EMPLOYMENT TRIBUNALS

Claimant: **Mr T Reuser**

Respondent: **University Hospitals Birmingham NHS Foundation Trust**

Heard at: **Birmingham by CVP** **On: 5 to 7 May 2021**

Before: **Employment Judge Broughton**

Representation
Claimant: **Mr B Collins QC**
Respondent: **Ms N Motraghi, counsel**

JUDGMENT

The respondent is ordered to pay £20,000 towards the claimant's costs.

REASONS

1. The claimant, a Consultant Ophthalmic Surgeon, brought claims of unfair dismissal, automatic unfair dismissal for having made a protected disclosure and wrongful dismissal.
2. I originally heard the case in August 2018 and held that the claimant had been both unfairly and wrongfully dismissed. However, I did not find that the sole or principal reason for his dismissal was the fact he had made a protected disclosure under s103A Employment Rights Act 2010.

3. The facts and the law were fully recorded in my judgment of 8 October 2018 and I will not repeat them here.
4. The respondent submitted lengthy grounds of appeal in relation to my findings on the unfair and wrongful dismissal, including in relation to a number of very serious failings and credibility concerns. Their appeal was unsuccessful.
5. The claimant, only as a response to the respondent's appeal, submitted one ground of cross appeal in relation to his claim of automatic unfair dismissal and that was remitted to me.
6. I rejected the claimant's claim of automatic unfair dismissal on remission, giving further details, on 4 November 2021.
7. The parties then resolved the remedy issues between themselves without the need for a further hearing.
8. This hearing was arranged to hear the claimants application for costs.
9. The application was made under rule 76 Employment Tribunal's rules of procedure 2013 and, specifically, the claimant alleged unreasonable conduct of the proceedings under rule 76 (1) (a).
10. The claimant also alleged that the respondent had been in breach of tribunal orders under rule 76 (2).
11. It was expressly confirmed that no application was made under rule 76 (1) (b). That said, it did appear that the claimant was effectively contending that defending the unfair dismissal claim was unreasonable conduct.
12. The claimant was asking for all of the costs of the proceedings from commencement to conclusion including all of those related to the appeal, albeit subject to detailed assessment in accordance with rule 78 (1) (b).
13. The respondent disputed all aspects of the application.

14. It was common ground that costs do not ordinarily follow the event in employment tribunals and awards are the exception rather than the rule. Further, I had three principal questions to consider:-

    a. was the respondent's conduct unreasonable and/or had they breached any tribunal orders?

    b. If so, was a costs order appropriate?

    c. If so, on what terms?

15. It was also agreed that, if I were to determine that some or all of the costs should be subject to detailed assessment then that would need to be addressed at a subsequent hearing.

16. It was further common ground on the established case law that, if I were to determine that there had been unreasonable conduct, I would need to have regard to the nature, gravity and effect of that conduct in relation to my deliberations on those matters identified at 14 b and c above.

17. There was, however, some divergence between the parties in relation to the extent that causation of any costs to be awarded was necessary all relevant.

18. Both parties, rightly, referred me to the case of Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1215.

19. The actual approach which I need to take is somewhere between the positions advanced by the parties.

20. Specifically, I need to look at the whole picture. I am not required to take a strict analytical approach to the direct causation of the costs incurred as a result of any alleged unreasonable conduct. That is not to say, however, that I do not have regard to the effect of any such conduct found.

21. In the case quoted, there was a significant finding of unreasonable conduct against the claimant. In particular, it was found that she had lied at a hearing. The respondent was initially awarded costs seemingly on the basis

that this made the whole claim unreasonable. As a result of the appeal, however, that was reduced to, principally, a proportion of the costs relating to the hearing itself. There was also consideration of the respondent's conduct.

22. Turning first then to the alleged unreasonable conduct. I refer to my previous findings on liability and on remission and will not repeat all of those here.

23. That said, I made clear findings of serious and material disclosure failings and evidential shortcomings.

24. For the avoidance doubt, however, I am satisfied that the respondent was entitled to defend the proceedings and there were a number of significant matters that required evidence to be heard along with detailed submissions and complex deliberations.

25. Moreover, they respondent successfully defended the whistleblowing claim which, had the claimant been successful, was likely to have led to significantly higher compensation and damage to the trust.

26. The respondent also successfully contended that the claimant had contributed to his dismissal and this still required evidence, submissions and deliberations, notwithstanding the claimant's at least partial acknowledgement.

27. Furthermore, whilst I found that the respondent did not genuinely view the allegations as gross misconduct, I did accept that conduct was the genuine, principal reason for dismissal.

28. I also acknowledged that, in certain circumstances, it can be legitimate for the sanction for misconduct to be effectively upgraded to dismissal and for that to be fair. For example, in circumstances where an employee has shown no insight or remorse and/or where it was reasonably believed that the employee would not act differently in the future.

29. That said, there were aspects of the respondent's case that were untenable or, as the claimant put it, attempting to defend the indefensible.

30. For example, the respondent maintained that the second allegation against the claimant was gross misconduct right up to the start of the liability hearing.

31. As is clear from my previous findings, I did not accept that the respondent genuinely believed this, even prior to the claimant's exclusion.

32. Even if they had so believed, that would have been a contention with no reasonable prospect of success.

33. The respondent sought to defend all aspects of the exclusion of the claimant and the NCAS and GMC referrals without coming close to any valid, cogent or justified explanations for their actions.

34. Whilst I stopped short of finding any deliberate dishonesty on the part of the respondent, or the key players involved, I could not rule that out.

35. As stated previously, however, costs awards in the employment tribunal are the exception rather than the rule and it is not uncommon for one party or another to seek to advance or defend a particular position on an aspect of the case that transpires, or even initially appears, to be unsustainable.

36. As a result, in isolation, those matters in this case, whilst serious and deeply troubling, do not necessarily given rise to any costs award, even if deemed to be unreasonable.

37. However, they cannot and should not be viewed in isolation as I am required to look at the whole picture and the claimant's principal focus before me was on the respondent's alleged ~~disclosure~~ failings regarding disclosure of relevant documents

38. It is clear there were such failings as recorded in my earlier judgments and usefully summarised in the skeleton argument of the claimant at paragraph 36.

39. There remains to this day no adequate explanation for those failings. I do not accept that many of the undisclosed documents were not known to be relevant.

40. For example, the exclusion of the claimant was expressly referenced in the ET3 and clearly formed part of the procedure leading up to the dismissal.

41. Contact with NCAS and other procedural matters were required by MHPS and/or the policies of the respondent as safeguards to employees in the claimant's position.

42. Internal emails of exchanges of views of relevant senior managers or evidence, in either case in relation to the allegations and internal procedures, were clearly subject to the duty to disclose.

43. Indeed, in relation to the NCAS documentation it appears that these were never provided, even after express requests by the claimant in a subject access request to the respondent. They only came before me after the claimant was able to obtain them directly from NCAS.

44. Whether they were withheld, destroyed or otherwise mislaid was impossible to determine or, rather, it would be wrong for me to have made such a specific determination on such a serious matter without a more detailed enquiry and all relevant individuals having an opportunity to explain themselves.

45. That said, it was striking that a significant number of the undisclosed documents were harmful to the respondent's case and several were very damaging indeed.

46. For example, the respondent's pleaded case in relation to the exclusion of the claimant appeared consistent with the documents they originally disclosed. There was no evidence at that stage of Dr Rosser's involvement in the exclusion of the claimant at an early stage, nor that both Dr Rosser and Dr Ryder were in possession of the information and documentation that demonstrated that the exclusion was, principally, on a false pretense.
47. The information provided to NCAS was beyond inaccurate and, as mentioned, this had not been provided by the respondent in disclosure or via the subject access request.
48. I do not accept that the claimant was being "tactical" in his search for these documents or in not disclosing them back to the respondent prior to exchange of witness statements.
49. It is fair to say that he could and, ideally for completeness, perhaps should, have expressly requested them via solicitors in the tribunal process. That said, it was not unreasonable for him to progress a subject access request from the respondent organisation, nor to approach NCAS when that was not complied with on time, nor to expressly request the missing documents via his subject access request subsequently.
50. If anything, this shows he was not being secretive, even if the responsible officers at the respondent (for disclosure and the SAR) were not speaking to each other.
51. Once the claimant did receive the documents, at a time when everyone was busy preparing their witness statements, he disclosed them within two weeks.
52. A number of these documents were key to my findings on apparent bias and collusion at an early stage. This then, of course, informed the significance of some of the procedural failings and the fact that allegation 2

should never have been capable of being viewed as potential gross misconduct.

53. The fact that these failings predated the protected disclosure and, as a result, aided the respondent's defence of that part of the claim does not, in my view, assist the respondent in relation to the matters before me today.

54. These were serious failings by the respondent and it was only by the claimant and his legal team seeking documents beyond those disclosed that these crucial and damaging issues came to light.

55. Regrettably, that was not the end of it.

56. Another key document which not only potentially supported the claimant's case on procedural unfairness and/or collusion but also, albeit unsuccessfully, his whistleblowing claim, was not disclosed until its existence came to light during the hearing.

57. That was the email from Mr Berry to Dr Rosser and, inexplicably, Dr Ryder, but not the other disciplinary panel member after the disciplinary hearing, which stated that the claimant would not be anticipating his dismissal. A further email from Mr Berry to Dr Rosser that day had been disclosed.

58. This was, therefore, a further very serious disclosure failing you with no explanation let alone justification and, indeed, it is difficult to conceive of one.

59. Of course, it is not unusual for occasional documents, potentially damaging ones, to be overlooked in disclosure. That would often fall short of amounting to unreasonable conduct.

60. However, the sheer number of disclosure failings in this case and the potentially damaging nature of so many of them has, understandably, left the claimant feeling that there may have been more.

61. Moreover, the lack of any cogent explanation from the respondent and, against that background, the maintenance of the untenable position that nothing untoward had occurred beyond human error, without, seemingly, any meaningful investigation, is deeply troubling not only in this case but in relation to any there may be in the future.

62. The disclosure failings were a breach of the tribunal rules and the respondent's obligations. These, coupled with the evidential failings, both in responding to the disclosure failings but also what the undisclosed documents revealed, howsoever caused, whether deliberate, dishonest, or just a reckless disregard for those rules and obligations do, in my judgment, amount to unreasonable conduct.

63. My findings have already illustrated the nature and gravity of that conduct.

64. I then need to consider whether that conduct was such that costs order should be made. In my judgment, such an award is appropriate but not at the level contended for by the claimant.

65. The conduct clearly adversely affected the claimant.

66. For the avoidance of doubt, I do not consider that any alleged failures in relation to settlement and/or acknowledgement and/or an apology from the respondent amount to unreasonable conduct, although they doubtless compounded the effect on the claimant.

67. I also do not consider that there was any material unreasonable conduct on the part of the claimant such as to discount any award I may consider.

68. It is, perhaps, surprising that the ET rules do not, in terms, confine costs awards to costs incurred in the ET proceedings themselves. That said, it seems to me that the requirement to consider the effect of the conduct and the prevailing case law, effectively does, albeit with the requirement for strict causation of excess costs.

69. So, I must consider the effect of the respondent's numerous failings.

70. The claimant inevitably had to take advice on the disclosure failings and to spend time seeking documents by another route, notwithstanding that these could, in addition, have been sought direct for the respondent's representatives in these proceedings.

71. That said, it seems unlikely that this would have resulted in the production of the NCAS documents at least, given specific requests in the SAR failed to do so. Moreover, the Berry email was not produced until it's existence was revealed in evidence.

72. There was then additional time and cost incurred in going through all of the documents obtained via various routes.

73. These would then have led to additional preparation time and, indeed, additional time in tribunal addressing the various issues arising, including the cross examination, not simply on the disclosure failings but also their astonishing persistence in the illusion of their case as originally pleaded such as regarding allegation 2, the exclusion, NCAS, Dr Rosser's involvement throughout and his alleged independence, the GMC referral and even their position on the denial, up until the hearing itself, of the urgency of the operation in allegation 1.

74. Those matters inevitably caused additional time and costs to be incurred for all concerned both before and during the hearing.

75. That said, it seems to me that this would always have been a complex case and hearing, including the whistleblowing and contribution issues. I do not accept that it would be just or appropriate to award the claimant all of his costs, or anything approaching that figure.

76. The total costs incurred and claimed by the claimant are around £200,000 plus VAT. It seems to me that a large proportion of those costs would have been incurred even were there no failings on the respondent's part.

77. I do not criticise his choice of legal representatives, at any given time, nor the total costs incurred, notwithstanding that they were considerable. This was, after all, a potentially career ending issue for a senior medic.

78. I do not, however, consider it would be just to extend my jurisdiction to provide for the costs incurred in the EAT, notwithstanding the innovative argument advance by Mr Collins.

79. However, to reflect the seriousness of the respondent's failings and the inevitable additional costs and difficulties faced by the claimant as a result, my award may be more than those which could be exclusively and directly attributed to each failing.

80. It should certainly be more than the negligible amount contended for by the respondent and include recognition of the costs of this application itself.

81. I have also considered rule 84 and had regard to the respondent's ability to pay. The respondent is clearly able to pay, notwithstanding that it will be from public funds which are always subject to competing pressures, particularly at this time.

82. It is principally for that reason that I have not invited representations on whether to go on to award a financial penalty in relation to the aggravating features in this case.

83. Whilst a fraction of the overall costs incurred by the claimant, I consider it appropriate to award the maximum amount provided for by rule 78 (1) (a) – being £20,000 but also to limit the award to that figure.

84. This is a genuine estimate of the effect of the respondent's failings, having regard to their gravity and the resulting additional costs, noting also that the

additional costs of a formal detailed assessment would not be warranted as they would be likely to exceed any adjustment that resulted.

Employment Judge Broughton
28 June 2021