EMPLOYMENT TRIBUNALS

PRELIMINARY HEARING

Claimant: **Mrs S Richardson**

Respondent: **Northumberland & Tyne & Wear NHS Trust**

Heard at: **North Shields** **On:** **26 & 27 March 2018**

Before: **Employment Judge Arullendran**
Members: **Ms L Jackson and Mr D Cartwright**

Representation:

Claimant: **Mr Y Bakhsh**
Respondent: **Mr A Webster of Counsel**

RESERVED JUDGMENT ON APPLICATION FOR COSTS

The respondent's application for costs against the claimant made by letter dated 5 July 2017 is not well-founded and is dismissed.

REASONS

1 An application was made by the respondent for a costs order against the claimant pursuant to rules 75 and 76 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, by letter dated 5 July 2017 which can be seen at pages 120-123 of the Tribunal bundle.

2 The respondent made the application for costs against the claimant on the basis that the claimant had brought proceedings that had no reasonable prospect of succeeding and therefore contends that the claimant acted unreasonably in the bringing and the conducting of the proceedings which resulted in the substantive hearing, which was heard by this Tribunal on 15, 16 and 17 May and 23 May 2017.

3 A copy of the Reserved Judgement from the substantive hearing can be seen at pages 91-116 of the Tribunal bundle. This Tribunal found that the claimant had not made a public interest disclosure on 13 March 2016, as alleged, and that she had not

been subjected to a detriment by the respondent company. The Tribunal found that there was no evidence in respect of some of the allegations brought by the claimant such as those relating to the allocation of annual leave and there being a conspiracy that employees within the respondent company were trying to silence her. Many of the other allegations made by the claimant were potentially capable of amounting to detriments, but this Tribunal found that they did not amount to a detriment in her case.

4 The claimant appealed to the Employment Appeal Tribunal on 14 July 2017 and this can be seen at page 124 of the bundle. On 20 October 2017 the appeal was rejected on the sift by the Employment Appeal Tribunal and this can be seen at pages 157-158 of the bundle.

5 The findings from the substantive hearing were as follows:

5.1 At paragraph 10.1 of the judgment we found that Mr Bakhsh was entirely mistaken in his understanding of the law.

5.2 At paragraph 10.2(a) we found that it was very difficult in cases where the key issue comes down to one person's word against another's.

5.3 At paragraph 10.2(b) we found that it was more probable than not that the information disclosed by the claimant to Ms Sharp on 13 March 2016 did not in the claimant's reasonable belief tend to show that the respondent had failed to comply with a legal obligation or that the health and safety of an individual had been put at risk.

5.4 At paragraph 10.3 we found that Mr Bakhsh had not adduced any evidence or made any submissions on what the potential legal obligation was and that the claimant did not reasonably believe that her disclosure was made in the public interest.

5.5 At paragraph 10.4 we found that the claimant's entire claim was predicated on the "but for" test and that Mr Bakhsh failed to understand this despite referring to the case of **Fecitt**. The claimant had failed to adduce any evidence of a causal link between the alleged detriments and the alleged protected disclosure other than stating that if she had not made the disclosure on 13 March none of the incidents or acts of detriment would have taken place.

5.6 At paragraph 10.5 we found that the alleged detriment regarding the refusal of annual leave preceded events of 13 March 2016 and the claimant agreed in cross-examination that it could not possibly be a detriment.

5.7 At paragraphs 10.6, 10.8, 10.10 and 10.11 we found that although the acts complained of were potentially capable of amounting to a detriment, they were not held to be actual detriments in the claimant's case.

5.8 At paragraph 10.9 we found that no evidence at all had been adduced that the respondent was trying to silence the claimant or that the respondent's employees had conspired to silence her.

6 The respondent contends that the claimant had pursued a misconceived case and that the claimant's representative, Mr Bakhsh, was entirely mistaken in his understanding of the law, in particular the application of the burden of proof.

7 In the alternative or further, the respondent submits that Mr Bakhsh acted vexatiously, abusively and/or disruptively in the conduct of the claim in the manner in which he cross-examined Joanne Sharp of the respondent and refers to paragraph 5 of the substantive decision which refers to Mr Bakhsh's aggressive manner.

8 **The law**

Rule 76 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, provides

"(1) 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.

…."

9 Mr Webster submits on behalf of the respondent that there is no requirement of bad faith in order for a costs order to be made under the provisions of Rule 76 of the Employment Tribunal Rules and he relies on the case of **Mr Ayoola v St Christopher's Fellowship UKEAT/0508/13**. In that case, the case of **Gee v Shell UK Limited [2002] IRLR 82** was referred to and it was stated that the first principle is that costs in the Employment Tribunal are still the exception rather than the rule. In terms of the procedure to be adopted by this Tribunal, the court in **Ayoola** referred to the two stage process set out in **Criddle v Epcot Leisure Limited [2005] EAT/0275/05:** (1) a finding of unreasonable conduct and, separately, (2) the exercise of discretion in making an order for costs.

10 Mr Webster also relies on the case of **Keskar v Governors of All Saints Church of England School & Another [1991] ICR 493** in which it was found that the question whether a person against who an order for costs is proposed to be made ought to have known that the claims that he was making had no substance is plainly something which is at the lowest capable of being relevant. In that case there was virtually nothing to support the allegations that the applicant made from which the Tribunal drew the conclusion that he had acted unreasonably in bringing the complaint. The respondent submits that in the instant case the claimant's representative had been told on many occasions the correct test in relation to the burden of proof, but he still failed to apply it correctly at the substantive hearing.

11 The respondent refers to the case of **Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255** on the question of causation and Mr Webster refers the Tribunal specifically to paragraphs 40-42 of that decision in which it was

decided that the vital point in exercising the discretion to order costs was 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.

12 Mr Webster refers the Tribunal to the case of **Vaughan v London Borough of Lewisham UKEAT/0533/12** in which it was found that the basis on which the costs threshold was crossed was the claimant's fundamentally unreasonable appreciation of the behaviour her employers and colleagues. Further, it was correct to consider the claimant's future ability to pay costs even though her present financial circumstances meant she could not meet the costs.

13 Application was made by the respondent to strike out the claimant's claims prior to the substantive hearing. This was considered by Employment Judge Buchanan on 12 December 2016. A copy of the Judgment on the preliminary hearing can be seen at pages 38-47 of the Tribunal bundle. Mr Webster relies on the case of **Ukegheson v London Borough of Harringay UKEAT/0312/14** and in particular paragraph 21 which states that a claimant's case should be taken at its highest as revealed by the claim unless contradicted by plainly inconsistent documents and that Judge Buchanan made his decision solely on the basis of what was written on the ET1 without consideration of the ET3 or any of the evidence. The respondent submits that Judge Buchanan had no idea what the detriments were at that stage and that was the reason why the strike out was not granted and this was also the reason why a deposit order was not made.

14 The respondent submits that when the claimant instructed Mr Bakhsh he had been provided with details of the alleged detriments and the ET3 and from looking at the evidence he should have, at that stage, advised the claimant to withdraw her claim as having no reasonable prospect of success and the fact that he did not constitutes unreasonable conduct on his part, especially after he had sight of the respondent's witness statements. The respondent submits that, had Mr Bakhsh applied his mind to the correct test for causation which had been pointed out to him on several occasions, it would have been clear to the claimant and Mr Bakhsh that the claimant should have withdrawn her claim months earlier. Therefore, the respondent requests an order for costs in the first instance on the basis that the claimant's claim had no reasonable prospect of success and, in the alternative, in the conduct of the proceedings as set out in paragraph 5 of the Judgement from the substantive hearing in that the claimant's representative behaved unreasonably in the way he conducted proceedings on her behalf in the aggressive way he cross examined Ms Sharp.

15 Mr Bakhsh relies on a written submission, which runs to eleven pages, the contents of which are not set out here in full but have been considered in their entirety.

16 The claimant refers to the case of **Marler v Robertson [1974] ICR 72** and submits that the definition of a hopeless claim is where an employee brings a claim not with the expectation of recovering compensation but out of spite to harass his employer over some improper motive. It is a serious finding to make against an applicant, for it will generally involve bad faith on his part and one would expect that discretion to be sparingly exercised.

17 Mr Bakhsh submits that the respondent applied to have the claimant's claim struck out on several bases, including that it had no reasonable prospect of success, and that Employment Judge Buchanan had dismissed this application in robust terms and therefore the claimant's claim could not be said to have been misconceived from the outset. The claimant relies on the case of **Eszias v North Glamorgan NHS Trust [2007]** in which an example was given of a case which would have no reasonable prospect of success where "the facts ought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation".

18 Mr Bakhsh also submits that there was considerable delay by the respondent in disclosing its evidence and in exchange of witness statements which has not been taken into account by the respondent in their application for costs.

19 The claimant relies on the case of **Blockbuster Entertainment v James [2006] EWCA Civ 684** which describes unreasonable conduct as "deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible" and submits that in no way is even remotely applicable to the claimant's conduct of her claim.

20 The claimant relies on the case of **Miller v Bromley Primary Care Trust Case No 1101248/2007**, however the Tribunal notes that a copy of this decision has not been provided to this Tribunal by Mr Bakhsh. In his submission, Mr Bakhsh states that it was held in this case that if there was some aspect in the claim which had to be tested on the evidence, which was clearly the position at the preliminary hearing, then it is unlikely that the costs application would get past the first test of the conduct of the party against whom costs is sought being unreasonable.

21 The claimant submits that unreasonably conduct is that which is designed to harass or make life difficult for the respondent, however the claimant was still working for the respondent at the time she made her application to the Employment Tribunal and had engaged in a lengthy internal grievance procedure, plus she made her application at a time when fees were payable and she would not have paid £1,200 of her own money in legal costs simply to harass the respondent.

22 With regard to the application of the burden of proof, the claimant submits that it was in her honest belief that she was presenting her case in line with the requirements of the correct legal test and that she had a genuine belief that she had suffered a series of detriments by the respondent and, therefore, submits that the application for costs should not be granted as the claimant's conduct could not be viewed as unreasonable.

23 Considering all of the documents and submissions made before us carefully, we find that the claimant and her representative have not acted vexatiously, abusively, disruptively or otherwise unreasonably in either bringing the proceedings or in the way that the proceedings have been conducted. The only "conduct" referred to by the respondent is that of cross-examination of Ms Sharp by Mr Bakhsh. Whilst this was unacceptable conduct on the part of Mr Bakhsh and cannot be condoned in any way, we did not make any findings at the substantive hearing that it was done out of malice and we cannot find that it crosses the threshold of unreasonableness, as defined. We

accept that it was done by an unqualified representative without the proper training in cross examination techniques and was not designed to harass the respondent.

24 With regard to the contention that the claimant's claim had no reasonable prospect of success and that it should never have been brought, we find that a differently constituted Tribunal on a different day may have reached a different decision in the claimant's case and the fact that she was unsuccessful in her claims in front of this Tribunal does not automatically mean that her claim had no reasonable prospect of success. We note that the respondent maintained a neutral position at the substantive hearing as to whether or not there had been a protected disclosure by the claimant because the respondent recognised that it was one person's word against another and a differently constituted Tribunal may have found that particular aspect of her claim well-founded. Further, even though Mr Bakhsh applied the incorrect test for the burden of proof, we find that it may still have been possible for a differently constituted Tribunal in different circumstances to have found that one or more of the respondent's witnesses had been materially influenced by the public interest disclosure and the claimant only needed to succeed in one of her allegations in order for her claim to be successful. Given that the respondent had already found in its internal appeal that it had been wrong to require the claimant to retake her online training, the claimant may had had an arguable case if there had been a finding that she had made a protected disclosure.

25 Thus, in all the circumstances, we cannot find that the claimant's claim had no reasonable prospect of success and therefore we find that the provisions of Rule 76(1)(a) and (b) have not been satisfied and the application for costs is not well-founded and is dismissed.

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Employment Judge Arullendran

Date …17 April 2018…