EMPLOYMENT TRIBUNALS

Claimant: Ms A Edwards

Respondents:
1. HM Revenue & Customs
2. Mr D Adsetts-Hopper
3. Ann-Marie Dargan Clayton
4. Gary Owen
5. Rhiannon Cummings

Heard at: Leeds **On:** 10 June 2019

Before: Employment Judge D N Jones

REPRESENTATION:

Claimant: In person
1st, 3rd, 4th and 5th Respondents: Not in attendance
2nd Respondent: In person

JUDGMENT: PREPARATION TIME ORDER

1. The claimant acted unreasonably in her conduct of the proceedings in failing to notify the second respondent in good time of the settlement of the claim and her withdrawal of the proceedings. It is just and equitable that a preparation time order be made in favour of the second respondent.

2. The claimant shall pay to the second respondent the sum of £152 by way of preparation time order.

REASONS

1. This is an application dated 16 February 2019 for a preparation time order. By rule 76, a Tribunal may make a preparation time order, and shall consider whether to do so, where it considers that a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings have been conducted or where the claim had no reasonable prospect of success.

2. In this case I have heard from the claimant, who attended in person, and from the respondent, who also attended in person.

3. The costs and preparation time order provisions involve a two-stage process. The Tribunal must consider whether any of the criteria I have set out are met. If they are not, that is an end of the matter. If they are, the Tribunal then must consider whether to make an order, applying the overriding objective. By rule 84 the Tribunal may have regard to a party's ability to pay, both in respect of whether to make an order and in what amount.

4. The grounds for the application are that the claimant acted unreasonably, disruptively and/or vexatiously and that the claim had no reasonable prospects of success. They are fully set out in the second respondent's application, and I shall deal with them in turn.

5. Before I do so, a brief summary of the case is as follows.

6. The claimant was employed by the respondent as an Administrative Officer from 13 February 2017 until 18 December 2017 when her employment was terminated on notice, ending on 22 January 2018. The claim was issued on 31 January 2018. The case was compromised by an agreement negotiated through ACAS in which the first respondent agreed to make a payment to the claimant in consideration for her withdrawing her claims against all respondents. I am told by the claimant that was not covered by a confidentiality clause, but I have not seen the COT3.

7. The Tribunal was notified of a settlement of the case by an email from ACAS on 6 February 2019 at 17:11 hours. That simply notified the Tribunal that the claimant wished to withdraw all claims against all respondents. It forwarded an email to that effect from the claimant.

8. In addition, the first respondent's legal representative, Mr Owen Wilson, emailed the Tribunal at 18:28 on that date confirming that he understood the claimant had written to withdraw all claims and that the Tribunal had received the message that evening. He went on to say that there would be no appearance on behalf of the first, third, fourth or fifth respondents who it represented, and he said that he had copied that message to the claimant and the second respondent on the basis it would not be necessary for them to attend.

9. Mr Adsetts-Hopper tells me that he did not receive a copy of that email. I am not satisfied he was an addressee because the emails were sent to Leeds ET, Diane Edwards and David **. I am satisfied that the correct email address of the second respondent, both at work and home, are as in the correspondence to the Tribunal and other parties. That address can be seen on an email sent by the claimant at 00:21 on 7 February 2019 when she sent to the second respondent a copy of the emails which had been sent to the Tribunal the previous day. I am satisfied that the second respondent only knew, therefore, at 00:21 on the day of the hearing that he was not to attend a ten-day hearing at which he was a named respondent and was to answer allegations of race discrimination and harassment.

10. The case has been subjected to two preliminary hearings: one before Employment Judge Davies on 3 September 2018 when she identified the claims,

which included direct race discrimination, harassment, victimisation and unfair dismissal, and the claim was brought against five respondents, the first being the claimant's former employer, the second being a work colleague and the third, fourth and fifth being managers.

11. A further preliminary hearing was arranged at the order of Employment Judge Davies to consider applications of the respondents to strike out the claims on the grounds they had no reasonable prospect of success and to consider whether to make a deposit. In fact the second respondent did not pursue the application to strike out the claim on the grounds there were no reasonable prospects of success but did pursue an application that the claimant pay a deposit as a condition of being allowed to pursue the claims. No deposit order was made by Employment Judge Cox. That hearing was on 16 October 2018. She refused the application to amend but further identified the complaints including, in ten paragraphs, against whom each respective complaint was made. By that stage it was clear that only a number of the various complaints could be brought against the second respondent, and they were identified in the Annex to her order at paragraphs 3, 6 and 7. The sixth allegation concerned an incident which arose at the end of July or beginning of August 2017 when, it is common ground, the second respondent brought into the workplace an inflatable monkey which he placed on the desk. That was the subject of an allegation of harassment. It was also the subject of a grievance brought by the claimant on 4 October 2017, which initially was upheld, but in subsequent disciplinary investigation was rejected on the basis there was no intention on the part of the second respondent to cause any upset to the claimant. There were other allegations against the second respondent which it is unnecessary for me to address.

12. In ***McPherson v BNP Paribas (London Branch) [2004] ICR 1398*** the Court of Appeal considered whether it was unreasonable conduct for a party to withdraw a claim shortly before the hearing (in that event, two weeks), some 19 months after the claim had been presented. The Court of Appeal gave guidance and pointed out that withdrawals could lead to a saving of costs and it would be unfortunate if claimants were deterred from dropping claims for fear of the prospect of an order for costs upon withdrawal that might well not be made against them if they fought on to a full hearing but failed. However, all would depend on the circumstances and it may be unreasonable for a party to withdraw at a late stage and to put the other party to considerable expense in defending such a claim. The Court of Appeal indicated there need be no direct link between the amount of costs and the unreasonable conduct, although it has subsequently been recognised that it is a relevant factor to take into account.

13. In the later case of ***Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420*** the Court of Appeal considered the relevance of conduct and gave further guidance. Mummery LJ said, at para 41, " *The vital point in exercise of its discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by [a party] …. and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had*".

14. At paragraphs 11, 12, 28 – 33 of the application are the second respondent's grounds for why the claimant was said to have acted vexatiously in bringing the claim against the second respondent and that the claim had no reasonable prospect

of success. Mr Adsetts-Hopper says that the sequence of events is highly significant. He says the claimant was failing in her capabilities and that there had been a series of complaints made against her by him and others, his being made on 28 September 2017; that this had been drawn to the claimant's attention on 4 October 2017. He says only then did the claimant raise the issue concerning the presentation at work of an inflatable monkey. He says this was done vindictively in response to his own complaint about her abilities and conduct. The claimant does not dispute the sequence of events, but does say that the incident concerning the monkey was a serious matter which caused her deep offence. I have been shown a series of documents in respect of the investigation but, given I have not heard the evidence in this case, it is not appropriate for me to make concluded findings about that incident.

15. In respect of the claim having no reasonable prospects of success, Mr Adsetts-Hopper said that the claimant only had her own statement in support of her claim, that Employment Judge Cox had described it as "extremely wobbly at best" and she had said that the claimant needed to be coherent. He said the hearing bundle was in excess of 1,200 pages and there were nine witness statements to show that the claimant's claim was untrue.

16. I do not accept those arguments. The starting point is that the second respondent produced in the workplace an inflatable monkey and placed it on the desk. That was in a team where the claimant worked. It raises questions as to why. It was against a background of disharmony in that team. There was dissatisfaction expressed about the claimant by others including the second respondent. Mr Adsetts-Hopper recognises that bringing that object into the workplace was ill-judged. He admitted that in the subsequent disciplinary investigation to Mr Tanner, the decision maker. Mr Tanner made a decision by 23 March 2018 that the allegation that Mr Adsetts-Hopper had wanted to provoke the claimant and had set out to upset her by bringing a toy monkey into the workplace was not made out.

17. Even were it the case that there was no intention to cause offence, the statute requires the Tribunal to consider whether it would have that effect regardless of intent. I recognise Mr Adsetts-Hopper's case is that even if the Tribunal had found that it was unwanted conduct relating to race, the claimant had not had her dignity violated, and the comment had not created an intimidating, hostile, degrading, humiliating or offensive environment. He says that she had made no complaint earlier and she complained of this solely because she was being called to account as a consequence of his raising what he believed were legitimate concerns. This would have depended on a consideration of all the evidence.

18. I do not accept Mr Adsetts-Hopper has made out a case that the claim was brought vexatiously. People who are subjected to harassment on the grounds of a protected characteristic are sometimes put off from raising matters for a variety of reasons; they wish to not be seen to be troublemakers and so keep their heads down or are frightened they may be subjected to retribution. Those were matters which would have been considered by the Tribunal had the claimant not withdrawn her complaint.

19. I reject the allegation that the claim had no reasonable prospects of success. It is not fair to say that all the witnesses supported the account that there was no harassment, on the facts. There was a different account given by different witnesses

about the presentation of this object in the workplace. Some regarded it as humorous and no cause for concern; others regarded it as inappropriate and distasteful, and some had regard to the upsetting impact it would have upon the claimant. They did not all point in one way as suggested by paragraph 33 of the application. The extensive size of the bundle dealt with various complaints, many of which were not related to Mr Adsetts-Hopper.

20. I am unclear about what Employment Judge Cox may have said about this particular allegation when she was evaluating the prospects of success. There was an application for a deposit which she did not accede to, and there is no record of her making any observation about the merits of the claimant's case. It is unsafe for me to rely upon the note of one of the parties and I must rely upon the order of the Tribunal or the supporting notes of Employment Judge Cox.

21. I do not know the reasons the first respondent settled the claim and paid the claimant a sum of money to withdraw it. I do not know if it had anything to do with a concern that it was at risk of being found vicariously liable for the conduct of Mr Adsetts-Hopper. It is a matter of record that, at an early stage in these proceedings, the first respondent withdrew its legal representation for the second respondent. I accept his suggestion that that was probably because of the outcome of the first grievance investigation, which upheld the grievance in respect of the claimant's complaint. I have no explanation from the first respondent why it did not reinstate that legal representation after the outcome of the disciplinary investigation which Mr Adsetts-Hopper said totally vindicated him. It remained the case that the first respondent raised the statutory defence, namely that if the second respondent had been found to have harassed the claimant it should not be liable because it had taken reasonable steps to prevent him acting in that way or in that type of way. That pleading was not amended; indeed the first respondent, whilst not accepting there was an act of harassment, expressly stated that that was to be a matter for the Tribunal to determine on the evidence. It did not align itself with the second respondent's defence to this claim. It was therefore inevitable that the claimant would have to pursue a claim against the second respondent in his own name, the statutory defence having been raised, without risk of her not being able to succeed on that matter.

22. I therefore turn to the other heads on which it is said I have jurisdiction to order costs. In respect of the late withdrawal of the claim, Mr Adsetts-Hopper complains that he was given ten hours' notice before the commencement of the hearing that the claimant was to withdraw her claims, and that the claimant had deliberately allowed him to waste considerable time and effort, over 13 months, in preparing this case for a hearing. I accept that this has been a very stressful time and he had to defend a claim of discrimination which did not come to a hearing to allow him the opportunity to establish his innocence. However, the consequence of the withdrawal of the claim is to bring an end to that claim.

23. The circumstances in which the claim was withdrawn are relevant. It is clear from the letter I have seen from Mr Wilson, dated 30 May 2019, sent to the Tribunal for the purpose of this hearing, that the first respondent had made it a condition of settlement that the complaints be withdrawn against all respondents, including the second respondent. I have no information as to why the lawyers of the first respondent did not communicate with the second respondent about this settlement,

either when it was being discussed or, for that matter, after it had been concluded. The circumstances in which the claimant accepted a financial payment were conditional upon her not pursuing her claim against the second respondent. That settlement only took place the day before the hearing. I do not find the claimant acted unreasonably by withdrawing the claim against the second respondent at such a late stage. By doing so she obtained a financial settlement. I have no details as to how the negotiations had progressed up until that point; it is cloaked with “without prejudice” privilege.

24. In the circumstances there was not unreasonable conduct in withdrawing the claim against the second respondent on 6 June. There was, however, unreasonable conduct of the claimant in not notifying the second respondent of that fact as soon as possible. I recognise she was not legally represented but she had written to the Tribunal to inform it of the settlement but did not inform the second respondent until the early hours of the following morning. I am satisfied that was unreasonable. He had had the allegations hang over his head for a long period and invested substantial time and energy in preparing a defence. The second respondent was entitled to be informed at the first opportunity of the fact that the claim had come to an end. That would have been, at the very latest, by 6.00pm on 6 February 2019.

25. Turning to the other areas in which it is said the threshold for a preparation time order had been established, I do not accept, under paragraph 17, that it is unreasonable or disruptive to submit a Schedule of Loss late, by a few days; of course, orders should be complied with, but I am not satisfied that was so grave as to be described as unreasonable conduct given a party was representing herself.

26. I also do not accept that there was unreasonable conduct in sending documents by email to a third party. I accept that that was an error and I accept that parties will, from time to time, make mistakes. I am not satisfied any significant breach of confidentiality has arisen as a consequence.

27. There had been a series of requests for adjournments and time extensions, but I am not satisfied that amounts to disruptive or unreasonable conduct. The claimant was struggling with preparing a case without the benefit of lawyers for much of the time; she did obtain legal representation at one point but that subsequently ceased. The claimant has a condition for which she is receiving counselling which has exacerbated her problems.

28. I reject the complaint that it was disruptive for her not to provide medical evidence when she sought a postponement, which was allowed. She did produce evidence from a counsellor and I am satisfied that was an attempt to comply with the order of Employment Judge Rogerson and was not disruptive, and I reject the suggestion it was simply parroting what the claimant herself had said. That document, dated 14 June 2018, explained how the claimant had been receiving support from the Chapeltown Wraparound Mental Health Team.

29. The claimant raised a wish for anonymous witness statements to be submitted. In addition, there was a suggestion from the claimant that there would be a secondary bundle because she was dissatisfied with the documents included in the agreed bundle. In the event, no such secondary bundle was ever produced and the claimant would have had to obtain permission from the Tribunal to adduce either that documentation or any witness statement of any individual who was to give evidence,

and she would have faced an uphill struggle. I do not consider that the correspondence relating to those two matters referred to in paragraphs 20 and 21 of the application amount to disruptive behaviour. They are additional complications to the preparation of a case in response, but given the circumstances, I do not consider they amount to such conduct as described.

30. In summary, I do not uphold the allegation that the claimant acted disruptively as alleged in paragraphs 17-24.

31. The claimant has not been able to obtain employment since she was dismissed by the respondent and is in receipt of Jobseeker's Allowance. She has capital of £8,000 albeit she has debts outstanding of £15,000 relating to outstanding fees. She says she is subject to a County Court Judgment, and has a debt to a friend for a car of £6,000.

32. In conclusion, I accept the threshold is established but only in respect of one issue, namely the failure to notify Mr Adsetts-Hopper, in good time, of the late settlement of this case. I am satisfied from what he tells me that he continued to prepare the case from 6.00pm, when he should have been notified the case had settled, to 10.00pm. That is four hours of work. It is just that the claimant pay for that time.

33. I make a preparation time order in favour of the second respondent and assess it at £152, that being four hours at £38 per hour.

Employment Judge D N Jones

Date 28 June 2019

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.