



EMPLOYMENT TRIBUNALS

Claimant
Ms M Nicol Wilson

Respondent
v South London & Maudsley NHS
Foundation Trust

PRELIMINARY HEARING

Heard at: London South

On: 7 May 2019

Before: Employment Judge Martin

Appearances

For the Claimant: Ms Shona Newmark - Solicitor

For the Respondent: Mr A Ross - Counsel

RESERVED JUDGMENT ON COSTS

1. The Respondent's application for costs is successful.
2. The Claimant shall pay to the Respondent £250 contribution towards its costs

RESERVED REASONS

1. This hearing was listed to consider the Respondent's application for costs and other matters which are set out in a separate document. The application was made for £8,409 costs of the adjourned final hearing on 3 October 2018, the preliminary hearing of 5 October and this hearing.
2. The background leading to the adjournment of that hearing was that the Claimant presented a claim on 27 December 2017 complaining of discrimination on the protected characteristic of race, unpaid holiday and unauthorised deductions from wages. There was a preliminary hearing on 5 April 2018 at which the final hearing was listed for three days commencing 3 October 2018 with the usual type of case management orders being made.
3. On 13 September 2018 the Claimant was dismissed with payment in lieu of notice being made. The Claimant instructed solicitors to represent her and they sent a notice of acting to the Tribunal on 28 September 2018. On 1 October 2019 (two days before the hearing) she applied to add unfair dismissal to her claim and for the hearing to be postponed. Both the application to amend and the application

for a postponement was refused by the Regional Employment Judge on 2 October 2018 and notified to the parties by email the same day.

4. At the start of the hearing on 3 October 2018, a further application for a postponement was made counsel for the Claimant. This application was made on the same basis as the application which had previously been refused and was refused again. The Tribunal was then informed that neither the Claimant or her counsel had the Respondent's witness statements. The Respondent told the Tribunal that it had exchanged statements on 25 September 2018 and had written confirmation of this.
5. The Claimant also said that although she had signed a witness statement, she had not been given the opportunity to read it by her solicitor who told her simply to sign it. It was not possible to establish precisely what had happened and therefore a decision was made by the Tribunal to adjourn the hearing and that the Tribunal and parties would reconvene on Friday, 5 October 2018 to consider the Respondent's application for its wasted costs and any further case management required. In the meantime, the Tribunal directed that the Claimant's solicitors should write to the Tribunal with an explanation as to what had occurred and ordered that the witness statements exchanged would stand as the witness statements in any future hearing and could not be amended.
6. On 4 October 2018 the Claimant sent an email to the Tribunal saying:

"Following yesterday's proceedings in court in which my barrister was not given the witness statements he has decided not to represent me any more.

In light of this unfortunate situation I would be grateful if I'm given more time to find a representative for myself"
7. The Tribunal regarded this as an application to postpone the hearing on 5 October 2018 and despite the Respondent's objections considered it was in the interests of justice that the hearing be postponed. It was relisted to this hearing.
8. On 4 October 2018 the Claimant's former solicitors gave a written explanation as requested by the Tribunal. The letter reveals the following chronology:

20 September 2018	Claimant instructs Julia and Rana solicitors
21 September 2018	Telephone call with the Claimant regarding her instructions for her written statement
22 September 2018	The Claimant sends her solicitor written instructions and the Claimant's witness statement is prepared on that basis.
24 September 2018	The Claimant calls her solicitors several times that day instructing them to send her statement to the Respondent urgently.
25 September 2018	The Claimant attends her solicitors' offices and signs her witness statement.

- 25 September 2018 at 13:01 The Claimant solicitors receive the Respondent's statements by email and send the Respondent the Claimant's witness statement. The Claimant was copied into the emails.
- 26 September 2018 The Claimant meet with her solicitors and has a discussion about the witness statements received on behalf the Respondent. The Claimant said she was having financial difficulties and Mr Mian agreed to meet with the Claimant and read the documents on a pro bono basis.
- 28 September 2018 Mr Mian attends the solicitor's office for a pre-scheduled conference with the Claimant at 2 pm. Mr Mian waited until 2:45 pm and then left. The Claimant arrived at 3:30 pm. There was a discussion about Mr Mian's fees which he had discounted, and the Claimant requested her solicitors to apply for an adjournment of the hearing on 3 October 2018 which they did after advising her of the advisability of making such an application.
- 1 October 2018 Mr Main collected the files first thing in the morning from the Solicitor's offices even though he was told that he has yet to be formally instructed. He collected two files from the office and the office did not realise that there was a third file which was the file which contained the Respondent's witness statements.
- 2 October 2018 At approximately midday the Claimant arranged for payment to be made to Mr Mian. She was told to attend the tribunal by 8 am to meet him in order to discuss matters prior to the hearing starting.
- 3 October 2018 The Claimant arrived at tribunal at 8:46 instructing Mr Mian to renew the application for an adjournment and telling him she did not know about the witness statements from the Respondent.
- The solicitors confirmed that the Claimant's witness statement was prepared on her instructions and that the Claimant did have the Respondent's witness statements and had commented on them in a meeting. Attendance notes were not provided by Julia and Rana solicitors as they were privileged and the Claimant had not waived privilege.

9. This letter is in direct contradiction to what the Claimant told the Tribunal on 3 October 2018. The Tribunal finds on the balance of probabilities that the Claimant did receive the Respondent's witness statements and gave her solicitor her comments on them. The Tribunal also finds that the Claimant's witness statement was prepared on her written and oral instructions and that she had the opportunity to read it before signing it at her solicitor's office.
10. The Claimant did not provide evidence of her means prior to the hearing as requested by the Tribunal.
11. Submissions were heard from both parties. The Claimant was represented for this hearing by a new firm of solicitors. A brief summary of the submissions is below.

- a. Essentially the Respondent's position is that despite witness statements being exchanged on 25 September 2018 the Claimant left it very late to give full instructions or to provide funds in a timely fashion to pay for representation. The inference taken by the Respondent is that the Claimant did not want to pay for two trials and did not want to go ahead on 3 October 2018 despite the Tribunal refusing her request for a postponement. The reason the Tribunal agreed to postpone the hearing was because Mr Mian was not prepared which was because the Claimant had left everything so late as she did not want to go ahead with the hearing on 3 October.
 - b. The Claimant's position in brief, is that the Claimant was dismissed which gave rise to another cause of action. The Claimant's position is that she did not act vexatiously as she did exchange her witness statement and agreed the bundle but said it was a waste of costs to have a three-day hearing where the dismissal arose out of the same set of facts.
 - c. In reply the Respondent said that the final written warning that the Claimant relies on as the link between the two cases was not appealed, so the veracity of it was not an issue in the unfair dismissal claim and they could easily be heard separately.
12. At this point in the proceedings the Tribunal adjourned for the Respondent to consider documents produced in the hearing by the Claimant about her means and for the Claimant's representative to explain to the Claimant what information the Claimant needed to provide to the Tribunal as evidence of her means.
13. The Claimant gave evidence of her means and from the documentation provided it appeared that there was another bank account that was not disclosed. However, the Claimant did eventually produce documents that showed that she was in receipt of benefits and therefore despite a suspicion that the Claimant had not fully disclosed her means, the fact of her being on benefits indicates that she had limited disposable income.
14. The relevant law is found in rule 76(1)(a) of the ET rules 2013 which provides that a tribunal may make a costs order... and shall consider whether to do so, where it considers that *"a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) all the way that the proceedings (or part) have been conducted"*.
15. Rule 76(1) of the 2013 rules (as amended) states that a tribunal may also make such an order and shall consider whether to do so when a *"hearing has been postponed on the application of a party made less than seven days before the date on which the relevant hearing begins"*.
16. The Respondent submits that the Claimant has acted unreasonably in various respects in particular that she waited until the day before a three-day hearing to instruct counsel; she failed to have a conference with Counsel because she turned up 1.5 hours late on 28 September; she failed to arrive early enough in the morning of the hearing as advised by her solicitors. She went to her solicitors to have a discussion with them a week before the hearing about the respondents

witness statements and yet apparently denied knowing anything about them on the morning of the hearing.

17. The Tribunal has considered the factual basis on which this application has arisen and also the submissions of both parties. The Tribunal's first finding is that the threshold test has been met and the Tribunal finds that the Claimant has acted unreasonably in the way that she has conducted the proceedings pursuant to rule 76 (1) (a) of the ET rules. Further, her late application for a postponement which was first made one day before a three-day hearing was unreasonable and has put the Respondent to unnecessary expense (rule 76(1) (c) of the 2013 rules. The Tribunal finds that the awarding of a costs award is appropriate.
18. However, when considering how much that award should be the Tribunal has taken into account the evidence of the Claimants means which shows that she is in receipt of benefits and has limited disposable income. The Tribunal is not satisfied that the Claimant has given full disclosure of her means and finds that the Claimant has not been wholly truthful in what she told the Tribunal at the hearing on 3 October 2018. The Tribunal suspects that the Claimant has more disposable income than she has disclosed and therefore makes an order that she pay £250 as a contribution towards the Respondent's costs.

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Employment Judge Martin
Date: 17 June 2019