Case Number: 2501191/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mrs C Shield	**AND**	**Newcastle City Council**

Heard at: North Shields **on 24 January 2018**

Before: Employment Judge Shepherd

Members: Mr R Dobson
Mr M Ratcliffe

Appearances

Written submissions

JUDGMENT

The unanimous judgment of the Tribunal is that the respondent's application for costs against the claimant is refused*.*

REASONS

1. The Tribunal considered the written submissions provided by Mr Stubbs, on behalf of the respondent and those provided by the claimant. The Tribunal also considered written representations provided by Mr Shevlin of Thomsons solicitors and Mr Horan, counsel, both of whom had previously represented the claimant.

2. The respondent applied for its costs caused by the late postponement of the substantive hearing of this matter which had been listed for a five-day hearing

commencing on 26 June 2017. The claimant had applied to postpone that hearing on 22 June 2017.

3. The respondent applied for costs pursuant to rule 76 (1) (a) and (c) and 77. These rules provide as follows:

> 76 (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; or
>
> …
>
> (c) a hearing has been postponed or adjourned on the application of a party made less than seven days before the date on which the relevant hearing begins.
>
> 76 (2) 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.
>
> 77 A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

4. The respondent indicated that it relies not only on the fact of the hearing being postponed but the matters leading up to that postponement in support of its application. Written submissions were provided on behalf of the respondent setting out the background. It was submitted that the claimant's conduct had been unreasonable and had eventually resulted in the hearing being postponed and the costs of the respondent being wasted.

5. It was submitted on 13 September 2017 that the claimant's conduct had been unreasonable and had eventually resulted in the hearing being postponed and the costs of the respondent being wasted within the submissions it was stated that:

> "a. Part of the reason for the hearing being postponed was that C's chosen counsel was unable to properly prepare the case in time. This is due to the actions of C;
> b. That disclosure had taken place late and the witness statements were due only a week before the hearing was entirely due to the actions of the claimant;
> c. C's actions in taking three attempts to plead her claim, asking for extensions of time to file and serve the F&BPs, failing to provide disclosure properly or on time, and providing witness statements late has caused R unnecessary costs. C's actions have been unreasonable;
> d. C had been warned about the potential cost consequences of her approach as far back as Februay 2017 by EJ Johnson;
> e. C was warned about the potential cost consequences when she was a litigant in person; shortly thereafter she became represented. Despite being represented dates continue to be missed and the proceedings continued to be conducted in an unreasonable manner;
> f. In the application to postpone it is suggested that Thomsons were instructed by C's trade union and not C herself. R finds this difficult to give credence to; whilst a trade union may fund a claim the solicitor is instructed by the lay client. Even if correct, R was never informed of any such arrangement by C or Thomsons;
> g. If C did not want Thomsons to represent she should have disinstructed them;
> h. If C chose to instruct counsel on a public access basis and not through her solicitors that was a decision that was up to her; it was incumbent on her to ensure that her chosen council had time in which to prepare;
> i. Equally, if C wanted to change her representation, that also was a decision that is entirely up to her but she must do so in time for the hearing of the person taking on the case to have sufficient preparation time;
> j. R was not told that C's chosen solicitors were coming off the record; R is unsure whether they have to date come off the record, in which case C has

created an extremely unusual situation, with two different and distinct legal representatives effectively on the record at the same time. There is no/no obvious justification for this;

k. C appears to have continued to miss deadlines and to have caused the hearing to be postponed when she had both solicitors and counsel instructed on a public access basis instructed;

l. Mr Horan indicates that he had had a conference with C several months ago, but he was speaking to Mr Shevlin on 14 June 2017 (seven working days before the hearing) and that he was involved in drafting witness statements;

m. In view of l. It is entirely unclear why C was not able to properly instruct Mr Horan in time for the hearing;

n. Based on the application it appears that C and/or her lawyers failed to properly inform R and the ET of the issues with representation in the case and the likely effect on whether the hearing could go ahead until too late, causing R to incur unnecessary costs."

6. On 22 June 2017 Mr Horan had made an urgent application for the five-day hearing to be adjourned. In his application he indicated that he regretted to say that, in the claimant's view, the Tribunal was misled by Mr Shevlin in a number of ways. Mr Horan indicated that he had struggled with presenting an acceptable case in line with his duty towards his client. He went on to state that:

> "In my professional view given a day for reading and sufficient time for both sides to cross-examine witnesses this case will take far longer than 5 days.
>
> …
>
> I note that the overriding objective is to have a fairer and timeless hearing but that there appears to be no prejudice to the other side or no prejudice which can't in the Tribunal's discretion be sorted out by costs. The best course in this matter is to adjourn the hearing and have it listed at a time convenient to both parties."

7. On 23 June 2017 the respondent's solicitor wrote to the Tribunal stating:

> "We have had sight of the letter from counsel on behalf of the claimant. It is unfortunate that this application has been made so late in the day, however,

> we recognise the concerns of counsel and wish to avoid the risk of the matter going part heard. In the circumstances therefore we will agree to an adjournment of this matter subject to costs being discussed at a later date."

8. In view of the various allegations in respect of the postponement, it was felt appropriate to seek the views of Mr Shevlin and Mr Horan, the claimant's former representatives. Thomsons solicitors indicated that the hearing was postponed on the application of the claimant through counsel, John Horan. They did not instruct Mr Horan on behalf of the claimant. They are concerned that counsel makes a serious charge that he had been instructed that Mr Shevlin misled the Employment Tribunal at the preliminary hearing.

9. Mr Horan replied repeating, among other things, that his professional view that the case would take far longer than the five days allocated for it and that there was no prejudice suffered by the respondent. He also stated:

> "In any event, I notice that for a case of this magnitude 5 days was clearly insufficient and, indeed, the Tribunal listed for eight days(sic). Counsel for the respondent and, indeed the respondent itself, in my view, should have known that it was most unlikely to be effective if listed for 5 days."

10. A response has been provided by Mr Stubbs, on behalf of the respondent. Within that response, it is noted that the claimant's former representatives were unable to agree on what did or did not take place leading up to the postponement application. Also, Mr Horan stated the application was based on his instructions from his client but the claimant states that the application was due to Mr Horan saying that he was unable to proceed at that time. It is submitted that such disagreement is indicative of the problems faced by the respondent and the unreasonable way in which the proceedings have been conducted. The prejudice to the respondent is that it incurred two brief fees due to the hearing being postponed and then relisted some considerable time later. Although the hearing may have gone part heard, had it commenced in June 2017, that would not have resulted in the same prejudice to the respondent as the case would have commenced and would have been concluded far in advance of the dates on which the hearing did take place.

11. The claimant has replied and within that reply, indicated:

> "I had really struggled to find representation and Mr Horan had agreed to take on the case only after reviewing the full file.… I did not want a postponement but in order of the case to be considered properly had no option but to accept Mr Horan's advice…
> The delays caused by R's actions compounded by the fact that the final bundle supplied to me was in a very poor state and also that the statements produced did not correlate with the information in the file… There were also many documents missing or incorrect or incomplete versions in the legal bundle… It was unfortunate for both parties at the hearing did not go ahead in June 2017… It was listed for 10 days and concluded within that timescale which is a further indication that the 5 days previously listed had been insufficient for a case with so much evidence and so many witnesses giving evidence. I do not believe that my behaviour or attempt to comply with the orders imposed by the ET has contributed to the postponement of the hearing…"

12. The Tribunal has carefully considered all the submissions. It is clear that there is an abundance of blame and recrimination within the information provided to the Tribunal. The Tribunal is satisfied that, with the volume of documentation, the number of witnesses and the confusion with regard to the allegations and claims brought, this case was unlikely to have been completed within the original 5 days that had been listed for the substantive hearing. The respondent's representative agreed to the adjournment stating that they recognised the concerns of the claimant's counsel and indicated that they would wish to avoid the risk of the matter going part heard. It is noted that this was subject to costs being discussed at a later date.

13. It is clear that, at the time of the application, both parties agreed that the case required more than the 5 days that had been listed for the hearing in June 2017 and there was no opposition to the claimant's application. It was not an unreasonable application.

14. The claimant was a litigant in person, although there had been some involvement of legal representatives at various stages and she had the assistance of her sister-in-law, Mrs Hall. The claimant admitted that she was struggling with the law and procedure.

15.The issues involved in such claims of disability discrimination are not straightforward for unrepresented parties to understand. The claimant had some assistance but it is clear that there was some residual confusion. The various attempts by parties and representatives to attribute blame in respect of the conduct of the proceedings and preparation for the substantive hearing do not take the matter a great deal further forward. The Tribunal is satisfied that the application to postpone the hearing was not an unreasonable application and it was agreed to by the respondent on the basis, at least in part, that they wished to avoid the case going part heard. The question of the incurring of two brief fees is a matter between the respondent and its counsel. However, the Tribunal is satisfied that it was sensible for the original hearing to be postponed in order to avoid the hearing commencing and then having to recommence on a date potentially months in the future.

16. The Tribunal is not satisfied that the postponement was as a result of the claimant's unreasonable conduct of the proceedings leading up to, and at the time of, the application and, in those circumstances, the application for costs against the claimant is refused.

Employment Judge Shepherd

24 January 2018