EMPLOYMENT TRIBUNALS

Claimant: **Mr. W. Malik**

Respondent: **London Borough of Hounslow**

London Central **On:** **14 March 2017**

Employment Judge Goodman
Ms J. Phillips
Dr V. Weerasinghe

JUDGMENT

No award of costs is made on the Claimant's Application

REASONS

1. The Tribunal panel that decided the substantive claim met today to consider the claimant's application for costs to be paid by the respondent. At the request of the parties this was decided on written representations only.

2. In order to decide the application we read or reread the following:
   - the written reasons (38 pages) sent to the parties on 19 July
   - the claimant's application for costs (7 pages) 14 August 2016
   - the preliminary response (2 pages) 15 August 2016
   - claimant's further information (4 pages) 21 October 2016
   - claimant's summary schedule of costs 21 October 2016
   - respondent's formal written response to application (4 pages) 3 November 2016
   - claimant's further information about charging basis 21 November 2016

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

"**When a costs order or a preparation time order may or shall be made**

76.—(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 (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. Thus, the normal rule is unlike that obtaining in the courts. In the employment tribunal, each party bears its own costs, unless the tribunal makes an order in the circumstances set out in rule 76. This rule is itself a two-stage test. First the tribunal must consider whether there has been vexatious (et cetera) conduct or no reasonable prospect of success, and then, if that threshold is passed, the tribunal must consider whether to make an order.

5. The claimant applies on the basis that the conduct was "unreasonable and vexatious, elsewhere "unjust, unreasonable misconceived and vexatious", and more particularly, that throughout the events preceding dismissal, as well as the conduct of the proceedings, the respondent engaged in "rigid resistance", both generally, and in refusing to take the whistleblowing allegation seriously.

6. Despite the length of the application, there is very little detail what respondent did, other than to defend the claim. We agree with the respondent, which described the application as "rich in verbiage and short in actual facts".

7. We deal first with the assertion that the response was misconceived, which we understand to mean that it had no reasonable prospect of success. We think this is far from the case because of the following points:

7.1 The respondent succeeded in showing that there was no unfair dismissal, whether section 98 or section 104A.

7.2 Two of the three respondents succeeded in showing that no claim should have been brought against them because neither was the employer, and in this respect it seemed from submissions that the claimant had confused protected disclosure claims of the Employment Protection Act with victimisation claims under the Equality Act.

7.3 The respondent succeeded in more than half of the matters alleged as detriment for making protected disclosure.

7.4 The respondent also succeeded in showing that some of the detriments found to relate to protected disclosure were out of time, until on a reconsideration application the claimant's solicitor produced a previously unknown early conciliation certificate. Early conciliation certificates are only available to respondents if the claimant discloses them, and this one had not been disclosed.

8. Substantial parts of the response therefore were not misconceived.

9. We move on to the assertion that the conduct of the proceedings was vexatious or unreasonable. We picked out from the claimant's application letters the following specific matters:

9.1 there was no evidence for the respondent's assertion that the claim was offered temporary alternative duties (27, 28,29)

9.2 respondent facing an earlier confusion over whether the policy would be handled under whistleblowing or grievance procedure was a typo. (30)

9.3 the criticism of Peter Newlin's investigation of the whistleblowing allegation (32)

9.4 there was no valid whistleblowing assessment (33)

9.5 they "unreasonably and scandalously sought to deny and cover up" the whistleblowing.

10. Of the matters identified in 9.1, 9.2 and 9.3, none of these matters was, in our view, so unreasonable as to sound in costs. The first two are details in the overall context of the complex story. The third is important, but was only part of the facts to be considered in deciding whether whistleblowing caused individual detriments, or the dismissal. 9.4 is of a piece with 9.3. The final paragraph of the reasons set out our concerns about the respondent's confusion of policies, but that does not mean the conduct of the proceedings was unreasonable, or that defending the claim was misconceived.

11. Finally, with regard to the alleged cover-up in 9.5, we could not understand what was said to be covered up. The only set of facts which might make this was the majority finding that the HR Department did not tell the dismissing officer anything about the content of the claimant's grievance (or whistleblowing). It is a stretch to call this a "cover-up", when it might have been done to avoid prejudicing the mind of the decision-maker on the absence issue. There was also ample opportunity for the claimant's representative to have told the decision-maker what the grievance or whistleblowing complaint had been about, but he did not, and there is no allegation that anything the claimant solicitor putting his lengthy written submissions to the dismissing officer had been redacted by the respondent. In any case, only two members of the tribunal found this, and the minority view was that it had not been covered up and was known to the decision-maker.

12. In conclusion, the claimant did not demonstrate what the respondent had done that was unreasonable or vexatious such as to sound in costs.

13. The tribunal understands how difficult the process has been for the claimant and that he was put to difficulty and expense in bringing the claim. The tribunal was critical of the respondent in the way set out in the reasons, but as tribunal costs do not follow the event, the fact that respondent lost on these points does not mean that there should be an order for costs.

14. Even if we had found that there should be an order for costs, we did not understand the basis on which cost should be awarded for legal representation while the claimant was employed. The rule is clear that a costs order is made all the conduct of the proceedings, or the adequacy of

the response, and makes no mention of costs incurred before the detriment or dismissal for which the claim is made. Arguably the claimant's expense in this respect could have been an item of special damage, but it was not so claimed.

15. Finally, had we been assessing costs, we would not have accepted that an hourly rate of £200 was reasonable between the parties. The current costs guidelines allow £113 per hour for paralegals in outer London postcodes. We would also have treated the statements of time incurred with scepticism. They are too general to be reliable, even on summary assessment; the claimant was invited to prepare a breakdown as for summary assessment in the County Court, but declined to do so.

Employment Judge Goodman
14 March 2017