EMPLOYMENT TRIBUNALS

Claimant: Mrs L MacInnes

Respondent: Telecare Services Association

HELD AT: Manchester **ON:** 7 November 2017

BEFORE: Employment Judge Ross
Ms C S Jammeh
Mr T A Henry

REPRESENTATION:

Claimant: Mr J S MacInnes, Husband of claimant.
Respondent: Mr P Warnes, Solicitor

JUDGMENT

The claimant's application for a Preparation Time Order pursuant to Rule 75(2) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 is not well founded and fails.

REASONS

1. By letter to the Tribunal dated 16 April 2017 the claimant's representative (her husband) made an application for costs.

2. At the Costs Hearing he clarified that given he had not been paid by his wife to represent her, he was bringing an application for a Preparation Time Order. He also clarified that he was bringing the application on the basis that the respondent had acted vexatiously or unreasonably within the meaning of Rule 76(1)(a) of the Employment Tribunals Rules of Procedure 2013. He confirmed that he did not

make an application for a Wasted Costs Order pursuant to Rule 80 against Ms K Clarke, the respondent's representative during the conduct of the proceedings.

3. Mr MacInnes provided a detailed submission for us to read. We had a witness statement for Ms K Clarke who attended and gave evidence and answered questions from the claimant. We also had a submissions document from the respondent's representative.

4. The Tribunal reminded itself that Rule 76(1) imposes a two stage test. Firstly, the Tribunal must ask itself whether a party's conduct falls within Rule 76(1)(a) namely in this case whether the party or party's representative has acted vexatiously or otherwise unreasonably in either the bringing of the proceedings or the way the proceedings have been conducted .Secondly, if the answer to the first question is yes we must go on to ask whether it is appropriate to exercise our discretion in awarding preparation time order.

5. The Tribunal turned to consider the grounds relied upon by Mr McInnes. Firstly Mr McInnes relied on a "failure to investigate the claim". The Tribunal is not satisfied that there was any finding in our liability judgment that the respondent failed to investigate the claim. The Tribunal reminds itself that this was a case where there were fifteen allegations of discrimination against the respondent. The claimant succeeded in part in one of those allegations. See our liability judgment. The Tribunal is not satisfied that the matters referred to by Mr MacInnes in his submission are relevant to a suggestion that there was vexatious or unreasonable conduct of the respondent or its representative in responding to the claim or the way they conducted the proceedings. The Tribunal notes that a number of matters raised by the claimant at this stage, as elsewhere in his submission document appeared to be an attempt to re-litigate the Liability Hearing at this stage which is inappropriate.

6. We turned to the second ground, failure to disclose evidence. The Tribunal has made no finding that there was an intentional failure to disclose evidence by the respondent. The Tribunal relies on paragraphs 191 to 196 of our Liability Judgment in relation to the disclosure of document at p254 (liability bundle.). The Tribunal remembers that this was a case where the liability bundle was extensive, amounting to some 1,000 pages. The Tribunal did have concerns about document at page 254 and those are expressed in our Liability Judgment. As a result of our concerns we found the burden of proof shifted to the respondent.

7. However we are not satisfied that the concern in relation to document 254 amounts to an intentional failure to disclose evidence. We remind ourselves that the respondent was represented by a claims management organisation. We remind ourselves that the duty to disclose documents is to conduct a reasonable search of documents which are or may be relevant to the case. Where a respondent is represented it is for their representative to inform the respondent of that obligation. The very nature of the exercise means there is discretion inherent in it. The Tribunal reminds itself that, as in this case, documents are sometimes disclosed in Employment Tribunal proceedings having come to light during a subject access request. How a subject access request is dealt with is governed by different

regulations under the Data Protection Act and is not a matter for this Tribunal. However the very fact that the two processes are subject to different rules means that documents which are not produced or found during a trawl for discovery under the Employment Tribunal rules are sometimes produced following a subject access request. The fact that this occurs is not evidence of a respondent "reluctant to meet obligations to disclose evidence" as suggested by the respondent. It simply shows there are 2 different processes.

8. The Tribunal did not express concerns about disclosure of any other documents in the liability judgement. The Tribunal finds that the other documents referred to by the claimant's representative in his submissions are an attempt to re-litigate the liability aspect of the claim.

Refusal to engage in mediation

9. The very nature of mediation means that it is voluntarily and both parties must be willing to commit to it. It is not possible to force a party to mediate a settlement. It is a fundamental misunderstanding of the judicial mediation process to suggest that a refusal to engage in mediation is unreasonable conduct or vexatious conduct. Judicial Mediation is simply a form of dispute settlement which the Tribunal offers the parties. If both parties are interested the Tribunal will mediate between them, it is not unreasonable for a party to prefer not to mediate a dispute.

10. Given that the claimant succeeded in only one part of one of her allegations it is in any event very difficult for the claimant to argue that the respondent acted unreasonably or vexatiously in failing to negotiate a settlement.

Unnecessary delay and harassment

11. There is no dispute that there was a delay in this case coming to hearing. It had an unusual history. The claimant presented her claim to the Employment Tribunal on 21 July 2014. The case was subject to a Case Management Hearing before Employment Judge Porter on 3 September 2014 where the claimant withdrew her equal pay and sex discrimination claim and clarified some of her other claims. The case was listed for hearing on 20 to 23 April 2015.

12. The hearing in April 2015 was before Employment Judge Holmes, Mrs Ensell and Mrs Denton. The Tribunal relies on the judgment and reasons sent to the parties by Employment Judge Holmes on 29 April 2015 where the claimant's claims were adjourned to 11 June 2015 for one day and thereafter to 26 October 2015, having gone part heard. The Tribunal relies on Judge Holmes note that at the lunch adjournment on day three the claimant became unwell. She had a history of coronary episodes and paramedic assistance was called. The Tribunal relies on Judge Holmes note that the Tribunal took the decision, having heard from Ms Clarke and Mr Budgeon (who then represented the claimant) to adjourn the case part heard so the claimant could conclude her evidence when she was well enough to do so and the Tribunal therefore listed the case on 11 June to allow the claimant time to recover and to be fit enough to resume giving evidence. Thereafter the time estimate for the remainder of the case was four to five days and it was fixed to

resume on 26 October 2015 which was the earliest date the Tribunal could accommodate it.

13. The Tribunal find it is not unusual that once a case has been fully prepared for hearing to find that the number of witnesses and the length of their witness statements together with the extent of the documents produced mean that estimated length of hearing is longer than predicted at the preliminary case management stage.

14. The Tribunal finds that unfortunately Judge Holmes was taken ill in June 2015 and so the case could not proceed on that date.

15. The hearing in October 2015 was postponed at the request of the claimant's representative because of her ill heath. She wished to postpone until after she had met with her Cardiologist in November 2015. The respondent was reluctant to postpone the case. The case came before Employment Judge Holmes (see his note) sent to the parties on 21 October 2015.He considered the history and noted that one of the lay members had now left the region so it was not possible to relist the case before the original panel. With reluctance he took the decision to re-list the case before a new panel on the first available convenient dates, 18 April to 27 April 2016.

16. The relisted hearing took place on those dates.

17. The claim succeeded in one part of one allegation and a Remedy Hearing took place on 29 March, 28 April and 7 May 2017 (in Chambers). The delay between the Liability and the Remedy Hearing was due to firstly to the fact that a reconsideration of the liability judgment took place on 1 November 2016 and it was agreed that remedy hearing should not proceed until that had been heard in case it resulted in a new liability hearing. At the conclusion of the unsuccessful reconsideration hearing the case was listed for a remedy hearing which took place on 29 March 2017.

18. Accordingly the Tribunal is not satisfied that the delay in this multi day case was caused by the respondent. The reasons for the delay are listed above. Furthermore, the Tribunal notes that the reason for the case going part heard on the first occasion and not proceeding in October 2015 was a combination of the ill health of the claimant and insufficient time for the case to conclude in the listed period.(At the time the claimant became ill, the respondent’s witnesses had not been reached.) The case did not proceed on the date in June 2015 due to the ill health of the Judge.

19. Mr MacInnes appears to suggest in his submission that the respondent made an application to delay the case which "resulted in Mrs McInnes having a heart attack, losing consciousness and being kept in hospital for eight days".

20. The Tribunal finds that Mr McInnes submissions are incorrect. The respondent did not apply to delay the case. What occurred was appropriate case management by the Tribunal once it became clear the original time estimate was not accurate (for understandable reasons) and once the claimant became ill. The Tribunal notes with concern Mr MacInnes's behaviour towards Ms K Clarke, as recorded by Judge Holmes at that first hearing. His conduct was highly inappropriate. By contrast the Tribunal notes Judge Holmes records "Ms Clarke's conduct before the Tribunal and

in her cross examination has been perfectly reasonable, good mannered, professional and polite and has in no way provoked the reaction that Mr MacInnes has visited upon her".

21. The Tribunal returns to its liability and remedy judgment. The Tribunal finds there was no unnecessary delay by the respondent and no harassment by the respondent or their representative in relation to the conduct of these proceedings. Indeed, the allegation of inappropriate behaviour accepted and documented by Judge Holmes is the behaviour of Mr MacInnes towards Ms Clarke.

Incorrect statements by the respondent and their representative

22. Paragraphs 24 to 33 of the claimant's submissions document set out what the claimant says are inconsistencies in the evidence of the respondent's witnesses and/or the pleadings. The Tribunal finds that these are matters for the liability hearing. Where the Tribunal had concerns about inconsistencies in evidence, it addressed those in the liability judgment. It is not satisfied that there was any conduct in the judgment which can be relied upon by the claimant. Although the Tribunal did have concern about Mr Single's evidence such that it found that the burden of proof shifted, once the burden moved to the respondent, liability did not arise because the Tribunal found a non discriminatory explanation for the conduct.

23. The Tribunal is not satisfied that this shows vexatious or unreasonable conduct in the defending of the proceedings or the way the proceedings have been conducted.

24. The claimant relies on a heading marking "evasion". This paragraph appears to relate to a submission relevant to the liability hearing. There was no specific allegation that a delay in the grievance process was discriminatory at the original hearing. The Tribunal finds this is not relevant to this hearing.

Delay

25. The Tribunal has already dealt with delay (see above). The Tribunal repeats that it is not satisfied that the respondent was responsible for the delay.

Respondent's breach of Tribunal orders

26. The Tribunal notes that this was a complex case with fifteen allegations and a total of seven witnesses (the claimant and six witnesses for the respondent). There was an extensive bundle for both the liability and remedy hearing.

27. We find it is not unusual for there to be a variation of orders made by the Tribunal, furthermore both parties have a duty to co-operate. There is no dispute in this case that there was extensive discovery and some documents because of the subject data access request were produced late.

28. The Tribunal makes no comment about an allegation about the preparation of the original bundle being poor as suggested by previous Judge. From time to time the Tribunal has to work with a bundle which is not well prepared. This Tribunal has

not seen the original bundle before Judge Holmes. In any event the case was restarted before this Tribunal and by the time the case was before the present panel the bundle was suitable.

29. The Tribunal is not satisfied there is anything in this case to suggest that the conduct of the respondent in relation to the bundle amounted to unreasonable or vexatious conduct.

Inadequate preparation of bundles

30. The Tribunal relies on this comment above.

Misleading statements

31. It is extremely serious to suggest that a professional representative knowingly misled the Tribunal. The Tribunal relies on the evidence of Ms Clarke in her statement. The Tribunal found Ms Clarke throughout to be calm, conscientious and mindful of the overriding objective. The Tribunal accepts her evidence that she dealt with this case conscientiously and properly. The Tribunal finds Ms Clarke is correct when she says there were fifteen allegations. They are summarised at paragraph 143 of the Liability Judgment namely 8.1 to 8.7 (seven allegations of direct discrimination but allegation 8.2 is in 2 parts so a total of 8 allegations) and 7 allegations of harassment. (Allegations 3A to G)

32. As stated above, allegation 8.1.2 is in two parts, the first part related to "the respondent has failed to provide the claimant with a car allowance (see page 24 of the Reserved Judgment), paragraphs 161 to 173. The second part of allegation 8.1.2 is in relation to the contractual pension scheme "the respondent has failed to provide the claimant with access to the contractual pension scheme". Accordingly because 8.1.2 is in two parts there are fifteen allegations. (In fact even on allegation 8.1.2. in relation to pension the claimant succeeded only in part because the only finding against the respondent was in relation to failing to backdate her pension contributions sufficiently only. The allegation that the respondent failed to allow her to join the scheme failed).

33. The confusion may have arisen because although the body of the judgment makes it clear that all 7 allegations of harassment fail(see paragraphs 224 to 257 of the judgment) as well as 7 of the allegations of direct discrimination, the Tribunal has not explicitly stated that at page one.

34. The Tribunal finds there is no positive evidence whatsoever advanced to demonstrate that Ms Clarke attempted to mislead the Tribunal and the Tribunal finds she did not and that she acted properly throughout.

35. At the outset of the hearing the claimant did not suggest that he wished to pursue a Preparation Time Order on the basis there was "no reasonable prospect of success". However he has included an entry in his submission document to suggest that he does.

36. This is an extraordinary suggestion. The claimant failed all but part of one of her claims. The Tribunal is not satisfied that the respondent had no reasonable prospect of success in pursuing its response.

37. Accordingly the Tribunal finds none of the grounds have been made out and the respondent did not act unreasonably or vexatiously in either responding to the proceedings or the way the proceedings have been conducted.

38. However in case the Tribunal is wrong about that the Tribunal has gone on to consider a second limb of the test, namely whether we should exercise our discretion. The Tribunal reminds ourselves that costs are the exception rather than the rule in the Employment Tribunal. Costs do not follow the event.

39. This was a case which was complex. It involved fifteen allegations of discrimination. The Tribunal heard detailed evidence over many days. The claimant did not succeed apart from in part of one allegation.

40. There is no suggestion that the behaviour of Ms Clarke has been anything other than courteous and professional throughout.

41. The Tribunal declines to exercise its discretion to award a preparation time order.

Employment Judge Ross

16 November 2017

JUDGMENT SENT TO THE PARTIES ON

20 November 2017

FOR THE SECRETARY OF THE TRIBUNALS