EMPLOYMENT TRIBUNALS

Claimant: D Calder

Respondent: Plymouth Hospitals NHS Trust

Heard at: **Exeter (in chambers)** **On: 22 May 2019**

Before: Employment Judge Housego

Representation
Claimant: Written submissions
Respondent: Written submissions

JUDGMENT

The Respondent's application for costs is dismissed.

REASONS

1. The claimant brought a claim for equal pay. There was a preliminary hearing on 22 February 2018 which set out the issues I determined at the hearing on 07 September 2018. It stated:

> *"2. By a claim form presented on 13 December 2017 the Claimant has brought complaints of failure to pay equal pay and discrimination on the grounds of sex under the Equality Act 2010 ("the EqA). The claimant's representative has confirmed today that the claim is presented as one of equal pay only, and not sex discrimination. The Respondent denies the claim.*
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> *3. The claimant's claim is as follows. In 2011 Mr Lee Johns was the claimant's line manager as Directorate Manager for Haemotology and Oncology. He moved departments and the claimant accepted what was then a temporary secondment and "acted up" in the same role from 1 August 2012 until 17 June 2013 (referred to as "the First Period" in this Order). The*

claimant was given a pay rise to Band 8B within the respondent's pay scale. She was then appointed to that role on a permanent basis from 18 June 2013, and paid at a higher level namely Band 8C during this "Second Period" from 18 June 2013 until 30 April 2017. The claimant asserts that she should have been paid at Band 8C throughout the First Period, and relies on Mr Johns as her comparator who had been paid at Band 8C whilst doing that role. The claimant asserts that this has had a knock-on effect of depressing her pay within Band 8C during the Second Period because she would have progressed through annual increments within that band more promptly if she had been lawfully paid from the start of the First Period.

4. The respondent asserts (i) that the claimant did not do like work, or work of equal value to Mr Johns, during the First Period and was correctly paid under the relevant pay scale; any claim in respect of the First Period was presented well out of time; and that the claimant has been correctly paid since her substantive promotion during the Second Period within the respondent's published pay band structure, and that the claimant is unable to identify any comparator to disprove the same."

2. The preliminary issues were set out:

"The Preliminary Issues to be determined are these:

(1) Whether the claimant's equal pay claim in respect of the First Period was presented out of time; and

(2) Whether the claimant's equal pay claim in respect of the Second Period should be struck out as having no reasonable prospect of success (Under Rule 37 of the Employment Tribunal Rules of Procedure), or alternatively should be subject to a Deposit Order as having little reasonable prospect of success (Under Rule 39 of the Employment Tribunal Rules of Procedure); and

(3) to the extent only that either claim survives, whether the claimant is precluded from pursuing a claim for equal value given that the respondent's pay structure follows a job evaluation scheme; and (iv) to make any necessary subsequent case management orders as may be necessary."

3. Written submissions were exchanged on 04 May 2018, in preparation for a hearing listed for 09 May 2018. That hearing was cancelled by the Tribunal for want of judicial resource. It was suggested that the matter be dealt with on the papers. The Claimant declined and asked for a new hearing date for an oral hearing, which was the hearing before me.

4. On 05 September 2018 a costs schedule was provided and it was indicated that a costs application would be made.

5. My decision was that the claim for the first period was out of time and dismissed that part of the claim for that reason. The claim for the second period was in time, but it was agreed (for the reasons set out in my decision) that the claim for the second period could only succeed if the claim for the first period succeeded Since I had struck that claim out I ordered a deposit to be paid as a condition for that claim continuing, as it had little reasonable prospect of success.

6. The Respondent then made application for the costs of defending the claim, by email of 19 December 2018. That application sets out the history of the claim. It sets out the text of an email of 24 August 2018 which refers to the submissions and skeleton arguments, and invited the claimant to withdraw her claims given the arguments advanced in that submission. It said also "*We suggest that the Claimant should consider carefully whether to withdraw her claim in order to reduce her exposure to costs."*

7. In its costs application the Respondent sets out its position as follows:

> "The Tribunal may make a costs or preparation time order, and must consider whether to do so, where it finds that a party has acted vexatiously, abusively, disruptively, or otherwise unreasonably in the bringing or conducting of the proceedings, or a part of them (rule 76(1)(a)). Alternatively, where any claim made in the proceedings by a party had no reasonable prospect of success (rule 76(1)(b)).
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> Conduct is vexatious *"if an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive"* (ET Marler Ltd v Robertson [1974] ICR 72). Whether conduct is unreasonable is a matter of fact for the tribunal. Unreasonableness has its ordinary meaning and should not be taken by tribunals to be the equivalent of vexatious (Dyer v Secretary of State for Employment UKEAT/183/83).
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> The Respondent considers that the Claimant has acted unreasonably in bringing and/or conducting the proceedings as a whole or alternatively in part. The Claimant delayed some 3½ years before raising a grievance in relation to her pay whilst as an Acting Directorate Manager; and some 4½ years before pursuing her allegations in the Employment Tribunal.
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> The Claimant has continued to pursue her claim despite the Respondent making clear at the outset that her claim was significantly out of time and the Tribunal did not have jurisdiction to consider it. The Claimant has had an abundance of opportunities to reflect on the merits of her claim (with the benefit of legal advice as has been legally represented throughout this litigation) such as:
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> - On receipt of the Respondent's ET3;
> - In light of the early indication by Employment Judge Roper that the case should be listed for a
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>   Preliminary Hearing to consider jurisdiction and strike-out / deposit orders;
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> - In light of the written submissions provided by the Respondent on 4 May 2018;
> - In light of the suggestion by the Acting Regional Employment Judge that the matters could be determined on the papers (i.e. the parties' written submissions), to which the Claimant disagreed;
> - On receipt of the email sent to the Claimant's solicitor on 24 August making clear that the Respondent was intending to make an application for costs and that the Claimant should consider carefully whether to withdraw her claim in order to reduce her exposure to costs."

8. I have not seen any response from the Claimant, but none is necessary, as I have concluded that a costs order is not appropriate in this case.

9. Rule 76(1)(b) in the Schedule 1 to The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 states:

> **When a costs order or a preparation time order may or shall be made**
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> **76.**—(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.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—

(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and

(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

10. It is not clear whether the Respondent is asserting that the claim was vexatious. If it is so asserted I do not consider that the Claimant was vexatious. She had a genuine sense of grievance. The claim was not brought to make things difficult for the Respondent.

11. I found against the Claimant, but re reading my decision it is apparent that there were legal concepts and arguments to be explored, and it was not a straightforward decision to make. The use of the work *"ultimately"* in paragraph 18 of my decision shows that it took some time and effort to evaluate the competing arguments, both put forward skilfully, and decide which I preferred. I state that I considered both arguments *"at length".* I preferred that of the Respondent, and so they were right to say that they would win the day. That does not mean that it was wrong of the Claimant to try. It was an arguable case, as if it were not the judgment would have read differently. The deposit was ordered in respect of the second claim only because the claim for the first period was out of time. Paragraph 18:

> "*18.Ultimately, and having considered both arguments at length, I decide that for the purposes of the Equal Pay Act this was a new contract, so that this is a standard case, and the claim in respect of the First Period is out of time and must be struck out, because this is not a stable employment case."*

12. I do not consider it blameworthy or unreasonable for a Claimant to ask for an oral hearing. That is the norm.

13. There was a tenable argument put forward by the Claimant and that the Respondent was right in its belief that their arguments would prevail does not equate to unreasonableness on the part of the Claimant. Were that so there would be far more costs applications than there are. That the Respondent issued costs warnings and then won is also not good reason to award costs. Were that so costs warnings would be routine and costs would tend to follow the event, which is not the regime in the Employment Tribunal.

14. To lose a preliminary point about time is not for that reason alone to pursue a case which had no reasonable prospect of success. The Claimant withdrew her claim upon receipt of the decision which said that the claim for the second period had little reasonable prospect of success. That is not unreasonable, but the reverse. It is not an argument for costs (without more) that a deposit order was made, for if so any claimant who had a deposit order made in her or his claim would be liable to have a costs order made against him or her.

15. Accordingly I decide that the provisions of the Rules relating to costs are not met in this case.

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Employment Judge Housego

Date: 22 May 2019

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