claimant. The peripheral arguments (about an alleged collateral contract to disapply this provision and about an alleged inducement to enter into the LLP Agreement and about a failure to vary the Agreement) although they generated evidential issues do not alter the fact that there was no reasonable prospect of successfully arguing that clause 29 (3) – which had never in fact been invoked – constituted direct discrimination.

10. We repeat in particular what we said at paragraph 53 of the original judgment about the claims against individual Respondents, Messrs Headley and Johnson. We are not impressed by the assertion in Mr Anderson's submission that it is reasonable to include them as members of the LLP because they are responsible for its collective

decisions as actually taken by Mr Clemit and where they, by definition therefore, have not themselves taken any potentially discriminatory action as agent of the First Respondent. An LLP has, of course, a legal personality separate from that of its members. These individual claims therefore had no reasonable prospect of success from the outset, even if the point was only fully articulated at the final hearing.

11. The only claim where it cannot be said that it had no reasonable prospect of success on the evidence as it transpired, and as the Claimant must have known it would transpire is that which relates to the LLP deciding to move out of corporate finance work, which was the Claimant's speciality. The difference here is that by reason of a concession made at an earlier preliminary hearing the live issue on this complaint was only about whether this treatment of the Claimant could be justified. Although we found that it was justified that was as question which could only be determined on analysis of the Respondents' evidence at the final hearing.

12. The precondition for making an order for costs is therefore satisfied.

13. In deciding to then exercise our discretion to award costs we do also take into account the general context of these proceedings, which are being conducted alongside arbitration to decide the extent of the Claimant's financial liability – which may, if the Respondent's succeed in that action, be substantial – arising on his resignation from the LLP. We do not find that the bringing or conducting of these proceedings is necessarily rendered vexatious by the fact that the Claimant, obviously, seeks by whatever argument may be open to him to avoid those potential liabilities. However it does appear to us that the Claimant has closed his eyes to the fact that this claim had, for the most part, no reasonable prospect of success because he is conducting it as part of a two-pronged counter attack upon the Respondents who are pursuing him for large sums of money. The continuation of these tribunal proceedings when in realty the only substantial argument may be within the Arbitration can also therefore be said to be unreasonable.

14. We also take into account that at the conclusion of the pre trial process, as directed by the Tribunal's case management orders –which admittedly had been somewhat delayed for various reasons and was only finalised at the last preliminary hearing on 11th September 2017 - the Respondents did, on 1st December 2017,issue a costs warning letter. That asserted that as evidenced on the now disclosed witness statements the claim was "misconceived". The Claimant nevertheless persisted in his claim based upon what we have found must have been known to be wholly inadequate evidence.

15. Although the Claimant has potentially substantial liabilities in the Arbitration if it goes against him and for his own legal costs we see no reason why his responsibility for the costs of this failed action should not be ordered to be borne at this stage.

16. The only limitation on the award of costs, having regard to considerations of proportionality, is by reason of the fact that not all elements of the claim had no reasonable prospect of success.

17. It is agreed between the parties that if we award costs the case should be referred to the County Court for a detailed assessment. The Claimant shall pay a fair proportion, which, in all the circumstances, we assess at 80 percent of those taxed costs.

EMPLOYMENT JUDGE LANCASTER

DATE 4th April 2018

JUDGMENT SENT TO THE PARTIES ON