EMPLOYMENT TRIBUNALS

Claimant: **Mr S Miles**

Respondent: **UK Research and Innovation**

JUDGMENT

The Claimant's application for a wasted time order is dismissed.

REASONS

The application

1. By an application dated 1 March 2020, the Claimant made an application for a preparation time order. The Respondent responded on 11 March to resist the application.

Relevant background

2. The Claimant issued proceedings on 26 August 2018. His claim had been of unfair dismissal, discrimination on the grounds of disability and breach of contract. The complaint of discrimination was dismissed as a result of the Claimant failing to prove that he was disabled at the material time and the remaining complaints proceeded to a final hearing.

3. The final hearing took place between 2 and 5 December 2019. The complaint of unfair dismissal was dismissed but the Claimant succeeded in his claim for breach of contract relating to notice. The essence of the case was that the Claimant was alleged to have falsely notified the Respondent of an illness which caused his absence work. The Respondent investigated allegations that the Claimant had been seen at the Swindon railway station on more than one occasion boarding trains to Bristol in the early morning when he was supposed to have been too ill to work. The allegations resulted in an investigation and the Claimant's subsequent summary dismissal.

4. The Tribunal found that the Respondent had had a fair reason for dismissal and that the dismissal had been fair within the meaning of s. 98 (4) and the application of the *Burchell* test. It has not, however, satisfied that the Claimant had been shown to have been guilty of the allegations on the balance of probabilities on the basis of the evidence brought to the final hearing. The Respondent did not call the key witnesses in relation to the only allegation which was considered to have been gross misconduct nor did its representative ask anything other than open questions in relation to the Claimant's whereabouts on the material dates.

5. In the Claimant's long application, he has argued that, on the basis upon which the Respondent conducted its case, it had no reasonable prospect of success

and ought to have been considered vexatious. He therefore appears to have relied upon rules 76 (1)(a) and/or (b) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

Relevant principles

6. The questions which arose were therefore whether the Respondent had been guilty of '*unreasonable conduct…in the way that proceedings had been conducted*' as defined by rule 76 (1)(a) or whether its defence to the breach of contract element had ever had any reasonable prospect of success within the meaning of rule 76 (1)(b). The essence of the latter test was neatly summarised in *Millin-v-Capsticks Solicitors* [2014] UKEAT/0093/14;

> "*Where a claim is truly misconceived and should have been appreciated in advance to be so, we see no special reason why the considerable expense to which a Respondent will needlessly have been put (or a claimant in a case within which a response is misconceived) should not be reimbursed in part or in whole*" (paragraph 67).

7. Rule 76 (1)(b) uses the same wording as rule 37 (1)(a). In the case of *QDOS Consulting Ltd and others-v-Swanson* UKEAT/0495/11 HHJ Serota QC indicated that the test of whether a claim had had no reasonable prospect of success was only met in "*in the most obvious and plain cases in which there* [was] *no factual dispute and which the applicant* [could have] *clearly crossed the high threshold of showing that there* [were] *no reasonable prospects of success.*"

8. In terms of causation, it was unnecessary to show a direct causal connection (*McPherson-v-BNP Paribas* [2004] ICR 1398 and *Raggett-v-John Lewis* [2012] IRLR 911, paragraph 43), but there nevertheless has to have been some broad correlation between the unreasonable conduct alleged and the loss that was incurred (*Yerraklava-v-Barnsley MBC* [2010] UKEAT/231/10). Regard had to be taken of the '*nature, gravity and effect*' of the conduct alleged in the round (both *McPherson* and *Yerraklava* above). A costs or preparation time order was restorative, not punitive (*Lodwick-v-Southwark London BC* [2004] EWCA Civ 306) and one ought not to have been made simply because a party had got something wrong.

9. Rule 76 (1) imposed a two-stage test: first, a tribunal had to ask itself whether a party's conduct fell within s. 76 (1); if so, it *had to* go on to ask itself whether it was appropriate to exercise its discretion in favour of making a costs or preparation time order against that party.

Conclusions

10. In this case, the fact that the Respondent failed to satisfy the Tribunal that the Claimant had been guilty of the misconduct alleged on the balance of probabilities did not render its conduct unreasonable or vexatious within the meaning of rule 76 (1)(a). The fact that Mr French-Williams failed to cross-examine the Claimant directly and/or more forcefully on his alleged culpability was surprising, but it was not to the Claimant's detriment. It contributed to the Respondent's failure to prove its case in relation to the breach of contract allegation, as too did its failure to call the two relevant eye witnesses.

11. Further, it could not have been said that the Respondent's defence to the allegation was misconceived and/or had no reasonable prospects of success within the meaning of rule 76 (1)(b). The Respondent definitely *did* have prospects of success if its case had been conducted differently.

12. Even if either of the tests considered above had been satisfied, it was not appropriate to exercise discretion in the Claimant's favour. The claims of breach of contract and unfair dismissal were inextricably linked and it was extremely difficult to apportion any particular additional costs to his pursuit of the former claim as distinct from those incurred in his pursuit of the latter which, was always the primary claim and was unsuccessful.

13. The Claimant also cited examples of the Respondent's failure to adhere to case management directions, but no particular dates or details have been provided and it was difficult to see how any additional specific time was incurred as a result. Whatever problems there may have been in preparation, the hearing was effective.

_____

Employment Judge Livesey

Date: 12 March 2020

……..