EMPLOYMENT TRIBUNALS

Claimant: **Miss C Horn**

Respondents: **(R1) Lincolnshire Partnership NHS Foundation Trust**
(R2) Dr Mark Gresswell
(R3) Dr Sherron Smith
(R4) Mr Gerald Dawson

Heard at: **Lincoln** **On:** **Wednesday 15 August 2018**

Before: **Employment Judge P Britton**

Representatives

Claimant: **The Claimant has represented herself, assisted by various friends to whom I will refer during this Judgment**

Respondents: The Respondents have appeared by way of written represented to which I shall refer

JUDGMENT

1. The Claimant's application for a reconsideration of the costs judgement made on 15 February 2018 succeeds. The judgment is revoked it being in the interests of justice so to do.

2. In so far as the Respondents may wish to make further representations on my provisional views that the Claimant does not meet the costs freshhold, they must provide those in writing by **14 days** from issue of this Judgment. If they do so, then at present my intention would then be to order an attended costs hearing.

3. If no representations are made, then I will take it that their costs applications are no longer pursued and the case will be closed.

REASONS

Introduction

1. For reasons that I will come to, on 18 November 2017 an Unless Order having not been complied with by the Claimant and thus her claim having been automatically struck out on the 1 September 2017, I granted the applications for costs of the Respondents. In so doing I made plain that the Claimant was copied

into both those applications of 21 and 29 September and that by her silence it could be inferred that she was not resisting the applications. I ordered that the Respondents provide schedules of the costs they claimed and copy them to the Claimant by 11 December 2017. This they duly did.

2. It was made plain that the Claimant should make representations if she objected to the amount of costs sought. She did not do so and thus on 15 February 2018 I issued a Judgment. It reads:

> *"Pursuant to my previous order dated 18 November 2017, the Claimant having been deemed by her silence to not object to the applications for costs, and my thus having determined that the assessment of those costs could be undertaken without a hearing unless the Claimant objected having been served the schedules of costs and that having occurred and the Claimant having made no submissions I order as follows:*
>
> 1. *As to the costs of 1 and 4 Respondents I assess the same as reasonable and order that the Claimant pay those costs in the sum of £18,193.*
>
> 2. *As to the costs of the 2 and 3 Respondents I assess the same as reasonable and order that the Claimant pay those costs in the sum of £12,800.40.*

3. My Judgment was signed off by me on 15 February 2018. It was sent to the parties the same day. On 26 February the Claimant made an application headed: "Please consider as a matter of urgency". She said:

> " *I am writing to advise the tribunal that I wish to request a reconsideration of the judgement for costs made against me, dated the 15th February 2018.*
>
> *I am therefore requesting an additional 28 days to the current 14-day deadline to submit a reconsideration request, until the 29 March 2018.*
>
> *My reasons for the request are listed below:*
>
> *1. I consider myself as a disabled person under the Equality Act 2010, namely mental health difficulties (namely depression and anxiety, for which I am receiving ongoing treatment) and my specific learning difficulties (ADHD, Dyslexia, Dyscalculia and Dyspraxia). As I am a litigant in person, these disability related challenges, including time management, information synthesis and appropriately responding to information which with I am provided pose significant difficulties for me.*
>
> *2. Due to disabilities I require reasonable adjustments to be able to do written work, this is typically an extension of time; and these adjustments are supported by numerous assessments I have undertaken in relation to my disabilities.*
>
> *3. I have been unable to obtain legal advice up to this point. This is due to my status as an unemployed student, so I am unable to afford a paid solicitor and the complexity of the case means finding free support has proven particularly difficult.*

4. As a litigant in person, who is also a full-time student I am not able to dedicate as much time as a paid professional would to complete a reconsideration and ask that this is taken into account.

I ask that the tribunal take all the above into account when assessing whether to grant an extension in this case.

4. The extension was granted by my colleague Employment Judge Milgate on 2 March 2018 and she gave the deadline of 23 March 2018. Inter alia she stated:

"Your application should set out why reconsideration of the original decision is necessary"

5. The Claimant replied by the deadline submitting a very detailed document with appendices headed "Application for reconsideration of judgement of costs dated 15 February 2018". She set out at considerable length under six headings her explanation for the non compliance with the directions that led to her claim being struck out and thence her inactivity on the costs application front until, of course, the final judgement was issued. I add that she made plain that she has no money.

6. I decided that given the amount of costs in issue that there should be an attended hearing to consider her application.

7. As to her detailed written submissions, the Claimant was helped in preparing this by the friends who have come with her today. Three of them have given sworn evidence before me going very much to the Claimant's disabilities and her problems and their interface to the litigation. I found all of them to be credible and compelling. They are her now partner of some 10 months' and who is a former policeman, Daniel Hart; Dr Peter Tyerman who is a qualified general practitioner; Catherine Tyerman, his daughter who is in training as a clinical psychologist. Also present was James Bulloss who did not supply a statement but confirmed what everybody else said.

8. The Respondents, for reasons of economics and which I entirely understand, have not attended but through their solicitors have provided written representations. Thus, from Sarah Hooton who is a senior solicitor with Browne Jacobson and who acts for Respondents 2 and 3 and also from Martin Cheyne a partner with Hempsons who represents Respondents 1 and 4. I have considered those representations. I have considered an extensive bundle of documents put before me by the Claimant. I have been through the entirety of the Tribunal file.

Matters procedural

9. I am of course not dealing with reconsideration of the strike out judgment dated 1st September 2017. There is no such application.

10. As to reconsideration of the costs judgment, I do not agree with the Respondents that the application for reconsideration was presented out of time. Rule 71 of the Employment Tribunals Constitution and Rules of Procedure Regulations 2013 Schedule 1 requires that any application for reconsideration shall be presented in writing within 14 days of the date upon which the written record or other written communication was sent. This was the 15th February. The Claimant's application by e-mail was sent to the tribunal on the 26th. Therefore it

was in time. Furthermore in it she was asking for an extension of time; albeit in reality she meant for further particularisation; finally in any event EJ Milgate granted the extension of time.

11. As to my power to reconsider the test for the exercise of my discretion is whether or not do it is in the interests of justice so to do: see Rule 70 and that "on reconsideration, the original decision may be confirmed, varied or revoked. If it is revoked it may be taken again.

12. The Judgment is my completion of the costs process by way of the assessment. Logically it of course follows from the unless order dated 10 August 2017 and the subsequent strike out.Therefore the preceding history and the explanations now given comes into play.

The scenario and my findings

13. The claim (ET1) was presented to the Tribunal on 2 November 2016. It had been prepared for the Claimant by a solicitor, Sally Hubbard. She is known to the Tribunal as an experienced employment practitioner of competence. Inter alia, pleaded was a scenario which would mean this was a claim based upon disability discrimination pursuant to the Equality Act 2010 (the EqA), whereby if I put it at its simplest**,** the Claimant having become absent for a variety of reasons as pleaded, and also it seems to me having difficulty coping with becoming qualified as a Chartered Clinical Psychologist, her employment was ended. The claim was based upon wrongful inception of the capability process and/or failure to make reasonable adjustments to it and the outcoming being, as I would see it, unfavourable treatment in terms in particular the dismissal, pursuant to Section15 of the EqA. The pleaded disabilities referred to were dyslexia, dyscalculia, dyspraxia and leukaemia. There was no reference in that pleading to clinical anxiety/depression. The Claimant said to me today that this was an oversight by her solicitor. Albeit Ms Hubbard is not here to comment, it matters not in that from all the documentation I have now read including the General Practitioner reports going back to 2015, it appears clear that the Claimant suffers from longstanding anxiety and clinical depression and that she remains on anti-depressants and is mentally not well at all, as to which see tab 1 and the medical reports of Dr Magee date 2 March 2010, 25 August 2015 and then bringing me right up to date, May of this year. The Claimant tells me today that the Respondents knew of this condition; certainly Respondents 2 and 3 in their capacity as clinical Director (Mark Gresswell) and course tutor (Sherron Smith) via Nottingham and Lincoln Universities which in effect oversee the Claimant's training rather like a Deanery in relation to trainee doctors.

14. Going back to the ET1 and matters procedural, in due course responses were presented and inter alia disability was not admitted. There was then a case management discussion before my colleague, Employment Judge Hutchinson on 22 February 2017; Sally Hubbard acting for the Claimant. He made directions in the usual way, in particular requiring the Claimant disclose her medical notes and that she provide an impact statement. He also ordered a Scott Schedule in terms of the issues and a time for the Respondent to reply thereto. Albeit there had been no application for strike out/deposit orders, he now put this on the agenda as well. Also he ordered determination of whether the Claimant was a disabled person, and finally as to whether there should be strike out or deposit orders mad. Thus he listed all of this for an attended preliminary hearing to be heard over 2 days commencing on 24 May 2017. The Claimant appears, from the correspondence that I have read, to have complied in part with the directions in

the sense of providing an impact statement and because the Respondents solicitors were thereafter to refer to it. I have never seen that impact statement. There is no copy on file but I will take that as read, ie compliance. She also provided a schedule of loss although the Respondents said it was not sufficient. She did not provide the Scott Schedules. Then on 29 March via her solicitor she stated that she was unwilling to disclose her medical records. Reading that letter, it was because of concerns that the preliminary hearing would be in an open hearing, furthermore she queried the need for the intrusion, so to speak, in that the Respondents had long since had the dyslexia report about her and which I now have in the bundle before me, and which had been written on 23 November 2015. It appears, reading the pleadings that the Respondents accept that they may have had that report. Second it was pointed out that the Respondents were in possession of the occupational health reports to which I have also now been referred (tab A10) and which commence with an occupational health report sent to Dr Sherron Smith as the senior clinical tutor and copied to HR dated 6 May 2016; and which I note does refer to the longstanding depression, anxiety and the references to the dyslexia etc. Finally, the GP reports to which I have now referred had been disclosed. Thus it was said that there was no need for the medical notes. But what was not addressed was her also reliance on suffering from leukaemia and which the Respondents challenged. The significance being that as a form of cancer, if she had been so diagnosed then she would automatically be classified as disabled as to which see schedule 1 of the EQA.

15. The Respondents objected to her proposal, also pointing out that the Claimant had not complied with the direction as to the Scott Schedule. My colleague Regional Employment Judge Swann, by his order of 19 May 2017 took a pragmatic course, namely proceed with the preliminary hearing, not strike out the Claimant for non-compliance, and concentrate on what we had got ie the documentation to which I have now referred.

16. As it is on 20 May 2017 the Claimant dispensed with the services of Ms Hubbard. I am not prepared to open any without prejudice correspondence between the Claimant and Ms Hubbard, albeit it seems to be in the bundle before me, without the consent of Ms Hubbard and she has not been asked for it. Suffice it to say for reasons I shall come to, it is my view that the Claimant was by now actually behaving irrationally and because she was not well. The Claimant at this stage, asked if she could have an adjournment as she was seeking to get alternative representation. The Respondents opposed inter alia pointing out that they had now occurred costs including irrecoverable brief fees to Counsel. As it is, another of my colleagues Employment Judge Ahmed on 22 May granted the stay considering it was in the interests of justice so to do. On 26 May the Respondents made a first application for costs; namely those thrown away by reason of the postponement of the scheduled hearing.

17. Also the solicitors for the second and third Respondent Browne suggested proposed directions for the way forward. Hempsons supported the application. The Claimant did not reply and so I directed accordingly. The Claimant was not complying, but on 19 June she wrote into the Tribunal a somewhat poignant letter. In summary she was trying to get representation but she now had no money.

18. In terms of context, circa May 2017 Nottingham/Lincoln University had upheld her appeal in terms of stopping her being able to train in that the internal proceeding had been a procedural irregularity, but they had decided that she

would not be able to qualify as a psychologist so the Claimant's career in that sense ended. I infer this was because of the health problems. She has not since then resumed training to be a Clinical Psychologist and has decided to try and qualify as a solicitor, I will re-come back to that.

19. Returning to the letter of the 19th June, she explained the problems she had with in particular her dyslexia, in coping with such as correspondence, and that she did not understand what the cost issue was all about. Could she please have an explanation. On 27 June I made plain that the renewed proceeding would have to go ahead; that is to determine whether the Claimant was disabled. The Claimant again wanted extensions of time to deal with directions which was granted. There was some reference by 21 July to the involvement of ACAS but in so far as the Claimant might seek to say to me that she had withdrawn the claim, there is no COT3 on the file and I think she is again muddled. I cannot want to go behind the veil into ACAS without prejudice type discussions as they are of course privileged. All that needs to be said is that the Claimant may have thought that the Respondents were happy for her to cease proceedings. The converse may be that they thought she was still holding out for something. Turn it round another way, I have no evidence that the Claimant withdrew her claims. Indeed in seeming contradiction the Claimant clearly was still proceeding in that she was asking for further extensions of time in terms of the then directions. The Respondents were by now, understandably, frustrated at the lack of progress in this case and inter alia the lack of the Scott Schedule, and therefore on 10 August I made the Unless Order that I have referred to. It read:

> *"…This case now has a long standing history of non-compliance by the Claimant. In particular she has refused to comply with EJ Hutchinson's order 2.1 dated 22 March 2017 for disclosure of her medical records. This is critical as it is for her to establish that she is a disabled person within s6 and schedule 1 of the Equality Act 2010. If she is not so disabled, her claim collapses at the first fence. Thus at present I see no need for the other directions to be complied with. However, I find her failure to comply with EJ Hutchinson's aforesaid order unreasonable, particularly as she pleads inter alia that she suffers from leukaemia which of course would in itself be a disability as it is a form of cancer, if she has been so diagnosed which I note as pleaded comprehensively by the Respondents is disputed. Thus at present I can only infer that that the Claimant is refusing to disclose her medical notes because they do not show leukaemia. Therefore unless all her medical notes, including prescription records and such as consultant letters to her GP, plus all specialist reports on the other pleaded conditions are disclosed to the Respondents by 4pm Friday 25 August her claim will be struck out for repeated unreasonable failure to comply with the Tribunal's orders. A copy of all of the same together with the statement EJ Hutchinson ordered she provide as per his Order 1.2 will at the same time be copied to the Tribunal".*

20. The Claimant not having complied with that order, her claim was automatically struck out pursuant to Rule 38 of the Rules; hence the letter that I have already referred which was then issued on 18 November. Thence the costs applications that I have referred to made by both Respondents on 18 November asking for their costs of the entire proceedings on the basis that the Claimant had behaved unreasonably. This would of course be pursuant to Rule 76 (1a):

"A Tribunal may make a costs order and should consider whether to do so where it considers that;

> *(a) a part (or that parties representative has acted vicariously, disruptively or otherwise unreasonably in either the bringing of the proceedings or part or the way the proceedings or part have been conducted or*
> *(b) any claim or response has no reasonable prospect of success…"*

21. As is obvious from the Unless Order wording, this was a case where prima facie, absent the Claimant making any representations to the contrary[1], the Claimant had clearly behaved unreasonably in her conduct of these proceedings ie repeated non-compliance. The Claimant was given notice of these costs applications, thus giving her the opportunity to show cause why cost orders should not be made. The Claimant having made no response at all to the Tribunal, the costs order was in due course duly made by me on 18 November and to which I have referred. The next stage would be the assessment of the Respondents costs in respect of which I ordered that they provide schedules of costs. This they duly did copying the Claimant the same. Thus, we get the Judgment which I have referred to of the 15 February. However, in fairness to the Claimant it is right, and it is reflected in the reasonable submissions of the Respondents in terms of accuracy, that the following needs to be factored in. Thus on 13 December the Claimant did write to the Tribunal making plain that she would be "responding" but was still trying to seek appropriate advice. She wrote again on 17 January that she was still seeking advice "to enable me to appropriately defend my position". She repeated this on 26 January. She wrote on 7 February reiterating how she had no money; reciting her disabilities and that she was having difficulty getting any representation, thus could she please have until 16 February to respond. It is clear to me that I had not seen that email when I made my Judgment on 15 February. This may be because of tail backs in correspondence getting on the files which I am well aware of was, and still is problematical with the volume of files the Tribunal is now dealing with and the shortage and change overs of staff. That brings me back to application for reconsideration.

22. As is now obvious, the Claimant has longstanding serious clinical anxiety and depression as to which see inter alia the medical reports to which I have referred. Furthermore from the collective evidence before me, this has profoundly adversely affected her. It is doubtless one of the reasons why she was failing despite being on the maximum dosage of the anti-depressant she has been prescribed namely **Sertraline**. She has had extensive therapy such as CBT and ran out of money to fund it herself. The problem there is that the GP's would usually refer her to the second and third Respondents in this case as the clinical port of call. For reasons which are perhaps obvious, she could not face seeing them. From my extensive judicial experience she has all the usual difficulties of the clinically depressed including suicidal thoughts, frequent inability to function, bunkering herself down so to speak, not dealing with correspondence and being unable to concentrate. Indeed it continues to have that impact in that albeit she enrolled on the law qualification course in September 2017, her health has prevented her from starting it. I hope she does not mind if I say that presently the prognosis would not be good in terms of her being able to qualify and function in what is a stressful profession.

[1] And which I of course only now have.

23. The dyscalculia etc also affects her but I do not think it is the primary factor applying here. It is first the depression. Second that brings me to the leukaemia and it goes to what has been an extremely difficult period for the Claimant. She **was**[2] diagnosed with leukaemia. She was treated with chemotherapy. Doctor Peters has told me all about that and the drugs that she was prescribed. She is currently in remission. Also the Claimant has had major problems with her back. That may not be a disability but it needs to be factored in in terms that she has had to undergo surgery during the material time that I am dealing with and has suffered residual complications.

24. The irony is that had she cooperated with the limited directions of REJ Swann and attended his planned PH, I have absolutely no doubt whatsoever that an Employment Judge would have found that at the material time and indeed continuing she was a disabled person as per the EQA.

25. So I have this raft of health issues and thus somebody who in that context from all the evidence I have now heard was unable to cope with this litigation. As her friends have confirmed they were trying to get legal help. The Citizens Advice Bureau was the first port of call but in this area it is not legally qualified and so could not help.[3] She went to see various solicitors but of course she has no funds. Because she cannot function on her law course but is nevertheless classified by the benefits agency as being a student, she is not entitled to any state benefits. She is wholly dependent on her partner. She has large debts largely accrued in terms of studying to be a Clinical Psychologist. She has given up her own rented house, sold her car, owes her parents at least £40,000, has another debt of some £19,500 and credit card bills of nearly £9,000 and she remains unwell. The last legal last port of call was to get advice on the cost issues: it came to nought when she was quoted a substantial fee.

Conclusion

26. On the scenario as I have now found it to be it follows that I do find that it is the interest of justice to revoke the cost Judgment. It is also implicit that prima facie in terms of re-visiting the costs issue de novo I find that the Claimant has not behaved unreasonably. The Respondent may, if it wishes, make further representations within **14 days** of the issue of this Judgment.

27. If it so wishes to be heard on the issue, then I will order a resumed Costs Hearing at which the parties attendance will be required. For the avoidance of doubt, that does include the Claimant but supported by her friends which will be the reasonable adjustment. I shall need no further documentation from the Claimant as it is covered fully by the bundle.

Employment Judge P Britton

[2] My emphasis.

[3] The CAB due to withdrawal of funding does not provide legal advice on employment matters in the Nottingham and Lincoln areas.

Date: 27 September 2018

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE