



EMPLOYMENT TRIBUNALS

Claimant: Mrs M Green

Respondent: South Cave Kids Club

Heard at: Hull **On:** 27 March 2018

Before: Employment Judge Rogerson

Members: Mrs S Scott

Mrs L E Benstead

UPON APPLICATION made by email dated 25 January 2018 to reconsider the judgment dated 12 January 2018 under rule 71 of the Employment Tribunals Rules of Procedure 2013

JUDGMENT ON RECONSIDERATION

Paragraph 4 of the Judgment that ‘the claimant is ordered to pay the respondent, costs in the sum of £10,000’ is confirmed.

REASONS

1. By an application dated 25 January 2018 the claimant’s husband, on the claimant’s behalf, applied for reconsideration of the costs order made at paragraph 4 of the Judgment, sent out to the parties on 12 January 2018.
2. The grounds of that application were that “*fresh evidence would become available which was the evidence of a psychiatric report to the claimant’s mental health during the hearing and specifically on 22 to 24 November*”.
3. The claimant asserts that the evidence could not reasonably be obtained at the time of the hearing or before the hearing because the claimant believed “she was fit to attend”. It was the “deterioration in her condition during the first two days of the hearing that led to her decision to leave the hearing on Wednesday and why she did not attend on the 24 November 2017”.
4. The application for reconsideration states that “*medical evidence is important because it will, I believe remove the basis for the Tribunal’s*

finding in paragraph 116."

5. In that paragraph, the Tribunal found that the claimant's decision not to give evidence was a deliberate decision she had made at that particular time because she anticipated that she would be asked difficult questions in cross examination which she did not want to face. We found that it was not because she was unable for medical reasons to give evidence. Her failure to attend after this was in our view another attempt by the claimant to avoid dealing with matters because of the difficulties she anticipated she would face because of the way her case was going.
6. The application acknowledges that this paragraph is "*a powerful set of findings which must have weighed with the Tribunal in considering both whether to make a costs award at all and the amount of the award*". The application states "*It was made on medical matters, without the benefit of current medical advice. The decision on costs is therefore unsafe and should be revoked*".
7. Alternatively the claimant applies if the Tribunal is not minded to revoke the Judgment on costs, to vary it by substantially reducing the costs ordered. The claimant asserts that did not '*run from the Tribunal to avoid questions. Certainly she was fearful of the prospect but who wouldn't be? Most parties and witnesses are fearful of facing cross examination in court, however strong their case*'.
8. The reconsideration application is said not to be an attempt to reopen the findings or reargue the case. The claimant was "*simply unable for medical reasons to tell the Tribunal her side of the story; the findings were made unavoidably without hearing from her.*"
9. The application indicates that steps would be taken to obtain medical evidence, a medical report from a psychiatrist, GP records and GP's letters on the claimant and on the claimant's husband on his medical problems experienced during the Tribunal that affected his performance. The application states "all of these will be in place with you, before the date of reconsideration".
- 9 The information that was provided by the claimant/her husband before the date of the reconsideration hearing on 27 March 2018 was as follows:
 - (1) Application for reconsideration dated 25 January 2018
 - (2) G.P's letter for the claimant's husband dated 27 December 2017
 - (3) G.P's letter for the claimant dated 31 January 2018
 - (4) Claimant's current financial statement 8 February 2018
 - (5) On 16 February 2018 further information was provided by the claimant of:
 - (5.1) SKIDS Financial statement for year ended 31 August 2014
 - (5.2) Prescribed current medication
 - (5.3) Ongoing prescription for Sertraline 16 February 2018
 - (5.4) Prescription medication and user information for Sertraline
 - (5.5) Response to the respondent's letter of 7 February 2018 resisting the application for reconsideration.
- 10 Before dealing with the medical evidence that has been provided we will set out in summary the respondent's response to the reconsideration

- application which sets out 8 grounds for objecting to that application.
- 10.1 The claimant did not assert prior to the hearing that she suffered from any medical condition which may affect her ability to participate in the hearing. If reasonable adjustments had been requested (breaks whilst giving evidence if required) these would have been made.
 - 10.2 As detailed in the judgment at paragraph 116 the claimant had actively participated in the hearing finding documents for her representative and giving instructions. The timing of her decision and the misleading manner in which proceedings were conducted, the absence of corroborative contemporaneous documentary evidence and the striking similarity between all witness statements are recorded. The Tribunal took into account all these matters before drawing a reasonable adverse inference that it was in fact, the anticipation of being asked difficult questions which the claimant wanted to avoid. For those reasons, the respondent's position is that further medical evidence is neither necessary nor proportionate.
 - 10.3 The absence of any of contemporaneous medical evidence.
 - 10.4 It is unclear what additional evidence the psychiatrist's report can provide. The psychiatrist suggested by the claimant was not her medical professional at the time of the hearing and in any event *"any report based on subjective reporting by the claimant is unreliable given the adverse findings as to credibility and honesty throughout the judgment"*.
 - 10.5 The claimant's husband has proved some medical evidence now when nothing was provided in advance of the hearing and he actively participated and cross examined the respondent's witnesses. It was only when it came to his own evidence (after Ms Stride's evidence) that he refused to participate. He attended for all 5 days and made reference to his health (diabetes) on the second day when offering an apology to the Tribunal for his terse manner towards them the previous day. No mention was made of that condition nor that it prevented him from giving evidence. The respondent contends that:
 - a. It is reasonable for the Tribunal to conclude that both the claimant and her representative refused to give evidence due to their concern over cross examination following Ms Stride's evidence.
 - b. The claimant's representative's assertions about his health at the time are a further attempt to mislead the Tribunal. The respondent is particularly concerned that the claimant's representative did not seek any medical evidence about the alleged impact of his 'medical problems' during the hearing until 27 December 2017 over a month after the hearing.
 - 10.6 In considering this application regard should be had to the interests of the party seeking the reconsideration but also the interests of the other party. The respondent is a small charity. It now has outstanding legal fees which it is required to settle and is attempting to do.

- 10.7 In the public interest there should, where possible be finality of litigation. The matter has been ongoing since 2016 the respondent's trustees have spent considerable time and resources defending this claim when the charity's resources should be spent on the care of the children.
- 10.8 If the application fails the respondent puts the claimant on notice of its intention to apply for the costs of responding to the application.
- 11 The claimant's response to those objections dated 15 February 2018 was also considered. The costs order was made on three grounds. The claimant and her representatives unreasonable conduct in bringing and conducting these proceedings, the claim having no reasonable prospects of success and the communications between the claimant's husband and the respondent's solicitor prior to the hearing demonstrating unreasonable and vexatious conduct.
- 12 The explanation the claimant now gives for her and her representative's 'conduct' in bringing and conducting these proceedings is that there is "*mitigating evidence for our conduct as set out in both G.P's letters*". As to the claim having no reasonable prospects of success the claimant refers to advice from the CAB of a very positive case of unfair dismissal and 'a reasonably confident case of age and race discrimination'. No evidence of that has been provided and it is not clear at what stage that advice was sought and what information that advice was based upon. As to the third ground of the 'without prejudice' save as to costs communications referred to in the Tribunal's reasons the claimant's position is that she believes they these discussions were 'private and confidential'.
- 13 The claimant's response then addresses the points made by the respondent and relies on the medical evidence provided. Additionally the claimant questions the legal costs incurred relying on a 2013/2014 financial statement which shows an insurance premium paid of £243 which the claimant believes are the real costs involved in her case in 2017. She also provides what she describes is a 'realistic and accurate valuation' of her home of £174,000 and she confirms that the home is jointly owned with her husband and is mortgage free.
- 14 Before we set out our decision on the reconsideration application we set out the rules for reconsideration of Judgments.
- 14.1 Rule 70 provides that "*a Tribunal may on the application of a party reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration the original decision may be confirmed, varied or revoked*".
- 14.2 Rule 71(2) provides that if the parties agree the reconsideration can proceed without a hearing. The parties should be given a reasonable opportunity to make further written representations before that reconsideration hearing.
- 15 Both parties were given until 16 February 2018 to provide any further written representations/evidence they wanted the tribunal to consider before the reconsideration hearing.

Conclusions

- 16 The Tribunal's judgment and reasons on costs are clear at paragraph 4 of the judgment and paragraphs 111 – 135 of the reasons.
- 17 The claimant has already referred to our unchallenged findings at paragraph 116 that the claimant's decision not to give evidence was found to be a deliberate decision because she anticipated difficulties in giving evidence she would be giving because of the evidence of her witness Ms Stride. We found that it was not because she was unable for medical reasons to give evidence. Her non attendance was in the Tribunal's view another attempt to avoid dealing with matters because of the difficulties she anticipated she would face in light of Ms Stride's evidence.
- 18 The claimant correctly describes those findings as "powerful findings" which must have influenced our decision to order costs. It is clear from our reasons that we agreed with all of the three grounds the respondent relied upon for the costs application that was being made which were supported by our findings of fact which are not challenged by the claimant in her application for reconsideration.
- 19 We refer specifically to paragraph 132 of the reasons. *The conduct of the claimant and her representative in bringing these proceedings and in their conduct of these proceedings was unreasonable. They made a deliberate decision not to give any evidence because they anticipated difficulties but have continued to persist in making serious allegations of race discrimination right up to the end of the case. The evidence presented was untruthful, exaggerated and misleading. We agree the email sent by Mr Green on the claimant's behalf was unreasonable threatening and vexatious in both it's tone and content.*
- 20 The claimant does not challenge our findings of fact on the email communications between her husband and the respondent's solicitor. She states that she believed they were private and confidential. As we set out in our reasons they were marked "without prejudice save as to costs" and were not privileged when relied upon to support the costs application that was made at the end of the hearing.
- 21 As to the 'conduct' of the claimant and her representative in bringing and in conducting these proceedings the claimant's representative relies upon the "severe depression" the claimant suffers which is referred to in her witness statement and her claim form and the GP's letter which "may affect her ability to participate in the Employment Tribunal". Although in the application that was made it was indicated that we would receive medical evidence as to her inability to participate in these proceedings that was not the evidence we had before us.
- 22 The letter referred from Dr Mansoor dated 31 January 2018 has a reference to it in the second paragraph to the Tribunal proceedings. It states:
"she has found that during her tribunal her anxiety was progressively getting worse and did attend and get in touch with the GP on several occasions to seek support and counseling with regard to this. She finds the tribunal process very stressful and

unfortunately ends up having panic attacks which make her feel extremely unwell”.

- 23 The medical evidence that has now been produced does not address/challenge those findings that have been properly made based on our observations of how the claimant actually presented at the time and the timing of her decision. We also note the claimant herself believed she was well enough before the hearing to participate. She does not provide any explanation for how she was able to proactively assist in the hearing during the respondent’s witness cross examination and the ‘only time’ her position changed on ‘participating’ was after Ms Stride had given evidence and the weakness in her case were exposed. She was aware that her case was not going as she had planned and she faced some difficult questions to answer. Those ‘difficulties’ were not because of the tribunal process but were because of the unreliable and untruthful evidence that had been presented to the Tribunal by or on the claimant’s behalf.
- 24 The claimant’s husband makes the point that most parties and witnesses would be fearful of cross examination in court, however strong their case might be. That is correct but the ‘circumstances’ in which the claimant was fearful are that she had observed her main witness give untruthful and unhelpful evidence before she was about to give evidence and she wanted to ‘avoid’ the same consequences for herself. We also refer to paragraph 17 of our reasons where we record that there was no information before the Tribunal to indicate that the claimant was unable to participate or attend the hearing for medical reasons. There was no evidence from which the Tribunal could conclude there were medical reasons why she could not give evidence. That position has not changed in light of Dr Mansoor’s letter.
- 25 In relation to Mr Green’s refusal to give evidence we have no medical evidence to suggest that he was unable to give evidence because of his diabetes. As stated at paragraph 19 we record that there was no explanation provided by him as to why he could not give evidence when he continued to attend the hearing without the claimant. Our observations of him were that he had prepared questions for the witnesses based on his views of the case and the evidence he would have presented during the disciplinary process because that was how he wanted to present the case. It was not that he was unable to ask questions he was unable to ask ‘relevant’ questions. He presented the evidence in a misleading way and persisted to do so despite repeated requests and reminders from the tribunal of the relevant issues. It was clear to us that he was the author of the claimants witness statements. Again, the timing of his decision not to give evidence was very relevant and was linked to Ms Stride’s evidence.
- 26 Mr Green relies upon a GP’s report of 27 December 2017 by Dr Abdalla which refers to
*“Mr Green told me that this was a week long case which he felt that he did not perform **as he would have wanted to** due to his diabetes and hypertension”.*
It is clear the report is based on what Mr Green is reporting to Dr Abdalla about the hearing a month after the hearing. It is not clear what, if any, information is provided to Dr Abdalla about the findings made by the tribunal and the reasons. It does not say that Mr Green was unable due to his diabetes to give evidence. The fact that Mr Green tells his GP he feels

he did not perform as well as he would have liked is not a ground for reconsideration of the judgment that has been properly made based on the evidence before the tribunal. As the respondent correctly points out there has to be finality in proceedings. The Tribunal has to consider the interests of justice for both parties. The claimant and her representative might wish, with the benefit of hindsight that they had done things differently but that does not change what they did do at the hearing. Parties cannot be given second bites of the cherry every time they are 'unhappy' with the outcome or wish they had 'performed' differently. The problem for Mr Green is that his 'performance' at the 'hearing' is consistent with his manner/performance in 'correspondence' with the respondent's solicitor before the hearing. He does not suggest his tone or content in written correspondence is down to his diabetes but suggests it is his sense of humor. It was his choice then to use the words he used making threats in correspondence which we found to be *unreasonable, vexatious and threatening behaviour*.

- 27 The other evidence we saw simply confirmed the medication the claimant takes for depression. We accept this is medication for depression which Dr Mansoor states the claimant has had for over a year (i.e. from approximately January 2017). The fact the claimant has depression is not the reason why the claimant did not give evidence. As the respondent notes in its objections, the tribunal deals with many cases where claimants suffer with depression and is use to making adjustments when they give evidence to accommodate this. The claimant whilst taking this medication believed she was well enough and was able to actively participate in the hearing until Ms Stride's evidence had been completed when she chose not to participate in the process any longer.
- 28 Having considered the information provided by both parties we find there are no grounds to reconsider the Judgment that was made to order costs and it is not in the interests of justice to do so.
- 29 In relation to the amount of costs ordered the claimant's husband had told us the claimant had no savings and no income and she is the joint owner of their home which has no mortgage. The claimant has confirmed that information is accurate and provides a valuation of the home of £174,000. Based on my member's local knowledge this is, in our view, a conservative estimate of the value based on homes in this area. However, taking the value given of £174,000, with the claimant's half share we were satisfied the claimant has the ability to pay the costs ordered of £10,000.
- 30 The claimant has also suggested the respondent has not incurred the legal costs claimed at all based on an insurance premium of £243 shown in the 2013/2014 accounts. We were satisfied based on the information the respondent provided to us at the Tribunal that the costs claimed were incurred. It was open to the Tribunal to increase the costs awarded because the actual costs incurred exceeding the amount we have awarded but we do not do so and confirm the amount of costs ordered £10,000 was a reasonable sum to award in all the circumstances.

Case No: 1800950/2017

Employment Judge Rogerson

11/04/2018