Case: 1800215/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mrs M Wallace**
Respondent: **Dr JEC Bennekers, Dr SBM Dahanayake, Dr S Thullamalli t/a White House Farm Medical Centre**

Heard at: **Leeds** **On: 19th December 2017**
Before: **Employment Judge Lancaster**
Members: **Mr P R Kent**
Mr A J Senior

JUDGMENT

The Respondent's application for costs is refused on the papers.

REASONS

1. The Respondent applied for costs by letter dated 17th August 2017.The Claimant was invited to reply, and did so in writing on 14th September 2017. It was then directed that the application be determined on the papers without the parties being required to attend following the submission of a costs schedule and a counter schedule which were duly provided on 5th and 19th October 2017 respectively.

2. We are not satisfied that this claim had no reasonable prospect of success so that we must consider awarding costs under rule 76 (1) (b) of the Employment Tribunals Rules of Procedure 2013.

3. The Claimant did, of course succeed in part of her claim for unlawful deductions from wages, alternatively breach of contract, in respect of underpaid holiday pay on termination.

4. The Claimant did not succeed in her claim of automatically unfair dismissal where the burden was on her to show that the reason or principal reason for dismissal was the making of a protected disclosure. This was, as Employment Judge Rogerson had observed when refusing to list the case for a strike-out hearing, a matter which turned upon the evidence. After analysis it became clear that she had not in fact satisfied the

burden of proof upon her but that does not mean that it was, or should have been obvious from the outset that this claim would necessarily fail.

5. The Claimant had made protected disclosures shortly before she was dismissed on 18th November 2016.. Even though the Claimant had no evidence that the making of the disclosures to the CQC on either 1st, 3rd or 17th November 2016 was in fact known to the Respondent she had been in communication with that prescribed body and it, in turn, had been in correspondence with the Respondents. The communication from the staff directly to the Respondents on 2nd November 2016 however certainly did contain some information which would have constituted a protected qualifying disclosure. Also although, in the event, we found that there was no sufficient evidence that the alleged disclosure on 25th October 2016 to the CCG was a qualifying disclosure there was never any dispute that it was both made and known to have been made, and it had apparently been accepted in discussion at the preliminary hearing before Employment Judge Rogerson on7th April 2017 that this too was, on the face of it, protected.

6. The reasons given for termination were, we found, insufficient to have given rise to a fair dismissal on grounds of conduct had the Claimant had the requisite 2 years' continuous service. Also no dismissal procedure was followed and we found that to have been an unreasonable breach of the ACAS code of practice.

7. Given the close proximity in time between the dismissal and the making of disclosures the Claimant was entitled, in these circumstances, to challenge the genuineness of the stated reason for dismissal. Her claim of unfair dismissal cannot be said to have had no reasonable prospect of success. Even though there was a body of evidence which suggested that the reason for termination (however inadequate it might have been) was not an automatically unfair one that was not conclusive and it was properly put to the test. Had we, as we may possibly have done, disbelieved the Respondents' evidence as to the principal reason for dismissal we might then have gone on to draw an inference that the real reason was indeed the making of a protected disclosure.

8. Nor did the claim, taken as a whole, of having been subjected to a detriment by reason of having made protected disclosures have no reasonable prospects.

9. Dr Thullimali had already determined as at 27th October 2016 that the Claimant would have to leave but did not formulate the reasons for that decision until 18th November 2016. Similarly all the Respondents had confirmed amongst themselves as at 9th November 2016 that the Claimant would be dismissed but were somewhat disingenuous in not disclosing that intention on 10th November 2016 when subjecting the Claimant to what she reasaonbly regarded as detrimental treatment in requesting the password and key words for her work computer. Once again the Claimant was entitled to explore, as a question of fact, whether the close proximity between her disclosures and the breakdown in relationship at this time, evident in the attitude of the Respondents towards her, indicated that those disclosures were a material factor in that treatment.

10. Nor are we satisfied that the Claimant has acted unreasonably so that we must consider awarding costs under rule 76 (1) (a) of the Employment Tribunals Rules of Procedure 2013.

11. Whilst this may have been a case where a deposit order might have been made on the grounds that it had little reasonable prospect of success such an application was not pursued. That was despite the express invitation of Employment Judge Rogerson to resurrect it following disclosure if it were thought appropriate. Absent the making of such an order the fact that the Respondents assert, as they do in their costs warning letter of 11th July 2017, that "the claim has always had very poor prospects of success" gives no basis for the award of costs.

12. It is not unreasonable conduct to have continued this claim which had some prospect of success, even in the face of a costs warning letter, when that letter was not backed up by a renewed application for a deposit.

13. In any event any award of costs is discretionary and we would not have exercised that discretion in favour of the Respondent even if we had found the preconditions for the making of an order to have been met. The Claimant did succeed in part. The Respondent completely failed to comply with the ACAS code of practice on dismissal and their conduct was not beyond reproach, as identified in our original judgment. Costs do not follow the result in Tribunal proceedings and all those matters are material in concluding that it would not be appropriate to award them in this instance.

EMPLOYMENT JU DGE LANCASTER

DATE 19th December 2017