Case Number: 1801437/2018
1801438/2018
1802232/2018
1802231/2018

EMPLOYMENT TRIBUNALS

Claimant 1: **Mrs J Harrop-Rhodes**
Claimant 2: **Mr R Jackson**

Respondent 1: **Door Solutions Ltd**
Respondent 2: **Mr D Watkins**

HELD AT: **Sheffield** **ON: 9 July 2019**

BEFORE: Employment Judge Rostant

REPRESENTATION:

Claimant: **In person**
Respondent: **Mr R Anderson, consultant**

JUDGMENT having been sent to the parties on 16 July and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimants each brought complaints of unfair dismissal and sex discrimination against the respondent. At a preliminary hearing on 14 March 2018 the cases were consolidated for hearing by Employment Judge Maidment. The claims were brought against Mr Donovan Watkins a director of the first respondent as well as against the first respondent. There were 19 separate allegations of sexual harassment laid at the door of Mr Watkins, 16 on the part of Mrs Harrop-Rhodes and a further three by Mr Jackson.

2. The matter was set down for hearing with case management orders. In advance of that hearing there was an application made by the respondent for specific disclosure. The application included an application that essentially asked the Tribunal to order that Mrs Harrop-Rhodes hand over to the first respondent the respondent's mobile phone issued to her for work purposes. The reason for the application was that a considerable part of the evidence relied on by Mrs Harrop-Rhodes in her claim against the respondent was comprised of text messages received by Mrs Harrop-Rhodes from Mr Watkins. It was the respondents' case that the claimants had disclosed only the part of the text exchange namely those texts sent by Mr Watkins to the claimant. It was the respondents' case that disclosure of the texts from the claimant to Mr Watkins would reveal the fact that the text exchange was in the context of a consensual sexual relationship. The respondents' position was that Mr Watkins, at Mrs Harrop-Rhodes's, request had deleted from his phone the texts he had received from her and that there was no other way of obtaining a copy of his side of the text exchange without obtaining the claimant's company phone which would contain the full conversation.

3. At the preliminary hearing on 18 June I concluded that it was within my powers to order the claimant to hand over the phone to the respondent. She did not deny that the phone was the first respondent's property and I was satisfied that the phone might contain evidence which was relevant to the hearing and which could be extracted and produced in documentary form. The claimant told the Tribunal that she had been asked for the phone but had not handed it over because she had been advised by the police to hang on to the phone until these proceedings were completed. I thought that that was an inherently improbable advice for the police to give particularly bearing in mind the possibility that the claimant could simply extract from the phone copies of the relevant documents and have them printed off and bearing in mind the fact that no criminal proceedings were in contemplation (as far as I had been made aware) and unlikeliness of a police officer advising a litigant in civil proceedings as to what evidence should or should not be retained, particularly in the circumstances where he was advising a person to retain property which was not their own. In any event, I ordered that the phone be handed over and I made provisions for the respondents to add to the file of documents copies of any documents which they extracted from the phone.

4. The matter came before a full Tribunal on 10 and 11 July 2018. At the outset of the proceedings the respondent applied to have admitted into evidence some print-offs of texts taken from Mr Watkins' phone which added some context to that which was disclosed by the first claimant. However, the respondent went on to say that sexually charged communication had been deleted by Mr Watkins at Mrs Harrop-Rhodes request. That was disputed and it was evident from the texts that were disclosed by Mr Watkins that they were devoid of any sexually related content. On behalf of the respondents, I was told at the hearing that the respondents had been unable to extract from the telephone handed over in accordance with my orders any information and it was the respondents' belief that the phone had been handed over absent a sim card. The claimants denied all knowledge of that. The Tribunal made no finding of foul play but were satisfied that the respondent had been unable to extract from the phone the full record of conversations between that telephone and Mr Watkins' telephone. The hearing on 10 July was then adjourned to allow Mr Watkins to explore with WhatsApp, as guardian of the WhatsApp correspondence between himself and the claimant,

Apple, as guardian of any information contained in i messages and EE as guardian as text communications, as to how a full record of those conversations could be obtained. The matter was returned to at the outset of the hearing on 11 July. Mr Anderson for the respondent explained that whilst it was now understood that all three providers did have the information, which could be extracted from the Cloud, they would require a court order. Mr Anderson was applying for orders for all three and applied for an adjournment to allow time for those orders to be complied with. The Tribunal concluded, reluctantly, that bearing in mind the various principles within the overriding objective, an adjournment was fair and proportionate. The matters were not trivial. At stake were not just the personal reputations of Mrs Harrop-Rhodes and Mr Watkins but also, potentially, quite large sums of money being claimed by the claimants in this case.

5. The Tribunal was critical of the respondent for not having made the application for an order earlier once it was apparent that the telephone did not contain the information available. Nevertheless, we concluded that the respondents might be significantly prejudiced in their ability to defend the claims unless they were able to produce the full record of the conversations between Mr Watkins and Mrs Harrop-Rhodes and we duly adjourned and re-listed the hearing to continue on 19 to 21 November.

6. On 13 July, the claimants wrote to the Tribunal asking permission to add three further people to attend as witnesses for the hearing in November. On 30 July, the Tribunal's case management order arising out of the adjourned July hearing was sent to the parties. On 24 July, in a letter copied to the claimants, the respondents provided the information to allow the Tribunal to make the third party disclosure order against Apple, EE and WhatsApp. On 2 August, before the order could be made, the claimant wrote to the Tribunal withdrawing their claims. By the same letter they made an application for preparation time which they considered that they had incurred by the respondent's failure to adhere to court orders. The application was made in detail by 20 August. On 4 September the Tribunal dismissed the claim on withdrawal and the respondents immediately made an application for costs. Following considerable further correspondence, the matter eventually came before me to determine both the claimants' application for the preparation time orders and the respondent's application for costs.

The law

7. Applications for costs and time orders are made under the Employment Tribunal Rules of Procedure 2013 and in particular Rules 74 to 84. Rule 74 defines costs as "fees, charges, disbursements or expenses incurred by or on behalf of the receiving party". Rule 74(2) defines "legally represented" as having the assistance of a person who "has a right of audience in relation to any class of proceedings in any part of the senior court of England and Wales, or all proceedings in county court or magistrates court". Rule 76 provides that a Tribunal may make a cost or preparation time order where it considers that a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing of the proceedings or in the way that the proceedings have been conducted, or where any claim or response has no reasonable prospect of success. Rule 78 provides that where a costs order is made in respect of representation by a lay representative (see Rule 74(3)) the hourly rate applicable

for the fees of a lay representative shall be no higher than the rate under Rule 79(2) that being the rate for a preparation time order.

8. In accordance with the provisions of Rule 79(2) the rate current at the time the preparation time and costs order relate to was £33 an hour. Rule 79 also provides that the amount of a preparation time order shall be based on the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on preparatory work, which excludes attendance at the hearing.

The application for preparation time

9. The claimant's basis for applying for a preparation time order is that a number of instances it alleges that the respondent failed to comply timeously with the Tribunal's case management orders necessitating extra work on the part of the claimant. In fact, the claimants' application includes a number of complaints about the respondent's conduct which did not in the end result in extra time being incurred by the claimants and those include the fact that the respondent responded late to a claim and did not take up an opportunity (voluntary) to amend its response.

10. Nevertheless, upon enquiry there were a number of complaints about the respondents' conduct which do reveal a breach of the Tribunal's orders. The first of those relates to the date of disclosure for documents. Employment Judge Maidment ordered that disclosure take place on 27 April 2018. The parties mutually agreed between themselves that in fact some documents would be disclosed by post with a posting date of 27 April. However, it was the uncontested assertion of the claimants that the respondents failed to comply with the varied order and did not post certain documents until 30 April, necessitating chasing up work on the part of the claimants. The claimants estimate that the extra chasing up time was a total of seven hours. Even if that were true, and I doubt that it would have taken seven extra hours of work to do what the claimants describe was entailed in the chasing up, I consider that seven hours is an unreasonable amount and I allow a total of three hours.

11. The claimants also complain that at the preliminary hearing of 14 March they were not, contrary to the Tribunal's order, each sent a copy of the respondent's agenda but they were handed one on the day of the hearing and had to email the respondent for a follow up copy following that. I accept that that too was a breach of the Tribunal's order but I do not accept that it necessitated three hours extra work as claimed by the claimants and I am prepared to allow at most an hour for that.

12. The next basis for complaint related to a disputed issue between the parties about the creation of the file. There is no doubt that Employment Judge Maidment ordered the respondents to produce a paginated file and a copy of that be with the claimants by 11 May 2018. There is no doubt that that order was not complied with. The question is why. The respondents assert that this was because the file was not yet agreed and that it decided not to paginate the file until final agreement as to its contents had been settled. It is further the case that the bundle arrived in two halves separated by three days the second half of the bundle not being received by the claimants until 14 May. The respondents acknowledge that and ascribe it to a problem with its server, the bundle being transferred electronically. The claimants assert that this necessitated six hours in chasing up time on their

part. I am on balance satisfied that the respondents' explanation for sending an unpaginated bundle is not made out. The respondent's case is that a request was made of the claimants to agree a draft index prior to 11 May. The claimants do not recall that, or at least if they do they do so only vaguely, and I was not shown a copy of that communication. Nor is it referred to by the respondents in their letter written to the Tribunal later and explaining the alleged default over the bundle. On balance I therefore take the view that the respondents were in breach of the order for creation of the file. There is no doubt that the claimants composed a lengthy letter to the Tribunal expressing its concern at the respondent's failure to comply with that and other orders and I have no doubt that that will have taken some time to compose. I take the view however that the six hours claimed is excessive and I limit that to two hours.

13. The claimants then complain about time taken in dealing with a difference of opinion between them and the respondents as to what documents ought or not to go into the file. Upon discussion with the parties it transpired that this was a difference of opinion as to whether or not explicit images should be included in the file or merely a description of those images. The respondents' letter to the Tribunal of 15 May asserts that Employment Judge Maidment said during that preliminary hearing that if the contents of explicit images are agreed between the parties the images themselves need not appear, merely a description of them. That assertion was never challenged by the claimants and certainly was not challenged today and appears to be the basis on which a disagreement arose between the parties, the claimants having concluded that it was necessary to include the actual images despite the fact that there was no disagreement as to what they showed. In the circumstances, it appears that the disagreement between the parties as to the inclusion of the full images was one where both parties had a legitimate basis for their stand point and I am at a loss to how where the respondent taking one stance which was not what the claimants wanted is evidence of unreasonable or vexatious conduct. I make no order in this regard

14. The claimants finally complain about the late application for specific disclosure on 29 May dealt with above in the setting out of the procedural history. Here again I take the view that there is no evidence of unreasonable conduct on the part of the respondent. The claimants were in possession of the first respondent's phone. The respondent wanted the phone in order to obtain missing evidence. The parties agree that there had been a disagreement between the claimant and the respondent's representative about whether or not the phone should be handed over and that that had eventually driven the respondent's representative to write to the Tribunal requesting an order. In the circumstances, I take the view that there was nothing unreasonable about that or about the requirement for the parties then to attend a telephone and case management discussion to discuss that and other matters that has arisen around about the same time.

15. Unless where explicitly stated above, I take the view that all breaches of case management orders by the respondent amount to unreasonable conduct. I am satisfied that they justify the making of a preparation time order and I have totalled that at six hours. I therefore order the respondents to pay to the claimants the total sum of £198, split half each.

The application for costs

The basis of the application

16. The respondent's application for costs is a somewhat unusual one since evidence disclosed to the Tribunal shows that Peninsula have agreed to indemnify the respondent for its costs. I am informed by Mr Anderson today that should I make an order for costs in favour of the first respondent as the receiving party, those costs will in fact be recouped from it by Peninsula. Mr Anderson submits that the definition of costs in Rule 74(1) including as it does fees, charges disbursements or expenses incurred by or *on behalf of* the receiving part. The amounts sought by Peninsula were incurred say on behalf of the receiving party, the first respondent. I accept that that is a correct approach and that there is no principle that prevents me from making a cost order in these circumstances.

17. The application is made on the basis of what the respondent would have been charged at a commercial rate by Peninsula and that says Mr Anderson is the appropriate basis for the calculation of the costs since it represents the opportunity cost to Peninsula of not supplying that advice and representation on a commercial basis to some other client. As to that latter point, I am satisfied that that is correct and that Peninsula is entitled to calculate its costs not on the basis of the costs to Peninsula of supplying the advice (the cost of the respondent of supplying the time of two paid employees) but the appropriate opportunity cost.

18. Having examined the detailed schedule advance by the respondents it did not appear to me that the total hours claimed was unreasonable or exaggerated. This was a complicated case which entailed a great deal of preparatory work not least two case ,management discussions and voluminous correspondence. All of that fell to be part of an application for costs if the claims were misconceived from the outset.

19. However, there is a more important difficulty with the basis on which Peninsula makes its application. The total number of hours being pursued is 62.1 hours. Of those, 30.5 hours are charged at £35 an hour and they are said to be Mr Anderson's time, Mr Anderson charging as a lay representative. That of course is not the appropriate rate which at the relevant time stood at £33 per hour.

20. The remaining 61.6 hours is timed work done by Miss Hassina Khan. Miss Khan is a trainee solicitor. I am satisfied that Miss Khan does not meet the definition of legal representative within the provisions of section 74(2) and would not do so until she is properly enrolled in accordance with the provisions of the Courts and Legal Services Act 1990. She does not have the requisite rights of audience required by section 74(2)(a) namely "all the proceedings in county court or magistrates court". That being so, the calculation of her time at £118 an hour is misplaced and the calculation for her time is capped by the provisions of Regulation 79(2) and that at £33 an hour. In the circumstances the correct calculation for the total of the respondent's application is not £8,423.80 but 62.1 hours at £33 an hour namely £3,148.05.

Are the provisions of Regulation 76 made out?

21. My decision on this depends on my view as to why the proceedings were withdrawn by the claimants when they were. In general, the act of withdrawing a claims should not be visited by a costs order unless unreasonably late. However,

in this circumstance I take the view that general observation does not apply. It is the respondents' case that the proper implication to be placed upon the withdrawal of the claimants' case on 2 August is that at that point they knew, to put it colloquially, that "the game was up". The claimants knew that the Tribunal's order, which was about to be made, would result in the disclosure of the full text exchange between Mrs Harrop-Rhodes and Mr Watkins. At least in relation to Mrs Harrop-Rhodes's case, that full disclosure, says Mr Anderson, would have been fatal to her contention that she was the victim of lewd unsolicited text correspondence. On the contrary, it would have shown that that correspondence was one half of correspondence taking place between two people in a consensual sexual relationship. The claimants' explanation for their withdrawal essentially centres on Mr Jackson's ill health. Both the claimants gave evidence before me and both asserted that they were not at all troubled by the prospect of what might be revealed by the text exchange but were rather concerned about the negative effect of drawn out proceedings in the Employment Tribunal on Mr Jackson's health.

22. Mr Jackson gave evidence that he was at the time, and still to this day is, suffering from significant mental ill health and it was the joint decision of the claimants that he could go on no longer. The claimants asserted that they were troubled by the length of the delay, the case had already taken 18 months to get to a trial and now they were facing a further three-month delay which might in fact be extended depending on how long it would take the relevant third party providers of the information to comply with the courts order.

23. If the claimants' explanation for the withdrawal is the true one then I take the view that an order for costs is not appropriate. Withdrawing in those circumstances does not amount to unreasonable or vexatious conduct or evidence of a misconceived claim. However, if the respondents' explanation is the true one, I take the view that the grounds for a cost order are made out since it was evident that the claimants' case was misconceived or was pursued in a vexatious or unreasonable manner.

24. The standard of proof is the balance of probabilities the burden here resting on the respondents. On the one hand, I have not ever been shown the texts from the claimant to Mr Watkins. Once the case was withdrawn the grounds for the Tribunal making the order to the providers disappeared and the evidence was not available. It therefore must, to some extent, remain a matter of speculation as to what that order would have revealed had it been complied with. On the other hand, I have to consider whether the explanations advanced by the claimants for withdrawing their claims are plausible. The first question is why both Mrs Harrop-Rhodes and Mr Jackson decided to withdraw when the real problem appears to have been Mr Jackson's ill health. The answer advanced by the claimants is that they understood that once Judge Maidment had consolidated all of the claims, and once the Tribunal had refused an application that the claims of unfair dismissal proceed unhindered whilst the claims of discrimination be set to one side pending the outcome of the order, they did not consider it was possible for one claim to be withdrawn and the other to continue. They both say that they had no legal advice or help and that what help they were getting was from ACAS. The advice from ACAS was that if they were planning to withdraw then they should do so as soon as possible. If that was their belief then it was a belief unreasonably

held. It certainly was not, they accept, a belief arrived at by them posing the question to ACAS as to whether it was possible for them to withdraw one claim and not another. An unreasonably held belief might nevertheless be the genuine reason for an action but I would have expected intelligent people contemplating such a drastic course of action to have taken some steps to make sensible enquiry. Mrs Harrop-Rhodes was the major partner in this case and she was proposing to give up the chance to pursue her many complaints because Mr Jackson was too ill to continue with his. I found the explanation unconvincing.

25. Next there is the troubling fact that despite being reminded of the necessity to produce evidence to support their case for this hearing there is no evidence at all from Mr Jackson to support his contention that he was unwell. This is explained by Mr Jackson, saying that he has coped with his mental ill health on his own and without consulting a doctor or making any claim for benefit and that he has survived over this period of time on the basis of his savings. Whatever may be the case, the fact is that I am in a position of having the unsupported word of Mr Jackson that he was too unwell to contemplate continuing with the claim. On the face of it, the seriousness of this hearing ought to have prompted Mr Jackson to seek medical evidence even if nothing else up to this point had.

26. Next there is the timing of the withdrawal. A few days prior to the withdrawal the claimants had written to the Tribunal applying to add witnesses to this case. At that stage they were clearly not contemplating withdrawing. However, by 2 August they had changed their minds. The only thing that had changed in-between was that the Tribunal's order, setting out in detail the grounds for the Tribunal making the decision to adjourn and for making the order for disclosure had been sent to and received by the parties and the respondents had supplied he necessary information. Mr Jackson told me that he did not know what that order would reveal but that he had not even asked Mrs Harrop-Rhodes what it might reveal. In fact, he said, there had had no conversation about the matter at all and that that was because he, knowing Mr Watkins, believed what Mrs Harrop-Rhodes has said to him about the unsolicited nature of the correspondence. I find that assertion inherently improbable. Mrs Harrop-Rhodes knew of course what that order would reveal. Mr Jackson could not have unless he had already been privy to the full and unexpurgated exchange. In those circumstances, and contemplating the risk at least to Mrs Harrop-Rhodes' case and to some extent to his of further disclosure which might fatally hold the claims below the water line, I find it improbable in the extreme that Mr Jackson would not at least make an enquiry as to what might be revealed.

27. Finally but significantly, the there is the history of the disclosure itself. I was, and am, sceptical that Mrs Harrop-Rhodes retained the telephone on police advice. The fact that when returned, the phone was "wiped", if true, adds to the suspicion that Mrs Harrop-Rhodes had something to hide. If not true, it is difficult to see what the respondent hoped to gain by the applications that followed.

28. Balancing all of these factors together I take the view that I can infer from all of those surrounding facts that the true reason for the claimants' joint withdrawal of their claims was their concern that the order for disclosure would finally reveal the full extent of the exchange between Mrs Harrop-Rhodes and Mr Watkins. That disclosure would have fatally undermined the cases advanced for the claimants. It follows then that I am satisfied on the balance of probabilities that this claim was

misconceived and/or that it was being pursued in an unreasonable or otherwise vexatious manner.

29. In the circumstances I take the view that a costs order is appropriate and I make one.

The claimants' means

30. I have enquired into the claimants' means. Those of Mr Jackson are easily dealt with. He told me and I accept that he has a long lease on a flat with no mortgage payments outstanding and that he has savings of some £15,000. As to the Mrs Harrop-Rhodes, I accept that she now earns some £1,400 (net) a month, the bulk of which is eaten up by mortgage and other commitments but that her husband takes home some £1,600 a month. On that basis I conclude that both Mr Jackson and the claimant have the means to pay the respondent the full amount that I have calculated namely £3,148.05.

31. I am unable to identify whose claim has put the respondent to most time and expense the claims having advanced together since March 2018. I can find no other basis for differentiating between the two claimants as to the amounts that they should pay. I therefore order that each claimant pay the respondent half of the outstanding sum, namely £1,574.03.

Employment Judge Rostant

Date: 16 July 2019