EMPLOYMENT TRIBUNALS

Claimant: **Ms Linda Fairhall**

Respondent: **North Tees and Hartlepool NHS Foundation Trust**

HELD at Teesside Justice Hearing Centre **ON: 1 September 2022**

BEFORE: **Employment Judge Johnson**
Members: **Mr S Wykes**
Mr P Curtis

REPRESENTATION:

Claimant: **Mr M Rudd of Counsel**
Respondent: **Mr D Bayne of Counsel**

JUDGMENT ON COSTS AND APPLICATION FOR RECONSIDERATION

1. The parties' joint application for a reconsideration of the remedy Judgment promulgated on 6 July 2022 is postponed.
2. The claimant's application for costs against the respondent is well founded and succeeds. The respondent is ordered to pay to the claimant costs assessed in the sum of £14,240.40.

REASONS

1. This matter came before the Employment Tribunal today for consideration of the claimant's application for costs against the respondent, pursuant to Rule 76 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. The claimant was again represented by Mr Rudd and the respondent was again represented by Mr Bayne. There was an agreed bundle of documents marked C1, comprising an A4 ring binder containing 121 pages of documents. Mr Bayne had prepared a skeleton argument on behalf of the respondent, which was marked RS1.

2. Before submissions were made in respect of the costs application, Mr Rudd informed the Tribunal that there had been an error in the calculations which formed part of the remedy Judgment which was promulgated on 6 July 2022 following a hearing on 31 May 2022. At that remedy hearing, following delivery of the Tribunal's Judgment on the basic principles of the remedy hearing, both counsel had agreed that they would undertake the necessary calculations to provide the appropriate figures once "grossing – up" had been applied. It has since then been recognised that there may be an accuracy in those calculations, which both sides are anxious to correct. Mr Rudd and Mr Bayne both indicated that they had agreed that the respondent should be given some time to consider the new calculations which had been prepared by Mr Rudd on behalf of the claimant, so that a joint application could be made for a correction of those figures. That application will take place by way of a joint application for reconsideration which both counsel have agreed should be considered by Employment Judge Johnson "on the papers" and without the need for a hearing with members.

3. Mr Rudd then made submissions on behalf of the claimant's application for costs. That application is set out in letters from the claimant's solicitors to the respondent dated 29 January 2020 and 2 August 2022. Mr Rudd submitted that in so doing, the claimant had complied with the Orders made by the Tribunal at the end of the remedy hearing on 31 May 2022. On that occasion the Tribunal required the claimant to set out in writing the grounds upon which the application for costs was made and that there should be included a schedule of the costs being claimed. Mr Bayne's submission to the Tribunal today was that the application for costs was "out of time", because by Rule 77 the costs application must be made within 28 days of the final hearing. Mr Bayne submitted that the written application had not been made until 2 August, more than six weeks later. The Tribunal was not persuaded by this argument. The Tribunal's records clearly show that the application for costs was made orally at the end of the remedy hearing and accordingly had been made within the appropriate time limit. What the claimant had been required to do was to provide further details about the grounds of the application and to provide further details of the breakdown of the costs claimed. The Tribunal is satisfied that the claim for costs was made in time.

4. The claimant's application for costs is made on 2 grounds, as set out in Rule 76, namely that the response or parts of it had no reasonable prospect of success and that it was unreasonable for the respondent to continue to defend the proceedings on that basis. It was agreed by both counsel that the Employment Tribunal must apply a three-stage test on applications for costs as follows:-

(i) What is the conduct which is alleged to be unreasonable?

(ii) If unreasonable conduct is established, should the Tribunal exercise its discretion to award costs?

(iii) If so, in what amount should costs be awarded?

5. Both counsel agreed that the Tribunal should follow the guidance given by the Court of Appeal in **Yerrakalva v Barnsley Metropolitan Borough Council** [2012 of ICR 420] which said:-

> *"The vital point in exercising the discretion to award 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 respondent in conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had."*

6. As Mr Bayne submitted in his skeleton argument, when considering whether the response had no reasonable prospect of success, the test is whether it had no reasonable prospect of success, judged on the basis of the information that was known or readily available at the time. (**Radia v Jefferies International Limited** – EAT 007/18). Mr Bayne also referred to the decision of the Employment Tribunal in **Opalkova v Acquire Care Limited** [EAT 0056/21] where it was confirmed that each cause of action should be considered separately and that there were three questions to be asked:-

(i) Did the response have no reasonable prospect of success when submitted or did it reach a stage where it had no reasonable prospect?

(ii) At the stage when the response had no reasonable prospect of success, did the respondent know that was the case?

(iii) If not, should the respondent have known?

7. The claims brought by the claimant were of ordinary unfair dismissal, automatic unfair dismissal for making protected disclosures, being subjected to detriment for making protected disclosures and wrongful dismissal (failure to pay notice pay). The claimant alleged that she had made 12 qualifying and protected disclosures, that as a result she had been suspended and thereafter subjected to various detriments and ultimately dismissed following a process which was tainted by bias and with a superficial investigation, disciplinary process and appeal process. The respondent admitted that the claimant had made a single protected disclosure, but denied that any of the other alleged disclosures amounted to "qualifying disclosures" in accordance with section 43B of the Employment Rights Act 1996. The respondent put forward as its potentially fair reason for dismissing the claimant, a reason related to her conduct. The respondent maintained throughout the proceedings that the claimant had been guilty of bullying and harassing behaviour towards her colleagues and subordinates. In its reasons, the Tribunal found that the respondent had failed to establish that its reason or principal reason for dismissing the claimant was a reason related to her conduct. The respondent failed to call the investigation officer to give evidence to the Tribunal. The dismissing officer was only able to refer to "themes" which had emerged from various interviews of members of staff, which interviews were conducted in a manner which suggested pre-judgment and bias towards the claimant. The alleged investigation lasted for some 18 months, following which a report was prepared, but which report was

not disclosed to the claimant for several months thereafter. Those witnesses who did attend to give evidence on behalf of the respondent were found by the Tribunal to be totally unreliable, and in some cases, untruthful.

8. At today's costs hearing, the Tribunal enquired of Mr Bayne as to whether the respondent was to put forward any explanation as to why the suspending officer and investigating officer had not been called to give evidence. Mr Bayne confirmed that no such explanation would be forthcoming.

9. The Tribunal explored with Mr Bayne the basic principles involved in an allegation of unfair dismissal where the reason put forward by the respondent related to the employee's conduct. Mr Bayne accepted that ordinarily the Employment Tribunal would expect to hear from the investigating officer, dismissing officer and appeal officer. It was clear and apparent from the grounds set out in the original claim form ET1 that the claimant challenged the reasonableness of the investigation, the reasonableness of the disciplinary procedure and the basis of the findings of both the dismissing officer and the appeal officer. Mr Bayne conceded that, ordinarily, that would be the case, but submitted that there was no obligation or requirement on a respondent to call those persons to give evidence, if other witnesses and documents were available to support the respondent's case.

10. The Tribunal pointed out to Mr Bayne the criticism made by the Tribunal in its liability Judgment, and further that such criticism had been noted by the Employment Appeal Tribunal when dealing with the respondent's appeal against that liability Judgment. The Employment Appeal Tribunal's comments were:-

> *"All in all it is hard to see how the findings could have been much more critical of the respondent. The respondent was found to have treated the claimant in a grossly unfair manner starting shortly after she had indicated her intention to invoke the respondent's whistle blowing policy and culminating in her dismissal."*

11. The Employment Tribunal liability Judgment records how Mr Rudd had systematically dismantled the evidence of those witnesses put forward by the respondent. Mr Bayne's response today was that it was reasonable for the respondent to assume that their witnesses would come up to proof and that it was reasonable for the respondent to stand behind those witnesses where there were serious allegations being made against the respondent's employees. The Tribunal rejected those submissions. It is obviously the case that the respondent is liable for the acts of its employees. The respondent must accept responsibility for the conduct of those employees and it is the respondent who is ultimately liable to pay any compensation in respect of the acts or omissions of those employees. If those employees fail in their duty and obligations to undertake fair and proper investigations into allegations brought in Employment Tribunal proceedings and to prepare truthful and accurate witness statements, then the respondent must be responsible and bear the costs of those shortcomings.

12. At the liability hearing, the Tribunal were satisfied that the respondent failed to discharge the burden of proving a potentially fair reason for its dismissal of the claimant. The Tribunal found that there was no substance whatsoever and the respondent's allegations that the claimant had committed acts of misconduct

and certainly none which could ever justify dismissal on the grounds of gross misconduct.

13. Similarly, both the Employment Tribunal rejected the respondent's the contention that the claimant had only made one qualifying and protected disclosure. The Tribunal were satisfied that it must have been immediately apparent to the respondent and those advising it, that the claimant's allegations that she had made qualifying and protected disclosures were bound to succeed. Furthermore, the respondent's contentions that the claimant had not been subjected to any detriments because she had made those protected disorders were similarly doomed to failure. The treatment administered by the respondent to the claimant was clearly such that it would in the eyes of any reasonable person satisfy the definition of "detriment". The respondent was put to an explanation as to why that treatment was administered. The reason given by the respondent was wholly rejected by the Employment Tribunal and in the absence of any meaningful explanation, the Tribunal was entirely satisfied the reason for the detrimental treatment was because of the claimant's protected disclosures.

14. The Tribunal was not persuaded by Mr Rudd's submission that it must have been clear to the respondents from the date they received the claim form ET1, that the allegations by the claimant could not be properly defended. The respondent was entitled to defend those claims, based upon the information given to it by those members of the management team who were involved in the procedures from the claimant's suspension to her dismissal. However, the Tribunal was satisfied that a time must have arrived when it became abundantly clear to the respondent that it could not continue to defend the claims brought by the claimant. The Tribunal found that the relevant time was once the respondents had received the claimant's witness statement, had prepared its own witness statements and had the opportunity to compare all those statements in light of what was contained in the bundle of documents. The Tribunal found that date to be 14 days after the exchange of witness statements. The Tribunal examined the timetable in the case management orders made by the Employment Tribunal. The original date for exchange of witness statements was 8 March 2019. An extension of time was granted to 31 May 2019 and again until 17 July 2019. The Tribunal found that not later than 31 July 2019 (bearing in mind that the liability hearing was due to start on 19 August 2019) the respondent ought to have been aware their defence had no reasonable prospect of success. The Tribunal found that costs incurred by the claimant after 31 July 2019 should be paid by the respondent because thereafter the response had no reasonable prospect of success and by continuing to defend the claims, the respondent acted unreasonably in its conduct of the proceedings.

15. Having made those findings, counsel for both sides were invited to prepare the appropriate calculation of the costs incurred by the claimant after 31 July 2019. After a short break counsel confirmed that the only costs incurred by the claimant after that date were counsel's fees for the liability hearing in the sum of £10,500, including VAT.

16. Mr Rudd then submitted that the respondent should also pay the claimant's costs of the application for costs at the hearing of that application. That application is made on the basis that the respondent's unreasonable conduct had resulted in the costs application being made and the respondent's refusal

to offer to pay any costs that led to the contested hearing. Mr Rudd claimed counsel's fees for the hearing in the sum of £1,940.40 and solicitors costs of £2,464.50.

17. Mr Bayne submitted that the respondent must again satisfy the Tribunal that the respondent had acted unreasonably in the conduct of the costs application before the Tribunal could award the costs of the costs application. The Tribunal found that the costs incurred by the claimant in pursuing the claim for costs flowed naturally from the respondent' pursuit of a response which had no reasonable prospect of success and the respondent's unreasonable conduct in continuing to do so. The Tribunal was further satisfied that it must have been equally apparent to the respondents that it was more than likely that the Employment Tribunal would award costs to the claimant in a case such as this, based upon findings set out above.

18. The Tribunal found that Mr Rudd's fee for the costs hearing in the sum of £1,500 plus VAT and expenses was reasonable and proportionate in all the circumstances. The Tribunal was not satisfied that the claimant's solicitor's fees were reasonable or proportionate, but found that those fees should be limited to the sum of £1,500 plus VAT. The total for the costs of the costs application itself are therefore £4,404.90.

19. The total sum ordered to be paid by the respondent in respect of the claimant's costs is therefore £14,904.90.

G Johnson _____

Employment Judge Johnson

Date 27 September 2022