EMPLOYMENT TRIBUNALS

Claimant: **Mrs V Smith**

Respondent: **Warrington & Halton Teaching Hospitals NHS Foundation Trust**

ORDERS

The Tribunal makes no order as to costs.

REASONS

1 This case was heard by the London Central Employment Tribunal from 19 to 26 July 2021. The Tribunal's judgment given at the conclusion of the hearing (with reasons) was that:

> (a) The complaint of unfair dismissal was not well-founded;
> (b) It did not have jurisdiction to consider complaints of direct disability discrimination or disability-related harassment about any acts that occurred before 18 September 2019;
> (c) The complaints of direct disability discrimination or disability-related harassment about any acts that occurred after that date were not well-founded; and
> (d) It did not have jurisdiction to consider the complaints of having been subjected to detriments for having made protected disclosures.

The written judgment was sent to the Manchester Employment Tribunal on 26 July 2021. Unfortunately, it was not sent out by Manchester ET to the parties until 15 March 2022.

2 On 20 August 2021 the Respondent applied for costs. It was sent to Manchester ET, who sent it to me on 28 September 2021. I was away from the office at the time and returned to work on 18 October 2021. I was then away again from 25 October to the middle of November. Unfortunately, when I returned to work in the middle of November, in the midst of all the other emails in my inbox, I did not pick up on the email with the application for costs. On 8 December 2021 and 15 February 2022 the Respondent chased up the matter

with Manchester ET. Manchester ET sent me their reminders on 15 February 2022. All the Respondent's communication were copied to the Claimant.

3 On 15 February I asked the parties whether they would consent to the costs application being determined by me alone on paper. The Respondent responded on the same day that it would. There was no response from the Claimant.

4 On 7 March 2022 the Claimant sent an email to Manchester ET addressed to me. It was not copied to the Respondent. She said that she did not know that she had to respond to the Respondent's application for costs and set out briefly whey she had pursued her claim and why she could not afford to pay any costs.

5 On 15 March Manchester ET wrote to the Claimant, on my instruction, asking her whether she consented to me dealing with the Respondent's application on my own (without the members) and, if she did, to send to the Respondent and to the Tribunal, any information that she wanted me to take into account. There has been no response from the Claimant.

Background to the costs application

6 In a claim form presented on 2 January 2020 the Claimant complained of constructive unfair dismissal, whistleblowing detriments and associative disability discrimination (her husband had been diagnosed with neuropathy disorder). Her particulars of claim were brief and her claims were not clear.

7 There was an attempt to clarify her claims at a preliminary hearing on 20 May 2020. It was clear that the Claimant's whistleblowing detriment claims related to disclosures that she made and detriments to which she was subjected while she worked on ward A8 which was managed by Joanne Hazlehurst. Those detriments ended in November 2018 when the disciplinary investigation relating to evets on that ward concluded. The Employment Judge who conducted that hearing suggested that the Claimant seek legal advice as there appeared to be a number of issues with her claim, which included time limit issues in relation to the acts that occurred while the Claimant worked on ward A8.

8 On 22 April 2021 the Respondent's solicitors sent the Claimant a "without prejudice save as to costs" letter. In that letter they set out why they considered that her various claims had no reasonable prospects of success. In respect of the whistleblowing detriment claims they said that her claims as identified at the preliminary hearing (and with which she had not disagreed) were that she had mode protected disclosures between February and May 2018 and that she had been subjected to detriments in April and May 2018. A claim for whistleblowing detriments had to be brought within three months of the detriment or the last in a series of detriments. She had presented her claim on 2 January 2020 and so the claims were significantly out of time. In respect of the disability discrimination claims, she had failed to produce sufficient evidence that her husband was a disabled person for the purposes of the Equality Act 2010. There was no evidence of her having submitted a flexible working request in 2018. The request submitted in January 2019 had resulted in a variation to her working hours which she had accepted. Her allegations of less favourable treatment were vague, historical, unsubstantiated and there was no evidence that any of it was because of her husband's disability. She had failed to identify any unwanted conduct which could amount to harassment. She had made a complaint of victimisation

but had not identified any protected act. As far as the unfair dismissal complaint was concerned, there was no evidence that the Respondent had committed a repudiatory breach of any express or implied term of her contract of employment which was reinforced by the fact that she had continued to work for the Respondent on a zero hours contract. They said that if she withdrew her claim by 29 April they would not pursue her for costs. The Respondent's costs at that time were about £6,000. If she did not withdraw the claim and lost, they would pursue her for their costs and would bring the letter to the judge's attention. They estimated that the costs would increase by about £15,000.

9 We heard the case from 19 to 26 July 2021. The Tribunal's judgment, as set out at paragraph 1 above, was that the Tribunal did not have jurisdiction to consider claims that had not been presented in time and those that had been presented in time were not well-founded. Other conclusions, which may be relevant to the costs application, were as follows (I set them out in some detail because, as neither party asked for them, written reasons were not sent to the parties):

9.1 The Claimant was employed by the Respondent from July 2008 to December 2019. From 2008 to July 2017 she worked as a Domestic Assistant. In July 2017 she was appointed Healthcare Assistant (HCA) on ward A8. It was a busy ward and there was a shortage of staff. It was a stressful work environment and the ward was not delivering the right level of patient care.

9.2 On 18 February 2018 the Claimant's husband was diagnosed with hereditary neuropathy with pressure palsies (HNPP). We accepted that he was disabled as a result of that condition.

9.3 We did not accept the Claimant's evidence that she had made a written request for flexible working in early 2018 but accepted that she had raised the matter verbally with J Hazlehurst who had advised her that she need to fill in the relevant form but had not provided her with any support or assistance to do so.

9.4 On 9 May 2018 the Claimant and other HCAs complained about staffing levels on the ward and said that they made the ward unsafe.

9.5 Following an incident on 11 May 2018 the Claimant was told that her conduct would be investigated and that she would be moved to a different ward pending the investigation. On 14 May the Claimant was moved to B18. She was happy on that ward.

9.6 Occupational Health advised on 1 June 2018 that a swift investigation would be beneficial to the Claimant's emotional well-being.

9.7 The disciplinary investigation took five months and the report was produced in October 2018. The incident being investigated was a brief one which required a limited amount of investigation, There was no reason why it should have taken so long. The decision was that there was no case to answer on any of the allegations and the matter should not progress to a disciplinary hearing. That decision was not communicated to the Claimant at that time.

9.8 On 28 October 2018 the Claimant resigned. She was told that she would have to work her notice period and that her employment would terminate on 23 December 2018.

9.9 On 20 November 2018 the Claimant raised a grievance in which she complained about a number of things. These included that the disciplinary investigation had been commenced because she had blown the whistle about lack of safety on the ward and that her request for flexible working had not been dealt with.

9.10 On 22 November the Claimant was told the outcome of the disciplinary investigation. She was told that as her conduct had been below the standard expected she would be given informal counselling. She was invited to a formal meeting for that and was told that it would be documented on her personal file. That was contrary to the Respondent's disciplinary procedure which provides that counselling will be informal and that no written record will be necessary.

9.11 At the beginning of January 2019 the Claimant made a written application for flexible working. In February 2019 the matron on ward B18 proposed a pattern of working, which would be reviewed at the end of six months. The Claimant accepted that proposal.

9.12 On 8 February there was a heated exchange between the Claimant and another HCA (Miller). The Claimant was distressed and sent home. On 11 February the Claimant complained about Miller. Miller brought to the matron's attention comments that the Claimant had posted on Facebook about working in a place that was rife with bullies and about working with "*vile, nasty people"* and that it was worrying that they were allowed to look after "*our family's"* [sic] It was clear from the post that the Claimant was employed by the Respondent.

9.13 On 25 February the Claimant was suspended on full pay while the incident of 8 February and the Facebook posts were investigated.

9.14 The Claimant's grievance was split into two parts and investigated by two different people under two different procedures. The first one produced his outcome on 27 June 2019, seven months after the Claimant raised her grievance. We found that there was no reason why it should have taken that long. The second investigation was concluded in August 2019. Her grievance about the delay in the disciplinary investigation and the formal record on her personal file when it had been found that there was no case to answer was upheld. Her grievance about flexible working was partly upheld because it was acknowledged that more could have been done to ensure that the Claimant had been supported and that he request was followed up.

9.15 The Claimant was invited to a disciplinary hearing in June 2019 but that was adjourned at the Claimant's request. It took place on 9 September 2019. The Claimant was given a final written warning for 18 months for the Facebook post.

9.16 The Claimant was not happy to return to ward B18. She was told that she could not have the same flexible working pattern immediately if she moved to a different ward. On 23 October the Claimant agreed to return to work on ward B12. The Claimant was told that she would have to work day shifts originally to

familiarise herself with the ward and that her request to work nights only would be reviewed at a meeting on 3 December 2019.

9.17 The Claimant started work at B12 on 1 November 2019. The ward manager was not informed that there was an application for flexible working that was to be reviewed on 3 December. That was important information which should have been conveyed to her. When the Claimant mentioned it to her, she said that she was not aware of it and would look into it. The Claimant resigned soon after that.

9.18 We looked at the Respondent's conduct between February 2018 and November 2019 and all the acts about which the Claimant complained. We did not find that they individually or cumulatively amounted to a breach of the implied term of trust and confidence. We found that the Claimant's application for flexible working had been dealt with to her satisfaction and had been granted in February 2019. The Respondent's decision to suspend the Claimant and conduct a disciplinary investigation in February 2019 had been reasonable. When the Claimant came back to work on a different ward after an absence of eight months, the Respondent's requirement that she initially work day shifts for a few weeks had been reasonable. When the Claimant returned to work she had found out that as a bank worker she could work 5-6 nights a week. She had to make a difficult decision – she could either give up her secure full-time employment and work nights as a bank worker or keep the secure full-time job with no guarantee that she would be allowed to work night shift at the end of 4-6 weeks. She chose the former.

9.19 The Claimant's whistleblowing detriments were considerably out of time (a year to 18 months). She had failed to satisfy us that it had not been reasonably practicable to have presented them in time. She had had the benefit of trade union advice and representation while employed.

9.20 As far the disability discrimination/harassment complaints were concerned the majority had not been presented in time, we did not consider it just and equitable to consider them and, in any event, there was no evidence from which we could infer that they had been done because the Claimant's husband was disabled.

10 On 20 August 2021 the Respondent applied for costs in the amount of £20,000 on the grounds that the claims had had no reasonable prospect of success and/or the Claimant's pursuit of them had been unreasonable. They attached to their application their letter of 22 April 2021. They said that the Claimant's response to that had been "*After careful consideration and advice I confirm I will not be withdrawing my claim."*

11 In her email of 7 March 2022 the Claimant said that she had been advised by ACAS and her trade union representative that for her to take her case to an employment tribunal would "*be free of costs."* She did everything herself because she felt that she had been very unfairly treated at work. She had never acted maliciously and had only told the truth. She respected the tribunal's decision but felt that she had not represented herself properly. Her husband's health had deteriorated and she had only ever asked for help and support at a very difficult time, instead the way that she had been treated had added to her stress. She was very worried about the costs that the Respondent was seeking as she would never have that amount of money in her lifetime. She was struggling to live and

pay bills and was getting deeper into debt. She did not know how on earth she could pay those costs.

The Law

12 Rule 76 of the Employment Tribunals Rules of Procedure 2013 ("the Procedure Rules") 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 … has acted vexatiously, abusively, disruptively or otherwise unreasonably by 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; or*
>
> *…"*

13 Rule 77 of the Procedure Rules provides,

> "*… No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application."*

Rule 84 provides,

> "*In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's … ability to pay."*

14 The principles to be derived from the authorities are as follows. Costs in employment tribunals are the exception rather than the rule and costs do not follow the event. Before any order for costs can be made, there should be a finding that the statutory threshold in rule 76(1)(a) or (b) has been met. If it has, the Tribunal has to consider whether it is appropriate to make an order in all the circumstances. Only when these two stages have been completed, the Tribunal should move on to consider the amount of the order to make.

15 A party's ability to pay may be taken into account in determining whether to make an order at all and, if so, the amount of that order.

Conclusions

16 I considered that the complaints of having been subjected to detriments for having made protected disclosures had no reasonable prospect of success because they were considerably out of time and the Claimant had not put forward any evidence of why it had not been reasonably practicable to have brought those claims earlier. That was a matter that was drawn to the Claimant's attention at the preliminary hearing on 20 May 2020. It had been repeated in the Respondent's solicitors' letter of 22 April 2021. They had explained to her clearly what the time limits were, when the claims should have been brought and why they were significantly out of time. The Claimant, however, was not legally represented throughout the proceedings and lay people do not always appreciate legal concepts such as time limits and the tests to be applied. It is not always easy for low paid employees, such as the Claimant, to be able to find and afford

legal advice. I did not consider that the Claimant had acted unreasonably in bringing or pursuing those claims.

17 I also considered that the complaints of disability discrimination had no reasonable prospect of success because there was no evidence from which the Tribunal could infer that the Respondent had done the acts, of which the Claimant complained, because of her husband's disability. As we said in our oral reasons, the Claimant did not give evidence to that effect. The substance of the Claimant's complaints was that the Respondent had not made the adjustments that she required to deal with her husband's disability. The position in law is that while complaints direct discrimination or harassment can be brought on the grounds of the disability of someone associated with the employee, the duty to make reasonable adjustments only arises if the employee in question is disabled. That is not a distinction that would be obvious or easily understood by a lay person. The point I made about the Claimant being a litigant in person (above) applies equally to this point. I do not consider that the Claimant acted unreasonably in pursuing this claim.

18 The Claimant complaint of constructive unfair dismissal relied on the breach of the implied term of trust and confidence and the conduct of the Respondent from February 2018 to November 2019. The Claimant had some hurdles to overcome in order to establish that. One of the Claimant's main concerns in her letter of resignation was about how the Respondent had dealt with her requests for flexible working. Regardless of how her first request had been handled, in February 2019 her request was dealt with to her satisfaction. The decision to investigate her postings on Facebook could not be criticised and the Respondent's requirement for her to work a short period on day shifts when she returned to work after a long absence and on a new ward was reasonable. That having been said, we found some shortcomings in the Respondent's treatment of her. Ms Hazlehurst could have supported the Claimant more to make the application in February 2018. There was an unacceptable delay in concluding the disciplinary investigation that began in May 2018 and concluded there was no case to answer. The outcome was only communicated to the Claimant in November 2018 after she had resigned and raised a grievance. The Respondent then acted in breach of its disciplinary procedure by keeping a record of informal counselling with the Claimant on her file. That was not rectified until August 2019. There was an unacceptable delay (nine months) in dealing with the Claimant's grievance. Although the Claimant was told in October 2019 that her request to work night shifts would be reviewed on 3 December 2019, her new ward manager was not made aware of that and was surprised when the Claimant raised it. That caused the Claimant to have doubts about whether it would happen. What might be clear once all the evidence has been heard and considered would not have been that clear before the start of the proceedings. I did not consider that this complaint had no reasonable prospect of success or that the Claimant acted unreasonably in bringing the claim.

19 Having concluded that the threshold had been met in respect of the disability discrimination and whistleblowing detriment claims, I considered whether it was appropriate to make an order in all the circumstances. The unfair dismissal claim covered the same factual matters that were the subject matter as those two claims and it is, therefore, difficult to see to what extent , if at all, the length or the costs of the hearing were increased by having those two claims as well. I also took into account that the Claimant was not legally represented in the course of

these proceedings and the necessary consequences of that (see paragraph 16 above). I did not have detailed evidence about the Claimant's means but I know that she worked for many years as a Domestic Assistant and more recently as a Healthcare Assistant. They were low paid jobs and the Claimant's annual salary would be close to the £20,000 costs that the Respondent seeks. I accept what the Claimant said in her email of 7 March 2022 that she was struggling to pay her bills and was in debt and that she did not have and would never have that amount of money. Having considered all those matters, I concluded that it would not be appropriate to make an order for costs.

Employment Judge Grewal

22.04.2022 London Central
Date and place of Order

For Secretary of the Tribunals

Date sent to the Parties
25 April 2022