EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs C Walton-Evans	**v**	**Marks and Spencer Plc**

COSTS JUDGMENT

The judgment of the Tribunal is that:

1. The Respondent is ordered to pay to the Claimant costs incurred by her in relation to the preliminary issue of whether or not she was disabled in the total sum of £3,640.

2. The Claimant is ordered to pay to the Respondent costs incurred by them in attending the aborted preliminary hearing on 15 September 2017 in the sum of £1,077.09.

REASONS

1. Both parties have made applications for costs, and agree that the matter can be determined on the basis of written submissions and without a hearing. The Claimant's application is in respect of the costs incurred by her in establishing that she was disabled for the purposes of the Equality Act claim. The Respondent's application is limited to the costs incurred by them at the aborted preliminary hearing on 15 September 2017, when the Claimant sought an adjournment in order to obtain expert medical evidence (at the suggestion of the Employment Judge).

The Law

2. Rule 74(1) of Employment Tribunals Rules 2013 provides that "costs" means fees, charges, disbursements or expenses incurred by on or behalf of the receiving party.

   Rule 76(1) provides that a Tribunal may make a costs 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 has no reasonable prospect of success; or

(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

Rule 78(1) provides that a costs order may -

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party.

3. Tribunals have a wide discretion with regard to costs where they consider that there has been unreasonable conduct in the bringing or conducting of proceedings. Every aspect of the proceedings is covered, from the inception of the claim or defence, through the interim stages of the proceedings, to the conduct of the parties at the substantive hearing. Unreasonable conduct includes conduct that is vexatious, abusive or disruptive. When making a costs order on the grounds of unreasonable conduct, the discretion of the Tribunal is not fettered by any requirement to link the award causally to particular costs which have been incurred as a result of specific conduct that has been identified as unreasonable – see MacPherson v BNP Paribas (London Branch) [2004] ICR 1398, CA. Also, Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78, CA.

4. The Tribunal has a large and un-fettered discretion to make costs orders under rule 76. In Monaghan v Close Thornton Solicitors UKEAT/0003/01 (unreported) 22 February 2002, the two questions the Tribunal should ask itself are:

(a) Is the costs threshold triggered, eg was the conduct of the party against whom costs are sought unreasonable? And if so,

(b) Ought the Tribunal to exercise its discretion in favour of the receiving party, having regard to all the circumstances?

Costs are compensatory and not punitive. A party's means may be taken into account – see rule 84.

5. The Claimant's application is based on unreasonable conduct of proceedings in respect of defending the disability issue, and also that that part of the defence had no merit. It is argued that it is well established that CFS is a physical and/or mental impairment. The Claimant's GP notes and her med3 sick notes refer to CFS on a regular basis. The Claimant's impact statement made it clear that there was a substantial adverse effect on her ability to carry out normal day-to-day activities during the relevant period. Even if these effects were controlled to some extent by medication, that is irrelevant for the purposes of the statute. The

symptoms of CFS are easy to distinguish from the symptoms of depression (low mood) and carpal tunnel syndrome (inability to grip things in her right hand) which were diagnosed much later in the relevant period – 2014 and 2016. The physical symptoms of CFS are severe fatigue, dizziness, recurrence of simple infections and insomnia. It is also clear, said the Claimant, that the Claimant's CFS had long term effects, arising before November 2011 and continuing until today. If that was not enough, then there was the expert opinion of Dr Damian, whose report was not contradicted with expert evidence at least from February 2018.

6. Employment Judge Moore at the hearing of 15 September 2017 believed that expert evidence was required and thus adjourned that hearing to allow the Claimant to obtain it. I find that it was necessary, as it authoritatively underlined and supported the Claimant's claim that she was disabled by the CFS. The fact that Dr Damian had not seem the Claimant's GP records was odd, but not fatal to his importance as a potential witness. My finding was that his opinion would not have been changed even if he had seen the GP records. Dr Damian had the Claimant's own account of her symptoms, and he could apply his own expertise to that to diagnose and confirm her condition.

7. Although the Respondent initially said that they wished to obtain their own expert evidence for themselves, in the end that they did not, and indicated that they were content to rely on the existing medical evidence, with no explanation as to the change of that position. Further, they did not insist that Dr Damian be called to give evidence, so that he could be cross examined and challenged on it. The Respondent had refused to instruct a joint expert on the issue of disability. The Claimant argues that, given that all that the Respondent did at the preliminary hearing was to pick holes in Dr Damian's report, without actually having him there to challenge, the Respondent's conduct of the hearing was unreasonable.

8. The Claimant's costs schedule is in three parts. First, £1,200 for the costs of Dr Damian's report, based on examination only with no reading of records. Second, counsel's fees for one hearing of some £3,000 plus VAT. Third, the solicitor's two grade A practitioners twelve hours at £200 per hour for the production of the medical report and preparations for the hearing.

Conclusions

The Claimant's application

9. On receipt of Dr Damian's conclusive report in the context of the medical evidence, it should have been clear to the Respondent that the Claimant was disabled by CFS. I believe they recognised this as, by their failure to obtain their own evidence or even ask for Dr Damian to attend for cross examination, they really mounted no challenge to the Claimant's evidence in totality. It is difficult to see how they could have expected any other outcome in the circumstances. The Monaghan questions (see above) are

answered. The Respondent's conduct was unreasonable, and the Tribunal ought to exercise its discretion to award costs in all the circumstances, the Claimant having been put to unnecessary expense with respect to the preliminary hearing.

10. However, I also conclude that the costs schedule is excessive. I discount the costs of Dr Damian's report, because that was necessary to obtain for final proof of disability. I also think that counsel's fees are too high for a one-day hearing for a relatively junior counsel (call 2014). The solicitor's fees must also be discounted, because they concern the production of the medical report in part, which was necessary, and any way they are too high for the work that was necessary to have been done. It is not reasonable to spend 12 hours working on the preparation of a relatively small aspect of the case, with such highly paid staff engaged.

11. I conclude that counsel's fees are reasonably in the sum of £2,000 plus VAT. The solicitor's work I discount to 6 hours at £200 per hour plus VAT. The total therefore is £3,640.

The Respondent's application

12. At the case management hearing on 9 June 2017, an open preliminary hearing to determine disability was listed for 15 September 2017. The Claimant's representative indicated that she would rely upon medical records to prove disability and had no need to rely upon any expert evidence. However, at the open preliminary hearing on 15 September 2017, counsel for the Claimant applied to postpone the hearing on the basis that there was insufficient evidence to prove disability. The Employment Judge granted the postponement and the parties agreed to obtain their own evidence. The Respondent argues that they are entitled to put the Claimant to proof of disability. The Claimant could not prove this, they assert, certainly not until she obtained Dr Damian's report. The Claimant had permission of the Employment Judge at an earlier hearing to apply for expert evidence, but they did not make such application prior to the open preliminary hearing. Instead, the Claimant indicated that she would be relying upon her medical records only. Thus, argues the Respondent, and by reason of the failure to make an application in accordance with Employment Judge King's order, the Claimant caused the Respondent to prepare for the disability preliminary hearing unnecessarily, thereby causing delay and incurring costs. That amounts to unreasonable conduct, pursuant to rule 76(1)(a). By rule 77, a party may apply for a costs order or at any stage up to 28 days after the date on which the judgment to finally determine the proceedings in respect of that party was sent to the parties. Thus, the application for costs by the Respondent is made in time.

13. The Respondent's costs for the hearing are £720 including VAT for counsel's fees, and counsel's travel expenses of £42.96. Solicitors' work for that aborted hearing is £314.13. The total therefore is £1,077.09.

14. I conclude that the Claimant caused that hearing of 15 September 2017 to be postponed on their application made less than seven days before the date on which that hearing began, contrary to rule 76(1)(c). That in itself gives rise to the right to ask for a costs order to be made. I also conclude that the Claimant's conduct of the proceedings was unreasonable, in causing that hearing to have to be adjourned by their late application for expert evidence. Accordingly, I am entitled to make a costs order, and I must consider whether to do so. I conclude that it is fair and reasonable to do so in the circumstances, as the Respondent has been put to unnecessary costs by that hearing having to be postponed.

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Employment Judge G P Sigsworth

Date: ……..
23 July 2018
Sent to the parties on: .....

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For the Tribunal Office