EMPLOYMENT TRIBUNALS

Claimant: Mrs S Brooks

Respondent: University Hospital of South Manchester NHS Foundation Trust

HELD AT: Manchester **ON:** 21 August 2017

BEFORE: Employment Judge Feeney

REPRESENTATION:

Claimant: Mr T Kenward, Counsel
Respondent: Ms A Smith, Counsel

JUDGMENT ON APPLICATION FOR COSTS

The judgment of the Tribunal is that the respondent's application for costs is refused.

REASONS

1. The respondent applies for its costs following the claimant's constructive unfair dismissal case being dismissed by me and as set out in a decision promulgated on 4 May 2017 after a four day hearing which took place on 7, 8, 9 and 10 March 2017.

2. The respondent made an application for costs by way of a letter of 30 May 2017 relying at that stage on rules 75-79 of the Employment Tribunals Rules of Procedure 2013 on the basis that the claimant in bringing the proceedings and/or conducting the proceedings had acted unreasonably and/or that the claim had no reasonable prospect of success. They relied on a costs warning letter sent to the claimant's representative on 25 October 2016.

3. The respondent clarified today that they were only proceeding with their application on the grounds that the claimant's claim had no reasonable prospect of success, in that:

(1) The claimant failed to identify or properly identify or properly identify any alleged breaches of contract;

(2) It was evident from the facts that the claimant had accepted any potential breaches; and

(3) The respondent acted as a reasonable employer throughout the claimant's employment in spite of the claimant's difficult and unreasonable behaviour.

4. The List of Issues appears to have been drawn up around 3 March 2017 which is two working days before the Tribunal started; however the respondent's counsel did not see this until the morning of the hearing. There had been a Case Management Order that a List of Issues be agreed, but obviously this had not been fully complied with. Whose fault that was, was not pursued at the hearing.

The Relevant Facts

5. The claimant issued a Tribunal claim on 7 July 2016. The respondent failed to respond in time and this necessitated their solicitors writing to the Tribunal on 16 August 2016 requesting that time be extended from the original deadline of 8 August 2016 to at least 15 August 2017. They stated that although the claim form had been received by the respondent's post room it had been initially misdirected, eventually being sent to the respondent's HR advisory service on 11 August 2016 where it was dealt with by an administrative assistant who was unaware of the significance of it. She failed to draw the document to the attention of the relevant person, Ms Carter, who then did not see it until she returned to the office on 15 August 2016. The respondent stated that they felt they had a good defence to the claim and that the claimant would obtain a windfall if her default judgment was allowed to stand.

6. The claimant opposed this, in particular saying that the respondent had been contacted by ACAS who had spoken to a relevant person at the respondent's undertaking and that it was the respondent's responsibility to ensure they had a safe system of allocating post.

7. A hearing was held and Employment Judge Porter agreed that the default judgment should be set aside and the respondent should be allowed to proceed with presenting their defence. That decision was made on 10 October 2016. No costs appear to have been sought or awarded in relation to this hearing.

8. On 25 October 2016 the respondent's solicitor sent the claimant's solicitor a "without prejudice save as to costs" letter where they stated as follows:

> "We consider that it is very likely that this claim will fail on the following grounds:
>
> (1) Your client has failed to identify a breach of contract in her claim. Quite simply without a breach of contract your client is precluded from claiming unfair constructive dismissal.
>
> (2) In her claim your client refers to events covering the period April 2015 to September 2015. Your client resigned from her employment with the

Trust on 7 March 2016. It is unclear why your client waited until March 2016 to resign and we consider it very likely that a Tribunal will find that she thereby accepted any breach of contract which she may try to argue occurred prior to this.

(3) It is clear from the documents that the Trust acted as a responsible employer throughout in its treatment of your client and her grievance. The Trust made several and repeated attempts to assist your client to return to work but she refused to cooperate or engage with this process.

In view of the above we consider that your client's claim has no reasonable prospect of succeeding and we would advise her to withdraw it. If she persists with her claim we reserve the right to draw the Tribunal's attention to the contents of this letter. We anticipate it is likely we will be in touch to make an application for costs against your client pursuant to rule 76 of the Employment Tribunals Rules of Procedure 2013 in the event that the matter proceeds to a hearing and her claim fails."

9. There was a file note from 7 November 2016 where the respondent's solicitor was asking the claimant's solicitor if he had discussed the contents of the costs warning letter. He confirmed he had and they would be carrying on unless there was a settlement.

10. On 22 February 2017 the respondent wrote to the claimant and asked for which breach of contract she relied on in support of her claim for unfair constructive dismissal. They asked three questions:

(1) Which term of her contract does the claimant maintain was breached by the respondent?

(2) Which of the respondent's employees does the claimant allege was responsible for such breaches?

(3) When does the claimant allege such breaches occurred?

11. The List of Issues (as referred to above, completed very close to the hearing) set out three terms of the contract, all implied terms:

(1) The implied term of trust and confidence under which 20 issues were referred to;

(2) The implied duty in respect of the duty to promptly redress grievances on which the same 20 matters were relied; and

(3) The implied term in respect of the duty to provide a suitable working environment and to take reasonable care of the health and safety of the claimant at work in respect of which the claimant relied on some but not all of the 20 alleged breaches.

12. The claimant understandably argued that she was constructively dismissed considering individually or cumulatively the breaches, as they were sufficient to constitute a repudiatory breach entitling her to resign and treat herself as having been constructively dismissed.

The Law

13. Rule 76(1)(b) of the Tribunal Rules of Procedure 2013 states that:

> "A Tribunal may make a costs order or a preparation time order and shall consider whether to do so where it considers that:
>
> (a) …
>
> (b) Any claim or response has no reasonable prospect of success."

14. There is a two stage test. The Tribunal asks itself:

    (1) Is rule 76(1)(b) made out?

    (2) If it is, is it right that the Tribunal exercises discretion in favour of awarding costs against the relevant party?

15. It has been established that a genuine belief in wrongdoing is no excuse.

Respondent's Submissions

16. The respondent's submissions were that:

> "Under rule 76(1)(b) the Tribunal shall consider whether to make a costs order where it considers that any claim or response had no reasonable prospect of success."

17. In **Cartier Superfoods Ltd v Laws [1978]** it was found necessary to "look and see what the party knew or ought to have known if he had gone about the matter sensibly". Further, in **Beynon v Scadden [1999] EAT** Lindsay J commented that:

> "A party who, despite having had an apparent conclusive opposition to his case made plain to him, persists with the case down to the hearing in the 'Micawberish' hope that something might turn up and yet who does not even take such steps open to him to see whether anything is likely to turn up runs a risk, when nothing does turn up, that he will be regarded as having been at least unreasonable in the conduct of his litigation."

18. The respondent also refers to **Vaughan v London Borough of Lewisham [2013] EAT** which established that a costs award can be made even where the respondent has not sent the claimant a costs warning letter; the point being the claimant would not have withdrawn her claim even if she had received such a letter. They also referred to **Npower Yorkshire Ltd v Daly [2005] EAT** stating that:

> "When it comes to a question of discretion it is not a conclusive or proper answer to a claim for costs that a misconceived claim was genuinely brought. As to whether there is no reasonable prospect of success this is an objective test and does not depend on whether the claimant genuinely believed in the claim."

19. Further, in **McPherson v BNP Paribas [2004]** the Court of Appeal said that:

> "When considering whether an order should be made there is no requirement to identify the precise costs linked to particular conduct."

20. The respondent then relied on the three matters described above. The respondent pointed out the failure of the claimant to delineate her actual breaches until the actual day of the hearing, or at best two days before, and that without setting out any breaches there was no reasonable prospect of success. The respondent also pointed out that the dates demonstrated that the claimant delayed considerably in bringing her claim compared to the events relied the facts referred to in the ET1 referring to a time period to September 2015, whereas the claimant did not resign until 7 March 2016.

21. The respondent relied on matters within the judgment showing that the claimant was obstructive and contradictory whilst the respondent was acting reasonably, in particular paragraph 163 where I stated:

> "The fact that the claimant did nothing about this leads me to the conclusion on the balance of probabilities that the claimant was not genuinely concerned about the intricacies of the investigation but was simply prolonging the process and instead of following this up she chose to resign. I find the claimant was backed into a corner; she had no valid reason for not completing the stress risk assessment and attending a further health review meeting. Mr Sturgeon had gone, additional staff had been found and no disciplinary action was to be taken against her. She could point to no last straw; she had simply run out of options to justify her absence."

22. The claimant had initially relied on two particular matters not to return to work: further that Don Sturgeon had bullied her and that the department was understaffed. However she did not return when these two matters were addressed.

23. In respect of investigating the claimant due to the disciplinary matter raised, this was concluded on 30 November but the claimant still did not return but continued to repeatedly ask for various documents, the majority of which were provided to her.

24. The respondent submitted that the claimant ought to have known, even in the absence of a costs warning letter, that her claim did not have a reasonable prospect of success.

Claimant's Submissions

25. The claimant's submissions centred round an argument that the claimant had an arguable case. The claimant's representative pointed out that the respondent had at no point applied for the claim to be struck out as having no reasonable prospect of success, or ask the Tribunal to award a deposit order, and whilst in some cases there are practical reasons for this, i.e. the length of the hearing is so short that having a separate preliminary hearing to decide such matters does not make any commercial sense, this was not the case here where the matter was listed for four days.

26. The claimant's representative also pointed out that there was only costs warning letter in October 2016 which was not ever renewed.

27. In particular Mr Kenward stated that there were particular aspects of the claimant's case which were highly arguable and therefore could not meet the test of no reasonable prospect of success, and that I had found there were some breaches of implied terms but not sufficient to form a fundamental breach, either singly or collectively.

28. In particular Mr Kenward that the claimant had an arguable case that the following were, either separately or collectively, fundamental breaches of conduct:

(1) That the Tribunal had accepted that Mr Sturgeon's behaviour was a fundamental breach of contract but felt that the claimant had left it too long to resign in relation to it.

(2) The respondent's decision to pursue a misconduct allegation against the claimant even though it had been raised by Mr Sturgeon who she was complaining had bullied her.

(3) That it was reasonable to argue that the retention of Mr Sturgeon until September was far too long a time to resolve the matter.

(4) The fact that the respondent failed to treat the claimant's complaints as a formal grievance in the absence of a grievance from herself was again arguably breach of the implied term to investigate a grievance.

(5) That there was a lack of support in respect of proceeding with the misconduct proceedings without obtaining Occupational Health's advice.

(6) That there was an arguable case that Mr Davies had failed to properly investigate the original complaint in any event.

(7) That there was an arguable case the misconduct allegations were put too highly and that the Tribunal had accepted this argument, finding that it was potentially a breach of contract. However in the circumstances it was acceptable as the later charge was toned down.

(8) That it was reasonable of the claimant to challenge a finding of misconduct against her even if the outcome was not excessive. Further, the claimant was entitled to be persistent about this.

(9) That there was a failure to deal with the understaffing for a considerable period of time and therefore it was a matter which had a reasonable prospect of success.

29. More generally regarding delay and affirmation this is a difficult area of law. The claimant was not well, she was not in work, and therefore it was clearly arguable that the delay was not unreasonable in this case. Also she was off work whilst not being paid so it was not a case where her resignation coincided with the ending of paid sick leave.

30. The claimant pointed out the following findings from my Judgment which indicated some support for her position even though overall she failed:

(1) Paragraph 140 was a fundamental breach regarding Don Sturgeon's actions.

(2) Paragraph 141: That she expressed scepticism that the respondent had not properly considered whether Mr Sturgeon's allegations against the claimant which led to the misconduct investigation were produced out of her bad motive following her allegations against him.

(3) Paragraph 141: Where the claimant suggested that the failure to relocate the bully could be a breach of the implied term of trust and confidence but in the end did not find this was fundamental or an actual breach due to the fact that the claimant chose to attempt to return early.

(4) Paragraph 148: This refers to the allegations being initially stated too highly before the investigation.

(5) Paragraph 154: That the failure to ascertain whether the claimant was well enough before the misconduct investigation was started was a breach of the implied term of the trust and confidence.

(6) Paragraph 155: That it was correct that the respondent's grievance procedure did not require a claimant to bring a grievance, again so that this could have been a breach of a term of her contract or an implied term of the duty to investigate a grievance. However, taking all the circumstances into account I found that it was not.

Conclusions

31. I find that section 76(1)(b) is not made out in this case and therefore that the respondent is not entitled to costs. This is because having found that some of the claimant's claims might have succeeded in different circumstances it cannot be said that the claimant's claim had no reasonable prospect of success.

32. In addition the law relating to affirmation and delay is subtle and nuanced. Delay by itself does not amount to affirmation (**W E Cox Toner (International) Ltd v Crook [1981] EAT**). There has to be other action showing affirmation of the contract. Drawing the line as to what other action is sufficient is not entirely predictable so it would be difficult to assess the likelihood of success in a delay case; certainly illness is one of the issues which can be taken into account in considering whether the contract has been affirmed or not.

33. In addition in this case I find the respondent did act very positively towards the claimant for a long time in respect of her sickness absence. However this of course does not negate the possibility of the respondent acting in fundamental breach of contract as it is not a best of best intentions but whether there has been a, often unintentional, breach of contract.

34. Further, there was only one costs warning letter sent to the claimant quite early on in proceedings, and I would have expected to see another maybe before witness statements were exchanged and/or after when the claimant's position on various issues was made clear. Whilst the respondent complains the claimant did not

identify the breaches of contract, their witness statements did address all the issues and so whilst not entirely fair to the respondent it is clear the respondent understood the claimant's claim.

35. Further, the respondent did not apply for a striking out of this case, and whilst the Tribunal would not encourage time to be spent on applications for striking out rather than going to a substantive hearing, in this case that would have certainly tested the strength of the respondent's case. In my view it would have been very difficult to say, however, that the claimant's claim at an earlier stage, and indeed after exchange of witness statements, had no reasonable prospect of success, although it is possible a deposit order may have been considered. However, to reach that stage would have involved consideration of so much evidence that it is clear a full hearing was necessitated. In those circumstances it cannot be said that the claimant's claim has no reasonable prospect of success.

36. Accordingly, as the respondent does not meet the test in section 76(1)(b) no costs are awarded. I have not gone on to form a view as to how much costs I would have awarded.

Employment Judge Feeney

Date 25th August 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

7 September 2017

FOR THE TRIBUNAL OFFICE