EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mrs A Hayes & Others	**v**	Qantas Cabin Crew (UK) Ltd

Heard at: Reading **On:** 1 February 2018

Before: Employment Judge Gumbiti-Zimuto
Members: Mr A Scott and Mrs A Gibson

JUDGMENT
ON RESPONDENT'S APPLICATION FOR COSTS

1. The claimants are ordered to pay the respondent's costs in the sum of £2,316.00.

REASONS

1. Rule 76 of the Employment Tribunals Rules of Procedure 2013 includes provision that:

> "(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;"
>
> …
>
> "(2) A tribunal may also make 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."

2. At the case management hearing on 25 January 2017, the employment tribunal made an order requiring the parties to give mutual disclosure of documents relevant to the issues which were identified so as to arrive on or before 22 January 2017. It was ordered that witness statements were to be exchanged so as to arrive on or before 10 July 2017. Disclosure was completed by list on 22 February 2017, inspection by each party providing copy documents on 1 March 2017.

3. On 7 July 2017, the claimants' solicitor wrote to the respondent's solicitors informing them that they will not be ready to exchange witness statements on Monday 10 July 2017 and sought an agreed extension of time for exchange to take place a week late on 17 July 2017. No reason was given for the need for the extension. The respondent agreed to exchange statements at 4.00 pm on 17 July 2017. 17 July 2017 was 5 working days before the hearing date.

4. On 17 July 2017, the claimants were not in a position to exchange statements. The claimant's solicitor informed the respondent's solicitor that the claimants should be in a position to exchange statements *"a bit later in the week"*. No reason was given for not being able to comply with the revised deadline.

5. On 19 July 2017, the claimant's solicitor informed the respondent solicitor "*I anticipate being ready a week today.*" No reason was given for the delay.

6. On 26 July 2017, the respondent's solicitors emailed the claimants' solicitor to ask for confirmation that exchange of witness statements could take place at 4.00 pm that day. There was no response. A further email was sent that day at 4.14pm in which the respondent's solicitor said: *"We are now past 4pm and you have not sent the statements thereby breaching for the third time your own deadline in relation to provision of the statements*".

7. The claimants' solicitor responded at 16:57 in the following terms: "*I am unable to finalise my clients' witness statements because your client has not disclosed any rosters beyond November 2016 despite disclosure taking place in March 2017. Can you please ask your client to disclose the rosters applicable to my clients from April 2016 to date. Clearly these are relevant as they will illustrate when my clients have been required to work on the standby roster this year*."

8. The respondent contends that this excuse for breaching the employment tribunal's order is totally without merit. The respondent says that inspection of documents had taken place on 1 March 2017. The claimants could have requested additional documents at any point in the ensuing five months. Nothing was done until after third date proffered for exchange of statements. The absence of a particular document does not excuse the failure to meet the employment tribunal order in respect of witness statements. The claimant should have complied with the order and dealt with any further documents that they then requested either by a supplementary statement or by examination-in-chief. The respondent also says that attention should be paid to the wording of the email sent by the claimants' solicitor on 26 July 2017. It states that documentation was required to "*finalise*" the statements. Implying that the statements were substantively complete but for dealing with the requested rosters.

9. On 27 July 2017, seven working days before the hearing date, the respondent provided the claimant with the disclosure that had been

requested. At 17:06 on 27 July 2017, by email, the respondent's solicitor chased the claimant's solicitor for witness statements. The claimants' solicitor did not respond to the respondent's email.

10. On 28 July at 16:45 the claimant's solicitor sent an email dealing with other matters. Nothing was said about the statements. The email enclosed pages to be added to the bundle and some new disclosure from the claimants. Some of the documents disclosed existed previously and could have been provided earlier. No explanation was given for the late disclosure.

11. On 28 July 2017, the respondent made an application for an unless order.

12. On 31 July 2017, the respondent's solicitor again chased the claimants' witness statements.

13. On 1 August, four working days before the hearing date, at 7:56, the claimants' solicitor wrote to the respondent's solicitor suggesting that she send some but not all of the claimants' witness statements in exchange for password protected versions of the respondent's statements. The respondent provided the respondent's statements on 1 August 2017 at 13:42 in accordance with this request.

14. The respondent wrote to the claimants' solicitor on 1 August 2016 in an email sent at 13:41 setting out a chronology of the correspondence, pointing out that the claimants were in breach of the employment tribunal's order, that the respondent was suffering substantial prejudice and asked "*please now provide an explanation as to the reason for the failure of your clients acting through OHP to exchange statements in accordance with the order (as varied by agreement)*". No answer was ever provided to this request.

15. The claimants' solicitor provided unsigned statements for 11 of the 12 claimants at 16:49 on 1 August and a further statement at 17:01.

16. The respondent's solicitor states that the respondent only had three working days before the hearing to consider the 12 statements.

17. On 2 August 2017, the respondent's application for an unless order was refused by Employment Judge Vowles. The reason given was: "*Due to the proximity of the hearing date, it is too late now to make the order requested."* Judge Vowles highlighted that: "*Sanctions for non-compliance may include striking out and/or a costs order*".

18. On 3 August 207, two working days before the hearing, the respondent's solicitors wrote to the claimants' solicitors concerning problems with pagination of the bundle and late disclosure provided by the claimants and the problems that the late disclosure of the witness statements was having on the case preparation. The respondent states that there was no substantive response from the claimants' solicitor but there was further

entirely new disclosure from the claimants provided without any explanation. The disclosed documents (including emails) in the main existed prior to the disclosure deadline and therefore could have been disclosed then.

19. On 4 August 2017, one working day prior to the hearing, the respondent's solicitors wrote to the claimants' solicitors concerning the late disclosure and problems with the trial bundle.

20. At the start of hearing before the Tribunal on 7 August 2017, there was a discussion about witness statements being served late and documents being disclosed late. The respondent applied to give its evidence first. The claimants resisted the application. The Tribunal gave a ruling that whilst it was not satisfactory that statements were served late, having read the claimants' witness statements, we could see no reason to reverse what would otherwise be the order in which witnesses were to give evidence. We decided to hear from the claimants first.

21. The respondent makes the following submissions.

22. From about 16:00 on 17 July 2017 until 17:01 on 1 August 2017, the claimants were in breach of the employment tribunal's order (as varied by agreement) in respect of the provision of witness statements. No explanation was given for this breach at the time, despite the respondent's request for an explanation, in by letter of 1 August 2017. This letter has not been answered the claimant's solicitor.

23. The respondent says that there is no possible reason that could justify the measure of delay. The late disclosure requested on 26 July 2017 provides no excuse. It was answered in full within 17 hours.

24. The respondent contends that the breach had a profound effect on the respondent's ability to prepare for the trial and caused genuine difficulties. The respondent had been entitled to four weeks' advance notice of the statements. Receiving 12 substantive witness statements with only three working days before the hearing significantly prejudiced the respondent's preparation.

25. The Tribunal was invited to note that until the point of exchange, all the respondent knew of the claimants' case was that contained in the two-page grounds of complaint.

26. The respondent says that the position was compounded by the claimants giving further disclosure extremely late and without any explanation on 28 July, 3 August and 4 August. This, coupled with the late exchange of statements, further prejudiced the respondent's ability to prepare for the hearing.

27. The respondent says that there can be no realistic dispute that the threshold for costs order is met, that the claimants were in breach of

employment tribunal orders, that the claimants and/or their solicitor behaved unreasonably in the conduct of proceedings concerning preparation of witness statements and the provision of further disclosure.

28. The respondent says that the tribunal should not refuse to make a costs order as a matter of discretion and makes the following points. The conduct was egregious; the claimants' solicitor failed to respond properly or give reasons for the failure to comply or to keep to their own revised deadlines; the conduct had a significant impact on the respondent's ability to prepare properly for the hearing; there has been no explanation or apology; there were other areas of preparation by the claimants that have been lacking (the failure to prepare for remedy was pointed out); the claimants had been professionally represented throughout and funded by the UK's largest union.

29. The respondent says that the sanction to be visited on the claimant for the conduct of the nature described is entirely compensatory in an amount that represents the costs to which the respondent has been put and which it ought not to have been.

30. The claimant's, in replying to the costs application, deny that the claimants or the claimants' solicitors conduct of the proceedings has been unreasonable.

31. It is accepted that the statements were exchanged late and that there was a breach of the employment tribunal's order. Reasons are now provided for the late exchange of witness statements. There were 12 claimants in the case. The lead claimant had to give detailed evidence about group disadvantage. It was pointed out that the statements were not all approved at the same time and that the claimants live in different locations in the United Kingdom and abroad. Instructions had to be obtained over the telephone while the claimants were at home, sometimes looking after small children. The respondent had the advantage that most of the witnesses were employed by it in the same location and providing instructions in the course of their work.

32. It was explained that some of the statements were ready earlier than others but it was not feasible to provide the statements that were ready first earlier because all the statements cross-referenced with the lead claimant's statement and some of the other statements also cross-referenced those of other witnesses.

33. The respondent failed to disclose the rosters for the period after November 2016 until it was requested to do so on 26 July 2017. These documents were relevant and should have been disclosed earlier. The claimants' solicitor had 12 claimants to take instructions from before completing the statements.

34. It is denied that the respondent did not know the case they had to meet until the exchange of witness statements. The claimant points out that the

respondent never requested further information about the claimants' claims either at the case management hearing or subsequently, which one would have expected if in reality it did not know what the case was that it had to meet.

35. The respondent's assertion that it was prejudiced by the late exchange of witness statements and therefore ought to be permitted to give its evidence first was rejected by the Tribunal at the start of the hearing. The claimant submits that the respondent's preparation for the case was not in fact prejudiced by the late disclosure of statements as evidenced by the fact that the respondent has only provided one example of the alleged prejudice. This does not appear to have increased its legal costs.

36. The claimants state that the late disclosure of documents was not unreasonable conduct of proceedings nor was there any prejudice to the respondent as a result. It is pointed out that inspection originally took place 1 March 2017 and that there was little disclosure by the claimants at that time and the bulk of documents disclosed came from the respondent in the form of personnel records, internal correspondence and rosters. The late disclosure of documents amounted to approximately 80 pages of documentation, less than 10% of the bundle, 30 pages of which was an IPPR report. The respondent produced further disclosure of about 50 pages in May 2017 after the bundle was produced. This was not accompanied by any explanation for late disclosure and none was sought by the claimant because in the normal course of litigation it is not unusual for the parties to disclose documents after both formal disclosure and the production of bundles. The parties have a duty to disclose relevant documents even if these only emerge after formal disclosure has taken place. Demanding an explanation for such late disclosure rarely achieves anything but an increase in costs.

37. The respondent failed to disclose the rosters for the after November 2016 until they were requested and whatever the respondent says by way of explanation for this now, these documents were clearly relevant and should have been disclosed earlier.

38. Had the claimants' solicitors been in the position to disclose the documentation referred to earlier, they would have done so. However, as they were representing 12 lay claimants, it was not possible to identify each and every single document which might be relevant until witness statements are in the process of being drafted, particularly when drafting multiple bespoke statements. It is said that lay claimants do not generally have all their documents tidily organised just in case they might bring a claim against their employer one day. There is an ongoing duty to disclose relevant documentation in the case no matter how late that might be.

39. As to the preparation of the bundles, it is said by the claimants' solicitors that there was no unreasonable conduct in relation to this.

Conclusions:

40. The Tribunal does not consider that the late disclosure of documents and the preparation of the bundles give rise to any justification for an order of costs being made against the claimants. Whilst the late disclosure of documents and the problems arising with bundles may have been frustrating, particularly in the context of the late disclosure of the statements, on their own, these matters do not justify an order for costs being made against the claimants.

41. They are unfortunate as described by both parties. However, in our view what is described is not conduct that is unreasonable. What is described, in our view, is the sort of matter that may unfortunately arise in the preparation of an employment tribunal case without any unreasonable conduct at its root. Not all things run according to plan or are done precisely and at the time that they should be done. However, in our view this does not necessarily result in an order for costs being made against the defaulting party. We consider that the issues relating to late disclosure and the bundles falls into that category.

42. In respect of the late exchange of witness statements, we are unable to accept the points which are made by the claimants' solicitor. There was an exchange of lists of issues and agendas for case management prior to the case management preliminary hearing conducted by telephone on the 25 January 2017. The case was listed for hearing on that date on dates which the parties agreed to. The timetable for preparation of the case for a hearing was determined on the basis of what the parties requested as opposed to what the employment tribunal imposed.

43. The claimants' solicitor could not have been surprised that they had 12 claimants and that they had therefore to take instructions from 12 people to prepare witness statements. The issues that the witness statements would be required to deal with in the statements, such as group particular disadvantage for the lead claimant, would have been clear early from 25 January 2017.

44. It could not have come as no surprise to the claimant's solicitor that the claimants live in disparate locations or that the claimants had small children to look after.

45. The matters which the claimants' solicitor points to as giving rise to difficulties that may have caused a delay in the late exchange of the witness statements are things that should have been anticipated in this case. They are the specific challenge presented in this case in acting as the claimants' representative. A failure by the claimants or the claimant's representative to find a way to work around them so as to be able to comply with the employment tribunals orders could result in suffering the consequences of breaching the orders. The orders that were made ought to have been complied with, if they could not be complied with for good reason that should have resulted in an appropriate application to the

employment tribunal. It seems to use that what is put forward as an explanation really is not an exculpatory explanation.

46. It is also pointed out that there was a failure to disclose rosters post November 2016 and that this resulted in a contribution to the delay in exchanging witness statements. The difficulty in relying on that is that this issue appears to have arisen on 26 July 2017, some 16 days after the date on which witness statements ought to have been exchanged. The absence of rosters for the period from November 2016 onwards would not have been a matter which was difficult to discover. In the context of this case, it would have been obvious had the matter been considered on the day that exchange of documents did take place that that disclosure had not been provided.

47. In any event the claimants individually received their own rosters from the respondent. The claimants potentially were then able to provide their solicitor with their own copy rosters. These were the claimants' own documents. If there is an obligation to disclose the documents on the respondent it applies equally to the claimants. November 2016 is a date after the claim had been commenced by the respondents. If it should have been obvious to the respondent that the documents were relevant it should have been equally obvious to the claimants (or at least their solicitors) that the documents were relevant. The simple fact is that the claimants' solicitor did not request the rosters from anyone until 26 July 2017, this being long after the date for exchange of statements.

48. The claimants' solicitors were responsible for the preparation of the hearing bundle. If it is alleged that the documents in the form of rosters should have been provided by the respondent, that should have become clear by the time the index was prepared.

49. We do not consider that there is anything in the point that on the morning of the hearing, the claimants' Counsel stated that there was no reason why the claimants' statements were provided so late and it is said that the four-page letter from the claimants' solicitors in this regard is therefore all the more surprising as a result. It appears to me clear that counsel was unable to assist in respect of the late statements. He was not in a position to know what if any problems lay behind the failure to exchange statements. We note that the issue about costs was put off at the end of the hearing because counsel was not able to deal with the issue.

50. The view of the Tribunal is that the respondent's application in relation to the late disclosure of the witness statements and costs is well founded. There was clearly a breach of the employment tribunal's order there were a number of breaches of the claimants' solicitor's own deadlines.

51. We consider that the late disclosure of the witness statements caused prejudice to the respondent. We consider that the simple late disclosure of the statements would have caused some prejudice but we take into account the fact that there was identified by Mr Pilgerstorfer in his written

submissions the evidence of one particular witness who specifically relayed the problems which arose as a result of the late disclosure of witness statements. We are satisfied that this is an appropriate case in which we should exercise our discretion to make an award of costs on the grounds there has been unreasonable conduct of proceedings.

52. Turning to the question of the amount of the costs, we have reviewed the schedule of costs which has been prepared on behalf of the respondent. The Tribunal's conclusion is that the claimants should pay to the respondent the costs which arise as a result of the late disclosure of the witness statements.

53. We have disallowed matters which we consider do not appear to relate to the late disclosure of witness statements or made an apportionment where we consider that other general preparation may have applied.

54. The Tribunal therefore considers that the claimant is entitled to recover the sum of £2,316.00.

55. We note that the respondent costs seek VAT at 20%. The Tribunal does not consider that it is appropriate to make an order in respect of VAT in this case. Qantas Cabin Crew (UK) Ltd would be registered for VAT, there ought to be no award made as in our view there would be no loss as any VAT would be capable of being claimed in the VAT scheme.

56. The Tribunal's decision is therefore that the claimants are ordered to pay the respondent's costs in the sum of £2,316.00.

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Employment Judge Gumbiti-Zimuto

Date: 7 March 2018

Judgment and Reasons

Sent to the parties on: .....

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For the Tribunal Office