Case Number: 3201921/2016

EMPLOYMENT TRIBUNALS

Claimant: **Mrs Meranda Chan Kwok Cheong**

Respondent: **(1) London Borough of Newham**
(2) The Governing Body of Tunmarsh School

Heard at: **East London Hearing Centre** **On: 9 November 2017**

Before: **Employment Judge C Ferguson**

Members: **Ms B Saund**
Ms M Long

Representation

Claimant: Not present or represented
Respondent: Not present or represented

JUDGMENT

UPON APPLICATIONS made by the Claimant and the First Respondent for costs orders it is the unanimous judgment of the Tribunal that:-

1. The First Respondent shall pay the Claimant £10,000 in costs.

2. The First Respondent's application for costs against the Claimant is refused.

REASONS

1. Following our judgment sent to the parties on 28 June 2017, in which we partially upheld the Claimant's complaints, the Claimant applied for her costs by letter dated 25 July 2017. That application was due to be heard at the remedy hearing on 10 October 2017 but there was insufficient time to deal with it and the Claimant had not supplied any evidence of her costs. The application was therefore listed for a two-hour hearing at 10am on 9 November 2017. The parties were informed that their attendance was not required, but they were invited to provide written submissions and asked to confirm by 7 November 2017 whether they wished to attend.

2. By email dated 16 October 2017 the First Respondent made an application for "costs/wasted costs" in respect of its costs in preparing for the hearing listed for 9 November 2017.

3. On 23 October 2017 the Claimant provided written submissions in support of her application and confirmed that she was content for the matter to be dealt with on paper. Nothing further was received from the First Respondent. By 10.30am the First Respondent had not attended and the clerk had been unable to contact its representative. We therefore proceeded to determine the applications on the basis of the written submissions and documents provided.

The Claimant's application

4. The Claimant applies for an award of costs pursuant to Rule 76(1)(a) on the basis that the First Respondent or its representatives acted unreasonably in the conduct of the proceedings in two ways:

4.1 By its failure to disclose relevant documents.

4.2 By its failure to ensure that the Claimant's sick pay/ pensionable service was corrected, even though the Claimant had offered to withdraw elements of her claim if this was done.

5. We note that Rule 76(1)(a) provides:

> (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

6. As noted above, we have received no response to the Claimant's submissions from the First Respondent.

7. We accept that the First Respondent or its representatives acted unreasonably in the conduct of the proceedings for the following reasons.

8. We have already found in our liability judgment that there were serious failings in the Respondent's disclosure, for which no adequate explanation had been given. There is no reason for us to depart from that view. Indeed we now find that the failings were more serious and extensive than was apparent at the time of the liability hearing. As a result of making a subject access request under the Data Protection Act 1998 the Claimant has obtained a large number of documents from the First Respondent that were potentially relevant to the issues and were not disclosed. These include:

8.1 An email from Ms Shirley dated 4 January 2016 in which she states that there is "no likelihood for [the Claimant] to return to work in the foreseeable future" and that it was time to call a Stage 3 meeting.

8.2 An email from Julia Wilson of NPW dated 13 January 2016 in which

she refers to the Claimant as "a right pain".

8.3 Emails between Ms Shirley and Ms Hewison on 21 March 2016 in which Ms Shirley asks to move to Stage 3 and Ms Hewison asks for the matter to be "fast-tracked".

8.4 Emails from Ms Hewison relating to the report recommending EMDR therapy, in one of which she says "I can't see [the Claimant] will ever be able to return to our setting".

9. These documents were clearly relevant to the issues and should have been disclosed. The Tribunal has still had no explanation for these failures. We commented in our liability judgment that it appeared to us that the First Respondent's solicitor, Mr Moher, had not properly advised the Respondent on its disclosure obligations. Mr Moher has not made any comment in response, but whether or not the fault lies with him or with the First Respondent we find that there was either a total failure to conduct any adequate search for relevant emails or a deliberate failure to disclose relevant emails, either of which amounted to unreasonable conduct of the proceedings.

10. As to the issue about the Claimant's sick pay and pensionable service, we accept the Claimant's argument that the First Respondent effectively refused the Claimant's offer to settle aspects of her claim and that this amounted to unreasonable conduct. In the run up to the hearing the Claimant continued to raise the fact that there were errors in the calculation of her sick pay. On the second day of the hearing the First Respondent conceded that the amount claimed was due and would be paid. It also conceded in principle that her pensionable service record was wrong and needed to be corrected. The First Respondent's failure to make these admissions sooner and ensure they were remedied was unreasonable and resulted in the Claimant incurring additional costs in pursuing the parts of her claim that related to those matters.

11. Having found unreasonable conduct, we have a discretion whether to make a costs order. We consider it appropriate to do so. The Claimant has incurred £19,790 plus VAT in pursuing her claim and seeks an award of £10,000. Given the seriousness of the First Respondent's failures we accept that an award of £10,000 is fair.

<u>The First Respondent's application</u>

12. The First Respondent's application was made on the following basis:

> "The Respondent believes that the Claimant/Claimant's solicitor has acted unreasonably in the way the proceedings have been conducted Rule 76(1)(a). In particular by being unprepared to present her application for costs at the remedy hearing of 10 October 2017.
>
> In the event that the Claimant persists with her application for costs, the Respondent will seek the cost of preparing for this hearing in full."

13. The First Respondent has not provided any evidence of having incurred

costs. It has not responded to the Claimant's written submissions and did not attend the hearing on 9 November 2017. It would appear that the application is not therefore pursued, but if it is we refuse it on the basis that the First Respondent has not incurred any costs in responding to the Claimant's application.

The Claimant's application for reconsideration of the remedy judgment

14. By a separate letter dated 23 October 2017 the Claimant applied for reconsideration or correction of an accidental slip in the remedy judgment given on 10 October 2017.

15. Two amendments were requested:

15.1 That the judgment should specify whether each payment ordered has been calculated gross or net. The letter refers to paragraph 18 of the Presidential Guidance dated 13 March 2014.

15.2 Re-calculation of pension losses.

16. These are not matters falling within Rule 69. All sums awarded were based on the Claimant's schedule of loss, the figures in which were not disputed, and were assumed to be net of tax. It was agreed during the remedy hearing that no "grossing up" was required. Paragraph 18 of the Presidential Guidance referred to by the Claimant relates to compensation for unpaid wages, holiday pay and notice pay and is not therefore relevant.

17. As for the pension loss calculation, we awarded the full amount claimed, which was in respect of pension contributions for the period 8 September 2016 to 10 October 2017 and 20 further weeks after 10 October 2017. This part of the schedule of loss was not disputed by the First Respondent. The Claimant now seeks to claim further losses in respect of the period 12 February 2016 to 7 September 2016. This appears to be an attempt to amend the Claimant's schedule of loss after the matter has been argued and judgment has been given. No reasons have been given and nor has the Claimant explained why it would be in the interests of justice to permit reconsideration on this basis. I consider that there is no reasonable prospect of this part of the remedy judgment being varied or revoked, so the application for reconsideration is refused.

Employment Judge Ferguson

14 November 2017