EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss C Serpell	AND	Choices Consultancy Service Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD IN CHAMBERS AT Bodmin **ON** 23 November 2018

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: **Written Representations**
For the Respondent: **Written Representations**

RESERVED JUDGMENT

1 The claimant suffered an unlawful deduction from wages, which has since been paid by the respondent, and her claim for consequential losses is dismissed; and
2 The claimant's claim that she was denied the right to be accompanied is dismissed; and
3 The claimant's claim for a preparation time order is also dismissed.

REASONS

1. In this case the claimant has brought a claim for unlawful deduction from wages, and for consequential losses. She also complains that she was denied the right to be accompanied at a disciplinary hearing, and has made an application for a preparation time order in respect of the time spent preparing and pursuing these proceedings. The parties have consented to these applications being dealt with by way of written representations to avoid the need to attend a hearing in person. I confirm that I have considered the factual and legal submissions made by the parties in their respective written representations together with such copies of the relevant contemporaneous documents with which I have been supplied. I make the following findings of fact on the balance of probabilities.
2. General Background
3. The claimant was employed by the respondent from 15 November 2017 until her dismissal on 6 June 2018. The reason for the dismissal was the respondent's perception that claimant had performed poorly and was unsuitable for the job. She was paid six weeks'

pay in lieu of notice in accordance with the terms of her contract. The claimant's dismissal followed a meeting on 6 June 2018. The claimant requested that she should be allowed to be accompanied at that meeting by her father. The respondent declined on the basis that the claimant had no statutory right to insist that her father should be allowed to attend with her.

4. The claimant complains of the lack of training and support provided for her during her employment, and the stress that this caused her, as well as the stress arising from her dismissal. It was made clear to the claimant that this Tribunal does not have jurisdiction to hear any such complaints, and the claimant has now confirmed that her claims are in respect of unlawful deduction from her wages, for financial losses consequential upon the same, and for a preparation time order in connection with her preparation and pursuit of these claims. She also seeks to present a complaint relating to the refusal to allow her to be accompanied by her father at the meeting on 6 June 2018. The respondent opposes all of these applications.
5. The main dispute between the parties relates to her pay. The claimant was paid upon receipt of timesheets which consisted of her own electronic spreadsheets of the hours which she had worked. At the dismissal meeting on 6 June 2018 she queried whether she had been paid correctly during May 2018, and it transpired that she had been accidentally incorrectly underpaid by the respondent. On 7 June 2018, the day after the dismissal meeting, the respondent made a further payment to seek to rectify the error. The respondent then also made a further payment to cover June and July 2018 which was the payment in lieu of the claimant's contractual notice entitlement.
6. Following her dismissal the claimant then wrote to the respondent on 12 June 2018 setting out what she perceived to be her correct entitlement to pay. The respondent considered the matter in detail, and compared the claimant's claim for pay against the rotas which the claimant had worked during April and May 2018. The respondent concluded that the claimant had recorded hours worked at home (rather than when she was rostered to work on the rota) and had therefore recorded unauthorised hours on her timesheet. The respondent concluded that the claimant had been overpaid for the work which she had actually done and for which she was correctly entitled. The respondent calculated that these total overpayments were in the region of £470.0 and that no further payments would therefore be made to the claimant.
7. The claimant did not agree with either the principle or the manner of these calculations and issued these proceedings claiming an unlawful deduction from her wages. The outstanding sum was not significant, and the parties entered negotiations with ACAS in the hope of resolving the matter. The claimant had initially suggested that she was due a further payment of approximately £277.00, and then in August 2018 the claimant asserted that she was owed £277.95 for May 2018, and a further £44.64 for June and July 2018, and was thus owed £322.55. In an attempt to settle matter the respondent made an offer of £277.00 (which was the sum which the claimant had indicated initially that she was owed). The claimant rejected this offer, and in an attempt to save the costs of the hearing the respondent agreed to pay the claimant the sum of £322.55, as claimed, without admission of liability but on the basis that the matter was resolved. This was agreed in principle and settlement terms were prepared, but the claimant refused to agree to those terms, and in particular required a confidentiality clause to be removed. The respondent agreed to remove the confidentiality clause, but the claimant still refused to settle this claim on that basis. The respondent then paid the claimant the sum of £322.55, as claimed, despite the fact that it did not agree that the sum was owing, in order to dispose of the claim.
8. The claimant did not agree to settle or withdraw her claim and it proceeded to hearing in August 2018. That hearing did not go ahead because it was postponed because of a lack of judicial resource. It was relisted for hearing, but as noted above the parties have now agreed that the matter should be resolved by way of their written representations.
9. <u>The unlawful deduction from wages claim</u>
10. Section 13 of the Employment Rights Act 1996 ("the Act") provides that an employer shall not make a deduction from the wages of a worker employed by him unless the deduction is required or authorised by statute, or the worker has signified agreement in writing or

consent to the making of the deduction. To that extent the deduction wrongly made by the respondent in May 2018 was an unlawful deduction, even though it was subsequently remedied. I therefore make the declaration that this was an unlawful deduction. On the evidence which I have seen I do not accept that there were any further unlawful deductions. In any event the deduction for May 2018, and the amount subsequently claimed by the claimant of an additional £322.55, have now both been paid by the respondent, and the claimant's claim for unlawful deduction from wages is therefore now dismissed.

11. The claim for consequential loss
12. Under section 24(2) of the Act, where a tribunal makes a declaration that there has been an unlawful deduction from wages, it may also order the employer to pay such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained which is attributable to that matter.
13. The claimant is on notice by way of correspondence from the Tribunal that any such claim for financial loss must be attributable to the unlawful deduction, and to provide evidence of the same. In response to this the claimant seeks to recover her loss of earnings when she took the day off to be ready to attend the Tribunal hearing in August 2018, and seeks a half day's pay which she missed owing to sickness which she attributed to the stress relating to this matter.
14. I do not accept that the pay which the claimant says she has lost in readiness to attend the hearing in August 2018 is financial loss attributable to the unlawful deduction complained of. In the first place the hearing was cancelled by the Tribunal service. Secondly, it relates to the conduct of the proceedings, in respect of which the claimant has made a preparation time order (for which see further below). With regard to the half day's sickness absence, the claimant has already been informed that the Tribunal does not have jurisdiction to make any award in respect of the stress allegedly suffered.
15. For these reasons I dismiss the claimant's claim for consequential loss under section 24(2) of the Act.
16. The right to be accompanied
17. The statutory right to be accompanied is in section 10 of the Employment Relations Act 1999. That right only applies whether the worker is required or invited to attend a disciplinary or grievance hearing and requests to be accompanied by a companion who fits the definition set out in section 10(3). This is limited to a trade union representative, or a fellow employee. The claimant did not have the statutory right to be accompanied by her father because he was not a trade union representative or a fellow employee. To the extent therefore that the claimant brings this claim, it is hereby dismissed.
18. The application for a preparation time order
19. The claimant has made an application for a preparation time order. She has prepared a schedule of the time spent in preparing and conducting these proceedings which comes to a total of 42 hours. This is claimed at the hourly rate of £33.00, totalling £1,386.00. She suggests that the respondent has acted "vexatiously and unreasonably" in the following respects: "(i) application to postpone tribunal due to not being able to attend, having had the date for three months; (ii) following application for postponement, giving 10 further dates unable to attend in November; making what I consider to be attempts to intimidate me by using legal jargon, one example of which is to say that they will be pursuing me for costs due to bringing an unnecessary hearing, this was before monies were paid; (iii) monies paid were put into my account and no explanation as to the reason for this payment was given until four days later, the respondent's solicitor advised me he was not aware why his client had made the payment at the time; (iv) the respondent did not provide their solicitor with the necessary paperwork (calculation of my claim forming the basis of this case) I provided this to the respondent's solicitor, despite having sent this recorded delivery to the respondent, and putting it in the ET1 that the respondent had available to them. This was further unnecessary communication and work for myself, and not the only example of such incident; and (vi) this list is not exhaustive, however, I want to ensure this is sent by return and these are the key points."
20. The respondent opposes the application, and replies to these points as follows: (i) the respondent had a reasonable expectation that the matter would be resolved because the

respondent had offered to pay the claimant the full amount of her claim, and its witnesses were not available; (ii) the respondent was merely responding to a request from the Tribunal for its own availability; (iii) having offered to meet the claimant's claim in full, despite the fact that it was not agreed in principle, the respondent was entitled to warn the claimant of its intentions that it might pursue an application for costs in appropriate circumstances; (iv) although the respondent had made the payment, the appropriate person then left the country, and the respondent's representative was without clear instructions for a day or two; (v) this was merely a simple request in the normal exchange of relevant documents to prepare the bundle as ordered by the Tribunal.

21. The Rules
22. The relevant rules are the Employment Tribunals Rules of Procedure 2013 ("the Rules").
23. Rule 75(2) provides: "A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at the final hearing.
24. 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 – (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.
25. Under Rule 77 a party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.
26. Under Rule 79(1) the Tribunal shall decide the number of hours in respect of which a preparation time order should be made, on the basis of – (a) information provided by the receiving party on time spent falling within rule 75(2) above; and (b) the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required. Under Rule 79(2) the maximum hourly rate for preparation time costs is currently £36.00 per hour.
27. The Relevant Case Law
28. I have considered the following cases: Gee v Shell Ltd [2003] [2003] IRLR 82 CA; McPherson v BNP Paribas [2004] ICR 1398 CA; Monaghan v Close Thornton [2002] EAT/0003/01; NPower Yorkshire Ltd v Daley EAT/0842/04; and Barnsley BC v Yerrakalva [2012] IRLR 78 CA.
29. The Relevant Legal Principles
30. The correct starting position is that an award of costs or a preparation time order is the exception rather than the rule. As Sedley LJ stated at para 35 of his judgment in Gee v Shell Ltd "It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to people without the need of lawyers, and that in sharp distinction from ordinary litigation in the UK, losing does not ordinarily mean paying the other side's costs …" Nonetheless, an Employment Tribunal must consider, after the claims were brought, whether they were properly pursued, see for instance NPower Yorkshire Ltd v Daley. If not, then that may amount to unreasonable conduct. In addition, the Employment Tribunal has a wide discretion where an application for costs is made under Rule 76(1)(a). As per Mummery LJ at para 41 in Barnsley BC v Yerrakalva "The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask 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 effects it had." However, the Tribunal should look at the matter in the round rather that dissecting various parts of the claim and the costs application, and compartmentalising it. There is no need for the tribunal to find a causative link between the costs incurred by the party making the application for costs and the event or events that

are found to be unreasonable, see McPherson v BNP Paribas, and also Kapoor v Governing Body of Barnhill Community High School in which Singh J held that the receiving party does not have to prove that any specific unreasonable conduct by the paying party caused any particular costs to be incurred.

31. When considering an application for costs the Tribunal should have regard to the two-stage process outlined in Monaghan v Close Thornton by Lindsay J at paragraph 22: "Is the cost threshold triggered, e.g. was the conduct of the party against whom costs is sought unreasonable? And if so, ought the Tribunal to exercise its discretion in favour of the receiving party, having regard to all the circumstances?"
32. Conclusion
33. I do not accept that the respondent has acted in any way unreasonably in the conduct and defence of these proceedings. Effectively it sought to dispose of the proceedings by offering to pay the claimant the sums claimed despite the fact that it did not agree that the sums were due. It was appropriate for the parties to have discussions through ACAS in the hope of resolving the dispute, particularly as the sums involved were not large, and arguably the eventual claims, application and correspondence have become disproportionate to the sum involved. Despite the fact that the respondent had offered to meet the claimant's claim in full, she was entitled to proceed to a hearing if she wished, in order to seek a declaration that there had been an unlawful deduction, and to seek repayment of what she perceived to be her consequential losses. That was her right, even though the claim could have been disposed of earlier and more simply. However, none of this means that the respondent was acting unreasonably or vexatiously in seeking to dispose of the proceedings in the most efficient and proportionate way. In my judgment the respondent's actions were entirely consistent with the reasonable defence of the claimant's claims, and reasonable attempts to settle those claims in accordance with the Overriding Objective.
34. In my judgment the costs threshold is not triggered, and we do not pass the first part of the two-stage process outlined in Monaghan v Close Thornton. I do not accept that the respondent has acted in any way unreasonably or vexatiously in the defence of these proceedings, and accordingly I hereby dismiss the claimant's application for a preparation time order.

Employment Judge N J Roper

Dated: 23 November 2018

Judgment sent to Parties on: 7 December 2018

FOR THE EMPLOYMENT TRIBUNAL