EMPLOYMENT TRIBUNALS

Claimant: Mr N Vaswani

Respondent: The Royal Liverpool & Broadgreen University hospitals NHS Trust

HELD AT: Liverpool **ON:** 25 & 26 September 2017

BEFORE: Employment Judge Shotter
Ms F Crane
Mr A Wells

REPRESENTATION:

Claimant: Mr Green, counsel
Respondent: Mr R Powel, counsel

JUDGMENT

The unanimous judgment of the Tribunal is the claimant is ordered to pay to the respondent a contribution towards its legal costs in the sum of £15,000.

REASONS

Preamble

1. This is a costs hearing following promulgation of the reserved judgment on liability promulgated 16 December 2015 and remedy promulgated 16 May 2017.

2. The Tribunal heard oral evidence from the claimant and considered the documentation set out within 3 lever arch files and the claimant's statement

sworn under oath together with his submissions on the respondent's cost application.

3. With reference to the claimant's evidence the Tribunal accepted submissions made on the part of the respondent to the effect that the claimant was less then credible when he gave valuations to the 4 properties held in his name and that of his wife. On balance, the Tribunal took the view the claimant had underestimated their valuations, particularly that of 49 Downfield Lane in Liverpool, which he valued at £450,000 to £500,000 in contrast to the Zoopla.com valuation range of £778,000 to £1,044,00. The claimant also relies on historical mortgage valuations which are a low value indication of the properties in comparison to market value given the increase in property values over the past few years. The Tribunal took the view there was sufficient equity in the claimant's residential property alone to cover a cost award of £15,000 and there was no requirement for the Tribunal to explore how the claimant came to have received into his bank account substantial transfers of money from Luxembourg, the beneficiary of which was his brother, Manwerial Vaswani, resident in Karachi, relating to a business owned by Manwerial Vaswani and earmarked for sporadic payments to be made to his children whilst they were at university in the UK.

4. It is uncontroversial that the claimant received a substantial monthly salary as a consultant, and if he retires on 1 November 2017 will receive a lump sum in excess of £100,000 and £28,800 per annum as of 1 November 2017 when he aims to retire. It is a matter for the claimant whether he tops up pension payments in the meantime, the payments he makes in respect of his son whilst at university and his decision to transfer 31 Discovery Road to his son, a property purchased by the claimant as an investment. The claimant may owe money to various family members; this was not evidenced in writing and the claimant's evidence that 17 Matchwood Close was held by him for the benefit of Manwerial Vaswani was not supported by any legal document,. It is notable he claimant conceded under cross-examination it was not held by him on behalf of Manwerial Vaswani had a beneficial interest. The same point applied to 31 Discovery Road, allegedly held for the beneficial interest on behalf for the claimant's son, Rameen Vaswani. The legal position is clear; the claimant together with his wife, is the title holder of 4 properties, and as such is entitled to payment of equity if and when those properties are sold.

5. The respondent has made an application that the claimant is ordered to pay costs totalling £76,077.21 excluding VAT. The claimant has taken an exception to this application. The Tribunal has taken into account closing submissions of the parties and the extract from Harvey dealing with costs submitted on behalf of the respondent, for which it is grateful as the law relating to costs is clearly set out and not disputed. The Tribunal has re-read its judgments in respect of liability and remedy, which form the basis of its reasoning in respect of the issues raised by this cost application.

6. The grounds relied upon by the respondent are set out in the letter of 30 May 2017, paraphrased as follows; that the claimant had acted vexatious, abusively, disruptively or unreasonably in:

6.1 Bringing claims of age and race discrimination struck out on 16 June 2015. The Tribunal was asked to read the Skeleton Argument dated 21 April 2015, which it has done and does not intend to repeat.

6.2 Amending the claim of race discrimination was misconceived, had no reasonable prospect of success and was ultimately unsuccessful.

6.3 Rejecting the offers made from 17 September 2015 repeatedly to settle claims, including the claimant's holiday pay claim by paying 7 days pay in respect of annual holiday.

6.4 Withdrawing the claim for unfair dismissal on 21 October 2015 some 2 weeks before the liability hearing. The respondent relies on the undisputed admissions made by the claimant concerning his dismissal for a "never event."

6.5 Bringing the claim of unlawful deduction of wages in respect of Deanery payments dismissed on 9 December 2016, a claim which had no reasonable prospect of success.

6.6 Bringing the breach of contract claim in respect of the award for discretionary points on the basis that it was unreasonable for the claimant to claim and award, the claims being "hopeless."

6.7 Continuing with the holiday pay claims after repeated offers to settle for 7 days holiday pay which was rejected by the claimant, the Tribunal then awarding 7 days pay in respect of annual leave.

6.8 The claimant's rejection of offers and cost threats made throughout the litigation. The Tribunal has read all relevant correspondence, which it does not intend to repeat. It is uncontroversial the respondent put the claimant on a cost warning very early on in the litigation, and it proceeded to threaten costs regularly from thereon in, the amounts increasing substantially as the litigation proceeded to a liability hearing. The claimant was thus aware very early on the respondent intended to make this cost application.

Law

7. The relevant Employment Tribunal Regulation is 74-76. Rule 76(1)(a) provides that: "A Tribunal may make a costs order…where it considers that a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either bringing of the proceedings….or the way that the proceedings (or part) have been conducted" Rule 76(1)(a), or "any claim…had no reasonable prospects of success" – Rule 76(1)(b) of the Tribunal Rules 2013. A two stage exercise is imposed for a Tribunal in determining whether to award costs. First, the Tribunal must decide whether the paying party (and not the party who is seeking a costs order) has acted unreasonably, such that it has jurisdiction to make a costs order.

If satisfied that there has been unreasonable conduct, the Tribunal is required to consider making a costs order and has discretion whether or not to do so. Fees for this purpose means fees, charges, disbursements or expenses incurred – rule 74(1) Tribunal Rules 2013. In Employment Tribunal proceedings costs do not ordinarily follow the event, unlike County Court and High Court actions.

8. The Tribunal has been referred by the claimant to McPherson v BNP Paribas [2004] IRLR 558 and ET Marler v Robertson [1974] ICR 72, particularly the reference to the "dust of battle" subsiding, a comment relevant to the claimant's holiday pay and breach of contract claim in this case.

Conclusion

9. Mr Green, on behalf of the claimant, made the point that this was not one of those "rare" cases where a costs order is appropriate; the Tribunal did not agree. He legitimately pointed out that the two main causes of action brought by the claimant, the holiday pay claim and breach of contract were successful. The race discrimination complaint and unlawful deduction were not, the burden of proof having shifted to the respondent in respect of the former.

10. The causes of action in respect of race, age and unfair dismissal were dismissed upon withdrawal prior to the liability hearing taking place. It is evident from reading the party-to-party correspondence the respondent had carried out a substantial amount of work in respect of the unfair dismissal in anticipation of the liability hearing, as that complaint was withdrawn with less than 2-weeks to go. The same cannot be said for the race and age discrimination complaints as they were dismissed on 16 June 2015, well before preparation of the trial bundles and exchange of witness statements.

11. With reference to the claimant bringing claims of age and race discrimination struck out on 16 June 2015, the Tribunal accepted it was rare for such claims to be struck out at a preliminary hearing, it must follow the claims had no reasonable prospect of success and the claimant had acted vexatious, abusively, disruptively or unreasonably in bringing those claims. In this respect the respondent had met the first part of the test for a cost order.

12. With reference to the claimant bringing a complaint of unfair dismissal under S.98(4) of the Employment Rights Act 1996 as amended, withdrawn on 15 October 2015, the claimant maintained in written submissions he had not acted vexatious, abusively, disruptively or unreasonably in bringing this claims, and Mr Green, on his behalf, pointed out that Employment Tribunals were a cost free jurisdiction and the claimant should not be penalised for withdrawing his unfair dismissal complaint. The Tribunal accepted that withdrawal of a complaint during the litigation process did not necessarily attract a costs order. The wording of the statute is clear, and it took the view the claimant acted vexatiously, abusively, disruptively and unreasonably in the knowledge that he was dismissed for gross misconduct after an act of negligence, described as a "never event," dismissal for which clearly fell within the band of reasonable responses open to a reasonable employer. The Skeleton Argument for the strike out application set

out the fact the claimant had conceded his conduct in respect of a patient fell below the acceptable standard and contravened the professional practise identified by the GMC. The claimant, who was represented by counsel at the disciplinary hearing, accepted he was at fault.

13. The fact the claimant withdrew the claim of unfair dismissal is not in itself unreasonable. The issue is whether he acted unreasonably in the conduct of the proceedings, and the Tribunal found this to have been the case - McPherson v BNP Paribas above. In short, the claim for unfair dismissal was totally without merit, and taking into account the claimant's means it is just and equitable for the Tribunal to use its discretion in favour of the respondent, a public authority, who has incurred substantial costs in defending a meritless claim.

14. With reference to the claimant amending the claim of race discrimination to include a complaint of direct discrimination under s.13 of the Equality Act 2010, at paragraph 89 of the promulgated judgment on liability the Tribunal found the claimant had proved primary facts from which inferences of unlawful discrimination could be drawn, the burden shifted to the respondent who provided an explanation untainted by race discrimination. Discrimination cases are often fact sensitive, and given the Tribunal's finding that the respondent was in breach of contract by not convening a discretionary award points panel, it was not unreasonable for the claimant to have amended his complaint so as to include race discrimination relating to the breach of contract and proceed with that complaint to a liability hearing. It is the Tribunal's view little extra time, if any, was caused to be spent on this complaint, given the complexity of the breach of contract claim, the amount of time spent by the Tribunal working through the at times incomprehensible contractual documentation relied upon by the parties. In short, the Tribunal did not accept the claimant's actions in this regard were misconceived, and there was no saying until the evidence had been considered whether the race discrimination complaint had any reasonable prospect of success, despite it being ultimately unsuccessful.

15. With reference to the claimant rejecting the offer made from 17 September 2015 repeatedly to settle the claimant's holiday pay claim by paying 7 days pay in respect of annual holiday, the Tribunal did not consider his actions to be unreasonable. The party-to- party correspondence exchanged during this period reveals there was a great deal of uncertainty over the claimant's holiday pay entitlement. In an email dated 3 July 2015 the claimant's solicitor, Mr Steel, referred to the contractual terms being key, and to "several contracts in existence." He attached copies, neither of which were dated 2008 which was a reference to a contract referred to in a hearing earlier. There exist a number of emails written in a similar vein, and the parties were unable to get to grips with the claimant's contractual entitlement, the documents were confusing, parties muddled and it was unsurprising the claimant raised his contractual entitlement to holiday pay as an issue which required resolution. Even the claimant's continuous employment and start of holiday year was in question – see the email sent 23 December 2015 at 16.39.

16. It is against this background the offer to settle for 7 days holiday pay quantified at £1952.75 was made on 14 October 2015 with a time limit of 2-days before withdrawal of the offer. The respondent periodically throughout this litigation made cost threats in a similar vein, on occasions with a very short period for acceptance, in an attempt to pressurise the claimant. It does not necessarily follow that the fact the respondent sent numerous costs warning letters these should result necessarily in an order for costs. Unsurprisingly the 14 October 2015 offer was rejected, the reason being that the claimant as at 14 October 2015 was "trying to work out what holiday is owed based on an August start of the holiday year….hoping that your client would be able to state precisely what days holiday have been taken." There was never any explanation from the respondent as to how the 7 days had been calculated, and the fact that this was the number of accrued days accepted as owed to the claimant by the Tribunal was coincidental. In its promulgated judgment the Tribunal referred to the complexity of the contractual documentation (paragraph 31) and to Kay Carter's evidence at paragraph 14 which confirmed there was no certainty on the part of the respondent with the claimant's holiday year which required the Tribunal to resolve this issue.

17. It cannot be said the claimant had acted unreasonably in the bringing or conducting of proceedings in relation to the holiday pay claim which was clearly in issue and required the Tribunal to consider a complex factual matrix and incomplete contractual documentation.

18. With reference to the claim of unlawful deduction of wages in respect of Deanery payments dismissed on 9 December 2016, the Tribunal agreed with the respondent this claim which had no reasonable prospect of success from the outset. However this changed with the respondent's letter of 25 March 2015. The claimant was seeking payment of the shortfall of the monies passed from the Deanery to the Respondent claiming he was contractually entitled to it. The Tribunal found the contractual position was clear, and there was no agreement for the full Deanery sum to be paid to the claimant – paragraph 97. However, in the 25 March 2015 letter Hill Dickinson referred to the Deanery payments as follows: "LNE understands that Mr Vaswani was paid the sum that was passed from the Deanery to the Trust and that was all he was entitled to receive. Our position is that we did not offer or promise to give him anything in addition to the amounts given by the Deanery." As the claimant was claiming the amounts paid by the Deanery to the respondent the 25 March 2015 letter reinforces that complaint and at very least, muddies the waters. It may be there was a misunderstanding on the part of Hill Dickinson, nevertheless the claimant is entitled to rely on representations made in correspondence with the result that as of late March 2015 the Deanery claim was no longer vexatious, abusive, disruptive or unreasonably brought and it could not be said it had no reasonable prospect of success.

19. Finally, with reference to the breach of contract claim in respect of the award for discretionary points on the basis that it was unreasonable for the claimant to claim an award, the claims being "hopeless" the Tribunal did not find it was an unmeritorious case, the claimant having established the respondent was in

breach of contract. It cannot therefore be said the claim was vexatious, abusive, disruptive or otherwise unreasonable and clearly, it had a reasonable prospect of success. The fact the claimant was not awarded damages for breach of contract does not undermine the Tribunal's conclusion that the respondent as in breach of contract, and the "never event" should not have been used as the reason for deciding not to convene a discretionary points panel. The claimant having been invited to apply for discretionary points had every expectation that his application should have been dealt with properly, and it was not.

20. Paragraph 59 of the promulgated judgment encapsulates the Tribunal's findings. The respondent seeks to rely on the Tribunal's finding at paragraph 10 that the claimant's application was hopeless from the outset and borne out by the evidence from managers as to how the panel's discretion would not have resulted in an award. In order to arrive at that judgment the Tribunal considered a substantial amount of evidence, including the criteria for awarding discretionary points. It is only when the battle dust had settled, and all the relevant documentation taken into account, a judgment could be reached as to whether the claimant was entitled to damages flowing from the respondent's breach of contract. It was not an easy matter to decide, and cannot be said that the claimant acted unreasonable in pursuing his successful breach of contract claim to a remedy hearing. The threshold is very high when the test was whether the party had acted frivolously, and an award of costs can only be justified if the claimant knew his case lacked substance or was on the face of it so manifestly misconceived that it could have no reasonable prospects at all - ET Marler v Robertson cited above.

21. In considering whether or not to use its discretion and make a costs order, the Tribunal took into account its findings above, and concluded that in respect of the race and age discrimination and unlawful discrimination claims the claimant's conduct was unreasonable and this had an effect of increasing the respondent's costs by a broad brush figure of £15,000. In assessing this figure the Tribunal considered the cost warning letters that set out a figure for costs at various intervals. For example, as at 28 October 2015 the costs were £25,000. By 16 June 2015 the race and age discriminating claims had been struck out and from that date no costs were incurred in respect of those complaints. The unfair dismissal remained and it is clear from the correspondence that prior to the withdrawal of that complaint a substantial amount of work was carried out in preparation for trial, preparing bundles and witness statements which were exchanged around the end of October, the unfair dismissal complaint having been withdrawn on 22 October 2015.

22. In the "without prejudice save as to costs" letter of 13 January 2016 the costs to trial were estimated at £40,000 and a payment of £20,000 from the claimant was sought. The Tribunal took the view that given the complexity of the contractual and holiday dispute it was not unreasonable for the claimant to refuse the offer and not proceed to remedy. He had succeeded in parts of his claim and was entitled to put forward argument as to why he should recover damages for the respondent's breach of contract. Following remedy it is notable the claimant

recovered a higher figure in respect of the holiday pay in the sum of £2487.41 that that offered by the respondent earlier.

23. By December 2016 the costs were £51,679, 28 April 2014 £68,291 and 25 May 2017 £76,077.21.

24. In arriving at the figure of £15,000 the Tribunal has attempted to take a broad brush view of the costs and allocate this sum to the additional work carried out in by the respondent as a result of the claimant's unreasonable conduct set out above. It accepted the claimant's submission that the purpose of the award is compensatory and not punitive; Lodwick v London Borough of Southward [2004] ICR 884 and the judgment of Underhill J in Barnsley Metropolitan borough Council v Yerrakalva [2011] EWCA Civ 1255.

25. In conclusion, the Tribunal recognises it is rare for costs orders to be made in this jurisdiction and that it has a wide discretion to award costs where it considers there has been unreasonable conduct at any stage during the proceedings, and where a claim had no reasonable prospect of success from its inception. The Tribunal found the claimant had acted unreasonably and three of his claims had no reasonable prospect of success. Accordingly, the claimant is ordered to pay to the respondent a contribution towards its legal costs in the sum of £15,000.

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Employment Judge Shotter

28.09.17

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

4 October 2017

FOR THE TRIBUNAL OFFICE