EMPLOYMENT TRIBUNALS

Claimant: **Ms K Garcha**

Respondents: **Oadby & Wigston Borough Council**

JUDGMENT ON A PRELIMINARY HEARING

Heard at: Birmingham **On: 20 & 21 May 2019**

Before: Employment Judge Flood

Appearance:

For the Claimant: **Mr Hyams** **(Counsel)**

For the Respondent: **Ms Motraghi** **(Counsel)**

JUDGMENT ON COSTS APPLICATION

The respondent's application for costs against the claimant is unsuccessful and dismissed.

REASONS

Background

1. The claimant is a Solicitor and was employed by the respondent from February 2006 until 31 January 2017. By a claim form presented on 26 June 2017, following a period of early conciliation from 28 April 2017 to 28 May 2017, the claimant brought complaints of: (a) race discrimination, (b) disability discrimination, (c) ordinary unfair dismissal, (d) in the alternative; automatic unfair dismissal by reason of whistleblowing or making a protected disclosure, (e) detriment by reason of whistleblowing or making a protected disclosure, (f) victimisation, (g) unlawful deduction from wages, (h) breach of contract, and (i) wrongful dismissal. The claimant has withdrawn her complaint of direct race discrimination of unlawful deduction of wages in respect of unpaid holiday pay (and breach of contract in so far as it relates to holiday pay) and in respect of the Deputy Returning Officer fee. Judgment confirming that these complaints are dismissed on withdrawal has been issued. The respondent defends all the remaining claims.

2. There have been three previous hearings in this case. A Closed Preliminary Hearing (CPH) before Employment Judge Harding on 14 November 2017; an Open Preliminary Hearing (OPH) before Employment Judge Lloyd on 5 March 2018 and a further OPH before Employment Judge Dimbylow on 3 January 2019. The background to and outcome to all those hearings are set out in the relevant case managements orders issued following those hearings. It is the first CPH before Employment Judge Harding that is relevant to the application currently being considered.

3. At the last OPH before Employment Judge Dimblyow, a further two day OPH was listed to determine 3 applications by the respondent as follows: (1) whether to strike out all or any part of the claim because it has no reasonable prospect of success, is scandalous or vexatious, (2) whether to order the claimant to pay a deposit (not exceeding £1,000.00) if it seems that any contentions put forward by the claimant have little reasonable prospect of success, and **(3) whether to make an order for costs against the claimant arising out of the adjournment of the first CPH before Employment Judge Harding on 14 November 2017**. The hearing on applications (1) and (2) has been adjourned pending the provision of further particulars and the Case Management Summary and Order sent to the parties deals with this.

4. The costs application at (3) therefore came before me on 20 & 21 May 2019. For the purposes of the hearing, I had before me the following documents:

   4.1. Skeleton argument prepared by Ms Motraghi on behalf of the respondent;

   4.2. Skeleton argument prepared by Mr Hyams on behalf of the claimant;

   4.3. Statement of claimant dated 29 April 2019;

   4.4. Bundle of Documents for Preliminary Hearing 20-21 May 2019 ("Bundle");

   4.5. Respondent's Supplemental Bundle for Preliminary Hearing 20-21 May 2019 ("R Supplemental Bundle"); and

   4.6. Claimant's Supplemental Bundle ("C Supplemental Bundle").

5. I heard evidence from the claimant and oral submissions from both parties. I reserved my decision.

The Issues

6. The issues which needed to be determined were:

   6.1. Did the claimant's conduct in not being in a position to clarify her claims at the OPH on 14 November and/or not seeking a postponement of the OPH amount to acting disruptively or otherwise unreasonably (within rule 76 (1) (a) of the Employment Tribunal Rules of Procedure 2013 ("ET Rules") ? and, if so;

   6.2. Should, in the Tribunal's discretion, a costs order be made?

   6.3. If so, how much should be awarded?

The relevant law

7. **Regulation 76, Schedule 1 of the ET Rules** states:

> *(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*
> *(b) any claim or response had no reasonable prospect of success.*
>
> *(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.*

8. This is a two stage test initially: a Tribunal must ask whether a party's conduct falls within rule 76(1)(a) or (b) as applicable. If so, the Tribunal must then go onto ask whether it is appropriate to exercise the discretion in favour of awarding costs against that party. It is only when these two stages have been completed that the tribunal may proceed to the third stage, which is to consider the amount of any award payable

9. **Gee v Shell UK Limited [2003] IRLR 82.** The Court of Appeal confirmed that it is a fundamental principle that costs are the exception rather than the rule and that costs do not follow the event in Employment Tribunals.

10. **McPherson v BNP Paribas [2004] ICR 1398**. In determining whether to make an order under the ground of unreasonable conduct, a Tribunal should take into account the "nature, gravity and effect" of a party's unreasonable conduct.

11. **Barnsley Metropolitan Borough Council v Yerrakalva [2012] ICR 420**. The vital point in exercising the discretion to order costs is to look at the whole picture. The Tribunal has to ask whether there has been unreasonable conduct by the paying party in bringing, defending or conducting the case, and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had.

12. **Oliver Salinas v Bear Stearns International Holdings UKEAT/0596/04/ DM.** The question of whether a costs order was exceptional or unusual was not significant, so long as the proper statutory tests were applied.

The relevant facts

13. Although it is not the function of the Tribunal when considering applications at the preliminary stage to make significant findings of fact, some fact finding was required in order to make a determination on whether the claimant acted disruptively or unreasonably. The relevant facts are as follows:

    13.1. The claimant is a solicitor and was employed by the respondent from February 2006 until 31 January 2017. She has had some experience

dealing with employment law cases although was not a specialist employment lawyer.

13.2. The claimant submitted her claim on 26 June 2017 and the response by the respondent was submitted on 25 July 2017. The respondent highlighted in its response that aspects of the claim were unclear. The parties were invited to attend a closed preliminary hearing. This was to take place on 14 November 2017 for the purposes of case management and the parties were sent notice of this hearing on 18 August 2017. That notice of hearing included the usual information that the hearing was to identify the issues and make case management orders. The parties were also sent a draft agenda to complete and return.

13.3. Mrs Garcha has sought assistance from friends and family throughout the claim and gave convincing evidence that she was not capable of dealing with it herself. This is primarily due she says to difficulties with her mental health. The claimant has been under the supervision of her GP and stated that whilst she is fine dealing with personal matters, every time she had to deal with anything related to the claim, she suffers with depression, anxiety and stress. When giving evidence today the claimant became very distressed.

13.4. The claimant's sister provided initial assistance to her and she has also been relying on the support of her friend, Ms D Souza, who dealt with ACAS on her behalf and drafted her claim. The claimant also gave her friend access to her e mails as she found it difficult to deal with correspondence from the respondent's solicitor. Although the claimant was unable to involve herself in the day to day running of her claim, she knew she had issued a claim and that the defence had been submitted. She said she also knew that she had a hearing coming up.

13.5. Ms Garcha was challenged during cross examination about what she said about her mental state during this period, as during the same time she was working full time for a charity, Coping with Cancer. The claimant accepted that she worked full time (albeit she was not required to attend work every day). She explained that she enjoyed this work with the charity as it was somewhere to go where she did not feel low and it made her feel good. She stated that medical professionals had advised her to carry on with this role. No medical evidence was supplied.

13.6. In October/November 2017 the claimant started to explore gaining legal assistance moving forward as her friend was not able to assist as much as she had. With the assistance of Mrs D Souza and the claimant's sister, she secured some funding for legal advice through some legal expenses insurance that she had.

13.7. On 6 November 2017, the respondent's solicitors, Bevan Brittan wrote to the claimant enclosing their completed agenda and a draft list of issues. This document had a number of requests for information contained within it. The claimant does not remember receiving this letter but recalls receiving "*lots of requests*" from the respondent's solicitors and she said she found it all difficult to deal with. Her many focus at this time she says was to obtain legal representation.

13.8. The claimant received notification on 7 November that she had secured funding for legal advice and confirmation that solicitors would be acting for her on 8 November 2017. On 9 November on the advice of her newly appointed solicitors, the claimant wrote to the Tribunal to ask if the hearing coming up could be converted to a telephone preliminary hearing. The claimant did this in an effort she say to keep costs down. In her email she stated that she was making arrangements for legal representation which would be in place for 14 November 2017.

13.9. The respondent's solicitors objected to this request on the same day, noting that the claim was complex and that an in-person hearing would be more appropriate. The Tribunal agreed with the respondent and confirmed that the hearing would be in person in a letter sent by e mail on 10 November 2017.

13.10. On 10 November, a Friday, the claimant's solicitors, Rich & Carr, informed the Tribunal and the respondent that they had just gone on record. They also informed that counsel had been instructed to attend the preliminary hearing the following Tuesday 14 November at 10am. There was an exchange of emails between the two firms of solicitors on 10 and 13 November 2017 about the draft agenda and list of issues and Bevan Brittan asked Rich & Carr whether the claimant would be attending (page 13-15 Bundle). The claimant stated that she was advised by her solicitors to discuss the issues that were coming up with the hearing with Counsel on the morning of the hearing. The claimant was keen to make progress with the hearing.

13.11. The hearing went ahead on 14 November 2017. The claimant attended with Counsel, Mr J Meichen meeting him on the morning of the hearing for the first time to discuss her case. The claimant's evidence was that she broke down in tears when speaking to Counsel and during the hearing itself and said she was "*all over the place and couldn't full comprehend what was going on*". The case management order for the hearing records that Counsel was given additional time to get instructions at the start of the hearing. It also notes that "*unsurprisingly, given the length of the narrative attached to the claim form and the lateness of his instructions, and despite being given extra time, Mr Meichen told me that he was not currently in a position to particularise the claimant's claims*". It was also recorded that: "*it may have been a more prudent course for the claimant's newly instructed solicitors to apply for a postponement of today's case management hearing on the basis that the claimant was not ready for the hearing to go ahead*".

13.12. The respondent made an application for costs in respect of the costs incurred preparing for and attending the OPH that day which was confirmed in writing on 21 November 2017 (page 95-97 Bundle). This letter set out the basis for the application. The respondent confirmed in this application that had the claimant applied for a postponement, that this may have resulted in the Tribunal considering making an order for costs under rule 76 (1) (c).

13.13. The claimant gave evidence about her financial position for the purposes of the costs application which was set out in paragraphs 25-33 of her witness statement. The claimant has a 50% interest in two properties,

which both are subject to an outstanding mortgage. She estimates that she has £11,000 approximately across her bank accounts. She is currently employed and after outgoings has just over £900 a month to cover day to day living including food, clothes, travel etc. She has outstanding credit card debts to the tune of approximately £25,000 and loans outstanding to family and friends.

Conclusion

14. The initial question I must consider is whether the claimant acted, disruptively or otherwise unreasonably under rule 76(1)(a) on the basis of:

    14.1. Not being in a position to clarify her claims at the preliminary hearing on 14 November; and/or

    14.2. Not seeking a postponement of the preliminary hearing if/when it became clear that the claimant would not be prepared to engage with the Tribunal in identifying the issues in her claims.

15. Ms Motraghi for the respondent submits that the claimant gives no explanation why she made no attempt to clarify her claims in advance of November 2017 despite being on notice that the claim lacked particulars from the point the response was submitted. She points out that the claimant does not provide any contemporaneous medical evidence corroborating her account of mental health difficulties, in particular that she was not well enough to deal with her Tribunal claim but could work full time for a charity. She notes that the claimant is a solicitor herself and had the assistance of experienced solicitors and Counsel in advance of the hearing. She also had the assistance of a friend who is also a solicitor throughout the process. As a result of what Ms Motraghi says is the claimant's unreasonable or disruptive conduct, the respondent has incurred the costs of preparing for an attending a CPH in the expectation that it would be effective. She submits that the claimant has significant means being in employment on a regular salary and having a significant interest in two properties

16. Mr Hyams submits that the claimant's evidence shows that cannot be said that the claimant acted unreasonably in attending the hearing on 14 November 2017 and not seeking postponement. He submits that the claimant's evidence shows that she was struggling because of her mental health (which is submitted is a disability) and therefore even if she acted unreasonably within the meaning of rule 76 (1) (a) it would be wrong to make a costs order against her. He submits that the respondent put the claimant in an impossible situation by making a threat to apply for a costs order in the event she did attend and was unable to particularise her claim. This also left her subject to a possible costs order if she did apply to postpone the hearing. He submits this left the claimant "between a rock and a hard place". He further submits that her means are such given her debts and lack of liquidity, that it would not be appropriate to order her to pay the respondents costs.

17. The first question is did the claimant act disruptively or unreasonably by not being in a position to clarify her claims at the preliminary hearing? I have considered carefully the submissions of the parties and my conclusion that the claimant's conduct whilst not an ideal way to conduct litigation, cannot be considered as being "disruptive" or "otherwise unreasonable". It was certainly unfortunate that the claimant did not clarify her complaints early in the process. It would also have been helpful if a response could have been provided to the

matters raised by the respondent at ET3 stage and in its draft list of issues sent on 6 November 2017. It might be expected that a woman of the claimant's qualifications and experience should have been able to prepare herself much better. However I have accepted the claimant's explanation that she was struggling to deal with any aspects of the claim during this period. She was relying heavily on friends and family and was not able to keep on top of the day to day running of the claim. She did not have any legal representation until her insurance was confirmed. Although a solicitor by profession, she was not an employment specialist and was still a litigant in person at this stage. There was insufficient time after solicitors were instructed and before the first hearing for any real progress to be made in clarifying the issues. Whilst I can understand the frustration of the respondent having to attend a hearing without this clarity, what happened or did not happen in the run up to the first hearing, does not in my view amount to unreasonable or disruptive conduct on the claimant's behalf, when looking at the whole picture.

18. The fact that she was unable to actively engage with her own Counsel or the Judge at the first preliminary hearing was also unfortunate. However again I accept the claimant's evidence that she became so upset when talking about the issues with her barrister in the morning that she was unable to think clearly enough to answer his questions. The claimant's demeanour at the hearing supported her evidence that she finds the process extremely stressful and indeed distressing. These are not simple claims and to particularise the complaints for whistleblowing claims, for example, when in a distressed state as she was cannot have been an easy thing to do. Therefore I also do not find that the claimant's conduct at the hearing itself in not being in a position to particularise her complaints meets the threshold of being "unreasonable" or "disruptive". The nature of the conduct complained of is not deliberate - I accepted that the claimant intended to attend the preliminary hearing and progress her case. She was simply not able to. I have taken into account the effect on the respondent in not being able to make progress, but I do not see that the nature, gravity or effect was unreasonable or disruptive.

19. Secondly, I must decide whether she acted unreasonably or disruptively when not applying for a postponement of the hearing on 14 November once she realised she was not in a position to engage with the tribunal to identify her claims. I am persuaded by the respondent's submission that the claimant was in a difficult position at the time her solicitors came on record. If she had applied for a postponement, it is likely that the respondent would have objected and even if it had been granted, she would be left exposed to an application of costs in any event under rule 76 (1) (c). I conclude that the claimant attended the hearing on 14 November with a genuine intention to progress her claim. Unfortunately, she was not mentally or emotionally able to deal with it on that day and I am not convinced that she appreciated that this would be the case in advance. Therefore this can in no way be seen as unreasonable or disruptive conduct especially as it is likely a costs application would have been made whether or not she applied for a postponement. I agree with the observation of EJ Harding that a postponement might have been a better idea all round. However the fact that this was not done, does not equate to unreasonable or disruptive conduct.

20. As I have not found any conduct which amounts to unreasonable or disruptive conduct within the meaning of rule 76 (1) (a), then I do not need to go on to

consider whether a costs application is appropriate and if so at what level it should be made.

21.

Employment Judge Flood

5 June 2019

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