EMPLOYMENT TRIBUNALS

Claimant: Mr P Duffy

Respondent: University Hospitals Morecambe Bay NHS Foundation Trust

Heard at: Manchester **On:** 9 November 2018

Before: Employment Judge Franey
Mrs F Crane
Mr CS Williams

REPRESENTATION:

Claimant: Mr P Gorasia, Counsel
Respondent: Mr B Williams, Counsel

COSTS JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The claimant's application for costs fails and is dismissed.

2. The respondent's application for costs fails and is dismissed.

REASONS

Introduction

1. Following a seven-day hearing between 16 and 24 April 2018, on 8 June 2018 the Tribunal issued its Reserved Judgment with Reasons (the "Liability Judgment"). A complaint of detriment during employment on the ground of a protected disclosure was dismissed, as was the complaint that there had been an "automatically" unfair dismissal because of any protected disclosure. However, the claimant succeeded in his "ordinary" constructive dismissal complaint and in his complaint of unlawful deductions from pay.

2. These Reasons will assume that the reader is familiar with the Liability Judgment.

3. On 16 July 2018 the respondent made an application for a costs order against the claimant in the total sum of £48,113.54. It asked for that application to be considered at the forthcoming remedy hearing on 27 July 2018, but there was insufficient time for that to be done.

4. At the remedy hearing the claimant was awarded the sum of £12,950 (gross) in respect of unlawful deductions from pay, a basic award for unfair dismissal of £10,298.50 and a compensatory award for unfair dismissal capped at £78,962.00. The total amount awarded was just in excess of £102,000.

5. Written reasons for that remedy judgment were sent to the parties on 28 August 2018. That same day the claimant made an application for a costs order against the respondent. It was made on the last day for any costs application in these proceedings (rule 77).

6. On 7 September 2018 the claimant submitted a detailed response to the respondent's costs application, and on 28 September 2018 the respondent replied to the claimant's application. Both applications were listed for hearing on 9 November 2018.

7. In addition to the written applications and responses, we had the benefit of a brief written submission from each advocate together with oral submissions.

8. The claimant was prevented from attending the hearing in person due to difficulties in travelling across from the Isle of Man. Mr Gorasia was content to proceed in his absence. Neither party wanted its ability to pay to be taken into account. The Tribunal heard no evidence.

9. Before dealing with each application these reasons will summarise the legal position in relation to costs.

Relevant Legal Principles

10. The power to award costs is contained in the 2013 Rules of Procedure. The definition of costs appears in rule 74(1) and includes fees, charges, disbursements or expenses incurred by or on behalf of the receiving party.

11. Rule 75(1) provides that a Costs Order includes an order that a party makes a payment to another party "in respect of the costs that the receiving party has incurred while legally represented".

12. The circumstances in which a Costs Order may be made are set out in rule 76. Rule 76(1) provides as follows:

> **"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."**

13. The procedure by which the costs application should be considered is set out in rule 77 and the amount which the Tribunal may award is governed by rule 78.

14. It follows that the Tribunal must go through a three-stage procedure (see paragraph 25 of **Haydar v Pennine Acute NHS Trust UKEAT 0141/17/BA**). The first stage is to decide whether the power to award costs has arisen, whether by way of unreasonable conduct or otherwise under rule 76; if so, the second stage is to decide whether to make an award, and if so, the third stage is to decide how much to award.

15. The case law on the costs powers (and their predecessors in the 2004 Rules of Procedure) include confirmation that the award of costs is the exception rather than the rule in Employment Tribunal proceedings; that was acknowledged in **Gee v Shell UK Limited [2003] IRLR 82**. Even so, in **Millin v Capsticks Solicitors LLP [2014] All ER (D) 12 (Dec)** the Employment Appeal tribunal said:

> **"Where a claim is truly misconceived and should have been appreciated in advance to be so, we see no special reason why the considerable expense to which a Respondent will needlessly have been put (or a Claimant, in a case in which a response is misconceived) should not be reimbursed in part or in whole."**

16. The position where claims are withdrawn at the start of a hearing was considered by the Court of Appeal in **McPherson v BNP Paribas [2004] IRLR 558.** Mummery LJ observed that the question was not whether the withdrawal was unreasonable, but whether the proceedings had been conducted unreasonably. He went on to say the following:

> **"28. In my view, it would be legally erroneous if, acting on a misconceived analogy with the CPR, tribunals took the line that it was unreasonable conduct for employment tribunal claimants to withdraw claims and that they should accordingly be made liable to pay all the costs of the proceedings. It would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs on withdrawal, which might well not be made against them if they fought on to a full hearing and failed. As Miss McCafferty, appearing for Mr McPherson, pointed out, withdrawal could lead to a saving of costs. Also, as Thorpe LJ observed during argument, notice of withdrawal might in some cases be the dawn of sanity and the tribunal should not adopt a practice on costs, which would deter applicants from making sensible litigation decisions.**
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> **29. On the other side, I agree with Mr Tatton-Brown, appearing for BNP Paribas, that tribunals should not follow a practice on costs, which might encourage speculative claims, by allowing applicants to start cases and to pursue them down to the last week or two before the hearing in the hope of receiving an offer to settle, and then, failing an offer, dropping the case without any risk of a costs sanction.**
>
> **30. The solution lies in the proper construction and sensible application of [the rule]. The crucial question is whether, in all the circumstances of the case, the claimant withdrawing the claim has conducted the proceedings unreasonably. It is not whether the withdrawal of the claim is in itself unreasonable…"**

Claimant's Costs Application

17. Mr Williams submitted that this was simply a retaliatory application made only on the very last day for seeking costs in these proceedings. We noted that argument but we addressed the application on its merits in any event.

18. The claimant's application was made under rule 76(1)(a) and (b). It was based on the proposition that the respondent had never had a reasonable prospect of successfully defending the complaints of unlawful deductions from pay and the ordinary unfair dismissal complaint. Both of those complaints succeeded but it is important to recognise the danger of hindsight. This was put as follows in **ET Marler Ltd v Robertson [1974] ICR 72 (**at 77B):

> **"Ordinary experience of life frequently teaches us that that which is plain for all to see once the dust of battle has subsided was far from clear to the combatants when they took up arms."**

19. We noted that at no stage had the claimant applied for an order striking out the response on these points, or for a deposit, and nor had the claimant sent any costs warning letter. That was no bar to a costs order, but it was relevant that at no stage had the claimant expressed the view that these complaints were bound to succeed.

20. Further, underlying both complaints as pleaded was the core issue of whether it had been agreed in a contractually binding way that the claimant would be paid remuneration of approximately £200,000 per annum. For reasons set out in paragraphs 176-191 of our Liability Judgment, that issue went against the claimant. The claimant's success on these two complaints was based on other matters, but closer scrutiny showed that neither complaint had been guaranteed to succeed.

21. As far as the unlawful deductions complaint dealing with repayment for the AAS sessions was concerned, the Tribunal had to resolve which sessions had been worked, the hours to be paid and the effect of the claimant not having submitted any claims for payment after early 2016. It is right to say that after the first claim form was lodged in October 2016 the respondent paid the claimant £5,850 by the end of that month and a further £17,430 in January 2017, but we concluded unanimously that the respondent acted reasonably in defending the proceedings for unlawful deductions on all matters once the claimant had been paid those amounts which the respondent had calculated as being due. There were issues with the audit trail which supported that position, even though ultimately we found that a further sum was due.

22. As for the unfair dismissal complaint, it was a complaint of constructive dismissal. Such complaints are frequently more difficult for a claimant than an actual dismissal complaint. They can be fact sensitive. They often turn on the oral evidence. That was the case here. The claimant's case was primarily based on the argument about a contractual entitlement to £200,000, which we rejected. Even once that was rejected there were further issues about whether the failure to pay him for the AAS sessions was a repudiatory breach. The impact of the desktop review was not a straightforward matter and the respondent was entitled to argue, as it did, that it was only an initial step in the hope of further discussion. The dispute about the reason the claimant resigned was reasonably pursued by the respondent (see paragraphs 233-235 of the Liability Judgment). Similarly, it was reasonable in our judgment for the respondent to pursue its points about affirmation and whether the claimant had lost trust at all in the respondent (see paragraphs 236-245 of the Liability Judgment).

23. Overall, even though the claimant succeeded in these two complaints we rejected the contention the respondent acted unreasonably in defending them or that its defences had no reasonable prospect of success. The power to award costs had not arisen and we unanimously dismissed the claimant's application for costs.

Respondent's Costs Application

Background

24. This application was made under rule 76(1)(a) and (b). It was based on the withdrawal at the start of the first day of the final hearing of the majority of the complaints based upon the protected disclosures.

25. On the eve of the final hearing the Tribunal was faced with 27 protected disclosures (of which four were disputed), ten allegations of detriment and the automatic unfair dismissal complaint. Through the withdrawals at the start of the hearing Mr Gorasia abandoned reliance on the disputed disclosures, and withdrew all but two allegations of detriment (the failure to pay monies that were agreed, and the desktop review). Both detriments were also relied upon as the repudiatory breaches that led to the claimant's resignation being a constructive dismissal. In the course of the claimant's evidence permission to amend was granted to enable the claimant to rely on a further disclosure (see Liability Judgment paragraphs 11-16).

26. The costs application was based on the proposition that the withdrawal of the remainder of those complaints meant that effectively 70% of the case had been abandoned and therefore the majority of the time spent on case preparation had been wasted. It was submitted that the claimant should have known from the outset that those allegations had no reasonable prospect of success.

27. In support of that proposition Mr Williams relied on a number of subsidiary points, including the changing nature of the claimant's case on protected disclosures and detriments and the fact that during the hearing the Daily Mail ran some coverage which appeared to have been based upon a draft witness statement by the claimant which contained matters which were not actually part of the case as pursued at trial. Overall the respondent sought an order in respect of 60% of its costs, a sum of just over £48,000.

28. Taking account of **McPherson,** the broad question for the Tribunal was whether the circumstances fell within paragraph 8 or 29 of that judgment: was the late withdrawal of these complaints a reasonable step which we should not penalise by way of a costs award, or did late withdrawal support the case that in fact these were claims which had never had a reasonable prospect of success and for which a costs order would be appropriate?

Press Coverage

29. We considered the impact of the press coverage on this. We understood the respondent's concerns, and it was indeed unfortunate that the press coverage was based on a draft of the claimant's witness statement and focussed on matters which were not part of the matters upon which we had to adjudicate at the final hearing.

30. However, we accepted Mr Duffy's oral evidence to the liability hearing that he did not pass the draft statement himself to the press. He had passed it to Public Concern at Work and to other bodies and it appeared to us more likely that the responsibility for it reaching the Daily Mail lay with one of those bodies rather than with the claimant personally.

31. Secondly, we also concluded that this did not impinge on the conduct of the proceedings or support the argument that the claimant had acted unreasonably in the way he pursued the litigation itself. The press coverage did not assist the respondent in its costs application.

Merits of Protected Disclosure Complaints

32. We considered whether the fact that the majority of the protected disclosure complaints were withdrawn, and those that were pursued failed on the merits, meant that with hindsight they were claims with no reasonable prospect of success which were unreasonably pursued.

(a) Complaints Determined

33. We addressed first the two protected disclosure complaints that the Tribunal heard and determined.

34. In relation to deductions from pay, we rejected the core complaint of the claimant that he was contractually entitled to remuneration of £200,000 per annum. Our decision on that point was based on legal analysis of the discussions that occurred at the time. We were satisfied the claimant acted reasonably in pursuing that argument. He was not aware of the respondent's full case until witness statements were served at the end of March 2018, but even then it was reasonable of him to pursue that further. The contemporaneous emails provided some support for his case.

35. The detriment complaints based on the failure to pay him for AAS sessions and on the desktop review failed on causation. It was necessary for the Tribunal to undertake a careful analysis of the facts, as we did in paragraphs 208-216 of our Liability Judgment. The lack of communication at the time to the claimant fuelled his perception that there was some form of detrimental treatment because of the protected disclosure. We concluded the claimant had acted reasonably in pursuing those complaints to a final hearing, bearing in mind the burden lay on the respondent to show the reason for the detrimental treatment.

36. As for the unfair dismissal complaint under section 103A, that essentially failed for the same reason: there was no causal link between any protected disclosures and the treatment which caused him to resign. In our judgment that complaint was reasonably pursued even though we rejected it once all the evidence had been heard.

(b) Complaints not Determined but Withdrawn

37. We then addressed the merits of the withdrawn allegations of detriment.

38. Mummery LJ remarked in paragraph 2 of **McPherson** that a costs order is usually made after the Tribunal has determined the case on its merits. We made no determination on these allegations. We heard no evidence on them.

39. Broadly, there were nine separate matters including allegations that others were maliciously completing clinical incident forms, maliciously reporting the claimant to the police and failing to appoint him to the role of Clinical Lead. Clearly those were substantial allegations which required considerable evidence to be prepared. There is no doubt the final hearing would have taken substantially longer had all those matters remained live.

40. The respondent asked us to infer that those matters had no reasonable prospect of success based on (a) the analysis of those complaints contained in the costs warning letter, and (b) the fact they were withdrawn not pursued to a determination. In contrast the claimant submitted that he withdrew those matters because of the costs warning letter received a few days before the final hearing. We considered that letter.

41. The costs warning letter sent by the respondent's solicitors on 10 April 2018 was detailed, clear and appropriate. It warned the claimant that the respondent would seek costs of approximately £90,000 if he pursued the matters and was unsuccessful.

42. It opened by saying that the analysis it contained was based on a review of the documents and the claimant's witness statements, reflecting the fact that witness statements were served only a few days earlier (29 March 2018). That doubtless accounted for its timing. The final hearing was due to start on 16 April. The initial date for exchange of witness statements, according to the Case Management Order of Employment Judge Slater on 7 September 2017, was 5 March 2018, but that date did not prove practicable because of disputes about disclosure of documents which had to be addressed at a further case management hearing before Employment Judge Batten on 21 February 2018. At that hearing Employment Judge Batten ordered that statements be served by 26 March 2018.

43. The Tribunal is not critical of the parties or their representatives for the fact that statements were only exchanged very shortly before the final hearing, but the consequence was that the full extent of the case on both sides was apparent to each side only just over two weeks before the final hearing. Had witness statements been exchanged much earlier, the costs warning letter could have been sent much earlier too.

44. The costs warning letter, as well as threatening an application for costs, also explained for the first time why the respondent and its advisers considered the claimant's complaints to be misconceived. The analysis in that letter is detailed and on the face of it persuasive. However, it is untested against the evidence. There was insufficient time before the final hearing for the claimant to respond to it in detail. In any event he chose to respond by withdrawing a good proportion of his case.

45. We also noted that the letter was not confined to the complaints subsequently withdrawn: it made the same points about lack of merit in complaints which the Tribunal concluded were well-founded.

46. The claimant was funded in these proceedings by the British Medical Association ("BMA") but the extent of that funding, we were told, would not extend to any costs order made against him for unreasonable conduct. It is easy to understand why this threat of a costs application would have a significant impact on the claimant: he could not look to the BMA for indemnity against any such costs award and it would have represented the first time that his personal finances became at stake in the litigation. We concluded that this explained the decision to withdraw the majority of the detriment complaints, not a belated realisation that they were hopeless.

Conclusion

47. Putting those matters together the Tribunal unanimously concluded that the power to award costs to the respondent had not arisen for the following reasons:

(a) The complaints pursued but rejected were reasonably pursued;

(b) The changing nature of the claimant's case on protected disclosures and detriments (as summarised in the costs warning letter) did not inspire confidence in his case but was not itself unreasonable conduct given the complex nature of the protected disclosure allegations;

(c) No determination as to the merits of the withdrawn complaints was made, and despite the analysis contained within the costs warning letter the Tribunal has not been persuaded by the respondent that they must have had no reasonable prospect of success;

(d) The claimant has shown that he had a reason for the lateness of the withdrawal which was not consistent only with those claims being hopeless; in our judgment it was explained by the timing of the costs warning letter and the costs threat it contained;

(e) Had the costs warning been sent much earlier, and had the claimant pursued these allegations despite the warning, unreasonable conduct might have been shown, but the costs warning letter was sent only very shortly before the final hearing and the claimant acted reasonably in taking a few days to consider and respond to it in a sensible manner;

(f) Unlike the claimant in **Millin v Capsticks,** we found the claimant to be a genuine and credible witness, and there was no previous determination against him made in any earlier proceedings on the same issues.

48. In summary we concluded that this was a **McPherson** paragraph 28 case where to make a costs order against the claimant would be to penalise him for the sensible step of withdrawing claims at the start of the hearing. It was not a paragraph 29 case where the claimant had got away with pursuing speculative claims which he never intended to go to trial.

49. We unanimously rejected the respondent's application for costs.

Employment Judge Franey

12 November 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

19th November 2018

FOR THE TRIBUNAL OFFICE