EMPLOYMENT TRIBUNALS

Claimant: **Mrs W Lynch**

Respondent: **HELP-LINK UK Ltd**

Heard at: **Leeds**

On: 7 November 2019

Before Employment Judge Dr E Morgan

JUDGMENT

1. The Claimant's application for costs is dismissed.
2. The Respondent's application for costs arising in relation to the issue of specific disclosure is granted. The Claimant is ordered to pay to the Respondent the sum of £750 (inclusive of VAT) by way of contribution to the Respondent's costs.
3. The Respondent's application for costs of the proceedings is refused.

REASONS

Introduction

1. Following a preliminary hearing on 7 & 8 March 2019, the Tribunal promulgated its judgment with written reasons on 15 March 2019. By that judgment the Tribunal determined that the Claimant was neither an employee nor a worker for the purposes of unfair dismissal and related monetary claims. In addition to addressing the question of status, the judgment also determined the underlying contract would not have been unenforceable by reason of illegality. The relevance of this aspect of the judgment will become apparent in what

follows.

2. The judgment was issued by the tribunal on 15 March 2019 There followed a request for reconsideration of the judgment pursuant to rule 70 of the Employment Tribunal Rules. The Tribunal considered and dismissed the application (which was opposed); providing written reasons for doing so on 12 August 2019.

3. Following the promulgation of judgment on reconsideration, directions were issued for the resolution of the parties' respective applications for costs. The original case management orders were compiled by the Tribunal on 10 July 2019. Seemingly -due to an administrative error- these were not transmitted to the parties. Upon identification of this administrative error, substitute directions were issued on 20 September 2019. By those orders, the parties were invited to indicate whether they were in agreement that their respective costs applications should be dealt with on paper without the need for a further hearing. Additional case management orders were issued in order to accommodate that contingency. These included provision of a joint bundle of documents by 4 October 2019 and the filing and exchange of any skeleton arguments by 18 October 2019. Alternative directions were also given in the event the parties requested a further oral hearing.

4. By email transmitted on 20 September 2019 [16:27 hours] those acting on behalf of the Respondents provided their consent to the costs applications being determined upon paper. A similar communication was received on behalf of the Claimant on 1 October 2019 [18:31 hours]. Notwithstanding this expression of agreement, there was no further indication from the parties by way of preparation as anticipated in the previous case management Orders. Accordingly, on 11 October 2019, a further communication was sent to the parties extending time for compliance with the early case management directions to 4 pm. on 18 October 2019. The correspondence clearly stated:

"In the absence of any further material being received by the Tribunal by that time, the Tribunal will determine the costs applications upon the basis of the material previously filed."

5. There followed a communication from those acting on behalf of the Respondent on 11 October 2019 [11:13 hours]; in which it was indicated that the parties had collaborated in the production of a supplementary bundle for use upon the respective applications. Pursuant to that correspondence and under cover of a letter of 11 October 2019, the Tribunal was provided with a supplemental bundle which extends to some 366 pages.

6. By email of 18 October 2019 [16:38 hours] those acting on behalf of the Respondent indicated that they had attempted to exchange skeleton arguments with the claimant's representatives, but had been unable to do so. A skeleton argument was therefore filed with the Tribunal by the Respondent on that date. That document extends to 16 pages and 99 paragraphs. The Tribunal has not

been able to identify any similar submission on behalf of the Claimant. Accordingly, the Tribunal has proceeded upon the basis that the Claimant's position remains as detailed in the previously filed correspondence.

Costs Jurisdiction

7. Rule 76 of the Employment Tribunal Rules confers a discretion upon the Tribunal to make a costs or preparation time order. It provides:

"A tribunal may make a costs order or 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, destructively or otherwise unreasonably in either the bringing the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(c) any claim or response had no reasonable prospect of success."

8. Thereafter, Rule 78 identifies the means by which the Tribunal may engage with determination of any costs order where it is satisfied it is appropriate for such an order to be made.

Claimant's Application

9. By letter dated 5 April 2019 those acting on behalf of the Claimant submitted a detailed letter extending to some 9 pages in support of an application for costs. The principal limb of that application appears to be the pursuit of what the Claimant's representative terms the "hopeless defence" of illegality. It is said that in advancing this contention, the Respondent: caused an adjournment on 18 October 2018; extended the duration of the preliminary hearing in March 2019 by one additional day; and increased cost by requiring the claimant to deal with multiple applications of specific disclosure; thereby causing extra work to be done undertaken.

10. On the issue of the adjournment of the hearing of 18 October 2018, the Claimant's representative has detailed the circumstances in which the Respondent made application for disclosure on 11 September 2018. The application was targeted and focused in its entirety to tax -related documentation relative to the Claimant. The disclosure application was opposed upon the basis that, according to the Claimant, the Respondent was "barking up the wrong tree". The correspondence continued concerning the proportionality and relevance of the material and is carefully set out within the course of the Claimant's costs application. It need not be repeated here. It is said that matters culminated with an order issued by Employment Judge Rostant on 15 October 2018; in which he observed that, in his view, the Tribunal would not be assisted by disclosure of the voluminous tax accounting records which were sought on behalf of the Respondent. The respondent sought a reconsideration of that order. It relied

upon a number of matters, including the need to accommodate the overriding objective. On behalf of the Claimant, it is now said that the respondent pursuit of this application necessitated the adjournment of the preliminary hearing then listed on 18 October 2018. From the perspective of those acting on behalf of the Claimant, this adjournment was necessary in order to avoid any "potentially significant prejudice to the Claimant."

11. In the events, the preliminary hearing scheduled for 18 October 2018 was conducted by Employment Judge O'Neill. She made further orders for the case management of the proceedings. The Judge's note of that hearing confirms that the parties were in agreement that the preliminary hearing in this claim would require two days. At paragraph 4, Employment Judge O Neill issued a direction for further disclosure between the parties. On the same date, and for reasons promulgated to the parties on 29 October 2018, Employment Judge O'Neill observed:

"Having had the benefit (which was not available to employment Judge Rostant) of hearing from the representatives of both parties, of considering the documents the bundle presented today, and in particular having heard from a representative of the Respondent with clarification as to what documentation they were seeking I make an order for disclosure as set out below."

12. The orders imposed were in the following terms:

"The claimant within 14 days will disclose the respondent copies of the following:

(a) the single document which she completed to register with this EIS which shows her declaration as to self-employment and the job she declared she undertook.

(b) the tax returns for the years she was "employed" by the respondent beginning with the tax year April 2010/2011 and ending with tax year 2017/2018."

13. The application for additional disclosure orders was refused.

Discussion and Disposal

14. As previously noted the Claimant's application for costs is set out within the letter of 5 April 2019. Much of that letter is given over to detailing the procedural history concerning disclosure; which culminated in the hearing before employment Judge O'Neill on 18 October 2018. The basis of the application appears at the penultimate page of the letter [41] and is expressed in terms of "unreasonable conduct". It is said:

"The pursuance of the issue of illegality was unreasonable because it never had any reasonable prospect of success and/or it was never an arguable point."

15. Thereafter it is said that the majority of the work conducted on behalf of the Claimant following the hearing of 18 October 2018 related to the "illegality" issue and was wasted. In monetary terms the resultant costs are said to

comprise the wasted costs relative to the hearing of 18 October 2018 (in respect of counsel's fees of £1800) and an unnecessary increase the hearing, thereby enlarging counsel's fees by a further £1500. It is also said that the pursuit of the illegality issue generated additional costs. These are said to be in the order of £13,586.40. The application reads:

"The claimant is seeking recovery of some or all of the wasted costs that the Employment Tribunal considers is just and equitable."

Whilst the term 'wasted costs' is used, it is clear that the application is both in its form and content directed to rule 76 (1) (a).

16. In answer to that application, it is submitted on behalf of the Respondent that the application is itself "misconceived". In support of that proposition reference is made to the conduct of the case management hearing on 18 October 2018. Reliance is placed upon a number of authorities to affirm the relevance of the material which the respondent sought at that time. In response, the Claimant's representative lodged a further email with the Tribunal. The same is dated 11 April 2019 [14:23 hours] and includes the following:

"The issue of the timing of the claimant's disclosure of tax documents is not relevant to the cost application. What is relevant is the unnecessary and extraordinary lengths the respondent took to obtain the relevant documents."

17. It continues

"Furthermore, it is not relevant to the cost application employment Judge O'Neill was persuaded to make an order for disclosure of the tax documents. EJ O'Neill did not have sight of the documents the respondent was seeking to obtain."

The same email also asserts that the Respondent's application for costs (as to which see below) was itself vindictive. Finally, within paragraph 85 of the Respondent's submission, the point is made that the outcome of the Tribunal's ruling on illegality does not, in and of itself, mean that a contention of illegality could not have succeeded. In this respect reference is made to the decision of Employment Judge Sneath in the case of **Bushinell v Editquest Ltd.** It is said:

"If a different Employment Judge has accepted the argument in a different case, it cannot be unreasonable behaviour on behalf of the respondent to raise it as a potential secondary defence, pending the Employment Judges findings of fact."

18. Before making any order for costs, the Tribunal must first be satisfied that a party has conducted itself in the manner anticipated by rule 76 (1) (a). In this case, as previously noted, the application advanced by the Claimant is squarely formulated by reference to *unreasonable conduct.* There are two limbs to the Claimant's application. The first concerns the pursuit of the defence of "illegality". The second is said to be directly related to the unnecessary pursuit of irrelevant disclosure for that purpose.

19. In dealing with this application it is important to bear in mind that the Tribunal has made extensive findings of fact with regard to the historical dealings between the parties. Those dealings commenced as long ago as September 2011 [see paragraph 7.6 of the judgment]. Within the ensuing course of dealings, the Claimant was invited to enter into a number of arrangements which included declarations as to her status [see by way of example paragraph 7.9 of the judgment]. The transactions in which the Claimant participated were, on their face, intended to secure specific forms of tax clearance. This principally came by means of access to the CIS regime. Those arrangements subsisted for the period September 2011 to January 2015. However, as noted in paragraph 7.22 of the Tribunal's judgment, those arrangements fell for revision. As part of the revision process the Claimant was invited to elect to remain upon a self-employed basis and did so. The documentation completed by the Claimant for that purpose is addressed within paragraph 7.23 and following of the Tribunal's judgment. As noted in the course of the judgment, those subsequent arrangements persisted throughout the period January 2015 to January 2018. At that time the relationship was terminated by the Respondent. Again, as recorded within the course of the judgment [paragraph 7.25] throughout this period the Claimant filed accounts with HMRC and declared herself to be self-employed. Those documents were filed after consultation with her accountant. As noted within the course of that same paragraph, the Tribunal made no express finding with regard to the content of those documents, their formulation or submission.

19. Having determined the primary issues of status, the Tribunal was satisfied that the question of illegality did not require determination. However given the terms of the Claimant's application for costs it is important to note the following, as recorded within the course of paragraph 47 of the judgment:

"Given the determination of the status question, the issue of illegality does not arise and is not necessary for the Tribunal to engage with the question of illegality. However having been expressly requested **by the parties** to determine this issue, the Tribunal considers it appropriate to indicate the conclusions it would have reached in the event that employee or worker status had been established under section 230 ERA and/or regulation 2 of WTR." [emphasis added]

19. Thereafter, the Tribunal received submissions from both parties with regard to the illegality issue. Central to those submissions was the degree of involvement which the Claimant had adopted within the course of dealing and the financial arrangements utilised in the period 2011-2015.

20. In engaging with this issue, the Tribunal was referred to a number of authorities including *Enfield*. Relevant extracts were cited within the course of the judgment. Those extracts point to the conclusion that it is not possible to formulate a single answer to the question of illegality. Rather, as the observations of Peel LJ make clear, the determination of whether the principles of illegality operate to preclude reliance upon a contractual arrangement requires a careful scrutiny of the specific facts of the given case. As noted by Peel LJ:

"…I do not accept that the categorisation of the relationship held to be erroneous necessarily prevents an employee suddenly claiming the advantages of being, or having been, an employee. 28. A contract of employment may, as the case shows, be unlawfully performed if there are misrepresentations, express or implied, as to the facts."

21. In applying these principles and guidance of the senior courts to the facts as found by the Tribunal, it noted:

"51. The evidence before the Tribunal confirms that the Claimant did indeed make representations to HMRC in connection with the 2011 contract entered into with Hudson. If that had been remained the only contractual relationship available to the claimant, this may well have justified the determination of illegality. However, it is not. It is common ground between the parties that this arrangement was itself superseded by the direct arrangement incepted between the Claimant and the Respondent in 2015. It is this contractual relationship upon which the claimant relies in support of her claims of unfair dismissal, wrongful dismissal and unlawful deduction from wages. Unlike the earlier arrangement, there is no evidence to support the proposition that the Claimant did anything more than participate in the classification of this relationship as one of self-employment…"

22. As will be apparent from the extracts quoted above, the issue of illegality required a fact sensitive analysis of the detail of the contractual arrangements entered into between the Claimant and Respondent and indeed, the Claimant's participation within them. Having carefully considered the terms of the earlier judgment and the history of the dealings between the parties, The Tribunal is satisfied that the pursuit of the defence of illegality was not unreasonable.

23. Further, and in any event, had the Tribunal been minded to conclude that the pursuit of the defence was itself capable of being classified as unreasonable conduct for the purposes of rule 76, it would not conclude that such conduct had the effect of causing the preliminary hearing listed for 18 October 2018 to be vacated, or for that matter the extension of the preliminary hearing held in March 2019. In the view of the Tribunal, the documentation sought by the Respondent (and granted by employment Judge O'Neill) was relevant to the Claimant's participation in the course of dealing which form the subject matter of these proceedings. Before the Tribunal at the preliminary hearing, the claimant was advancing the proposition that she had simply signed, without consideration of understanding, the transactional documents. The Tribunal rejected that proposition [paragraph 7.10]. The disclosure exercise was in the view of the Tribunal, not limited to that of illegality. The documentation was clearly relevant to wider issues regarding the Claimant's reliability and indeed, whether it could be said that the formulation of the relationship which was in fact incepted between the Claimant and Hudson and thereafter the Claimant and the Respondent was the product of some inequality of bargaining power. As the submissions advanced on behalf of the Claimant made clear, what was required in this case was a multifactorial assessment of the form and substance of those arrangements. It is clear that the Tribunal was assisted by the documentation which was disclosed. That disclosure represented a legitimate line of inquiry which was relevant to both the issue of the structuring of those transactions and

the Claimant's knowing participation within them.

24. Moreover, whilst the application for costs is predicated upon the basis that the question of illegality was irrelevant and unreasonably pursued, the Tribunal cannot overlook the fact that it's determination on this issue was made in response to the specific request of both counsel.

25. Having regard to these matters, the application for costs advanced on behalf of the Claimant is refused.

The Application by the Respondent

26. The Respondent's application is dated 11 April 2019 [pp43-46]. Much of that communication is given over to a response to the Claimant's own cost application and need not be repeated. At internal page 3 of that document, the following statement is made:

"If the application is dismissed on the papers then acting proportionately, the respondent will not pursue its own cost application."

27. There follows a list of indented bullet points which take the form of criticism against the Claimant and/or those representing her. The schedule concludes with the following:

"In the circumstances, it is submitted that it was unreasonable for the claimant, given her knowledge shown by these findings of fact, to assert employment/worker status… "

28. In support of this proposition, a number of aspects of the Tribunal judgment are identified. These relate to the character of the Claimant, her commercial experience, her own knowledge that she was self-employed from the outset [paragraph 38] and her participation in the fiscal arrangements which evidence those transactions. Those grounds have been supplemented in the form of a skeleton argument filed with the Tribunal on 18 October 2019. As previously noted, that document extends to some 16 pages. That document confirms that the application for cost is pursued "in full". There are three themes to that document. The first is said to relate to:

- the Claimant's "resistance" to disclosure of her tax records;
- the costs occasioned by the need for a case management hearing on 18 October 2018;
- Non-compliance with the order of employment Judge O'Neill which extended from October 2018 to 7 February 2019.

29. Second, the need for the respondent to apply for an "unless order" as a means of securing the outstanding information; which was eventually produced on the 8 and 12 February 2019. Third, it is said the late disclosure of this

information generated the need for additional preparation in the form of a witness statement from Mr Ian Anfield. Accordingly, it is made clear that the Respondent's own application for costs is advanced upon two limbs,

- In chasing the Claimant's representatives for disclosure following their breach of the order until disclosure was finally completed in February 2019;
- In defending the claim, given the Tribunal findings that the Claimant was never an employee or worker.

30. In this respect having reverted to a number of findings made by the Tribunal, it is said at paragraph 92:

"In the circumstances, it is submitted that it was unreasonable for the claimant, given her knowledge shown by these findings of fact, to assert employment/worker status after the contractor concluded.
93. Given the findings of fact, of which she was obviously aware, her claim had no reasonable prospect of success at all and it was unreasonable behaviour to have pursued it at the Tribunal."

Discussion and Conclusion

31. Having considered the detailed procedural history of this matter and reviewed the terms of its judgment on liability, the Tribunal must consider whether or not the conduct of the Claimant is capable of classification as "unreasonable". Dealing first with the disclosure exercise, it is clear that this process was surrounded with some degree of confusion. This was compounded by the circumstances which led to the initial order made by Employment Judge Rostant. However, it is clear that by the time of the hearing before Employment Judge O'Neill, the Respondent was pursuing the same disclosure application. It was successful in part on that occasion. Therefore it cannot be said that the Claimant was acting unreasonably in resisting the initial request (i.e. as originally formulated). The issue of the failure to comply with the orders made by Employment Judge O'Neill is, however, a different matter. It is clear from the documentation held by the Tribunal that the Respondent was required to pursue compliance with that order; up to and including making an application for an unless order. The final documentation was only provided in February 2019 (that is some four months after the hearing before Employment Judge O'Neill (and a matter of weeks before the listing of the rescheduled preliminary hearing.) Having considered the clarity of the orders made by Employment Judge O'Neill and the fact that the Claimant was represented at that time, there is no adequate explanation as to why the documentation sought by the Respondent at that stage could not and should not have been provided in line with the timescale which was imposed by that order (i.e. 19 November 2018.) It appears to be common ground that the final documentation required by the Respondent was not in fact provided until two months later. Tribunal orders are, of course, made to be complied with. The orders in this case were particularly important in that they were intended to equip the parties with the means of preparing for an important preliminary

hearing to determine the ability of the claimant to pursue her substantive claims. Even allowing for the fact that the reasons formulated by Employment Judge O'Neill were transmitted to the parties on 29 October 2018, The Tribunal is satisfied that the failure to comply with the orders in the time specified was unreasonable conduct and generated additional time cost and expense to the Respondent.

32. In the course of the submissions filed on behalf of the Respondent figures are provided in respect of the total costs incurred by the Respondent, namely: £16,329 plus VAT. As noted, these constitute less than half of the cost incurred by the claimant. There is no attempt within the course of the schedule to attribute a particular element of those costs to the time and expense which may be regarded as due to the non-compliance with the earlier orders. In those circumstances, the application has been interpreted as an invitation to the Tribunal to address the issue of costs within its own discretion. Upon this basis consideration must of course be given to the Claimant's means.

33. Whilst not determinative, the Claimant’s means remain a relevant factor. On this issue the Tribunal has the benefit of a witness statement from the Claimant dated 11 June 2019 which details her financial position. In that document, she indicates she has been required to dispose of her property in order to discharge her own legal fees. She makes the point that neither herself nor her partner has any savings or additional assets upon which to draw to discharge any costs order which may be made against her.

34. Given the terms of the unreasonable conduct which has been identified (i.e. relative to the disclosure exercise following the order of Employment Judge O Neill), the Tribunal is satisfied that the interests of the overriding objective are met by an order for costs in the sum of £750. (inclusive of VAT). In the view of the Tribunal this sum is likely to encapsulate the costs of addressing the disclosure orders made by Employment Judge O'Neill on 18 October 2018, up to and including the making of the unless order application, and will go some way towards the costs of the preparation of the witness statement from Mr Ian Anfield; bearing in mind that, in the view of the Tribunal, a statement would have been adduced in any event had disclosure been made in line with the earlier time scale originally imposed.

35. However, the Respondent's application is cast somewhat wider. It is also submitted that it was unreasonable for the Claimant to advance her claim having regard to the degree of knowledge which the Tribunal has identified and her participation within the transactions which have fallen for scrutiny within these proceedings. There is a superficial attraction to this contention. However, the fact that a party has been unsuccessful in the substantive claim is not a passport to a determination that the claim was, in fact, unreasonably pursued. It is clear from the Tribunal's findings of fact that the Claimant was a knowing participant in the transactions which were entered into first with Hudson and thereafter with the

Respondent. However, given the complexity which has bedevilled the determination of employment and worker status respectively, participation in the transactions in question cannot, in and of itself, be considered determinative. The Tribunal's own judgment on liability demonstrates a number of matters required careful evaluation before any conclusion could be made as to the legal consequences, or classification, of the relationship which was entered into between the parties at the time. Those matters are-even to experienced practitioners-issues of considerable complexity and susceptible to nuanced interpretation. Given these realities, the Tribunal is not satisfied that the pursuit of these claims was such as to amount to unreasonable conduct. Accordingly, the application for costs on this ground is rejected.

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Employment Judge Morgan
21st November 2019