EMPLOYMENT TRIBUNALS

Claimant: Mrs N Johnson

Respondents: 1. Mental Health Care (UK) Limited
2. Mental Health Care (Newton House) Limited

Heard at: Manchester **On:** 27 & 28 January 2020

Before: Employment Judge Sherratt
Ms S Howarth
Mr W Haydock

REPRESENTATION:

Claimant: Mr J Small, Counsel
Respondents: Dr E Morgan, Counsel

JUDGMENT having been sent to the parties on 4 February 2020 and written reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This Tribunal heard the claimant's claims over a number of days in 2018 resulting in a Judgment being sent to the parties on 24 May 2018. The Tribunal found that the claimant had made some protected disclosures but that she had not suffered detriments arising therefrom nor had she been unfairly dismissed for having made protected disclosures. The claimant's equal pay claim succeeded and there was a remedy hearing on 9 October 2019.

2. The respondents made a costs application and the claimant a preparation time application.

3. Rule 76 of the Employment Tribunals Rules of Procedure 2013 provides that:

> (1) 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."

4. In this case the first application came from the respondents on 11 June 2018 in writing to the Tribunal:

> "Please consider this letter as an application on behalf of the respondents pursuant to rule 76(1)(b) of the Employment Tribunals Regulations because the claimant pursued claims which had no reasonable prospect of success.
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> For the Tribunal's consideration we enclose copies of the following:
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> (1) The Judgment; and
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> (2) Letter to the Claimant dated 12 April 2017."
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> In our letter to the claimant, we explained why we considered that her claims had no reasonable prospects of success. On page 2 we made it clear that the claimant's claims of automatically unfair dismissal and detriments in response to alleged protected disclosures under the whistle-blowing legislation had no reasonable prospects of success. We went on to warn the claimant on page 2 that, in the event her claims failed as anticipated, then we were instructed to make an application for our clients' costs.
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> At the final hearing on 19 March to 10 April 2018, the Tribunal found that the claimant was not dismissed in response to any alleged qualifying protected disclosures, nor did the respondents subject the claimant to any detriments in response to any alleged qualifying protected disclosures. We refer to paragraphs 1, 2, 81, 113, 186, 202 and 207 of the Judgment.
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> On a commercial basis we made a significant offer of settlement to the claimant on behalf of the respondents, initially in the sum of £10,000, which rose to £15,000 following negotiations with her then representatives at the Royal College of Nursing. The final offer from the respondent to the claimant was £15,000 which was refused by the claimant on 7 April 2017. We enclose a copy of the RCN's letter dated 7 April 2017 which confirmed they no longer acted on behalf of the claimant as of that day.
>
> Despite the offers of settlement made to the claimant and the warning given to the claimant about an impending costs application the claimant chose to pursue her claims.
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> In the light of these issues, we respectfully request that the Tribunal make a costs order in favour of the respondents against the claimant pursuant to rule 76(1)(b) and with reference to rule 75 of the initial Rules."

5. The claimant's application was first made on 24 October 2018 referring to the Civil Procedure Rules. That application was later substituted by an application that we will shall come on to later.

6. From the reading of the written submissions at the start of the costs hearing there arose a question as to the basis of the respondents' costs application as Dr Morgan's skeleton argument referred only to rule 76(1)(a) and not to rule 76(1)(b). In his skeleton argument on behalf of the claimant Mr Small noted that the respondents' skeleton related to Rule 76 (1) (a) whereas the respondents' written application was under subsection (b). Dr Morgan made no application to amend the basis of the respondents' application. Indeed, he made no mention of this issue when he made his oral submissions to us, but in reply after Mr Small had made his oral submissions Dr Morgan submitted that case management allowed for the respondent to amplify its submissions from (b) to (a).

7. I have looked in the Tribunal file and on 2 December 2019 Clyde and Co representing the respondents wrote to the Tribunal opposing the claimant's application to strike out the respondents' application for costs. They referred to the notice of the costs hearing and the application and they said this:

> "At the remedy hearing on 9 October Employment Judge Sherratt made the following directions in respect of preparation for the costs hearing as noted down during the remedy hearing by an associate of this firm:
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> (1) Each party is to set out the nature of their applications by 15 November 2019;
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> (2) Each party is to respond to the nature of the applications in simple terms by 14 December 2019;
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> (3) The respondent is to compile a costs hearing bundle by 20 December 2019.
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> On 6 November the Tribunal sent notice to both parties confirming the dates of the two day costs hearing and that the parties are to submit written representations not less than seven days before the hearing. The respondent notes the following:
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> (1) On 13 November the claimant requested a seven day extension to set out the nature of her application until 22 November due to ill health – we agreed to the requested extension on behalf of the respondent.
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> (2) On 22 November 2019 we served on the claimant a further copy of the respondent's application for costs which was originally filed and served on 11 June 2018. We explained that the application had already set out the respondent's reasons for the application and confirmed an intention to send the costs hearing bundle to the claimant the following week, which would include the respondent's costs schedule. We received no response to our email dated 22 November and the next time we received contact from the claimant was her application for strike out dated 26 November 2019."

8. It is therefore apparent that on 22 November a further copy of the respondent's application for costs was served confirming that it was made under rule 76 (1) (b) and not (a).

9. There is no suggestion that there was anything other than the original application. There is no suggestion of an application to amend or to permission to amend being given. In our judgment the respondents have confirmed to the claimant and the Tribunal on 2 December 2019 that the basis of the application was under rule 76(1)(b) and not (a) therefore we approach the respondents' application on the basis of the confirmed contention that the claims had no reasonable prospect of success. In the light of this finding we shall not recite the submissions made by Dr Morgan.

10. I have referred to the application appearing at pages 55 and 56 in the bundle. That referred to two further letters dated 6 March and 12 April 2017. The first of those letters was sent to the claimant's then legal representative from her professional organisation, The Royal College of Nursing. The letter contained a costs warning saying that:

> "We invite your client to withdraw her equal pay claim. The merits of the equal pay claim are exceptionally poor for the reasons set out below and have no reasonable prospects of success."

11. Again I note that the respondents used the "no reasonable prospects of success" basis for their application, or rather their threat, in respect of a potential application for costs.

12. The letter, written at the time the claimant was represented, set out over three pages a lot of detail as to why in the respondents' submission or view it would be inappropriate for the claimant to proceed with her equal pay claim. The Royal College of Nursing responded on behalf of the claimant on 14 March saying that they had received and considered the letter but were unable properly to advise the claimant due to the inadequacy of the respondents' disclosure and the fact that some of the disclosed documentation had been unnecessarily redacted by the respondents. Further, no details of any bonus had been provided. In our judgment this amounted to a reasoned response to that letter.

13. There then followed the second letter on 12 April 2017 by which time the claimant was no longer represented by The Royal College of Nursing. This was a much shorter letter. It made reference to some earlier settlement negotiations, that the claimant was no longer willing to settle on those terms but without any explanation as to why the claimant had withdrawn from the negotiations. They referred to an earlier letter setting out the reasons why the equal pay claim was bound to fail as it had no reasonable prospect of success, and then they went on to deal with other matters, saying:

> "We are also firmly of the view that your other claims (automatically unfair constructive dismissal and detriments in response to alleged protected disclosures under the whistle-blowing legislation) have no reasonable prospects of success. It appears extremely unlikely that the Tribunal will find that you suffered any detriment or constructive dismissal in response to making any alleged disclosures for reasons including the following:
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> (1) You did not make any qualifying protected disclosures;

(2) In the unlikely event that the Tribunal finds that you did make qualifying protected disclosures

(a) You were not constructively dismissed in response to any alleged qualifying protected disclosures; and

(b) You did not suffer any detriments in response to any alleged qualifying protected disclosures.

(3) The respondent's actions did not constitute a breach of contract, whether fundamental or otherwise.

In the unlikely event that the Tribunal finds that the respondent's actions did constitute a breach of contract you did not resign in response to any such breach but because you had found a new job. Should you proceed with your whistle-blowing claims to the final hearing in October then we are instructed to make an application against you for our client's legal costs in preparing for an attending that hearing."

14. The claimant clearly rejected that offer because the hearing went ahead, although we are not aware as to the reasons why she rejected it.

15. We have set out that the claimant did succeed on her equal pay claim and in respect of some of the alleged protected disclosures but not in respect of detriment or automatically unfair dismissal.

16. As to whether or not the claimant's claim had no reasonable prospect of success, we note that this was not a case where the respondents applied to the Tribunal under rule 37 to have the claim struck out or even to have part of the claim struck out on the basis that it was scandalous, vexatious or had no reasonable prospect of success, and this was not a claim in which there was an application for a deposit order under rule 39 should the Tribunal have found that the claim or any part had little reasonable prospect of success.

17. Had a strike out application been made then the Tribunal would have considered that it is not usual on the basis of strong authority to strike out claims of discrimination on the basis of there being no reasonable prospect of success, on the basis that such claims are generally fact sensitive and require a full examination by the Tribunal of the evidence before it can make a proper determination, and of course equal pay is a type of discrimination claim coming as it does under the Equality Act 2010.

18. Whistle-blowing claims have been held to be analogous to claims of discrimination. It is for the Tribunal to consider the evidence as to whether or not the disclosures were made and why the employer acted as it did. In this particular case where the claimant was alleging automatic unfair dismissal for having made public interest disclosures, one of the reasons for that being she had not been employed for two years, the unfair dismissal claim is effectively bound up with the whistle-blowing claims because they depend on whether or not the claimant had been found to have made a protected disclosure. So in simple terms where disputes of evidence in relation to these matters exist it is generally wrong to strike a claim out as having no reasonable prospect of success.

19. In this case we note that the claimant was invited to withdraw her claims both when she was represented and thereafter; we note that she did not do so. We have considered the terms of the warning letters and the claimant's reasoned response. We have considered the claimant's pleaded cases. We note the existence of intertwined disputed facts dealing with discrimination (equal pay) and public interest disclosure, and we note the claimant, contrary to the thoughts put into her head by the respondent, succeeded in part.

20. Taking all of these matters into account leads us to the conclusion that it could not be said that the claimant's claims had no reasonable prospects of success, and so the respondents' application for costs is dismissed and the stay on payment of the award is lifted.

21. We now move to the claimant's application for a preparation time order which was initially made with reference to the Civil Procedure Rules. The claimant thereafter made a further application, this time saying that as a litigant in person she was claiming preparation time in relation to the equal pay claim only, on the following grounds:

(a) The claimant won her equal pay claim and was found to have made protected disclosures;

(b) The respondent's conduct throughout the case was disruptive, unreasonable and improper and that they were deliberately negligent to disadvantage the claimant; and

(c) The respondent failed to make appropriate disclosures.

22. Looking at that application it seems to us that that is made under 76(1)(a) relating to the conduct of the litigation.

23. We have obviously noted the claimant succeeded in her equal pay application. That by itself is not a ground is not a ground to make a preparation time order.

24. We have considered the claimant's extensive application set out over 30 pages in the bundle. We have noted that she has appended to that application a further 31 pages setting out the time she has spent for which she claims recompense. We have noted the respondents' response set out over 16 pages in the bundle. We have heard from both counsel and we have received their written submissions. We have taken into account all these matters in reaching our conclusions.

25. We find that the conduct of the litigation by the respondents was robust but not so robust as to be unreasonable. We find that there were no applications for or orders for costs or preparation time made in respect of various applications as they proceeded before the Tribunal. We take the view that when things did not happen when the claimant expected they would but happened later, in the main those put off the time when the claimant would have spent preparing for the hearing rather than in the main adding to that time. We have noted that eventually in respect of the remedy hearing the respondents made an offer to the claimant that was reasonable in that it exceeded the amount which the Tribunal awarded at the final hearing. Had the claimant accepted that offer then the remedy hearing might have been avoided.

26. In conclusion, whilst we understand that the claimant was annoyed and frustrated by the way in which the litigation was conducted, we in our judgment and experience do not find that do not find that the actions of the respondents in conducting the proceedings were unreasonable so it is not appropriate to make a preparation time order.

Employment Judge Sherratt

13 March 2020

REASONS SENT TO THE PARTIES ON

16 March 2020

FOR THE TRIBUNAL OFFICE