



EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT

v

RESPONDENT

Dr Christopher Day

**Lewisham And Greenwich NHS
Trust**

**Heard at: London South On: 20 June to 8 July 2022, 12 July 2022,
Employment and 14 July 2022 and in chambers
Tribunal 25-28 July 2022. 28 October 2022
By CVP and 3 November 2022.**

**Before: Employment Judge Martin
Ms J Forecast
Ms C Edwards**

Appearances:

For the Claimant: Written submissions

For the Respondent: Written submissions

RESERVED JUDGMENT ON COSTS APPLICATION

The unanimous judgment of the Tribunal is that the Claimant's application for costs is dismissed.

RESERVED REASONS

1. Following the judgment dated 15 November 2022, the Claimant made an application for costs on 13 December 2022. The Respondent responded on 9 January 2023 and the Claimant replied to this on 28 February 2023. It was agreed that the application would be dealt with on the papers without the need for a hearing. The Tribunal met on 6 March 2023 to consider the application and response to it.

The Law

2. Rule 76 Employment Tribunals Rules of Procedure 2013.

When a costs order or a preparation time order may or shall be made

(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

...

(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. The Tribunal had before it the following case law:

- a. Yerrakalva v Barnsley Metropolitan Borough Council and another [2012] ICR 420
- b. Haydar V Pennine Acute NHS Trust UKEAT/0141/17/BA
- c. Power v Panasonic (UK) Limited UKEAT/0439/04/RN
- d. Kotecha v Insurety Plc T/A Capital Health Care UKEAT/0461/07/LA

4. The following case law was referred to in the Respondent's submissions:

- a. Raggett v John Lewis Plc [2012] IRLR 906
- b. Hendricks v Commissioner of Police of the Metropolis [2003] ICR 530
- c. Frewer v Google UK Ltd and others [2022] IRLR 472

5. The basis for the Claimant's application is as follows "*The Claimant contends that the Respondent's conduct in relation to disclosure leading up to and during the final merits hearing between 20 June – 8 July 2022 (not sitting on 24 June, 5 and 6 July); 12 July 2022, 14 July 2022 was unreasonable, and further or alternatively, was in breach of the Tribunal's orders. This conduct resulted in an increase to the Claimant's costs, as set out further below.*" The relevant part of the judgment is paragraphs 50-56.

6. The Tribunal has a discretion as to whether to award costs. Costs are the exception in this jurisdiction and not the norm. The Respondent submitted that the Tribunal should take account of the case as a whole and the conduct of the Claimant was also of relevance relying on Yerrakalva.

7. There are three stages in the process of deciding whether to exercise the

discretion to award costs.

8. Step 1: the Tribunal should assess whether it considers that the Respondent has acted vexatiously, abusively, disruptively, or otherwise unreasonably in the way that the proceedings (or part) have been conducted (Rule 76(1)(a)); or that there has been a breach of an order or Practice Direction (Rule 76(2)).
9. Step 2 relates to the means of the paying party. Tribunals are not obliged by Rule 84 to take account of means, but may do so.
10. Step 3: if the Tribunal considers that a costs order may be appropriate, the Tribunal should consider the amount of any costs order under Rule 78.
11. The Tribunal considered the steps in turn. The Tribunal concluded that the threshold test at stage one was met. The judgment gives the Tribunal's view on the Respondent's disclosure. The Tribunal did not sit for two days whilst further disclosure was carried out. Submissions had then to be given on an extra day the week after evidence concluded. Taken at face value, the Tribunal finds that the Respondent acted unreasonably in failing to ensure that disclosure was adequately undertaken and that this resulted in the Tribunal sitting for extra days and the parties being required to attend on days that had been expected to be for the Tribunal's use.
12. Having decided this, the Tribunal went on to consider stage 3 (stage 2 is not relevant in this case). **Haydar** at paragraph 37 says: "*Once the Respondent had satisfied the Tribunal that there was jurisdiction to award costs, it was for the Tribunal to satisfy itself, in light of its conclusion that unreasonable conduct of some kind had been established, whether a costs order was appropriate in all the circumstances having regard to any factors relevant to the exercise of that discretion.*"
13. **Yerraklava** held at paragraph 41: "*The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the Claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had.*"
14. The Respondent summarised its response in its submissions as follows: "*The Trust opposes the Claimant's application. For the reasons explained below it would be manifestly unfair and unjust (and hence contrary to the overriding objective set out in Rule 2 of the 2013 Rules of Procedure) for any costs order to be made in the Claimant's favour. The Trust's alleged unreasonable conduct has been exaggerated by the Claimant and any additional costs incurred as a consequence have been dwarfed by the costs occasioned by the Claimant's own unreasonable conduct. The ET is therefore invited to dismiss the application.*"
15. The Respondent has put in its submissions various comments the Claimant made on social media following the judgment. As a starting point, the Tribunal did not consider these and instead focussed its attention to the case itself and resulting judgment.
16. Amongst other matters, the Respondent relies on the length of the Claimant's

first witness statement and his production of another two statements. It relies on the list of issues and the evidence adduced by the Claimant which went far beyond the issues that the Tribunal had to deal with and went back to the issues in the 2014 claim which was withdrawn. It cited the witnesses the Claimant had produced and the lack of relevance of those witnesses' evidence to the issues. The Respondent also submitted that the way in which the Claimant gave his evidence was unreasonable in that he would not answer straightforward questions. It also referred to the Claimant's own disclosure errors in particular the late disclosure of the letter before action sent to Mr Milsom.

17. The Tribunal has already made findings in its judgment about these matters. The Tribunal referred to **Hendricks**: "*Attempts must be made by all concerned to keep the discrimination proceedings within reasonable bounds by concentrating on the most serious and the more recent allegations.*" As found in the judgment, the Claimant was wanting to present evidence about the disclosures themselves. This was not relevant to what the Tribunal had to determine. The case the Tribunal was to determine was solely related to any detriments that may have been made in the public statement made after the Claimant had withdrawn his 2014 case and whether there was a causal connection between any detriment found and the public interest disclosure the Claimant made and which the Respondent by and large accepted as being protected.
18. The seriousness of the disclosures was not relevant. Most of the disclosures were admitted to be protected disclosures, and those that had not been conceded as such would not make any difference to whether there were detriments in the public statements. The Claimant's evidence was exceptionally long. It did not confine itself to the issues. The Tribunal gave direction that not all parts of the Claimant's witness evidence was to be cross-examined on, and that the Respondent should concentrate on those matters that had been agreed in the list of issues.
19. Inevitably this increased the costs for the Respondent and for the Tribunal which are both publicly funded bodies. The Tribunal has no doubt that if the Claimant had applied his mind to the actual issues in this case and had not sought to re-litigate his 2014 case, the hearing would have been significantly shorter and therefore less costly to the Respondent and the Tribunal. The Tribunal notes that the Claimant has presented another claim. It is hoped that in any future litigation the Claimant confines his evidence to the issues which the Tribunal is to decide.
20. The Respondent has also submitted that the Claimant's claim had no reasonable prospect of success. The Tribunal has not considered this in any detail given its comments regarding the Claimant and the way he conducted the proceedings. This is sufficient for the Tribunal to conclude that whilst the threshold test for the Claimant's application for costs against the Respondent is met, that it would not be just and equitable to award costs. In coming to this conclusion, the Tribunal has looked at the whole picture of what happened in the case and finds that there has been unreasonable conduct by the Claimant in conducting the case. The unreasonable conduct relied on is set out above together with its effects.

21. The Respondent referred to comments the Claimant made on social media about the Judgment and the Claimant responded to what the Respondent said. Having considered these comments (after the Tribunal had considered the matters set out above), the Tribunal finds that they reinforce its view that the Claimant engaged less with the agreed issues and rather more with trying to re-litigate his 2014 case which is why his evidence was so extensive which in turn led to an increase in Tribunal time and costs for the Respondent.
22. In all the circumstances the Claimant's application for costs against the Respondent is dismissed.


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Employment Judge Martin
06 March 2023

JUDGMENT AND REASONS
SENT TO THE PARTIES ON:
26 April 2023



Mr J Azam
FOR THE TRIBUNAL OFFICE

