



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Robson

Respondent: NCC Group Security Services Ltd

Held at: Leeds **on:** 25 September 2019

Before: Employment Judge Cox
Ms B R Hodgkinson
Mr K Lannaman

Representation:
Claimant: Mr Frew, counsel
Respondent: Mr Boyd, counsel

COSTS ORDER: REASONS

1. The Respondent made an application that the Claimant should pay towards its costs in defending this claim.
2. The first issue was whether there were grounds for making a Costs Order falling within Rule 76 of the Tribunal's Rules of Procedure. The Respondent argued that the Claimant had acted unreasonably in the way she conducted the proceedings and that her claim had had no reasonable prospect of success, giving grounds for a Costs Order under Rule 76(1)(a) or (b). If there were grounds for making an Order, the second issue was whether the Tribunal should exercise its discretion to make an Order. If there were grounds for an Order and the Tribunal considered that it was appropriate to make one, the third issue was what sum should be ordered. In deciding whether to make an Order and, if so, in what amount, the Tribunal had a discretion to have regard to the Claimant's ability to pay (Rule 84).

Unreasonable conduct of the proceedings

3. The Respondent argued that the Claimant had conducted the proceedings unreasonably by refusing an offer of £11,348 to settle the claim.
4. As the Tribunal explained in the reasons for its decision, the Respondent's witness statements and documentation did not make clear how the decision to allocate the Claimant to the Client Development Team was made. It was reasonable for her to pursue that allegation to the Hearing on the basis that she had a reasonable

prospect of succeeding in establishing that the decision amounted to maternity discrimination and also provided a basis for her claim of unfair and discriminatory constructive dismissal claim. An offer of £11,348 was less than the compensation for loss of earnings and injury to feelings that she might reasonably have expected to have been awarded if this allegation succeeded. The Tribunal does not accept that she was acting unreasonably in refusing the settlement offer.

5. The Respondent argued that Mrs Robson had acted unreasonably by not complying with her duty to disclose documents relating to her employment with her new employer, Fujitsu, and the timing of her booking of a holiday to be taken after her employment with the Respondent ended. The Tribunal accepts these documents were relevant to the timing of and the reasons for the Claimant's decision to resign and should have been disclosed. The first and general Order for disclosure had a compliance date of 17 January 2019. These documents were not disclosed then. The Respondent therefore made an application for an Order for specific disclosure and the resulting Order was made on 14 February 2019 with a compliance date of 20 February 2019. Even that Order was only partly complied with on 20 February 2019 and not fully complied with until shortly before the Hearing began on 18 March 2019.
6. The Tribunal accepted that this did amount to unreasonable conduct: these clearly were relevant documents which should have been disclosed several weeks earlier than they were and were not fully disclosed even when an Order for specific disclosure was made. The Tribunal therefore had grounds for making a Costs Order on that basis.
7. Turning to the issue of whether it should exercise its discretion to make an Order, the Tribunal considered the nature, effect and gravity of the Claimant's unreasonable conduct (McPherson v BNP Paribas (London Branch) [2004] EWCA Civ 569). The Tribunal noted that all the relevant documents were supplied to the Respondent in time for the Hearing. At the Hearing, the Respondent did not make any application for an adjournment or a postponement on the ground that the late disclosure meant it had not been able to prepare adequately for the Hearing. In these circumstances, the Tribunal did not consider it appropriate to make a Costs Order on these grounds.

No reasonable prospect of success

8. The Claimant withdrew a number of her claims but not until the Hearing, namely: her claim of unauthorised deduction from wages, maternity discrimination by deduction from wages and unpaid holiday pay. During the Hearing she also withdrew all her claims of maternity discrimination other than discrimination relating to her alleged demotion, but continued to argue that these acts amounted to a breach of the implied term of mutual trust and confidence for the purposes of her claims of unfair and discriminatory dismissal.
9. In the reasons for its decision, the Tribunal explained why it had concluded that a large majority of the Claimant's allegations relating to breaches of trust and confidence and victimisation were without merit. The facts and matters upon which the Tribunal based its conclusions on these allegations were all known to the Claimant at the point when she presented her claim. The Tribunal was satisfied that these allegations had had no reasonable prospect of success from the outset. There were only two allegations that were arguable. One related to the decision on

the team to which the Claimant was to be allocated and the other related to the decision on who was to be offered a place on the high value selling course.

10. In pursuing the many other allegations that had no reasonable prospect of success, however, the Tribunal was satisfied that the Claimant acted unreasonably, and that there were grounds for making a Costs Order under Rule 76(1)(a) or (b).
11. These allegations added very substantially to the length of the Hearing and the preparation time for it and so caused the Respondent to incur significant and unnecessary costs. The Tribunal was satisfied that it was appropriate to exercise its discretion to make a Costs Order against the Claimant.

Quantum

12. The Tribunal considered the amount of the Costs Order. The Claimant did not challenge the schedule of costs that the Respondent submitted, which totalled £82,211, other than in respect of the attendance of a solicitor at the Hearing in addition to representation by counsel. The Tribunal accepted that those sums should be discounted. Whilst the attendance of a solicitor may have been desirable from the Respondent's perspective, it was not, objectively assessed, an expense that it would be reasonable for it to recover. The total sum claimed for the attendance of a solicitor was £9,284.80. Deducting that from the schedule of costs gave a figure of £72,926.21.
13. At the costs Hearing, the Respondent conceded that it should reduce the amount it was claiming by 50% to reflect the fact that it accepted that the strength of two of the Claimant's allegations could be assessed only after evidence had been heard at the Hearing. That reduced the amount the Tribunal might award to £36,463.10.
14. The Respondent also claimed its costs in relation to the costs application. The Claimant argued that the Tribunal should exercise its discretion not to award any costs in relation to the costs Hearing because the Respondent had not made its concession and reduced its claim by 50% until the costs Hearing itself. The Tribunal accepted that it should take the Respondent's late concession into account but was satisfied that, even if the concession had been made earlier, there was at best a 50% chance that the claim for costs could have been settled without the need for a Hearing. The Respondent claimed £5,100 in costs for the costs Hearing. Discounting the £2,000 claimed for preparation, attendance and travel for the solicitor who attended the costs Hearing left a figure of £3,100. The Tribunal then reduced that sum by 50% to reflect the possibility of a settlement of the costs application if the Respondent's concession had been made earlier and arrived at a figure of £1,550.
15. In summary, the Tribunal concluded that the amount of the Respondent's costs that it was appropriate to take into account when deciding the quantum of the Costs Order was £38,013.10.

Ability to pay

16. The Tribunal decided to exercise its discretion to consider the Claimant's ability to pay.

17. From the evidence the Claimant gave at the costs Hearing on her household's financial position, the Tribunal found that whilst she had no savings, she did have £67,500 worth of equity in the family home. She had non-mortgage debts of £56,500, leaving her with £11,000 of net assets. The Claimant had a new job and her husband was also working, as a self-employed electrician. Their joint net income was in the region of £5,000 a month. The Claimant gave evidence on the family expenditure. Whilst some of that expenditure was on what might be viewed as luxury items such as gym membership and horse-riding lessons for the children, the Tribunal accepted that the family currently had little disposable income to spare at the end of the month. The Tribunal was also satisfied, however, from a letter submitted in evidence from the Claimant's new line manager, that she was doing well in her new job and was likely to reach the targets set for her in the new incentive plan year beginning on 1 April 2020, so she had the potential to earn substantial sums in her new job in the future.
18. Taking all the facts and circumstances into account, the Tribunal decided that the Claimant's limited financial means did not make it inappropriate to make a Costs Order at all but did indicate that the quantum should be reduced substantially. The Tribunal therefore reduced the award from £38,013.10 to £10,000 and gave the Claimant until 30 June 2020 to pay.

Employment Judge Cox

Date: 18 October 2019

REASONS SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE