EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Parry**

Respondent: **L&D Brothers Ltd**

Heard at: **Mold** **On: 13 April 2018**

Before: **Employment Judge S Davies (sitting alone)**

Representation:
Claimant: Mr Roberts, Counsel
Respondent: Mr Smith, Consultant

JUDGMENT
(COSTS ORDER)

1. It is the decision of the Employment Judge sitting alone that the Respondent is ordered to pay the Claimant £5,340.00 in respect of costs under Rule 76 of the Employment Tribunal Rules of Procedure 2013.

2. Reasons were given orally at the hearing.

3. Judgment having been sent to the parties on 21 April 2018 and reasons having been requested by the respondent on 20 April 2018, these written reasons are provided in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

4. The hearing start time was delayed until 11.30am following a request from the parties for time for settlement discussions which did not prove fruitful.

5. I was presented with a bundle of documents containing the Claimant's written application for costs sent to the Tribunal on 20 November 2017 and the Respondent's written response dated 27 November 2017.

6. The Respondent provided a 'Skeleton Argument as to Costs' (undated) which I read prior to the hearing and I heard oral submissions from both representatives.

7. At tabs 6 and 7 of the bundle were my enquiry of 31 January 2018 and the Claimant's email response of 13 March 2018. In the response the Claimant confirmed that she did not seek detailed assessment of costs (the amount in the Schedule of Costs exceeded £20,000) and confirmed her solicitor's rate (£177) and PQE (5 years) by reference to the 'Guideline figures for summary assessment of costs'.

8. Mr Roberts confirmed that the case of **Mardner v Gardner UKEAT/0483/13** was not relied upon (as had previously been signaled by the claimant). I indicated to the parties that the hourly rate paid by the insurers was £100 (page 2 of the application for costs); Mr Roberts confirmed that the Claimant sought payment on the basis of the hourly rate actually paid and not on any higher rate.

9. The hearing was considered in 2 stages; firstly, the question of whether I would exercise my discretion to make an order for costs and, if so, secondly, dealing with quantum.

Whether to exercise my discretion to make costs order

10. In summary the Claimant's submissions were that there had been unreasonable conduct by the Respondent in defending the claims, which it was contended were plainly going to succeed and that there were no prospects of success for the defence. Somewhat less forcefully, it was submitted that this behaviour could be considered vexatious. In outline the first submission related to the incident of assault by Mrs Griffiths against the Claimant at the Christmas party; it was inevitable that the Tribunal would reach the decision that it did because of the Magistrates Court conviction in May 2017.

11. The Claimant submitted with regard to the broader case, that the breaches of contract were so obvious (including the removal of IT access/passwords and the removal of the Claimant from Companies House register) that there were no reasonable prospects of defending the claim. I was also referred to those matters of conduct which the Respondent intimated had been

discovered post termination of employment and were set out in Mr and Mrs Griffiths' witness statement but were not pleaded in the ET3 response and were not proceeded with at the hearing.

12. Finally, I was referred to an approach by the Claimant with regard to settlement, but Mr Roberts rightly conceded that there was no evidence before me of this approach and Mr Smith could not assist as he was not aware of it.

13. In summary the Respondent's submissions were to remind me that cost orders in the Tribunal are the exception rather than the rule. That there was no costs warning or application for a Deposit Order or strike out made on behalf of the Claimant and that the Respondent had been successful in some elements of its defence (the claim for contractual sick pay and with regard to the number of keys for which a deduction from wages was made). As regards the assault, Mr Smith submitted that different evidence was presented to the Employment Tribunal; the email at page 106 - the statement it is alleged Carl Haycocks made to the HR professional investigating the grievance. Mr Smith submitted that there was no suggestion that its contents were fabricated and I had been invited to reach a different conclusion with regard to the assault, based on this email evidence which was not available at the Magistrates Court hearing.

14. With regard to constructive dismissal Mr Smith referred me to the first two parts of the legal test; whether there had been a fundamental breach of contract (in this case the implied term of trust and confidence) and secondly whether the Claimant had affirmed the breach. He submitted that satisfying the test was not contingent on whether the Respondent accepted the assault had taken place and the question of each alleged breach and whether it had been affirmed was something that needed to be decided by me at the hearing, which needed to proceed regardless of whether the assault had taken place. Mr Smith also submitted that I had not made any findings of dishonesty in my liability Judgment (although Mr Roberts in response submitted that dishonesty was implied because of my findings).

15. I take as my starting point that cost orders are a relatively rare occurrence and a matter of discretion for me under Rule 76.

16. Tribunals make findings of fact as to whether they prefer one version of events over another on a daily basis, so the concept of implied dishonesty, suggested by Mr Roberts, where I have preferred one version of events to another could be applied to a huge number of the cases dealt with in Tribunal every day yet costs are not awarded in each such case. I also note that high bar for concluding there has been vexatious conduct.

17. Turning now to the particular matters I was referred to starting with the assault, I reminded myself of the email evidence presented at page 106. The Respondent's representatives must have known that this document alone would be extremely unlikely to persuade an Employment Judge to make a different finding to that that was reached in the Magistrates Court, where the standard of proof is higher. The Respondent should have known or been advised that without hearing evidence from Mr Haycocks in person at the hearing, a Tribunal would place little weight on a written document. Particularly this document; I note there is no suggestion that this content is fabricated, but the email does not even emanate from Mr Haycocks himself, it was sent by the HR professional to herself. To that extent, I consider that the defence regarding the assault had no reasonable prospect of success and furthermore it was unreasonable for the Respondent to persist in denying the assault had taken place in light of the criminal conviction and the way in which it sought to contest that at the Tribunal liability hearing.

18. I do not consider, however, that the Respondent's actions were vexatious, that is a high hurdle, rather they are indicative of an intransigent stance where the personal relationships had broken down to such an extent as they have between the parties in this case.

19. I am mindful that the Claimant's claim was not based on the assault itself, rather I was asked to consider the Respondent's response towards the Claimant following the assault. Although, to an extent, the issues are intertwined in that there was no acknowledgment by Mr Griffiths of the assault and therefore he made no assurance with regard to her safe return to work. The fact of the assault was the catalyst to the claim, rather than being an issue central to its determination.

20. Turning now to the case more generally, and notwithstanding my comment that 'implied' finding of dishonesty being something that could be a very regular feature of Tribunal decisions, I do consider that the Respondent's defence was unreasonable in one respect; Mr Griffiths position with regard to the removal of the Claimant's access to email and computer systems. The documentation at page 66 and 67 of the original bundle was strongly persuasive evidence that he had instructed the IT company to remove the Claimant's access to the computer systems, but he sought to deny this in the defence, contrary to those documents. This seems to me to have been an unreasonable position to adopt in light of that documentary evidence to the contrary and his failure to call evidence from the IT support team in person.

21. Mr Roberts submitted that had the Claimant resigned at the point that her IT access was removed and she was removed from Companies House register that hers would have been an 'open and shut' plain case of constructive dismissal. The submission was well made but it takes me to

the submissions of Mr Smith when he referred me the test for constructive dismissal. The fact is that the Claimant did not resign at that point in time. Perhaps understandably in light of her length of service, she instead elected to remain in employment, although on sick leave, whilst the grievance process was ongoing. Where an individual chooses not to react to a breach of contract by resigning immediately, they run the risk that their actions could be interpreted by a Tribunal as having affirmed the employment contract and waived the breach. I cannot say in the particular circumstances of this case that there was no reasonable prospect of success with regard to this line of defence; there was a need for a Tribunal to consider the evidence and to reach conclusions based upon it.

22. As for the alleged misconduct which it was said was discovered post termination of employment, these matters were not pleaded rather they were raised in the witness statements of Mr and Mrs Griffiths. I identified at the very start of the liability hearing that they had not been pleaded, Mr Smith confirmed that there was no application to amend the Response and accordingly those parts of the witness statement did not feature in the evidence and I did not take them into account. There was no evidence submitted on behalf of the Claimant to counter those allegations by way of a supplementary statement. In circumstances where the Claimant's representatives had not identified this issue prior to the liability hearing and it was dealt with as a preliminary issue as the hearing commenced, I do not consider it would be appropriate for me to base a decision on a costs order on this aspect of the Respondent's defence.

23. Mr Smith referred me to the fact that there was no cost warning or application for deposit order or strike out; that is not a conclusive factor either way.

24. I considered it appropriate to exercise my discretion to make a costs order with regard to the matters I identified as satisfying the test in Rule 76.

25. At this point in the hearing, I heard submissions from both sides with regards to quantum and the Schedule of Costs.

Amount of costs order

26. The Claimant seeks an order for the entirety of her costs and does not identify a particular period in time from which point she says costs should be payable.

27. I set out a brief chronology of events; ACAS Early Conciliation started on 16 March 2017, the EC certificate was issued on 16 April 2017, the criminal conviction for assault took place on 8 May 2017, ET1 was submitted on 4 July 2017, the ET3 on 4 August 2017, exchange of witness statements on

25 September 2017 and the Tribunal hearing was heard on 6 and 7 November 2017. From this chronology it is clear that the outcome of the criminal trial was known prior to Tribunal litigation commencing.

28. There will be a limitation on the amount of costs awarded for the reasons I have already given; I could not say there was no reasonable prospect of success with regard to aspects of the defence and a hearing was needed to determine factual disputes. Additionally, the Respondent was successful in minor elements of its defence; sick pay and a deduction with regard to a number of keys. The costs order that I make should reflect costs incurred in dealing with only those matters that I have identified as having no reasonable prospect of success or where the Respondent has acted unreasonably.

29. Costs are compensatory in nature. My primary consideration when looking at summary assessment of costs is proportionality, that is key, even if it is reasonable and necessary to have incurred a cost those costs must be proportionate. The Schedule of Costs as originally presented exceeded £23,000 in a case where the total amount of compensation awarded was £18,303. The legal costs claimed in the Schedule were not proportionate to the value of the claim.

30. I am also mindful that the approach in summary assessment is a broad brush and in light of my reasons for making a costs order, it was not terribly instructive for me to go through the Schedule of Costs item by item because the Schedule relates to all costs for all aspects of the case, perhaps including some pre-litigation work.

31. I am grateful for the pragmatic suggestions from Counsel as to how I might approach this exercise by ordering a proportion of the total amount, but I reject that suggestion because the Schedule of Costs relates to the whole case. I cannot discern which costs have dealt with those particular aspects that I have found to be unreasonable or having no prospects of success. However, in light of the strong evidence that an assault had taken place, and the documentary evidence with regard to removal of access from IT systems, I imagine relatively little because the Claimant's solicitors can have been assured that they had a strong case.

32. When it comes to Counsel's fees, I am persuaded that a hearing would have taken place and I am mindful that the assault was not one of the reasons relied upon by the Claimant but rather the catalyst that sparked the events which led to the claim. However, I am persuaded by the submission on behalf of the Claimant that had there been acceptance of the assault as a fact at an early stage after conviction, that may well have changed the approach to litigation, possibly reducing the number of witnesses and meaning the case could be dealt with in 1 day rather than 2. I concur with

Mr Smith that the liability hearing was relatively tight for time, but that was on the basis that all matters were 'up for grabs'. That said, the case was not overly complicated and if fewer issues remained live for determination I consider a shorter hearing would have been possible.

33. The amount of costs ordered is £5,340, on the basis that costs are compensatory and the sum ordered is equivalent to the amount that was paid by the Claimant personally (including VAT) prior to claiming legal expense insurance and half of Dr Ahmed's Counsel's fees (to reflect the shorter hearing that would have been possible).

Employment Judge S Davies
Dated: 30 April 2018

REASONS SENT TO THE PARTIES ON

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……30 April 2018……
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS