EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms Martha Pitt **v College of North West London**

Heard at: Watford **On**: 17 January 2018

Before: Employment Judge Bedeau

Appearances

For the Claimant: Mr M McDonough, Employment Consultant
For the Respondent: Mr E Kemp, Counsel

JUDGMENT ON COSTS

1. The claimant is ordered to pay the respondents' costs in the sum of £3,000.

2. The respondent's application for a wasted costs order is refused.

REASONS

1. After a hearing on liability lasting three days from 19 to 21 April 2017, I gave judgment and I came to the conclusion that the claimant's claim of unfair dismissal was not well-founded and the wrongful dismissal claim had not been proved.

2. After giving judgment Mr Kemp applied for the respondent's costs to be met by the claimant and I gave orders for the formal service of an application for costs together with a costs schedule. The claimant was ordered to serve a statement of her means with supporting documentation.

3. The case was listed for a one day costs hearing on 8 September 2017.

4. On 24 April 2017, the respondent's representatives made a formal written application for costs to be paid by the claimant. The application was made under Rule 76(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended and was on the basis that in bringing of proceedings or in the conduct of proceedings, the claimant had

acted vexatiously, abusively, disruptively or otherwise unreasonably. Various parts of the liability judgment were referred to. Further, reliance was placed on the claimant's claims as having no reasonable prospect of success. The authorities of Dunedin Canmore Housing Association Limited v Donaldson UKEAT/0014/09 and Daleside Nursing Home Limited v Matthew UKEAT/0519/08 were referred to in support.

5. The costs are £23,763.85 but is limited to £20,000 to avoid assessment.

6. On 15 September 2017, the respondent's representatives made an application for a wasted costs order to be met by the claimant's representative, Mr Michael McDonough, of McDonough Associates because of the late request for a postponement of the costs hearing on 8 September 2017. As a consequence of the late application being granted, costs were incurred by the respondent. The sum of £3,322.14 being the figure claimed, the bulk of which is counsel's fees.

Submissions

7. Mr Kemp, in his submissions to me, in respect of the application under Rule 76(1), said that I had made a finding in paragraph 60 of the liability judgment, in effect coming to the conclusion that the claimant had either made a false statement or that she had lied regarding her circumstances on Tuesday 6 October 2015, when she was in the United States of America. That finding is material because it assists me in coming to the view that the claimant's conduct of proceedings could be classed as unreasonable and that I should make an order for her to pay either all or some of the respondent's costs.

8. The unreasonable conduct being that the claimant had knowingly misled the tribunal. There was no reasonable prospect of her succeeding in her claims against the respondent. She had been, in effect but not explicitly, warned about the weaknesses in her case and I was referred to an email sent in response to Mr McDonough's email in which the respondent's representatives' email stated that the respondent was confident that the claimant's claims were without merit and that the evidence showed that she has knowingly misled the tribunal.

9. In relation to wasted costs, Mr Kemp set out the chronology as he saw it on 14 August 2017. There was an operation to remove a cancerous tumour on Mr McDonough's lungs. On 19 August, Mr McDonough was probably not fit for work for a month because on 30 August, he was signed off as unfit from 14 August to 30 September. On 4 September, he applied for the postponement of the hearing. That application was not copied in to the respondent's representatives. On 6 September, the respondent's representatives were informed by Ms Reena Sharma, who assists Mr McDonough, that an application to postpone the hearing had been made. On 7 September, the tribunal copied the application to the respondent's representatives.

10. Initially, the application to postpone was refused on 7 September by Employment Judge Smail at 15:48. When it was later renewed, it was granted by me the same day at 16:54.

11. Mr Kemp submitted that the case of Ridehalgh v Horsefield [1994] 3 WLR 462, is a case in point by reference to negligence as referred to in Rule 80, in that there had been a failure to act with the competence reasonably expected of ordinary members of the legal profession. He stated that any reasonable competent legal representative who had received medical advice not to work and/or had been signed off sick for the period covering the tribunal hearing, would have taken prompt steps to seek a postponement or arrange suitable alternative representation for their client. Mr McDonough had been negligent when he withheld the information and left the postponement application to be made until the last minute. Further, the respondent was not notified of the application to comment on it. A reasonable, competent legal representative would have complied with the basic rule in respect of notice.

12. Mr Kemp went on to submit that no medical explanation has been advanced for the failure. Even if there was such an explanation, a reasonably competent legal representative would have delegated the task of making the application to a colleague and he invited the tribunal to come to the view that in the particular circumstances of the case, it is just to make a wasted costs order.

13. Mr McDonough submitted that it is exceptional for a tribunal to make a costs order and it does not follow, as in a civil case, that costs follow the event. The assertion that a party told a lie, submitted Mr McDonough by reference to the case of Arrowsmith v Nottingham Trent University, will not necessarily be sufficient to found an award of costs. He quoted paragraph 40 in that judgment, the case of HCA International Limited v May-Bheemul UKEA/0477/10/ZT, in which it stated;

> "Where, in some cases essential allegations found to be a lie, that may support an application for costs but it does not mean that on every occasion that a claimant fails to establish essential plank of the claim, an award of costs must follow."

14. There was no express finding that the claimant had told a lie. The claimant was dismissed for having deliberately asked for sick leave when allegedly not being genuinely sick and for not wanting to use her annual leave for the period of absence, and for pre-planning the trip to New York because of the death of her nephew.

15. Mr McDonough further submitted that there was no evidence that the claimant was not unwell, a double negative, on Tuesday 6 October 2015. The evidence that she gave was that she was unwell at that time. She intended to return to work on Tuesday 6 October. The tribunal concluded that the respondent had reasonable grounds for concluding that she committed an act of gross misconduct.

16. The claimant had an unblemished work record prior to these events and had been working for the respondent for 24 years. The evidence, he submitted, contradicted a pre-planned decision to stay in New York and to return to work on the Wednesday. If the claimant wanted to defraud the respondent, she had planned it in an inept way. She could have said on Tuesday 28 September, that she was not fit for work and stay on sick leave and self-certificate.

17. Mr McDonough's final submission was that based on the evidence before me, during the liability hearing, it was open to another judge to come to a different conclusion on the same evidence. He, therefore, submitted that the tribunal should not award costs in favour of the respondent and against the claimant, nor should the tribunal award wasted costs in this case.

The law

18. The costs provisions are in rules 74 to 84, schedule 1, Employment Tribunals (Constitution and Rules of Procedure) regulations 2013, as amended. "Costs" includes any fees, charges, disbursements or expenses including witness expenses incurred by or on behalf of the receiving party, rule 74(1).

19. The power to make a costs order is contained in rule 76. Rule 76(1) provides,

> "A tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –
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> (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
>
> (b) any claim or response had no reasonable prospect of success."

20. In deciding whether to make a costs order the Tribunal may have regard to the paying party's ability to pay, rule 84.

21. In the case of Yerrakalva v Barnsley Metropolitan Borough Council [2011] EWCA Civ 1255, the Employment Judge in the case awarded the respondent 100% of its costs based on the claimant's lies prior to her decision to withdraw. On appeal the EAT said that it was unable to see how the lies told at the prehearing review caused the respondent any loss at all from which they were entitled to be compensated. She succeeded in her appeal. On appeal to the court of Appeal, Mummery LJ giving the leading judgment held:

> "The vital point in exercising their discretion to order costs is to look at the whole picture of what happened in the case and asked whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what affects it at that. The main thrust of the passages cited above from my judgement in McPherson's case was to reject as erroneous the submission to the court that, in

> deciding whether to make a costs order, the employment tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs the claimant. In rejecting that submission I have no intention of giving birth to erroneous notions, such as that causation was irrelevant or the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances….
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> 52 In my judgement, although the employment tribunal had jurisdiction to make a costs order, it erred in law in the exercise of its discretion. If, as should have been done, the criticisms of the council's litigation conduct had been factored into the picture as a whole, the employment tribunal would have seen that the claimant's unreasonable conduct was not the only relevant factor in the exercise of the discretion. The claimant's conduct and its effect on the costs should not be considered in isolation from the rest of the case, including the council's conduct and its likely effect on the length and costs of the prehearing review."

22. In the case of Vaughan v London Borough of Lewisham UKEAT/0533/12/SM, the Employment Appeal Tribunal held that there was no error of law when the employment tribunal in awarding costs took into account whether there was a reasonable prospect of the claimant being able, in due course, to return to well-paid employment and be in a position to pay costs. Also in that case it was held that the failure on behalf of the respondent to apply for a deposit order is not necessarily an acknowledgement that a claim has a reasonable prospect of success as there are a variety of reasons why such a course of action may not be adopted, such as additional costs involved in having the matter considered at a preliminary hearing and which may not deter the claimant.

23. The tribunal have to consider, once the claims have been brought, whether they were properly pursued, Npower Yorkshire Ltd v Daly UKEAT/0842/04.

24. Knox J, in Keskar v Governors of All Saints Church England School and Another [1991] ICR 493, page 500, paragraphs E-G, held,

> "The question whether a person against whom an order for costs is proposed to be made ought to have known that the claims he was making had no substance, is plainly something which is, at the lowest capable of being relevant, and we are quite satisfied from the decision itself, in the paragraph which I have read and need not repeat, that the industrial tribunal did have before it the relevant material, namely that there was virtually nothing to support the allegations that the applicant made, from which they drew the conclusion that he had acted unreasonably in bringing the complaint.
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> That in our view, does involve an assessment of the reasonableness of bringing the proceedings, in the light of the non-existence of any significant material in support of them, and to that extent there is necessarily involved a consideration of the question whether the applicant ought to have known that there was virtually nothing to support his allegations."

25. I have also taken into account the cases of E.T Marler v Robertson [19974] ICR 72, a judgment of the National Industrial Relations Court, and Oni v Unison UKEAT/0370/14/LA.

26. In Marler, it was held by Sir Hugh Griffiths under the old "frivolous or vexatious" costs requirements that,

> "If the employee knows that there is no substance in his claim and that it is bound to fail, or if the claim is on the face of it so manifestly misconceived that it can have no prospect of success, it may be deemed frivolous and an abuse of the procedure of the tribunal to pursue it. If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously, and likewise abuses the procedure. In such cases the tribunal may and doubtless usually will award costs against the employee.", page 76 D-F.

27. In the Oni case, Simler J, President, re-stated the principles, namely that the tribunal has a wide discretion in deciding whether to award costs. It is a two-stage process. The first being, to determine whether the paying party comes within one or more of the parameters set out in rule 76. The second, is if satisfied that one or more of the requirements have been met, whether to make the award of costs. However, costs had to be proportionate and not punitive and reasons must be given.

28. In Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797, a case where the claimant was ordered to pay costs of £3,000 because she had made a case dependent on advancing assertions that were untrue. The Court of Appeal held that under rule 41(2) the tribunal was not obliged to take her means into account although it had done so. The fact that her ability to pay was limited, in that she was unemployed and no longer in receipt of statutory maternity pay, did not require the tribunal to assess a sum limited to an amount she could pay. The amount awarded was properly within the tribunal's discretion.

29. In relation to the exercise of the tribunal's discretion whether to take into account the paying party's ability to pay, under the old rules, HHJ Richardson, in the case of Jilley v Birmingham & Solihull Mental Health NHS Trust (EAT/584/06), held:

> "The first question is whether to take ability to pay into account. The tribunal has no absolute duty to do so. As we have seen, if it does not do so, the County Court may do so at a later stage. In many cases it will be desirable to take means into account before making an order; ability to pay may affect the exercise of an overall discretion, and this course will encourage finality and may avoid lengthy enforcement proceedings. But there may be cases where for good reason ability to pay should not be taken into account: for example, if the paying party has not attended or has given unsatisfactory evidence about means."
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> "If a tribunal decides not to do so, it should say why. If it decides to take into account ability to pay, it should set out its findings about ability to pay, say what impact this has had on its decision whether to award costs or on the amount of costs, and explain why. Lengthy reasons are not required. A succinct statement of

> how the tribunal has dealt with the matter and why it has done so is generally essential."

30. Under Rule 80(1), a Tribunal may make a wasted costs order against a party where the other party has incurred costs,

> "(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative."

31. I have taken into account the cases referred to me by Mr Kemp and Mr McDonough.

Conclusion

32. Mr McDonough holds himself out as an employment law specialist, in practice since 1989. His firm, McDonough Associates, is regulated by the Claims Management Regulator.

33. In answer to questions I put to Mr McDonough, he told me that on 14 August 2017, he was at Harefield Hospital and had an operation to remove, or to burn out a cancerous tumour on his lungs. He was also diagnosed as suffering from emphysema and had problems with his breathing. He was discharged from hospital on 19 August 2017. His son travelled from his home to care for him. His doctor visited on 30 August 2017 and provided the Fit Note already referred to.

34. Mr McDonough told me that he had a four-day employment tribunal case in Bristol Employment Tribunal and needed the Fit Note to put in an application that the hearing be postponed. He was due to represent 16 claimants in constructive unfair dismissal as well as failure to consult claims. It was his intention to represent the claimant on 8 September 2017 as she told him that her 85-year-old mother, who lives in Dominica, required her to be there to care for her and wanted the case to be heard on 8 September 2017. Notwithstanding that the medical evidence clearly stated that he was unfit for work during that period of time, he intended to represent the claimant at that hearing.

35. Matters took a turn for the worse on 4 September when he wrote to the Tribunal stating that he would not be fit to represent the claimant on 8 September, and gave an account of his operation and the diagnosis of emphysema.

36. On 5 September, he suffered from a collapsed lung and was sent to Northwick Park Hospital where he was operated on to inflate his lungs. While in hospital he was informed that his application for a postponement was unsuccessful which he later renewed. He was discharged on 9 September 2017.

37. The matter came before me and I took in to account his circumstances at that time, on 7 September, and granted the postponement.

38. In relation to the applications by the respondent, in paragraph 19 of the liability judgment, I found,

> "On Monday 28 September 2015, she contacted Ms Carty to request three days' annual leave from Thursday 1st, Friday 2nd and Monday 5th October 2015, in order to attend her nephew's funeral in New York."

39. In paragraph 22, I found the following:-

> "At 21:37 in the evening of Monday 28 September 2015, she booked her flight. From the flight confirmation invoice, it discloses a departure date as Wednesday 30 September 2015 at 6pm and that her return flight was on Tuesday 6 October at 7:30pm, arriving at London Heathrow Airport on Wednesday morning at 7:40am. From that information, it was quite clear that the period of time the claimant was going to be away was in excess of the three days leave she had applied for and which was granted by Ms Carty."

40. I concluded in paragraph 60 of my conclusions, the following:-

> "In relation to the wrongful dismissal claim, I have to consider all of the evidence. The decision is mine alone based on the evidence given during the course of this hearing. What struck me about the claimant's account was what she said in relation to her position on Monday 5 October 2015. She stated that she was fit and able to travel to the United Kingdom on that day but the following day, after she realised that she had made a mistake, she asserted that she was ill. Bearing in mind the other evidence in this case and other findings, I have come to the conclusion that she deliberately put down in First Care, the statement that she was ill after she realised that she had made a mistake. That was intentional and it breached trust and confidence. It was a fundamental breach of trust entitling the respondent to terminate her contract. It does not give me any comfort to come to this decision because I acknowledge the claimant has had a clean disciplinary record and it is most unusual for the tribunal to be faced with a claimant who had been in employment for 24 tears and whose employment had been terminated in such circumstances. Her wrongful dismissal claim has not been proved and is dismissed."

41. I came to the conclusion in respect of the unfair dismissal claim, that there were reasonable grounds upon which the respondent's disciplinary and appeal officers, genuinely believed in the claimant's guilt. I also concluded that the claimant's dismissal could not be viewed as outside of the range of reasonable responses. I did not say that in respect of the unfair dismissal claim, as part of my reasoning, that the claimant had told lies. It was open to her to argue that she was unwell on 6 October 2015; that she could have self-certificated her sickness absence if she wished to do so; that her 24 years' service should be taken in to account as well as her hitherto clean disciplinary record, and that an alternative course of action was available to the respondent other than the termination of her employment. In so doing, I do not take the view that her conduct could be described as unreasonable in bringing or pursuing her unfair dismissal claim. Nor do I take the view that her unfair dismissal claim stood no reasonable prospect of succeeding. She was entitled to put these points to a tribunal and it was open to the tribunal to determine whether or not her unfair dismissal claim was well-founded.

42. In respect of her wrongful dismissal claim, paragraph 60 of my conclusion is relevant because it refers to my findings of fact and the statement that the claimant had put down that she was ill because she realised that she had made a mistake. It was intentional and amounted to a breach of trust and confidence. She knew about that when bringing her wrongful dismissal claim and in pursuing it. The first limb in Rule 76 has been established by the respondent.

43. Mr Kemp submitted that I should have regard to the nature, gravity and effect of the claimant's unreasonable conduct in pursuing her wrongful dismissal claim. The respondent cannot work out in precise terms how much of its costs is attributable to defending that claim. The suggestion is that it would be £7,000 and that the respondent would be seeking an order in that amount.

44. Mr McDonough submitted that costs should either be negligible or nil. It is a false dichotomy trying to establish that the respondent has incurred additional costs over and above the work done in defending, successfully, the unfair dismissal claim. In his words, he said that no extra piece of paper has been produced in relation to the wrongful dismissal claim and not a penny more had been expended in defending it.

45. The claimant is 56 years of age. When she applies for work she cannot lie. She has to state the reason to any prospective employer, why she left her employment with the respondent. In reality, her prospects of obtaining further employment or comparable employment, are bleak.

46. I do take in to account what is stated in her witness statement, namely that her savings in her Nationwide account is around £30 but she has numerous outgoings. She has a property with equity in the region of £330,000 but is in debt of around £60,000 and is the subject of an involuntary arrangement, "IVA".

47. I do accept that she has a property with considerable equity in it. I do take in to account her age. It is not easy for someone at her age to obtain comparable employment but based on her length of service with the respondent and her experience, I do take the view that there is some prospect of her obtaining employment, though that may not be at comparable level.

48. I also take in to account the nature, gravity and effect of the unreasonable conduct. The claimant pursued a wrongful dismissal claim right up to judgment being given. The test for wrongful dismissal is separate and distinct from unfair dismissal. I had to look at the evidence and form a view myself, not constrained by the requirements of the test for unfair dismissal, but whether or not the respondent repudiated her contract of employment. I have come to the conclusion that it did not. Indeed, Mr McDonough's submissions are very brief on the point. Wrongful dismissal was part of the claimant's case which, if successful, she would have been entitled to, in my view, to a considerable sum of money. That was a claim the respondent

had to defend right up to the end. It is difficult to quantify how much of its time and money was spent in defending it but is limited to £7,000. However, taking in to account the claimant's financial circumstances, in particular, the enormous amount of debts and her IVA, to do justice, I make an award in the sum of £3,000 to be paid by her to the respondent in defending the wrongful dismissal claim.

49. In relation to the wasted costs application, I do not conclude that Mr McDonough was negligent in making the postponement application. I accepted his answers to the questions I put to him. Although there was an extant Fit Note stating that he was unfit for work from 14 August to 30 September 2017, he took it upon himself, in early August or from mid-August, to continue to represent the claimant as he had her best interests in mind. She wanted this case to come to a conclusion on 8 September in order to facilitate the care of her mother in Dominica. Mr McDonough, notwithstanding his medical condition at the time, was prepared to represent her on 8 September. His circumstances on 4 September when he put in his application, had worsened the following day, 5 September. When he realised his application was refused by Employment Judge Smail, he renewed it and was granted by me. He told me that he did not want to notify the respondent about the details of his medical condition, hence the failure to comply with Rule 30. The tribunal, however, did inform the respondent, with Ms Sharma's consent, of the application three days later, on 7 September.

50. In any event, such was Mr McDonough's condition that even if the case was heard by me on 8 September, based on Mr McDonough's condition at the time, I would have had no alternative but to postpone the hearing.

51. I have come to the conclusion and the respondent cannot be faulted in any way nor their representatives. The application for wasted costs is, however, refused.

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Employment Judge Bedeau

Date: 27 April 2018

Sent to the parties on: .....

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For the Tribunal Office