EMPLOYMENT TRIBUNALS

Claimant: Mrs S Fox

Respondent: Hazel Grove High School

Heard at: Manchester **On:** 24 July 2019

Before: Employment Judge Franey
Ms J K Williamson
Mr B J McCaughey

REPRESENTATION:

Claimant: Mr R Lees, Counsel
Respondent: Mr S Gorton, Queen's Counsel

WRITTEN REASONS ON COSTS

1. These are the written reasons for the Judgment refusing the respondent's application for a costs order which was delivered orally with reasons at the conclusion of the costs hearing on 24 July 2019, and sent to the parties in writing on 30 July 2019. The claimant requested written reasons by email of 26 July 2019.

Introduction

2. At the conclusion of a nine day hearing in March 2019 the Tribunal unanimously dismissed complaints of detriment in employment on the ground of a protected disclosure, and of unfair dismissal brought by the claimant in respect of her employment by the respondent between September 2016 and September 2017. Complaints of disability discrimination were also dismissed as they had been withdrawn at the start of the hearing. Detailed Written Reasons for that decision were sent to the parties on 15 April 2019, and it will be assumed that the reader of these Reasons has read those Written Reasons. Any reference to numbers in brackets – e.g. [120] - is a reference to the paragraph numbers of those Written Reasons.

3. At the conclusion of the final hearing, following delivery of oral judgment with reasons, the respondent indicated an intention to make an application for costs

against the claimant. Case Management Orders in relation to any such costs application were made and a costs hearing listed for 24 July 2019.

4. The application itself was set out in a letter of 9 May 2019 from the respondent's solicitors. It was based on the proposition that the claimant had sought to mislead the Tribunal by giving evidence which was not true in relation to three of her alleged protected disclosures, and also on the proposition that the claimant had acted unreasonably in pursuing her complaints of disability discrimination until they were withdrawn on the morning of the first day of the final hearing. The application indicated that the total costs incurred by the respondent were approaching £100,000, but the application was restricted to an order requiring the claimant to pay £20,000, which is the maximum that the Tribunal can award without a detailed assessment.

5. The claimant resisted the application by a letter from her solicitors dated 31 May 2019. It was denied that the claimant had given any misleading evidence. Any suggestion that misleading evidence meant that there had been no reasonable prospect of success was opposed. The withdrawal of the disability discrimination complaints had been a sensible litigation decision which served to narrow the issues and had not caused any additional cost in any event. Information was supplied about the claimant's ability to meet any costs award.

6. At the hearing on 24 July 2019 the Tribunal had the benefit of a seven page note from Mr Gorton summarising the respondent's position, and a five page note from Mr Lees summarising the claimant's response. In addition we heard oral submissions from both advocates before making our decision.

Costs Application – Legal Framework

7. The power to award costs is contained in the 2013 Rules of Procedure. 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".

8. The circumstances in which a Costs Order may be made are set out in rule 76, of which paragraph (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."**

9. Rule 78 empowers a Tribunal to make an order in respect of a specified amount not exceeding £20,000, or alternatively to order the paying party to pay the whole or specified part of the costs with the amount to be determined following a detailed assessment.

10. It follows from these rules as to costs 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. Ability to pay may be taken into account at the second and/or third stage under rule 84.

11. 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**.

12. If there has been unreasonable conduct there is no requirement for the Tribunal to identify a precise causal link between that unreasonable conduct and any specific items of costs which have been incurred: **McPherson v BNP Paribas (London Branch) [2004] ICR 1398**. However, there is still the need for some degree of causation to be taken into account as the Court of Appeal pointed out in **Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78**:

> **"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."**

13. The cases that concern awards were made where parties are found to have lied, which include **Daleside Nursing Home Ltd v Mathew UKEAT/0519/08/RN, Nicolson Highlandwear Ltd v Nicolson [2010] IRLR 859** and **Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797**, demonstrate collectively that there is no absolute rule that an award of costs should follow from a finding that a party has not told the truth to a Tribunal, but that it is necessary to look at the nature, the gravity and the effect of the lie.

14. The position where claims are withdrawn at the start of a hearing was considered by the Court of Appeal in **McPherson.** 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…"**

Discussion and Conclusions – Misleading the Tribunal?

15. Having considered the written and oral submissions from both parties, the Tribunal first considered the respondent's assertion that the claimant had deliberately misled the Tribunal in relation to three matters in her evidence at the final hearing.

FP8 9 November 2016

16. The first matter concerned evidence about the meeting on 9 November 2016, considered at [61] and [222] – [230]. This was the eighth of the alleged protected disclosures ("**FP8**"). Broadly, Mr Franklin gave evidence that the claimant told him on that occasion about inappropriate staff relationships (i.e the Debi Lowe issue), but we found that had not been mentioned. Mr Gorton submitted that the claimant had adduced that evidence from Mr Franklin and relied on it in support of her case. He also said that in cross examination under oath she had confirmed the correctness of Mr Franklin's account, thereby expressly adopting that account in order to support her case.

17. We rejected the factual premise upon which that application was based. The Tribunal had no note of the claimant saying in evidence that she regarded Mr Franklin's account as correct. Indeed, at [227] the Tribunal specifically noted that this had not been the evidence of the claimant. It did not appear in her witness statement and nor did she take that position in oral evidence. We were satisfied that this false assertion came from Mr Franklin alone, not from the claimant.

18. Further, although Mr Franklin was called as a witness by the claimant, that does not mean that she necessarily endorsed everything he said. We rejected the assertion that she acted in concert with Mr Franklin and got him to lie to support her case. Had that been her intention the claimant could have given evidence herself that she raised the question of staff relationships with Mr Franklin on that occasion. Given that only the two of them were present at that meeting, that would on the face of it have been a deception likely to be effective. The claimant did not pursue that course of action.

19. Accordingly we unanimously concluded that even if Mr Franklin deliberately invented this element of the discussion with the claimant, that would have been in pursuit of his own agenda against the respondent, and not a matter for which the claimant could be held responsible. It was never her case that she made a protected disclosure about Debi Lowe on this occasion. There was no unreasonable conduct which could give rise to a costs order.

FP7 and **FP9** 18 October and 9 November 2016

20. The second and third matters concerned what the claimant had earlier said to Cherry Franklin on 18 October 2016 (**FP7**), and what she subsequently reported to Anna Cohen about her conversation with Mr Franklin (**FP9**). We rejected the claimant's account of these two discussions as recorded at [216-221] and [231-237].

21. However, although the Tribunal found that the claimant's evidence in her witness statement and given orally was not correct, preferring as we did her own handwritten notes, grievance document and text messages, we were satisfied that this did not establish unreasonable conduct on her part. We did not consider that the claimant had deliberately invented these details. This case concerned a complex series of events over a period. The claimant had been badly affected by her experiences and had suffered from significant health issues. Errors in recollection of discussions of this kind are common. Even though the claimant's diary notes on which our conclusions were based were disclosed late, we did not consider there to have been unreasonable conduct on her part.

22. Nor did we consider that these discrepancies in the evidence showed that her case had enjoyed no reasonable prospect of success.

23. We therefore rejected the application by the respondent for a costs award in so far as it was based on a proposition that the claimant had acted unreasonably by deliberately seeking to mislead the Tribunal. The power to award costs had not arisen.

Discussions and Conclusions –Disability Discrimination Complaints

24. As was explained by the Court of Appeal in **McPherson**, the question was not whether the withdrawal itself was unreasonable, but whether it demonstrated that the disability discrimination complaints had been unreasonably pursued up to that point. That required us to take account of the circumstances and timing of the withdrawal. We also noted the risk of Tribunals deterring the late withdrawal of claims by penalising that conduct by means of a costs order, although equally one would not wish to encourage speculative complaints by permitting withdawal at the last minute without any consequence.

25. We noted that the disability discrimination complaint had been raised in the original claim form and in the further particulars. The respondent had conceded that the claimant was a disabled person but denied knowledge of that. The claimant was represented by Mr Lees at a preliminary hearing before Employment Judge Ross in March 2018 where the disability discrimination complaints were analysed and clarified. Those complaints remained live until the first day of the final hearing when they were withdrawn by Mr Lees.

26. Without waiving privilege, Mr Lees explained that the withdrawal flowed from a re-evaluation of the prospects of success at a conference held on 14 March 2019, the Thursday before the final hearing began on Monday 18 March 2019. The only factor he identified which caused a re-evaluation of the prospects of success was the absence from the Occupational Health records of any reference to a pre-existing condition. That absence was not consistent with the claimant's evidence that it had been mentioned, and it went to the prospects of the respondent successfully establishing the knowledge defence.

27. Mr Gorton argued strongly that there was nothing new here, and that the same evaluation could have been made a year earlier, if not prior to the disability discrimination complaints first being advanced in September 2017. We also noted that the knowledge defence is only an issue in relation to the statutory formulation of the complaints of discrimination arising from disability and of a breach of the duty to

make reasonable adjustments, although it can implicitly go to causation on the question of direct discrimination. It could have no bearing, however, on the indirect disability discrimination complaint which was pursued.

28. Despite those points, however, the Tribunal unanimously concluded that the claimant had not acted unreasonably in pursuing her disability discrimination complaints up to the start of the final hearing.

29. Firstly, those complaints on their face were not plainly hopeless or misconceived. It appeared to us that they could reasonably have been pursued further. This was not one of those cases where we heard and determined those complaints and therefore were in a position to say with hindsight that they had enjoyed no reasonable prospect of success.

30. Secondly, it is a natural consequence of the litigation process that the focus narrows as the case proceeds, even during the final hearing.

31. Thirdly, it was plain that the protected disclosure complaints alone would occupy all the time at the final hearing. This was a complex and factually extensive case. There was indeed a risk that if the disability discrimination complaints and issues remained live the hearing might not be concluded within the time allocated. That supported the contention of Mr Lees that the withdrawal of those complaints was a sensible litigation decision.

32. Fourthly, we were satisfied that an award of costs in this situation would have the effect anticipated in **McPherson** of penalising a sensible withdrawal of claims that faced some difficulties and were not the heart of the issue between the parties.

33. The Tribunal therefore unanimously concluded that there had been no unreasonable conduct in the pursuit of the disability discrimination complaints which would give rise to the power to make a costs order.

34. The application for a costs order was therefore refused.

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Employment Judge Franey

20 August 2019

REASONS SENT TO THE PARTIES ON

22 August 2019

FOR THE TRIBUNAL OFFICE

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