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EMPLOYMENT TRIBUNALS

Claimant: Ms F Oluwo
Respondent: Essex Partnership University NHS Foundation Trust
Heard at: East London Hearing Centre
On: 23 June 2017
Before: Regional Employment Judge Taylor

Representation

Claimant: Did not attend (written submissions supplied)
Respondent: Did not attend (written submissions supplied)

JUDGMENT

The Judgment of the Tribunal is that the Respondent's application for an order for an award of costs is dismissed.

REASONS

1. This claim was presented by the claimant on 14 June 2016. The claimant was employed by the then South Essex Partnership University NHS Foundation Trust as a Staff Nurse.
2. On the application of the respondent the name of the respondent was amended to Essex Partnership University NHS Foundation Trust and the title to the proceedings amended accordingly.
3. The brief background to this claim is that the claimant was dismissed following an incident that occurred at her place of work, on 29 June 2015, when a patient collapsed. The claimant was the first member of staff to respond but, it is alleged, she failed to respond appropriately to the emergency situation. The claimant was subsequently dismissed for gross misconduct for her failure to respond appropriately to that event. In her defence to the disciplinary proceedings, the claimant claimed that she had a disability which prevented her from responding appropriately to the emergency, namely a heart condition identified by her as Cardiac Myxoma. Her disability, she claimed, caused her to be breathless such that she was unable to carry out the necessary cardiopulmonary resuscitation (CPR) at the time. In its response to the claim form, dated 9 September

2016, the respondent accepts that the claimant was a person with a disability, as defined, but denied there had been any mention by the claimant of her being unable to perform CPR or react effectively and appropriately to an emergency situation. The respondent claims that CPR is a skill that all nursing staffs are expected to perform and if the claimant knew she was unable to perform this basic function or that she was unable to provide appropriate care and treatment to a patient in such circumstances she was under professional obligation to notify her managers about her inability.

4. The respondent resisted all of the claimant's claims of unfair dismissal, unlawful direct disability discrimination, indirect disability discrimination, discrimination arising from disability and failure to make reasonable adjustments.

5. A preliminary (case management) hearing was held before Employment Judge Jones on the 26 September 2016. The claimant attended and was represented by Ms Salami, a consultant and the respondent was represented by Miss Clayton, a solicitor. On that occasion the issues to be decided were considered, but not finalised, and the final hearing was listed to be held on five non-consecutive days between the 2 and 9 May 2017.

6. One of the claims brought by the claimant was unfavourable treatment because of something arising in consequence of her disability, pursuant to section 15 of the Equality Act 2010. It appeared from the case management summary that given this contention medical evidence to support the claimant's claim, brought under section 15, would be needed. Case management orders were made which included that the claimant was to produce medical evidence to support her case by 14 November 2016:

'By 14 November 2016, the claimant is to produce medical evidence to support her case and if necessary, to counteract the occupational health reports, in respect of her complaint that she could not do CPR because of her heart complaint.'

7. Notwithstanding the Tribunal's orders, the claimant failed to provide medical evidence and on 14 November 2016 she applied for an extension of time to comply with this part of the order. The tribunal wrote to the claimant on 5 December 2016 requesting further information in respect of her application to extend time. The claimant replied on 14 December. The respondent responded to the tribunal's letter in an email dated 30 December 2016 setting out that the claimant and her representative had agreed at the preliminary hearing that it was necessary for her to disclose her medical records and any additional medical report that she may wish to produce in support of her contention that she did not have the ability to do CPR. The claimant had not produced any medical evidence at all by 24 February 2017 when the respondent applied for an unless order:

'Unless the claimant complies with the tribunal's order made at the preliminary hearing on 26 September 2016 to provide medical evidence to the respondent regarding her allegation that she could not do CPR because of a heart condition (including both the claimant's GP records from 2008 to 2016 and any other report she intends to produce) within 14 days, the claim would be struck out without the need for any further order of the tribunal as at the date of non-compliance.'

8. The claimant opposed the application by letter dated the 28 February 2017 but on 10 March 2017 Employment Judge Russell issued an 'unless order' requiring the claimant to comply with the tribunal's order to produce medical evidence by 23 March 2017. The claimant then provided a limited extract from her GP's electronic notes on 3 March 2017. The GPs records were not provided in full. The respondent made a further application for the unless order to be confirmed dated 7 March 2017. An unless order was made

requiring the claimant's GP records relevant to her heart condition from 2008 until 2016 to be disclosed. The claimant's representative ceased to act for her on that day.

9. In a letter dated 20 March 2017 the claimant contended that she had complied with the order for disclosure to the fullest extent possible because she was still waiting for results from tests that would measure the severity of her condition. The tribunal granted the claimant an extension of time until 31 March 2017 to disclose all of the medical evidence. By this time the claimant had secured alternative representation.

10. Meanwhile, the claimant had not exchanged witness statements by the then scheduled date of 5 April 2017. The respondent brought this to her representative's attention and subsequently made an application to the tribunal for an unless order on 20 April 2017 for failure to comply with the order to exchange witness statements. There appears to have been an oversight in that no directions were given by the tribunal upon the expiry of the extension of time, 31 March 2017.

11. Following receipt and consideration of the medical evidence the claimant had disclosed, on 4 April 2017 the respondent sent the claimant a 'without prejudice save as to costs' letter explaining why it considered the claimant's claims had no prospect of success. The respondent offered not to claim costs if the claimant withdrew her claim before 11 April 2017. The claimant replied in a letter dated 18 April 2017 rejecting the threat of costs and arguing that, on balance, she had a good chance of succeeding in her claim.

12. By an email dated 24 April 2017 the claimant withdrew her claim attributing her decision to 'personal reasons'. The claimant's withdrawal of her claim was acknowledged by the tribunal and the five day hearing listed to commence on 2 May 2017 was vacated. A dismissal judgment was signed by Employment Judge Warren and sent to the parties on 15 May 2017.

13. The respondent made an application for an award of costs in a letter dated 1 June 2017. The claimant provided written response opposing the respondent's application for costs by a letter dated 13 June 2017. The respondent requested that the application be considered without a hearing in order to save unnecessary costs. The claimant agreed to this in a letter dated 13 June 2017. Judge Warren had a letter written to the parties dated 15 June confirming the decision would be taken on the papers without a hearing and that the parties need not attend.

14. This matter duly came on before the tribunal to determine respondent's application for costs. Due to an error, presumably on the part of the respondent's solicitor, counsel for the respondent attended the tribunal office on 23 June 2017 but given that the costs application was to be considered without the parties present the respondent did not attend.

The applicable law

15. The employment tribunal has the power to make a costs orders in favour of a party to proceedings. Rule 76(1)(a) of the Employment Tribunals Rules of Procedure 2013 provides that a tribunal may make a costs order and shall consider whether to do so, where it considers that:

"A party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) all the way that the proceedings (or part) have been conducted or

Rule 76 (2) provides:

A tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.”

The submissions of the parties

16. The respondent limits its application for award of costs to a specified amount exceeding £20,000 and makes an application pursuant to both rules 76(1)(a) and rule 76(2):

1. The claimant withdrew her claim on 24 April 2017, without notice or warning, eight days before the hearing of the claim was due to begin on 2 May 2017 and after the brief fee for counsel had been incurred;
2. When the claimant withdrew her claim she was in breach (by 19 days) of the case tribunal’s case management order that witness statements be exchanged by 5 April 2017;
3. Given that the claimant had not exchanged witness statements the claimant may have already decided, by that date, not to pursue her claim but have failed to tell the respondent this.
4. The claimant’s very late disclosure of medical evidence on 3 March 2017 following an unless order, followed repeated breaches of the tribunal’s earlier case management directions as to disclosure of evidence.
5. The medical records disclosed by the claimant show that the claimant’s claim had no reasonable prospect of succeeding. The respondent was unable to set out its position on the merits of the claimant’s claim until it had seen this medical evidence. After considering the medical evidence produced by the claimant the respondent considered that it showed that the claimant’s claim had no reasonable prospect of succeeding and it then invited the claimant to withdraw without cost consequences.
6. The claimant order have appreciated before the latest medical evidence that her claim had no reasonable prospect of success.

The claimant’s submissions

17. The claimant submitted that she had reasonable grounds for bringing her claims. The claimant had withdrawn her claim because of the impact it was having on her health and ongoing financial difficulties.

18. The claimant was surgically treated for a heart condition in 2008 and as a result of the ongoing symptoms of cardiac myxoma is exacerbated by stress. The claimant was referred to a psychologist and as a result was prescribed some medication. The claimant attached a letter showing that she had been referred for therapeutic treatment with Barking and Dagenham Improving Access to Psychological Therapies Service.

19. The claimant argued that she had reasonable grounds for bringing the claim and sufficient evidence to support her claim at a tribunal hearing. The claimant denied that she

had acted unreasonably in the late disclosure of her medical records and did not accept that the late disclosure of the medical records had any effect on the respondent's decision not to send her a costs warning letter until 4 April 2017.

20. The claimant's delay in providing medical evidence was through no fault of own. She was awaiting assessment by a consultant and placed on a waiting list for that. The claimant's position was that although her GP records do not explicitly provide evidence that her condition gives her shortness of breath, making it impossible for her to provide an emergency response. She submitted that shortness of breath is a well-known symptom of Cardiac Myxoma and she did not have the lung capacity necessary for performing CPR. Both parties position on the unfair dismissal claim was unaffected by the claimant's medical evidence and the disability discrimination complaints were not solely dependent on the claimant presenting medical evidence she could not perform CPR. The claimant submitted that the respondent could have engaged with the claimant sooner about the position as to costs.

21. The claimant did not accept that she had acted unreasonably in breach of the case manager order in respect of exchange of witness statements. The respondent had agreed to exchange statements on 18 April with the claimant's representative, but even the respondent was not in a position to exchange witness statements until 19 April 2017. It was on the following weekend that the claimant could not continue preparing for the claim due to the adverse impact the preparation was having on her health. Legal advice was sought by her on Monday, 4 April 2017, which led to the claimant withdrawing the proceedings.

22. Claimant is not in a financial position to pay costs. The claimant has mortgage arrears, debt recovery fees and a monthly overdraft. She was recently summoned in respect of council tax payments. The claimant has one dependent. A costs award would put the claimant in considerable financial hardship.

The conclusions

23. Tribunals have a wide discretion to award costs where they consider that there has been unreasonable conduct in the bringing or conducting of proceedings. Unreasonable conduct includes conduct that is vexatious, abusive or disruptive.

24. The conduct alleged by the respondent to have been unreasonable was the claimant withdrawing her claim shortly before the hearing and not by the date given in its costs warning letter. The respondent argues that the claimant's conduct was unreasonable because she was clearly and firmly put on notice that her claims had little prospect of success by its costs warning letter and she ought to have withdrawn her claim, at the latest, on the date proposed by the respondent which was the 11 April 2017. The respondent submitted the direct effect of the claimant's delay was that the respondent incurred unnecessary additional costs in preparing for the hearing, which included the cost of counsel's brief fee for the final hearing. The tribunal considered the reasons why the respondent maintained that the claim had little prospect of success. Looking at the claimant's claim it appeared that her case was materially dependent on her assertions that she was not capable of performing CPR by reason of her disability. Case management orders had been made to give the claimant an opportunity to obtain the best medical evidence in support of this argument. However, the claimant had explained in her letter to the respondent why she disagreed that failing to establish direct medical evidence on this point was not necessarily fatal to her claims.

26. Although the tribunal considered the claimant's claims appeared not to be the strongest of claims the tribunal was not satisfied that the claimant's decision to continue the proceedings was so unreasonable that a cost order should follow. The tribunal bears in mind that the claimant had sought advice from a consultant at the time. The tribunal was not persuaded that the mere fact of pursuing a potentially weak claim constituted vexatious, abusive, disruptive or unreasonable conduct on the part of the claimant.

27. With one break, the claimant had been represented by a consultant throughout the preparation of her hearing and to the last believed that she had an arguable case given the purported effect of her disability and her unblemished length of service.

28. Having regard to all of the submissions, the tribunal is not satisfied that late withdrawal of a claim in the circumstances of the case meets the threshold of constituting unreasonable conduct.

29. The tribunal considers on the submissions presented by the claimant being late preparing witness statements does not, without more, constitute unreasonable conduct. The tribunal had regard to the claimant's contention that at a late stage she was still gathering medical evidence, in that she was waiting assessment by a consultant. The tribunal considers delay to preparation of a witness statement in the circumstances of this case did not constitute unreasonable conduct.

30. To conclude, the tribunal is not satisfied that late withdrawal of a claim and late presentation of a witness statement in the circumstances of the case meets the threshold of constituting unreasonable conduct.

31. Accordingly the respondent's application for an order for an award of costs is dismissed.

Regional Employment Judge Taylor

28 June 2017