EMPLOYMENT TRIBUNALS

Claimant: Miss C A Baines

Respondent: Blackpool Borough Council

HELD AT: Manchester **ON:** 12 June 2017

BEFORE: Employment Judge T Ryan
Mr A G Barker
Mrs S Ensell

REPRESENTATION:

Claimant: In person
Respondent: Mr H Serr of Counsel

JUDGMENT ON RECONSIDERATION

The judgment of the Tribunal is that the application for reconsideration is dismissed.

REASONS

1. This is a reconsideration at an oral hearing in respect of an order made by the Tribunal in respect of costs.

2. The relevant background is set out in the two judgments the Tribunal has previously made; the first of those being its judgment of 16 May 2016 by which the claims for unfair dismissal, equal pay and discrimination were dismissed, which were sent with written reasons to the parties on that day.

3. The respondent made an application for the costs of the proceedings and after the preparation and exchange of written representations that resulted in the costs hearing of 11 October 2016 whereby the claimant was ordered to pay a contribution to the respondent's costs in the sum of £20,000.

4. It is that judgment, namely the order for costs, that the claimant now seeks to have the Tribunal reconsider.

5. In the meantime the claimant had appealed the Tribunal's judgment to the Employment Appeal Tribunal by a notice dated 27 June 2016.

6. On 23 August 2016 on what is called the “sift” His Honour Judge David Richardson permitted it to go forward to an oral hearing to be considered by a single Judge.

7. Our hearing in relation to costs, as we say, proceeding by way of written representations, took place on 11 October 2016. The judgment was sent to the parties on 25 January 2017, on the same day when the oral hearing took place at the Employment Appeal Tribunal.

8. At the oral hearing His Honour Judge Peter Clarke refused the claimant leave to amend her notice of appeal and dismissed the appeal as not having any prospect of success.

9. The costs judgment that was sent by the Tribunal to the claimant on 27 January 2017 resulted in an application in writing dated 8 February 2017.

10. The claimant then, on 31 May 2017 after we had decided to set the reconsideration down for an oral hearing, prepared a witness statement dated 31 May 2017, and then she prepared further submissions dated 4 June 2017 and finally we received a witness statement from Miss Dutton of the respondent dated 6 June 2017 to which was attached some documents in relation to the claimant's financial situation.

11. The claimant at this hearing produced, without objection by Mr Serr, two additional documents. A statement of her end of year information showing that her pension is payable at the rate of £30,033.60 gross a year and that her net pension for the year is approximately £24,500. The other document she submitted was a fee note of Miss Gumbs of counsel showing that the claimant had instructed her, by direct access, to read into, prepare and direct a skeleton argument for the original hearing, that is the merits hearing, at a sum of £5,000 plus VAT, and drafting a response to the costs application which the claimant put in when we first considered the question of costs on 17 June 2016, the fee for that being £700 plus VAT.

12. The reason we quote those figures is because the claimant's financial position is one of the matters that we considered we should look at again. Although Mr Serr in answering this application did not accept that technically the claimant did not have an opportunity to advance information about her means, he recognised that the information the Tribunal had when it made its original order was limited. He did not seek to persuade us that we should not consider afresh information about the claimant's means.

13. The claimant, however, does not rely only upon her means, although she does rely upon those, as a reason for setting aside the original order, as is apparent from her statement and her submissions and her application. The claimant refers to three matters. We can deal with them broadly.

14. One is that the respondent had, and this is of course in the period up to and before the judgment of 16 May 2016, done three things.

15. She alleges first that the respondent had failed to give disclosure. She referred to a document prepared by a member of the respondent’s staff which itself referred to an email of June 2011 which the claimant had still not seen but which she said showed failure to disclose that document. Although she does not say as we

understand it that she made a specific request for that, it means that the bundle of documents was wrongly compiled. That led to the picture before the Tribunal being at best incomplete, but perhaps supported false evidence given by a witness at the original hearing leading, she said, to erroneous findings of fact.

16. Second, there was a general point about disclosure and a further specific one.

17. The general point was a failure to make proper disclosure at all or in time. Specifically that there had been the substitution of one notice of appeal in relation to her grading, that is in the stage 2 grievance appeal, for another. The beginning of the claimant's submission to that had been substituted in the bundle wrongly for what the claimant had actually submitted at stage 3. This led, she said, to the Tribunal making a finding of fact that was in error at paragraph 98.

18. Third, she asserted that the respondent, or somebody, had marked her witness statement without her consent or knowledge, and it was only when she got to the witness table that she realised that the witness statement she was looking at there when being cross examined by Mr Serr, which as we recall took some hours, had markings upon it.

19. The Tribunal had no recollection of the markings on the witness statement when the claimant made this submission. We dealt with it in this way. In deliberations we have looked at our copies of the witness statement of the claimant that we had at the hearing. In many places there is yellow highlighting. We have each marked our copies of the statement in other respects with the notes that Tribunal members put upon statements as they read them, either by way of annotation or emphasis or to draw attention to a particular passage. It is clear that the highlighting was not done by us because each witness statement is apparently identical in terms of the highlighting. We do not have, any longer, the witness table copy of the witness statement in that form. We are prepared to accept that it was highlighted in the same way.

20. We do not recall raising any question about the marking of the witness statement at the hearing. Nor indeed do we believe that anybody else did so to the best of our recollection.

21. Now our attention has been drawn to the highlighting we are sure that none of the marks had any significance. We certainly did not attach significance to them at the time. We venture to suggest that looking at some of the markings they appear to be markings more like those that somebody acting on behalf of the claimant would make rather than otherwise. They seem to emphasise points that might be said to be to her advantage, but whether that is right or wrong matters not.

22. The claimant indicated that she wanted to raise those matters with us. We suggested that if those matters were properly to be raised they were relevant, if significant, to the liability judgment of the Tribunal, rather than to the question of costs. The claimant emphasised that there is a need for disclosure to be done properly, and of course she is right to say that. So we permitted her to raise those points.

23. We asked the claimant in the course of argument whether she had raised these points in the EAT. Because we do not have written judgment of the reasons of

HH Judge Peter Clarke for refusing the appeal at the preliminary stage we needed to ask the claimant. She thought that she might have mentioned one of those points, she told us, but certainly not all three.

24. Although that was a preliminary hearing in the EAT addressed by the claimant alone, Mr Serr had attended on behalf of the respondent and had taken a note. He told us that to the best of his note and recollection the claimant had raised all three of those matters. It was only a short hearing. We accept she may not have raised them at the length that she has raised them with us, but they appear to have been raised before HH Judge Clarke when he was considering whether to allow the appeal to proceed. One of them related to the amendment issue, and that is based upon the three points as we understand it that we have just described.

25. Mr Serr's submission is that by virtue of that, it is not a matter that the claimant can raise again in this context. We agree with that. The submission is right as a matter of law.

26. Even if we thought that the claimant could rely upon them again, in our judgment they are nothing to the point. This is not a reconsideration of the Tribunal's judgment in relation to the merits of the case. To some extent the merits of the case are a relevant factor in determining whether to make an order for costs and by extension perhaps whether it is in the interests of justice to revoke that order for costs. But in our judgment the points that the claimant makes, whatever their merit, seem to us to fall far short of providing a material factor upon which it can be said to be in the interests of justice to reconsider the application for costs.

27. We remind ourselves that rule 70 of the Tribunal Rules says that a Tribunal can revoke, vary or confirm a judgment if it considers it in the interests of justice to do so upon reconsideration. We remind ourselves also that rules 76(1), 78 and 84 relate to the question of when and in what circumstances and how much a costs order might be. Rule 84 in particular says the Tribunal may have regard both in determining whether to make a costs order and if so how much, the paying party's ability to pay.

28. The substance of this application, having considered the other matters above, is whether it is appropriate to look again at the question of the claimant's means in terms of reconsidering the order costs. We refer in that regard to paragraph 25 of the reasons for our judgment when we made the costs order. We said in terms that we did not have information in respect of the claimant's capital position. The claimant had the opportunity to provide that information but did not do so. We considered it was not unreasonable to infer given her professional qualifications and history of a lengthy employment that if she did have at least some capital assets or the prospect of such she would have said so.

29. That said, we recognised also that a person in the position of the claimant caring for elderly parents, even with a Local Authority pension income, may be unlikely to be able to meet a costs order out of her income other than by relatively modest payments over an extended period of time.

30. The background to the costs application is this. As we recorded in paragraph 3, the schedule of costs showed that solicitors' costs for these proceedings were £21,355; counsel's fees added a further £14,250 and £9,000 was the cost of

counsel's fees for the six days of hearing. So the total costs sum, therefore, exceeded £35,000. In those circumstances the Tribunal could not at the costs hearing have awarded the full amount but it could order a sum up to £20,000. The respondent's claim for costs was limited to that amount as noted in paragraph 11 of our earlier judgment.

31. The material facts appear to us to be these. The claimant was born in 1954. She was dismissed from the Borough Council at the end of 2014 and she is in receipt of a Local Authority pension. She could have taken a lump sum of some £60,000 and had a smaller pension in payment year on year, but she chose to commute, as she could under the scheme, the entirety of the lump sum to enhance her income during her retirement. That has resulted in the gross figure for the annual payment of £30,033.60. Of course that is subject to tax.

32. The respondent refers both to that pension income figure but more particularly the claimant's capital position. The claimant, a single person, lives with her parents who are elderly. The document attached to Miss Dutton's witness statement shows that according to the entry at the Land Registry Mr and Mrs Baines and the claimant have the benefit of a lease granted in 1999. It is a lease or under lease in respect of a lease of 999 years less ten years granted originally in May 1892 and there appears to be another lease in December 1908.

33. The claimant explained that she and her parents were originally joint tenants. In about 2001 they became tenants in common. She states in her witness statement, and the Tribunal accepted this without hesitation, that a stage came at about that time when in order to achieve income for themselves her parents entered into an agreement with an insurance company, not identified, whereby in return for the value of their equity and the remainder of the lease, which is a third each for them, they would assign that to an insurance company in return for an annuity. As a result of this the claimant's interest is a one third share of the capital value of the remainder of the leasehold value of the property.

34. The claimant's estimate, based upon what other houses in the road are selling for, is that the value of the property is now £180,000. If that is right then it would follow that the value of her interest in the property is in the order of £60,000.

35. The claimant had, at the time of leaving employment, some savings of some £12,000. She explained in her witness statement that she spent £10,000 or thereabouts on the Tribunal process. It seems to us that is probably right. The total of fees for the claimant to bring the case to the Tribunal, the appeal and the fee notes of |her counsel indicate that she spent about £10,000 in the process.

36. The claimant has retained savings of £2,000 as against what she calls "emergencies". She describes herself as "caring for elderly parents" (apparently they are now in their 80s). She will not receive a State Pension for some years, and given her age and the current arrangements in relation to State Pensions we accept that, but she receives nonetheless pension of approximately £2,000 a month and, as we say, she has the capital asset of her interest in the house.

37. We hear from the claimant and accept that she has no other particular debts, nor indeed any other savings or capital assets.

38. Against that background we ask ourselves this question: was the order made by the Tribunal such that it is in the interests of justice, having regard to this information, to revoke or vary it.

39. We have considered it carefully. We do not think that the claimant has made any valid attack on the Tribunal's reasoning for making the order other than in the respects that we have mentioned. We do not consider that her financial position is such that it can be said that no order should have been made at all.

40. The claimant's means are relevant to the amount of the order. Having regard to the matters that we rehearsed in our earlier costs judgment and the informnation now provided, we say it is not in the interest of justice to vary or revoke the order for costs. The order, though significant, is one which the claimant can, at least in due course, meet.

41. Since the tribunal concluded its deliberations and prior to the preparation of this written judgment to other events have occurred to which we should refer.

42. The first is that the claimant has paid fees in connection with this claim. In **R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51** the Supreme Court decided that it was unlawful for Her Majesty's Courts and Tribunals Service (HMCTS) to charge fees of this nature. HMCTS has undertaken to repay such fees. In these circumstances I shall draw to the attention of HMCTS that this is a case in which fees have been paid and are therefore to be refunded to the claimant. The details of the repayment scheme are a matter for HMCTS.

43. Second, on 26 July 2017 the claimant made another application for reconsideration. This however is an application respect of the tribunal's original judgment of 16 May 2016. This has been considered separately and the result of that consideration is contained in a separate decision.

Employment Judge T Ryan

Date 25 August 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

7 September 2017

FOR THE TRIBUNAL OFFICE