



# EMPLOYMENT TRIBUNALS

## Claimant

Miss C Mead

## Respondent

v Central and North West London NHS  
Trust

## COSTS JUDGMENT

1. On the respondent's application for costs against the claimant, the decision of the tribunal is that there is no order for costs.

## REASONS

1. Following the original decision of the tribunal on 2 May 2018, the respondent made an application for costs on 25 May 2018. There then following a reconsideration hearing on 15 and 16 August 2018, listed at the instigation of the Employment Judge (ie not sought by a party), but then there was no further, nor amended, application for costs thereafter. The respondent's cost schedule totals £21,509.86 claimed – for costs up to and including the original hearing. However, the respondent seeks a costs order limited to £20,000 under rule 78(1)(a) of the Employment Tribunals Rules of Procedure 2013. With the agreement of the parties, and in the interests of cost and proportionality, this application is determined on the basis of the parties' written submissions, with no hearing.

### The Respondent's Case

2. The respondent's application is made on two grounds. First, that the claim had no reasonable prospect of success – rule 76(1)(b). Second, that the claimant acted unreasonably in bringing or pursuing the proceedings – rule 76(1)(a). They rely on two 'without prejudice' letters to the claimant, dated 24 November 2017 and 8 February 2018, seeking to settle the proceedings before the original hearing, and argue that the claimant failed to properly engage with the points raised. With regard to the first ground, the broad point made by the respondent is that in respect of the six

allegations made by the claimant in support of her case of constructive unfair dismissal, she failed on all of them – in other words, none were found to amount to a breach of the implied term of trust and confidence, entitling her to resign. Further, any breach that could have been made out was found by the tribunal not to be causative of her dismissal. For the tribunal's detailed findings and conclusions, reference should be made to the substantive decision dated 31 August 2018.

3. The respondent also argues that the claimant acted unreasonably in bringing and continuing to pursue the claim. In particular, they rely on the fact that they made a substantial commercial offer of settlement to the claimant on 8 February 2018 in the sum of £24,573. Their costs at that stage amounted to £9,630.83. They referred in the letter to an alleged overpayment of wages of £4,025.34, not the subject of an employer's claim, and a back payment of £7,955.08 which was the subject of an employer's claim. At the tribunal hearing, the respondent acknowledged that they could not pursue the employer's claim, as the claimant had not brought a claim for breach of contract, and they withdrew it. In their 'without prejudice' correspondence, the respondent pointed out that the claimant's award, if successful, would be unlikely to be much in excess of the basic award of £6,836.85, as she had mitigated her loss by finding alternative employment.

### **The Claimant's Case**

4. The claimant's response to the respondent's application is contained in her letter to the tribunal dated 19 November 2018, and her letter to the respondent dated 2 March 2018. She said that she genuinely believed that her claim had a chance of success and that there was a case to be answered. She could not afford to obtain legal advice. She was never in breach of an order or direction of the tribunal. She argues that the respondent did not explain to her, in the 'without prejudice' correspondence, why her claim would fail. She felt they put undue pressure on her. The respondent had not referred to any alleged overpayment of wages to her since October 2014 until the letter of 8 February 2018, and their pursuit of the back payment had no proper legal foundation as an employer's claim. Thus, the claimant doubted the sincerity of the offer of settlement of 8 February, and found it confusing. The claimant pointed out that no decision had been made on the value of her claim, and that her claim included pension loss and (possibly) the regular bank hours that she had always worked.

### **Other Matters**

5. I also find that the claimant's claim of constructive unfair dismissal was made against a background of complex facts and law. Her case was a most unusual one of its kind, in that she was dismissed for misconduct then reinstated on internal appeal, before she thereafter resigned. So far

as the tribunal proceedings were concerned, then I concluded that after the initial hearing and decision I made, or may have made, a misdirection of law and so I directed that a reconsideration hearing should be listed. The reconsideration hearing did not arise as a result of any application by the parties. In the end, although further evidence was called and considered at the reconsideration hearing, the outcome was the same – that the claimant was not constructively unfairly dismissed by the respondent. Full details of this are set out in the substantive decision.

## The Law

6. Rule 74(1) of the Employment Tribunals Rules of Procedure 2013 provides that ‘costs’ means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party.

Rule 76(1) provides that a tribunal may make a costs order...., and shall consider whether to do so, where it considers that:

- “(a) A party (or 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; or
- (c) The hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.”

Rule 78(1) provides that 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.”

7. Tribunals have a wide discretion with regard to costs where they consider there has been unreasonable conduct in the bringing or conducting of proceedings. Every aspect of the proceedings is covered, from the inception of the claim or defence, through the interim stages of the proceedings, to the conduct of the parties at the substantive hearing. Unreasonable conduct includes conduct that is vexatious, abusive or disruptive. When making a costs order on the grounds of unreasonable conduct, the discretion of the Tribunal is not fettered by any requirement to link the award causally to particular costs which have been incurred as a result of specific conduct that has been identified as unreasonable – see MacPherson v BNP Paribas (London Branch) [2004] ICR 1398, CA; Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78, CA. In Monaghan v Close Thornton Solicitors, UKEAT/0003/01 (unreported) 22

February 2002, it was said that the two questions the Tribunal should ask itself are:

- “(a) Is the costs threshold triggered, eg was the conduct of the party against whom costs are sought unreasonable? And if so,
- (b) Ought the Tribunal to exercise its discretion in favour of the receiving party having regard to all the circumstances?”

Costs are compensatory and not punitive. A party's means may be taken into account – see rule 84.

### **Conclusions**

8. Although expressly invited by the tribunal to make her submissions or provide evidence about her financial means if she wanted to rely on her means as a reason for not awarding costs against her, the claimant has chosen not to do so. I have therefore not had regard to the claimant's ability to pay any costs award (under rule 84).
9. With regard to the first ground of the application – the merits of the claim – I conclude that the claim cannot be said to have had no reasonable prospects of success. Something went wrong with, or during, the disciplinary process, which caused the appeal panel to reverse the decision to dismiss the claimant. Although I concluded, on the basis of the way the case was presented and the evidence, that there was no breach of the implied term, that does not mean that the respondent was blameless. There was substantial delay in the process overall (including the appeal), which impacted adversely on the claimant, as was recognised by the appeal manager. Arguably, the sanction of dismissal may have been unreasonable, given the decision to reinstate the claimant, although this was not a matter specifically relied on by the claimant as a breach of the implied term in her evidence at the hearing. What I do say is that it was by no means a foregone conclusion that the claimant's claim of unfair constructive dismissal had no merit and was bound to fail.
10. The respondent's second ground of their costs application is that the claimant unreasonably pursued the proceedings, particularly after the respondent's offers of settlement in November 2017 and February 2018. However, the value of the claim was by no means restricted to the basic award. Despite having a new job, the claimant had a continuing loss of earnings (potentially including her bank earnings) and pension loss. At the hearing, the value of the claim was not something that was considered or determined. Thus, whether the respondent made a reasonable offer of settlement in February 2018 is not clear. At that point and up to part way through the hearing the respondent purported to pursue an employer's claim in respect to the back payment to the claimant, which they were not entitled to do as the claimant had not brought a contract claim herself.

11. Costs do not follow the event in tribunal proceedings. To trigger the costs threshold, the claimant's case has to be without merit and / or the claimant's conduct in pursuing it unreasonable. As I have concluded, this was not the position here, in the complex circumstances of this case. Further, even if the costs threshold has been triggered I conclude that it is not appropriate in all the circumstances to award costs against the claimant in this case.

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Employment Judge GP Sigsworth

Date: ...4/2/19.....

Sent to the parties on: .....

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For the Tribunal Office