EMPLOYMENT TRIBUNALS

Claimant: Mr J Brooks

Respondent: Nottingham University Hospitals NHS Trust

Heard at: Nottingham

On: Friday, 11 May and Monday 21 May 2018

Before: Employment Judge Solomons

Members: Mr G Austin
Mr M Missett

Representation
Claimant: Mr L Davies, Solicitor
Respondent: Mr T Coghlin Queens Counsell

RESERVED JUDGMENT AT A COSTS HEARING

1. The unanimous judgment of the Tribunal is that, pursuant to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Rules 74 to 84, the **Claimant** should pay to the **Respondent** the whole of the Respondent's costs, the amount to be determined if not agreed by way of detailed assessment carried out by the County Court in accordance with the Civil Procedure Rules 1998.

REASONS

Background

1. The Claimant, following a 27-day hearing between November 2015 and February 2016, had his claim of detriment on the grounds of public interest disclosure dismissed by way of a judgment dated 3 March 2016 with written reasons being provided on 7 December 2016. The Respondent made application dated 13 January 2017 for the Claimant to pay its costs of defending the proceedings, which application was adjourned pending the determination of the Claimant's appeal to the Employment Tribunal which was rejected at the sift stage on 31 March 2017, and again following an oral argument on 23 August 2017.

2. The Tribunal heard the costs application on 11 May 2018 and then met in Chambers to determine the application on 21 May 2018.

3. For the purposes of the application the parties agreed a bundle of documents which included, as well as certain correspondence, the application and the Claimant's response to it, certain EAT documentation and the Tribunal's reserved judgment and reasons, as well as the Claimant's witness statement in the Tribunal proceedings. In addition, both representatives provided skeleton arguments in writing for the purposes of the hearing which were added to briefly orally. The Tribunal was provided with a bundle of authorities.

The Law

4. The provisions of the Employment Tribunal Rules of Procedure in relation to costs are so far as relevant as follows:

4.1 Section 76

(1) A Tribunal may make a costs order and shall consider whether to do so, where it considers that:

(a) a party 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.

(2) A Tribunal may also make such an order where a party has been in breach of any order

4.2 Section 78

(1) A costs order may-

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;
(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined by way of detailed assessment carried out by a county court in accordance with the Civil Procedure Rules 1998

4.3 Section 84

In deciding whether to make a costs order, and if so in what amount, the Tribunal may have regard to the paying party's ability to pay.

The Grounds of the Application

5. The Respondent contends that the Tribunal has a discretion to award costs in this case on three grounds:

4.4 That the Claimant advanced a case which he knew or ought to have known had no foundation and he gave untruthful evidence in support of central themes of the case and that he therefore acted unreasonably in bringing and/or conducting the proceedings;

4.5 The allegations made by the Claimant, or a number of them, were so weak as to have had no reasonable prospect of success, and the Claimant acted unreasonably in pursuing them;

4.6 That the Claimant produced a witness statement that was unreasonably long and was repetitive and contained large amounts of argument, hypothesis and irrelevant material, and thereby breached the express terms of a Tribunal Order and thereby acted unreasonably in conducting these proceedings.

5. Further the Respondent submits the Tribunal should exercise its discretion to award costs, having regard in particular to the following considerations:

5.1 The nature and extent of the Claimant's unreasonable conduct;
5.2 The fact that the Claimant had legal advice and representation throughout;
5.3 The degree to which the Claimant's conduct has been deliberate;
5.4 The Claimant's means;
5.5 The fact that the Respondent, a public body with notoriously stretched resources, has been put to very considerable expense (in the region of £170,000) in defending the Claimant's unmeritorious claims.

6. The Claimant argues in essence:

6.1 That the claim was arguable and not one which had no reasonable prospects of success;
6.2 That it was not unreasonable to bring and continue the proceedings;
6.3 That the Claimant was not in breach of the Tribunal's Order in relation to the provision of a witness statement.

7. The parties' submissions are set out in detail in their written and oral submissions which will in the circumstances not be repeated in detail in this judgment, save in so far as it is necessary to refer to them but for the purposes of our findings and conclusions. It should be pointed out however that during the course of the Claimant's Representative's written and oral submissions, reference was made both to arguments put forward by the Claimant in the EAT in seeking to challenge the Tribunal's judgment on the merits, and to matters relating to the Claimant's employment which had occurred since the Hearing and the Tribunal's Judgment. During the course of oral submissions it was by and large accepted on behalf of the Claimant that those are matters which are irrelevant to the Tribunal's consideration of this costs application, and that certainly that the Tribunal in making its decision on this application must do so upon the basis of the Tribunal's findings and conclusions as set out in our Judgment and Reasons on the merits, and that it is not open to the Claimant at this Hearing to seek to challenge those findings and conclusions, either on the basis of the arguments put forward to the EAT when the application for leave to appeal was refused, or on the basis of matters which have occurred since the Judgment was given.

8. We base our conclusions upon our findings of fact and the conclusions set out in the Tribunals judgment on the merits.

Conclusions

9. As we found a central theme of the Claimant's case was the assertion that his treatment or perceived treatment at the hands of the Respondent dramatically worsened after the point when he made protected disclosures. This was central because unless the Claimant could show a deterioration of his treatment or perceived treatment after the point at which he made protected disclosures, his claim that his treatment was influenced by the making of those protected disclosures was fatally weakened.

10. We rejected the Claimant's case on this central theme since it was squarely contradicted by the contemporaneous documentation including in particular the letter drafted by the Claimant himself between March 2010 – January 2011 (see Judgment paragraphs 37 to 39, 61 and 143). We found (paragraph 39) that the Claimant has been shown to be distorting the truth in relation to a central theme of his evidence. Furthermore (paragraph 42) the Judgment indicates that the Tribunal did not find the Claimant to be an impressive witness and found that he had sought to embellish his evidence in both his witness statement and in cross examination. We made that finding in the context of a second key theme of the Claimant's case, which was that everything that happened to him in this case was part of a conspiracy against him brought about by his making protected disclosures (paragraph 42).

11. A third key plank of the Claimant's claim was that in a meeting on 19 December 2011 Mr Perks had threatened to "finish him" and certainly wanted to remove the Claimant from his department. The Tribunal found that on the balance of probabilities that remark was not made.

12. Our conclusion is that the Claimant, although not being deliberately untruthful or dishonest with the Tribunal, had a distorted perception about what in fact happened to him and the reasons for it which led him to conclude that he had a case which was eminently arguable before the Tribunal. However, we are satisfied that any reasonable and objective person looking at the evidence which was available to the Claimant at the time of the commencement of the proceedings would not have so concluded.

13. It is clear in the view of the Tribunal that many of the allegations of detriment on the grounds of public interest disclosure made by the Claimant were so weak as to have had no reasonable prospect of success. Examples are as follows:

13.1 Detriment 1 (paragraph 40): The contention of Dr Skoyles falsely accused him of misconduct was a distortion of the facts. It cannot be contended that the Claimant suffered a detriment by being asked about the matter. There was simply no evidence whatsoever to support the Claimant's case on causation.

13.2 Detriment 3 (paragraph 45): There was absolutely no evidence to show that the reason Dr Othman recorded his concerns was in any way connected with making protected disclosures.

13.3 Detriment 9 (paragraph 54): The Tribunal found that the chronology shows clearly that the allegation made by the Claimant that his grievance was ignored was simply not correct.

13.4 Detriment 10 (paragraph 55): It was never suggested that in making his allegation Dr Al-Benna was motivated by the Claimant having made protected disclosures. Once Dr Al-Benna made his allegation it clearly had to be investigated and such a decision could not be legitimately criticised. There was simply no evidence to support the Claimant's case that the investigation and subsequent processes were motivated by the Claimant's protected disclosures.

13.5 Detriment 11 (paragraph 57): It was clearly reasonable to investigate the new allegations that had been made. It was not suggested to Mr Siara that he was even aware of, still less influenced by the making of protected disclosures with the consequence that the allegation cannot succeed.

13.6 Detriment 12 (paragraph 58): There was a complete absence of evidence to support the Claimant's case that Ms Allison was 'put up' to making a complaint against the Claimant.

13.7 Detriment 15 (paragraph 62): It was not suggested to Dr Skoyles or Mr Perks in cross examination that they were responsible for suggesting the dates in question. There was no detriment to the Claimant in suggesting dates as he could and did say they were not suitable. There was simply no evidence at all to support the Claimant's case on causation.

13.8 Detriment 22 (paragraph 83): The Tribunal found that the allegation was non sensical and without foundation and it could not reasonably be contended that there was a detriment to the Claimant.

13.9 Detriment 23 (paragraphs 84 to 87): The allegation that the Claimant was ambushed by the production of the emails in question was inaccurate since the Respondent had previously sent the document to the Claimant's Representative. It was not suggested to Mr Siara that he was personally influenced by the making of any protected disclosure and in fact the Tribunal found that he was not aware of any protected disclosure.

13.10 Detriment 25 (paragraph 94): The Tribunal found that since it was not the Claimant's case that either Mr Girling or Ms Woolley was personally influenced by the making of protected disclosures his case was unsustainable and must fail.

13.11 Detriment 26 (paragraphs 95 to 96): The Claimant did not advance a case that Mr Fern or anybody else on the panel was influenced by the making of protected disclosures. To criticise Mr Fern for alleged procedural errors was to miss the point; such failures are not equivalent to the decision being made on the ground of the making of protected disclosures.

13.12 Detriment 29 (paragraph 102): It was demonstrably inaccurate that the Claimant's letter was ignored. Indeed, it was addressed by the Trust at the highest level, namely Chief Executive Officer and Chairman level.

13.13 Detriment 30 (paragraphs 113 to 115): There was no evidence that Mr Perks advised the patient RG to complain, and the Claimant could not say he did. There was a complete lack of evidence to support the Claimant's case that RG was encouraged to complain.

13.14 Detriment 31 (paragraph 116): The Claimant's evidence was flatly contradicted by a good deal of other evidence.

13.15 Detriment 34 (paragraph126): This allegation was abandoned by the Claimant during the Hearing.

13.16 Detriments 36 and 37 (paragraph 133): It was not the Claimant's case that Mr McKee was personally influenced by the making of protected disclosures so the claim could not succeed.

13.17 Detriment 40 (paragraphs 139 to 141): Based on the contemporaneous documents and the Claimant's own admission in cross examination it was clear that the reason for the Claimant's resignation as Clinical Lead was the lack of support within his team for him to continue.

14. The above are but examples of which more are to be found in the Judgment, of allegations made by the Claimant which in our conclusion had no reasonable prospect of success in the light of the documentation and material available to the Claimant prior to the commencement of his proceedings, and the pursuing of those allegations during the Hearing amounts to unreasonable conduct of the proceedings.

15. The Respondent also contends that the Claimant was guilty of unreasonable conduct and that he was in breach of a Tribunal Order by reason of producing a witness statement which was unreasonably long and repetitive and contained large amounts of argument, hypothesis and irrelevant material. The Order for the witness statement, made by Employment Judge Heap, had been to serve a witness statement which is full but not repetitive which sets out all the facts about which a witness intends to tell the Tribunal relevant to the issues as identified above (at the case management discussion), but must not include generalisations, argument, hypothesis or irrelevant material.

16. The witness statement which ran to over 1,000 paragraphs and 214 pages was to an extent repetitive, and contained a number of generalisations and some argument and arguably some irrelevant material. However, the Tribunal has concluded that there were so many allegations which were made in this case, and such a large amount of evidence, that it was inevitable that the Claimant would have to produce a very lengthy witness statement, and inevitable also as is common that he would seek to argue certain parts of his case through the evidence that he was giving in the witness statement. In those circumstances the Tribunal does not accept the Respondent's contention that the Claimant was in breach, and certainly not deliberate breach of the witness statement order or that the production of such a witness statement could be said to amount to

unreasonable conduct of the proceedings. Although it took some time to read the Claimant's witness statement and for him to be cross examined upon it, we are not satisfied that the excision from that witness statement of matters which were said to be irrelevant or repetitious would have made any substantial difference to the length of the Claimant's evidence, and of course there was no application made by the Respondent to excise any parts of the witness statement during the course of the Hearing.

17. Accordingly, for the reasons set out above, the Tribunal concludes that the Claimant presented a case which had no reasonable prospect of success and acted unreasonably in pursuing such a case over a very lengthy Hearing. In those circumstances, and being so satisfied, we have the discretion to make a Costs Order against the Claimant.

18. We bear in mind that this is not a case where the Claimant has committed one or two relatively isolated and minor acts of unreasonable conduct. In fact, his entire case was founded on his unreasonable conduct in distorting and embellishing evidence in relation to the three central pillars of his case, and his case was in large part misconceived even though he had made a number of protected disclosures.

19. We bear in mind also that he had the benefit of legal advice and representation throughout. It was suggested during the course of written submissions on behalf of the Claimant, that he had been advised that he had a good case, but when (he having waived his privilege in that way) the Respondent not unnaturally asked for disclosure of the advice received from Counsel, no such disclosure was made. We have heard no evidence that the Claimant was so advised or been shown any document that he was so advised, and in the circumstances, we proceed upon the basis that he had been properly and carefully advised as to the risks and weaknesses in his case, and of the potential for an adverse costs order.

20. We are not satisfied that the Claimant has been deliberately dishonest with the Tribunal and we are inclined to the view that he himself, for reasons best known to himself, was of the view that he had an arguable case. However, upon the basis of our findings, we are entirely satisfied that any reasonable person, looking at in particular the documentation which was available to the Claimant prior to the proceedings, and based upon his knowledge of what had happened in the time during the period of his employment leading up to the commencement of the proceedings, would have been driven to the conclusion that his claim was unsustainable, and we are satisfied that the Claimant holding the contrary view sought to suggest that there was an overarching conspiracy against him and embellished his evidence in support of his case at a number of points.

21. We are also satisfied that this is not a case in which it can be said that the Claimant's means are such that he is not in a position to meet a costs order. Although he has effectively been suspended by the employer for nearly four years now, he has throughout been in receipt of his salary of approximately £106,000 per annum, and he has also on his own admission been very successfully working in the private sector and no doubt earning substantial additional income through that means. We bear in mind also that the Respondent is a Public Body with notoriously

stretched resources which has been put to very considerable expense in defending what we have determined are the Claimant's unmeritorious claims. The Respondent's costs, we are told, are in the region of £170,000.

22. In all the circumstances we consider that it is just to make a Costs Order in this case. We recognise that the normal result is that there are no costs in Employment Tribunal proceedings, but we have concluded that this is one of those cases where the Claimant can truly be said to have brought a claim which had no reasonable prospects of success, and which was unreasonably pursued in those circumstances, and that accordingly the Claimant should be liable for the Respondent's costs , if not agreed, to be assessed by the County Court.

Employment Judge Solomons

Date 26 June 2018

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

27 June 2018

FOR EMPLOYMENT TRIBUNALS