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EMPLOYMENT TRIBUNALS

Claimant: **Ms C Corner**

Respondent: **HFH Healthcare Ltd**

Heard at: **East London Hearing Centre**

On: **12 March and 7 May 2019**

Before: **Employment Judge M Warren**

Representation

Claimant: In person on 12 March, Mr Cumming, solicitor, on 7 May 2019

Respondent: Mr Crawford, counsel

JUDGMENT having been sent to the parties on 18 May 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Background

1 Production of these reasons has been delayed because the request for written reasons had been overlooked by the Administration.

2 Ms Corner's daughter is disabled with complex health needs. The daughter lives at home with Ms Corner and receives care under an NHS contract placed by the Newham Care Commissioning Group placed at the relevant time with the Respondent. The Respondent provided a package of care as agreed with the Care Commissioning Group. Ms Corner was employed by the Respondent as part of that care package.

3 Issues arose between the Respondent and Ms Corner in July 2018. The merits of that are not a concern at this stage.

4 The Respondent withdrew Ms Corner as lead carer for her daughter, referred to in the papers here as suspension. Ms Corner had previously been assisted with this matter by Thomas Mansfield Solicitors, but acting in person, she issued a claim form on 19 July 2018.

5 After two preliminary hearings before Employment Judge Baron on 8 January 2019 and Employment Judge Jones on 15 February 2019, the issues in the case were identified as being:-

5.1 That despite her suspension she continued working and was not paid, she claims for her pay in that respect.

5.2 That she worked for seven days a week, 84 hours a week, but was only paid for six days, 72 hours a week. She seeks payment for those additional days.

5.3 On certain specified dates, she had to work an extra nightshift when the appointed carers for the night did not show up. She seeks payment for those nightshifts.

Hearing on 12 March 2019

6 The matter came before me for a final main hearing on 12 March 2019. At the outset, I reiterated and checked with the Claimant that the above were indeed the issues in the case.

7 At the hearing on 12 March 2019, Ms Corner represented herself. The Respondent was represented by Mr Crawford of Counsel, who appears here for the Respondent today.

8 On the day of the hearing on 12 March at 12:30, after a reading break, my note reads as follows:

> "EJ confirms is aware daughter in building and may be called away at any moment to administer medication. Should not though discuss at all during such break".

9 Ms Corner's cross-examination commenced after a further hour's break, at 1:30pm. That cross-examination appeared to raise questions about Ms Corner's case:

9.1 She appeared to be retained on a zero hour's contract, although her evidence was she never signed any such contract, there was such a contract in the bundle and an email which suggested she had been provided with it at the beginning of her employment.

9.2 That when she injected her daughter with insulin, she did so as a mother and not a carer.

9.3 That the Respondent only had a contract with the Care Commissioning Group to provide care for six days a week, not seven.

9.4 There appeared on the papers, to be genuine concerns about Ms Corner's conduct.

10 At 3:05 Ms Corner's telephone rang and she was called away to attend to her daughter. We adjourned in something of a rush, because it was obviously imperative that she attended urgently to her daughter, who was in the building. Having heard or seen nothing further of Ms Corner, at 3:40 I sent the Tribunal's clerk, (Rob) to try and find out what was going on. He was unable to locate Ms Corner. He tried telephoning her a couple of times, but was unable to obtain an answer.

11 At 4 o'clock, Rob went to look for Ms Corner again. He was unable to locate her. On both occasions, he spoke to security in both waiting areas and on both occasions, he reports that security said they had no idea as to her whereabouts.

12 I had the Respondent back into the Tribunal room at 4:15; I then liaised with them to arrange for the matter to be re-listed for today and indicated that I would cause a letter to be written to Ms Corner, asking for an explanation as to what had happened.

13 After the parties had left the room, I noticed that the witness table bundle and statements had gone missing. Rob confirmed to me that he had not removed them and I knew the Respondent had not taken them, because I was in the room as they left.

14 Before going on, I should make it clear in terms of my observations about the Claimant's case and the difficulties arising from cross-examination, two points need to be born in mind:-

14.1 The cross-examination had of course not finished, it had been interrupted and there may have been other issues; and

14.2 I had yet to hear from the Respondent's witnesses and the cross-examination of them so I am in no position to form any view on the merits.

Subsequent correspondence

15 In light of the Claimant's absence from the Tribunal and the loss of the bundle and witness statements, I caused an email to be sent to her on 15 March 2019. In the meantime, Ms Corner had emailed the Tribunal at 16:09 on 12 March 2019. I did not have this in front of me at the time. In this email, she explained that her daughter had a seizure and her blood glucose levels were going up, she had informed security and the clerks and had left immediately. She sincerely apologised for any inconvenience this may have caused. By way of reply to that email, the clerks wrote to Ms Corner in the terms that I had directed. These pointed out that she had removed the witness table bundle and statements and should bring them back to the Tribunal and reminded her:

> "You are in the middle of giving your evidence. You should not discuss your case with anybody. This is a serious warning; cases have been struck out in the past where parties have ignored this requirement."

16 On 12 April 2019, the Tribunal received an email from solicitors, Whitehead & Low, stating that they had been instructed by the Claimant and wished to be placed on the record as acting.

17 On 15 April, the Respondent's solicitors wrote to the Tribunal applying for the Claimant's claim to be struck out on the grounds that she had failed to comply with an order of the Tribunal and that it is no longer possible to have a fair hearing, by her instructing solicitors contrary to my instructions.

18 By an email of the same date, the Claimant's new solicitors responded objecting to that application, saying that there had been no order by the Tribunal, the Claimant was not in breach of any order and disputing that it was not possible to have a fair hearing, that her having instructed solicitor would not to adversely affect the Respondent.

19 On that correspondence being referred to me on 30 April 2019, I directed the parties be informed that the application to strike out would be considered at the outset of the resumed hearing on 7 May. I suggested that the parties may wish to consider the case of *Chidzoy v British Broadcasting Corporation* UKEAT/0097/17/BA.

20 The Respondent has today referred to the case of *Chidzoy*, the Claimant has not.

21 On 2 May 2019, the Claimant's solicitors made an application to amend her claim by adding a holiday pay claim and in a separate email, provided a schedule of loss.

Today's hearing

22 We resumed the hearing today by my hearing evidence from Ms Corner, specifically on facts relevant to the strike out application. To begin with, I asked her questions and then with the agreement of the representatives, we proceeded by Mr Crawford asking questions in cross-examination, then allowing Mr Cumming to follow up with questions of the Claimant himself.

23 After a 10 minute adjournment during my questions, Ms Corner waived privilege in respect of matters discussed between herself and her solicitors. Her evidence then about events was as follows. She contacted the solicitors by email. She sent them a copy of my email. She sent to them the bundle and the witness statements. She discussed her case with a solicitor called Katie Harwood, they had a telephone conversation. Ms Harwood confirmed that her firm would act for Ms Corner and provide her with representation for this hearing. Asked about my email and the fact that she was in the middle of giving evidence, Ms Corner told me that she was told by Ms Harwood that did not matter, she was entitled to seek legal advice, it just means

that she should not discuss the case with the public. If true, I have to say that is extraordinary advice. Ms Corner says that she did not discuss the merits of her case with her solicitors at all, she says she did not discuss her evidence and she did not discuss the difficulties arising out of her cross-examination that I have referred to above.

24 On 22 March 2019, Ms Corner sent a Mr Jamie Woolley, (a social worker at Newham) a copy of an email he had sent to others, (not Ms Corner) on 27 June 2018. She says that the purpose of this was just to ask Mr Woolley why she had not been invited to a meeting relating to her daughter which had taken place on 27 June 2018. She said that this was prompted by a discussion with the nurse that had visited her that day, 22 March 2019.

The law

25 The Tribunals Rules of Procedure, rule 37(1)(b), (c) and (e) read as follows:

> "37(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds –
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> …
>
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
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> (c) for non-compliance with any of these Rules or with an order of the Tribunal;
>
> …
>
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)."

26 Rule 1 deals with interpretation of certain words and expressions and includes at (3)(a):

> "A 'case management order', being an order or decision of any kind in relation to the conduct of proceedings, not including the determination of any issue which would be the subject of a judgment:".

27 I must also have regard to the overriding objective set out at rule 2.

28 I have mentioned the case of *Chidzoy*, that is a case where an Employment Judge struck out a claim in the middle of the Claimant's evidence, after she had spoken to somebody about the case during an adjournment, in disobedience of the

usual directive that witnesses do not do so. It is a case on its own very particular set of facts, but there is a useful summary of the law provided by Her Honour Judge Eady. Striking out a claim is a draconian measure that should not be imposed lightly. Her Honour Judge Eady refers to the well-known case of *Blockbuster Entertainment Ltd v James* [2006] IRLR 630 in the Court of Appeal and *Bolch v Chipman* [2004] IRLR 140 in the EAT where an Employment Tribunal was considering the possibility of striking out a claim. There were four matters it would need to address which are in summary:-

28.1 There must first be a conclusion, not simply that a party has behaved unreasonably, but that the proceedings have been conducted unreasonably by her or on her behalf.

28.2 Secondly, assuming there is such a finding, in ordinary circumstances the Tribunal will need to go on to consider whether a fair trial is still possible.

28.3 Even if a fair trial is not possible, the tribunal must still consider what remedy is appropriate and whether a lesser remedy might be more proportionate and even if the Tribunal were to decide what was referred to as debarring order is the appropriate response, the Tribunal should consider the consequences of such an order.

28.4 A tribunal should not move to strike out a claim where firm case management might still afford a solution. The Tribunal needs to assess the nature and impact of the wrongdoing in issue and to consider whether there was in truth any real risk of injustice or to the fair disposal of the case (see *Bayley v Whitbread Hotels* UKEAT/0046/07).

Conclusions

29 Ms Corner was told by me twice not to discuss this case with anybody during an adjournment whilst she was giving evidence; the first time was orally in the early stages of the hearing; the second time was in writing. On that second occasion, it was made clear to her that a strike out was a potential consequence. Notwithstanding that warning, she proceeded to do so. On her own evidence, she did so because the solicitor she spoke to told her that it was permissible. If that is true, then she may well have a claim in negligence against those solicitors.

30 I note that during her evidence today, at no point did Mr Cumming speak up to suggest that he was unable to continue representing Ms Corner and therefore presumably, he does not know that anything that she said to me in evidence was untrue, as professionally he would have been obliged to do. But I also note that Mr Cumming is not the person who dealt with Ms Corner; she was dealt with by Ms Harwood, so it may well be that he would not have had personal knowledge of the matters that I was being told about by Ms Corner.

31 The difficulty that I have today is with regard to the credibility of Ms Corner's evidence and what she has told me, her evidence that she did not discuss her case with her solicitors or anybody else. I am troubled by the contradiction in her evidence

that she did not discuss her case with her solicitors because she was under oath and she knew that she should not. But on the other hand, she had said she had been told by her solicitors that it was permissible for her to discuss her case with them.

32 During cross-examination she said she did not need to discuss her case with her solicitors because her case was clear and obvious from the documents. I can safely say, having grappled with this case on the documents on the morning of 12 March 2019, that it most certainly is not. I find it inconceivable that a lawyer could set about preparing to represent a client in this hearing or any other hearing, without seeking extensive clarification on the facts as alleged by the Claimant, what the case was about and establishing what the Claimant had said in her evidence thus far. Asked about why she contacted Mr Woolley, initially she said that it was because Counsel had asked her questions about Mr Woolley's email of 27 June 2018. Then she changed her story and said it was because she had been speaking to the nurse, she had asked the nurse why she had not been invited to the meeting on 27 June 2018 and the nurse had then given her Mr Woolley's email of that date, which she says prompted her to write to him. The point here is that she changed her evidence and it seemed to me an indication that she had indeed been discussing this case with others.

33 I think it is probably significant that Ms Corner's originating email to Mr Woolley, (that which prompted his reply on 22 March 2019 she has put in a supplemental bundle before me today) was not itself before me as well. It is also significant in my view, that no solicitor's correspondence or file notes have been produced to me today to corroborate Ms Corner's evidence that her case had not been discussed with them.

34 I do not see how Ms Corner's application to amend her case to bring the holiday pay claim or the preparation of her schedule of loss, could have been produced without detailed discussion with her about her case.

35 I conclude that there has been deliberate and contumelious breach of my order that she should not discuss this matter with others during the break in her evidence. I consider that instructing her not to discuss the matter was an order by me. I have heard no submissions and been shown nothing to suggest to me that it was anything other than an order.

36 In any event, I further find that discussing this matter with solicitors during an adjournment is unreasonable conduct of these proceedings by Ms Corner.

37 As to whether there can be a fair hearing, I do not consider that a fair hearing is possible. I can have no trust in the honesty of Ms Corner's evidence going forward and she has gained advantage in obtaining advice during her evidence. I do not consider that I can remedy that situation by making a cost order and pressing on. I considered whether simply abandoning this hearing and re-listing the matter before another Employment Judge, perhaps with an order for costs, might have been a way forward, but any Employment Judge hearing this matter is going to be tainted with the same knowledge that I have and if we start a fresh hearing, Ms Corner would have obtained an unfair advantage by having a chance to rehearse her evidence and how to answer questions in cross-examination.

38 I cannot conceive of any other alternative and none has been suggested to me, other than a strike out. My Judgment is that these proceedings are struck out for the disobedience of an order, for unreasonable conduct and because a fair hearing is not possible.

Employment Judge Warren

14 August 2019