EMPLOYMENT TRIBUNALS

Claimant: **Dr. G.M. McLure**

Respondent: **Central and North West London NHS Foundation Trust**

Heard at: **London Central** **On: 14 September 2017**

Before: **Employment Judge Goodman**

Representation
Claimant: in person

Respondent: Mr S. Brittendon, counsel

RESERVED
COSTS JUDGMENT

The claimant is ordered to pay the respondent's costs in the sum of £7,920.

REASONS

1. At the conclusion of the preliminary hearing at which it was decided to dismiss the claim on two grounds, first, that it was out of time, second, that it had no reasonable prospect of success, the respondent applied under rule 76 for costs.

2. The rule was explained to the claimant, and the tribunal then heard representations from both parties, and was shown two costs warning letters that had been sent to claimant. As there was no further time, due to a prearranged telephone hearing, the decision was reserved.

3. Rule 76 of the Employment Tribunals Rules of Procedure 2013 provides:

   "A tribunal may make a costs order… and shall consider whether to do so, where it considers that

   (a)a party… has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way proceedings (or part) have been conducted; or
   (b) any claim… had no reasonable prospect of success".

4. This is a two-stage test. The tribunal must decide whether policy has acted vexatiously and so on, and then it must exercise discretion to decide whether to order costs ("may make").

5. Rule 84 provides that in deciding whether to make a costs order, and if so, in what amount, the tribunal may have regard to the paying party"s ability to pay.

6. The tribunal rules differ from the position in the courts, where the norm is that the losing party pays both sides costs. In most tribunal cases, each side bears its own costs. Only if grounds are under rule 76 can the tribunal consider making an order for costs: **Yerrakalva v Barnsley Metropolitan Borough Council 2012 ICR 420.** Factors affecting the discretion to make an order if grounds are shown can include both the claimant, especially an unrepresented claimant, was given a warning about the risk as a costs order might be made if the outcome went a particular way, and orders can be made even if warnings have not been given – **Vaughan v London Borough of Lewisham 2013 IRLR 713.** Consideration should be given to the fact that the party is not represented, and so may not appreciate the legal issues, and the extent to which that party had access to specialist help and advice can be relevant, should be made for inexperience and lack of objectivity, but that does not mean that costs orders cannot be made against unrepresented parties **– AQ Ltd v Holden 2012 IRLR 648.**

7. The respondent argues that the claimant was unreasonable in bringing the claim, and the reasonable prospect of success, and the reasons given in the judgement dismissing the claim, it was and should have been clear to him the basis on which the respondent made a decision not to provide pay protection when he lost his national award, and that this could not have been to do with his whistleblowing activity; further, it was all should have been clear to him that the decision that resulted in reduction in pay from loss of the award without replacement by a local award at the same level, was made in November 2015, and not in November 2016, so he should also have known that it was out of time.

8. The Respondent relies on two letters sent to him marked as without prejudice save as to costs. A letter dated 27 July 2017 urges him to take legal advice if he is not already doing so if in any doubt about the content of the letter, which goes on to explain the respondent believed that the claimant will fail to explain that he suffered any detriment in November 2016, or that there was this was a new decision, or that this was reneging on an assurance given in November 2015, pointing out that he had not taken any steps to show Ms Murdoch that the T that rust was acting inconsistently with national guidance. Secondly the letter asserted that he would fail to establish any causal connection between the email of November 2016 and his whistleblowing disclosures. He was warned that given the respondent's duty to minimise costs to the public purse, they will seek an order for costs and invited him to withdraw. The second letter is dated 18 August 2017 and repeats that he should seek legal advice if he does not understand the content, refers to the respondent's amended response making it clear that he had not been able to substantiate his claims and in particular that the email of 30 November 2016 was not a detriment. With respect to the claimant having asserted that the respondent

had failed to enter into arbitration, it was pointed out that this was only a reference to the ACAS early conciliation process, which closed in April 2017 when respondent had refused to make a payment. Again the claimant was urged to withdraw his claim before costs were incurred in preparing for the hearing on 14 September, saying that counsel's costs will be £2500 plus VAT as well as the solicitors' preparation cost.

9. The claimant replied that he had acted in good faith, not scandalously or vexatiously, and that the prospects of success depended on a "fine interpretation of documents"; no document explicitly said that a national award would revert to 0 if it was not awarded on the 2015 round. The Trust had no explicit policy on this. The NAMPS email of 2015 suggested that some Trusts were making arrangements for transitional provisions, and the Public Health England document of 2017 was one example of it. He had made every effort to avoid going to an employment tribunal hearing, and had hoped for arbitration but the respondent was not prepared to submit to independent conciliation. As for the letter of June 2016, that came from Annabel Butcher, the HR manager, not the chief executive, and he did not consider that the decision could affect that of the chief executive. It became clear from listening to the claimant that by arbitration he understood that his claim would be referred to a body which would make a decision not similar to that of an employment tribunal, on the rights or wrongs of the dispute and that he hoped it would make an award for transitional arrangement along the lines of the temporary reduction envisaged by Public Health England.

10. He added that he had taken legal advice (it was explained to him that he did not have to say what the advice was). It was clear from the substantive proceedings that the claimant had advice from the BMA (at least, said he was consulting the BMA) about his clinical excellence awards and their reduction, as well as other employment issues that arose from time to time, and he added that he had been a member of a senior committee of the BMA.

11. On ability to pay, the claimant conceded that as a National Health Service consultant physician he was reasonably well paid by most people's standards on the usual consultant scale, without the clinical excellence award. He did not wish to say anything else about his ability to pay. The tribunal takes into account to that he is already drawing all or part of his occupational pension, and that it is based on more than 30 years' service.

12. The claimant has acted unreasonably in bringing proceedings. It is noted that he agreed that of all the detriments pleaded at the outset, all others are but background the loss of a level IX clinical excellence award. He knew this had been refused from November 2015. His quarrel was with the decision that there should be no transitional protection. He was told that it was based on national policy. He was sent the national ACCEA document from 2014 that no transitional provision, and he had seen the NAMPS document urging Trusts to hold the line and not make special arrangements. He may say that none of these say explicitly that when a national award ends he reverts to nil, but is difficult to understand how he could interpret a statement that there will be no pay protection as meaning anything other than when the national award ended he would no longer get that money. He was told very clearly in November 2015 that the local

award was made on its own criteria. Ms. Murdoch's letter of November 2015 is courteously worded, but can only be interpreted as meaning that she relies on her advice as objective and given in good faith, but also will look at it if he is the provides anything to show advice is wrong. This is not an agreement to an appeal process special to him, as the claimant argues, and he does not have such evidence. He knew, or ought to have known, that the trust's decision was based on national guidance, which he had read, and it he had no reasonable prospect of showing that it was because of any whistleblowing activity.

13. The claimant is not a lawyer, but he is by virtue of his qualification and experience an intelligent man, used to making decisions based on evidence, and, from his committee work, can be presumed to be familiar with documents about doctors' national terms and conditions and about the conditions and constraints under which Trusts operate within the National Health Service. The documents say what they mean, in plain English, and are not Chancery pleadings, even if their meaning is unwelcome to him.

14. Based on that, I conclude that the claimant ought reasonably to have appreciated firstly that the operative date of the decision adverse to him was November 2016, or by a stretch, June 2016, and secondly, that the reasons for the trust's decision were playing, relied on national guidance, and followed the pattern operating in many other trusts. In these proceedings he asserts that the reason he did not get payment protection transitional or otherwise, is because of his whistleblowing activity. It is hard to see how he could believe that, although allowance must always be made for the fact that a person who considers himself unfairly treated can always find it hard to objective about the reasons for the treatment. It should be noted that although his combative letter included three paragraphs about whistleblowing, he does not in terms state that the reason why he was reverting to nil was because of it. The fact it was a hint or a veiled threat, not an explicit statement, suggests that his rational self knew they were not linked.

15. The claimant in fact was asking for special treatment. It is hard to see how that can be a detriment. The trust's position was always that they must apply their rules across the board. Their case was that he was being treated no differently because of his whistleblowing. His case seems to be that he should have been treated differently – and favourably – because of his whistleblowing. Not to give him more favourable treatment than others who had not blown the whistle could not ever have established detriment.

16. Had the claimant given this rational consideration – and this would not require legal knowledge – he could have understood the trust's reasons were based on national practice. At best he lacked objectivity, as will be familiar to doctors aware that they should not try to diagnose or treat themselves or their families, but seek help from a colleague. He was twice urged to seek advice, and plainly he had access to advice, whether through the BMA legal department, or arranged for himself, which was practically possible given his income level. He was aware of the risk of an order for costs been made against him, and the reasons why, and these are substantially the reasons which succeeded in the preliminary hearing. Finally, plainly the claimant has ability to pay - that is not a reason not to make an order.

17. I conclude (1) the claimant brought proceedings unreasonably alternatively (2) that they had no reasonable prospect of success, both on the grounds of time, and because it should have been plain from the documents that the Trust acted as it did for reasons which applied to all doctors losing a clinical excellence award. As the exercise of discretion, I take account of the access to advice, and the fact of two costs warnings. I do not consider that the respondent was at fault for failing to settle when they believed they had a strong case in the employment tribunal, nor that there were any grounds for going to arbitration, which is interpreted by the claimant means an independent review and decision, which is what the tribunal has provided on analysis of the law. At best the claimant hoped for something that was, on his view, fair, but it cannot be said that relying on the law, and the contract, and national guidance about clinical excellence awards, is unfair. This is a case where it is right to make an order for costs.

18. The respondent set out its claim for costs in a schedule, for preparation between 27 July and 14 September of £5,607.78, and counsel's brief fee for 14 September of £2,500, both before VAT.

19. It is understood that the Trust is not registered for VAT. This means it cannot recover the VAT element by set off, and VAT must be added to the bill.

20. Of the £5,607 78, there are 6 hours claimed for an associate, amounting to £950, for attending on counsel, which seems more than a standard service. Some of the time allowed is on the generous side. The solicitor's preparation fee is reduced to £4,000. Adding counsel's fee and VAT, the claimant is ordered to pay the respondent's costs in the sum of £7,920.

Employment Judge Goodman

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Date 15 September 2017