EMPLOYMENT TRIBUNALS

Claimant: Mrs C Parris

Respondent: Mr S Boghani and Dr SH Sachedina t/a Alpha Care

Heard at: **London South Employment Tribunal**

On: **12-13 September 2019**

Before: **Employment Judge Ferguson (sitting alone)**

Representation
Claimant: Mr R Henman (Claimant's husband)
Respondent: Ms J Shepherd (counsel)

RESERVED COSTS JUDGMENT

It is the judgment of the Tribunal that:

1. The Claimant's application for a Preparation Time Order is refused.

2. The Respondent's costs application is refused.

REASONS

INTRODUCTION

1. In January 2019 the Claimant applied for a Preparation Time Order ("PTO") in respect of preparation for and attendance at a Preliminary Hearing on 20 November 2018. The application was heard at the conclusion of the final hearing on 12-13 September 2019. The Respondent also made an application for its costs that was heard at the same time. Judgment on both applications was reserved.

RELEVANT BACKGROUND

2. By a claim form presented on 31 March 2017 the Claimant brought complaints of unfair dismissal, wrongful dismissal and for unpaid wages. She named

"Sussex Health Care" as the Respondent, which was the name given as her employer on her contract of employment.

3. A response was submitted by "SHC Clemsfold Group Limited", asserting that:

   3.1. Sussex Health Care is not a legal entity, but is a trading name of SHC Clemsfold Group Limited;

   3.2. The Tribunal does not have jurisdiction to consider the claim because the Claimant was never employed by SHC Clemsfold Group Limited;

   3.3. SHC Clemsfold Group Limited, together with SHC Rapkyns Group Limited, manages 22 live-in care homes;

   3.4. The Claimant was employed by "Alpha Care", which is a partnership, and was assigned to work in 3 or 4 of the care homes operated by SHC Clemsfold Group Limited and SHC Rapkyns Group Limited;

   3.5. The majority of the Claimant's services as a physiotherapist were provided to SHC Clemsfold Group Limited.

4. The response also contained a substantive defence to the complaints.

5. On 8 May 2017 solicitors for SHC Clemsfold Group Limited applied for a Preliminary Hearing to determine the jurisdiction issue. The Claimant objected, suggesting that Alpha Care could be added a respondent. On 16 May 2017 the solicitors for SHC Clemsfold Group Limited wrote the Tribunal saying that it would be prepared to withdraw its argument that it is not the Claimant's employer if the Tribunal named it as the sole respondent. The email also stated:

   > "We envisage that if the Tribunal amend the proceedings to include Alpha Care this will incur unnecessary costs and a preliminary hearing will be necessary, as we consider it likely that Alpha Care would submit that SHC Clemsfold Group Limited was the Claimant's employer."

6. On 24 May 2017 Employment Judge Baron wrote to the parties noting that SHC Clemsfold Group Limited appeared to have opened its first UK establishment on 1 December 2014, which was well after the commencement of the Claimant's employment. It was also noted that the legal status of Alpha Care was not clear. He asked the parties for further clarification.

7. On 30 May 2017 the Claimant's then solicitor wrote to the Tribunal asking for Alpha Care, Sussex Health Care Limited, SHC Clemsfold Group Limited and SHC Rapkyns Group Limited to be added as respondents at this stage and for the matter to be considered at the start of the substantive hearing.

8. The solicitors for SHC Clemsfold Group Limited wrote to the Tribunal again on 6 June 2017, saying that there had been genuine confusion in relation to the identity of the Claimant's employer, which arose in part "from a misunderstanding of the complex corporate structure". It asserted as follows:

   8.1. The Claimant was originally employed in 1998 by Alpha Care, which was and remains a partnership.

8.2. In 2005 the Claimant signed a contract of employment with Sussex Health Care, which was a trading name of Sussex Health Care (Clemsfold) Group Partnership, which was a partnership.

8.3. SHC Clemsfold Group Limited was incorporated in 2014 and took over the assets of Sussex Health Care (Clemsfold) Group Partnership. The Claimant's employment also transferred to SHC Clemsfold Group Limited, whose trading name is Sussex Health Care.

8.4. The Claimant continued to be paid through Alpha Care until the end of her employment because this entity was used to allocate costs to the care homes where the Claimant worked.

8.5. Sussex Health Care Limited does not employ any employees and was never the Claimant's employer.

9. On 27 June 2017 the Tribunal wrote to the parties saying that the identity of the Respondent was a matter to be determined after hearing all of the evidence.

10. On 26 October 2017 the proceedings were stayed. The Respondents had applied for a stay because of concerns about prejudicing a police investigation. Employment Judge Baron refused the stay for that reason but considered that the proceedings should be stayed because of parallel proceedings in the County Court against the two companies (Clemsfold and Rapkyns).

11. A telephone preliminary hearing took place on 31 July 2018 to consider whether to lift the stay and case management in general. By this stage the Claimant was no longer represented by solicitors. Her husband, Mr Henman, was on the record as her representative. In an agenda completed for that hearing Mr Henman asked for Mr S Boghani and Dr S Sachedina to be added as respondents on the basis that they are partners of Alpha Care and Sussex Health Care. Employment Judge Baron lifted the stay. He ordered that the Respondent's name be amended to "SHC Clemsfold group Limited t/a Sussex Health Care" and added Mr Boghani, Mr Sachedina and SHC Rapkyns Group Limited as respondents. He listed a one-day preliminary hearing on 20 November 2018 for a number of purposes, including:

11.1. To ascertain the identity of the Claimant's employer as at 2 November 2016 (the effective date of termination) and the correct Respondent(s) to the proceedings.

11.2. To consider the Claimant's application to amend the claim dated 27 October 2017 (which was mainly to add whistleblowing complaints).

11.3. To consider whether the stay should be lifted permanently.

12. The proceedings were served on the additional respondents and on 5 September 2018 the second to fourth respondents, represented by the same firm of solicitors as the first respondent, submitted responses to the claim. The grounds of resistance were in identical terms for each of the three additional respondents and asserted that:

12.1. The Claimant was never employed by the first or second respondents (SHC Clemsfold Group Limited t/a Sussex Health Care, and SHC Rapkyns Group Limited).

12.2. At the time of termination of her employment the Claimant was employed by Alpha Care, which is a partnership between Mr Boghani and Dr Sachedina.

13. On 7 September 2018 the solicitors for all four respondents wrote the Tribunal asking for the proceedings against the two companies to be dismissed. It was argued that it was now unnecessary for this issue to be determined at the preliminary hearing, but it was noted that there were other matters for determination.

14. Mr Henman, on behalf of the Claimant, opposed the application to remove the first and second respondents from the proceedings.

15. On 31 October 2018 the Tribunal wrote to the parties as follows:

> "I have been asked by Judge Baron to write to you.
>
> In the light of the Claimant's opposition to the application made on behalf of the Respondents dated 7 September 2018 the Judge has decided to refuse the application, and that the matter is to be decided judicially. The preliminary hearing therefore remains listed for 20 November 2018 and the case management orders made on 31 July 2018 remain in force. If it transpires that the Claimant unreasonably refused to consent to the application then the Respondents may have a remedy in costs."

16. In a witness statement prepared for the preliminary hearing Mr Boghani asserted that it was "the view of all current Respondents" that the Claimant's employer was Alpha Care and that the correct party to the proceedings was either Alpha Care (a partnership) or Mr Bohani and/or Dr Sachedina (partners in Alpha Care). The Claimant submitted a witness statement saying that the correct respondents were SHC Clemsfold Group Limited t/a Sussex Health Care and Dr Sachedina and Mr Boghani, partners in both Alpha Care and Sussex Health Care.

17. At the preliminary hearing on 20 November 2018 Employment Judge Baron decided that the two companies, then the first and second respondents, be discharged from the proceedings. The Respondents were "Mr S N Boghani and Dr S H Sachedina (t/a Alpha Care)". He also refused the Claimant's application to amend the claim, save for a minor amendment to argue that the dismissal was unfair due to inconsistent treatment. The case was listed for a six-day final hearing commencing on 9 September 2019.

18. On 14 January 2019 Mr Henman made an application for a PTO and to strike out the Respondents' response.

19. On 28 January 2019 the Respondents' solicitors wrote to the Tribunal admitting liability for unfair dismissal and wrongful dismissal. They said that the only live issues were:

19.1. Whether the Claimant has failed to mitigate her losses;

19.2. How much the Claimant was entitled to recover for unfair dismissal;

19.3. How much the Claimant was entitled to recover in respect of pension contributions in relation to the 12 weeks pay in lieu of notice;

19.4. Whether there had been any unlawful deduction from the Claimant's wages.

19.5. Whether the Respondents failed to provide the Claimant with a written statement of reasons for dismissal.

20. On 28 March 2019 Employment Judge Baron wrote to the parties reducing the length of the hearing to two days, to consider the above issues and the Claimant's application for a PTO and to strike out the response.

21. On 23 July 2019 Mr Henman submitted an amended application for a PTO and to strike out the response. He sought preparation time costs up to the preliminary hearing on 20 November 2018 due to the failure to join the correct respondents at the earliest opportunity and the vacation of the first hearing "due to unfounded stay". The application to strike out the response was made on the basis that the Respondents' conduct amounted to "malicious misconduct" by failing to disclose documents and misleading the Tribunal under oath. It was alleged that Mr Boghani had made false statements in his evidence amounting to contempt of court.

22. A preliminary hearing was listed on 5 September 2019 to consider an application by the Respondents for specific disclosure. That application was withdrawn before the hearing, but the Claimant wished to preserve the hearing to consider her own applications. At the preliminary hearing Employment Judge Balogun noted that the Claimant's application for a PTO was to be determined at the final hearing. She also considered what Mr Henman had described as an "unambiguous impropriety" application. She noted that he was unable to explain what actions the Tribunal was being asked to take or under what powers. She therefore declined to deal with it. Also at that hearing the Respondents confirmed that mitigation of loss was no longer in issue and the Claimant should be awarded the maximum compensation for unfair dismissal. The Claimant had also by that stage indicated that she sought reinstatement or re-engagement, so Employment Judge Balogun made case management orders for that matter to be dealt with at the final hearing.

23. The final hearing took place on 12-13 September 2019. After judgment had been delivered on 13 September 2019 on all substantive matters (see written judgment and reasons sent to the parties on 5 October 2019) the parties said that the following applications were outstanding:

23.1. The Claimant's application for a PTO in respect of the preparation for the preliminary hearing on 20 November 2018.

23.2. The Respondent's application for costs in respect of the final hearing.

24. The Claimant also mentioned his "unambiguous impropriety" application. I noted Employment Judge Balogun's comments on that application at the previous preliminary hearing. Mr Henman was still not able to explain what action he was asking the Tribunal to take and he did not pursue the application.

25. I heard submissions on the PTO and costs applications and reserved judgment on both.

THE RULES

26. Rule 76 of the Employment Tribunals Rules of Procedure provides, so far as relevant:

> (1) A Tribunal may make a costs order or a 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, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; …

CONCLUSIONS

Claimant's application for PTO

27. The application for a PTO was made on the basis that the Respondents' conduct prior to the hearing on 20 November 2018, in particular its position as to the identity of the Claimant's employer and the application for a stay, was unreasonable and unnecessary time was spent preparing for and attending the Preliminary Hearing. Mr Henman calculated the time spent at just over 125 hours. He claimed £5,264.60.

28. At the hearing Mr Henman said that he also now wished to apply for a PTO for the whole proceedings, which he valued at £20,000.

29. The application is refused.

30. Although the present Respondents were not parties to the proceedings until July/ August 2018, they are directors and owners of the two companies and the same solicitors represented all respondents until around May 2019. I accept that those solicitors initially put forward a position as to the identity of the Claimant's employer and the correct respondent to the proceedings that was contrary to what they said in September 2018 and contrary to what was found at the Preliminary Hearing on 20 November 2018. In particular they said on 8 May 2017 that it was likely that Alpha Care would submit that SHC Clemsfold Group Limited was the Claimant's employer, and on 6 June 2017 said that the Claimant's employment had transferred to SHC Clemsfold Group Limited. Both of those statements are entirely inconsistent with the position eventually put forward at the Preliminary Hearing and the findings of the Tribunal at that hearing.

31. The concern does arise from that correspondence that the current Respondents, who are partners in Alpha Care, were seeking to avoid personal liability as a result of the Claimant having named Sussex Health Care as the

Respondent (which was of course entirely reasonable given that that was the name on her contract of employment).

32. Having said that, I am not satisfied that the Respondents' conduct met the threshold under Rule 76(1)(a) or that the preparation time claimed can be said to be attributable to such conduct, for the following reasons:

    32.1. The finding of the Tribunal ultimately was that Alpha Care, not Sussex Health Care, was the correct Respondent. Notwithstanding the concern identified above, it is relevant that the Claimant named the incorrect respondent (albeit inadvertently). That meant there was bound to be correspondence on the issue. The Respondents' solicitors referred to "a misunderstanding of the complex corporate structure", which could explain the inconsistency between their initial stance and the one put forward in the ET3s submitted in September 2018. I am not able to conclude that the statements made by the solicitors in May and June 2017 amounted to unreasonable conduct.

    32.2. In good time before the Preliminary Hearing on 20 November 2018, the Respondents accepted in their ET3s submitted on 5 September 2018 that they were the correct respondents. The Tribunal issued, in effect, a costs warning to the Claimant if she continued to press the matter unreasonably. In view of the confusion in the previous correspondence I do not consider it was unreasonable of the Claimant to seek a ruling on the matter at the Preliminary Hearing, but it is significant that the Tribunal's decision reflected precisely the position put forward by the Respondents at that hearing.

    32.3. The Preliminary Hearing was listed to consider other matters, including the Claimant's application to amend the claim, which was largely unsuccessful.

33. As to the stay of the proceedings, this was done of the Tribunal's own motion and not for the reason it was requested by the (then) respondent. I am not satisfied that there was any unreasonable conduct. It may have caused delay, but that did not result in any additional preparation time on the part of Mr Henman.

34. For the avoidance of doubt, the Claimant has not demonstrated any other conduct falling within Rule 76(1)(a) that could possibly justify the £20,000 claimed by way of a PTO in respect of the whole proceedings.

<u>Respondents' application for costs</u>

35. The Respondents' application was made on the basis that since 28 January 2019 the Respondents have been prepared to settle the case for £70,000, which was significantly in excess of the maximum amount the Claimant could recover and of the amount she was in fact awarded. The Respondents seek costs incurred from May 2019 onwards, when they instructed their current solicitors. They asked for an order in the sum of £20,000.

36. In an email of 28 January 2019 headed "Without Prejudice Save as to Costs" the Respondents offered to pay the Claimant £70,000 in full and final settlement

of the Employment Tribunal claim. The letter asserted the maximum value of the claim was £63,188.04 plus a potential 25% uplift on the non-unfair dismissal awards (which would amount to less than £400). The letter said the offer was open for acceptance until 4pm on 25 February 2019 and if it was not accepted and the Claimant recovered less than the sum offered the Respondents reserved the right to bring the offer to the Tribunal's attention in respect of an application for costs.

37. Mr Henman rejected the offer on 25 February 2019. He said he was not prepared to continue without prejudice discussions until after a hearing had taken place in the Claimant's High Court defamation proceedings relating to an application to strike out and case management. He claimed that without prejudice communications were being used by the Respondent in the defamation claim.

38. On 12 August 2019 the Respondents, now represented by Mills & Reeve, repeated the above offer in an open letter. The offer was said to be open for acceptance until noon on 15 August 2019. A costs warning was given as before. Mr Henman rejected the offer on 15 August 2019 on the basis that he did not accept the Respondents' calculations and he considered that the matter should be considered as part of a "global ADR" meeting to attempt to resolve all outstanding proceedings.

39. The Respondents' solicitors replied on the same day maintaining that the offer was in excess of the maximum the Claimant could recover and saying that the Respondents were not prepared to participate in a "global ADR" meeting. The deadline for acceptance was extended to 4pm on 16 August.

40. In the judgment given on 13 September 2019 the Claimant was awarded a total of £62,587.80.

41. This application is also refused.

42. I accept that the offer was more than the Claimant could have recovered at the final hearing, but the Employment Tribunal does not routinely award costs on the basis of "Calderbank" letters. Although liability for unfair dismissal and wrongful dismissal had been accepted, the Claimant had a live claim for unauthorised deductions from wages which was partly successful. In those circumstances, although this was not the reason given by Mr Henman for refusing the offers, I do not consider it was unreasonable for the Claimant to pursue the matter to a final hearing. Further, the Claimant had, prior to the Preliminary Hearing on 5 September 2019, sought reinstatement or re-engagement. She was entitled to a hearing and a judgment on that issue. Finally, a hearing was required to determine the Claimant's application for a PTO. Although that application has been unsuccessful, the Respondents did not argue that it was unreasonable of the Claimant to have made it. As noted above, the Respondents' approach to the issue of the identity of the Claimant's employer was confused until shortly before the Preliminary Hearing in November 2018.

43. The Respondents argued that some of the costs incurred were due to responding to "voluminous correspondence" from Mr Henman. While it is true that Mr Henman has a tendency to write a large number of very long letters and

emails, the Respondents have not identified any particular unreasonable conduct. Given that I am not satisfied it was unreasonable for the Claimant to pursue the case to a final hearing, the threshold under Rule 76(1) is not met.

Claimant's application for reconsideration

44. On 16 September 2019 the Claimant applied for "reconsideration in respect of a decision made in the case management order by Judge Balogun". It is not entirely clear what decision the Claimant is asking to be reconsidered. Mr Henman appears to be saying that he did not pursue the "unambiguous impropriety" application before Employment Judge Balogun because it would have required referring to without prejudice correspondence and he did not want to prejudice the final hearing. He appears to have interpreted Employment Judge Balogun's comments in the case management order as a decision that he could not pursue any such application at the final hearing. He asks for that to be reconsidered and for the unambiguous impropriety application to be considered as part of my reserved judgment on costs.

45. First, I consider that Mr Henman has misunderstood what Employment Judge Balogun said. She did not make any order precluding him from making any applications at the final hearing; she simply observed that he had not explained what he was asking the Tribunal to do or under what powers. There is nothing to be reconsidered. Secondly, the position at the final hearing remained as before; Mr Henman did not explain what he was asking the Tribunal to do. The application for a PTO has been considered on the basis of his oral submissions and the amended written application submitted in July 2019. Mr Henman did not pursue any application at the final hearing to strike out the response.

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Employment Judge **Ferguson**
Date: 5 December 2019