



EMPLOYMENT TRIBUNALS

Claimant: Ms R Pullan

Respondent: Rodney Brumfit on behalf of the management committee and trustees of Otley Conservative Club (an unincorporated association)

Heard at: Sheffield by CVP

On: 10 September 2020

Before: Employment Judge S A Shore

REPRESENTATION:

Claimant: No Appearance (written submissions)

Respondent: Ms K Baker, Solicitor

JUDGMENT AND REASONS

The judgment of the Tribunal is that:

1. The claimant (the paying party) will pay the respondent (the receiving party) a contribution to its legal costs in the total sum of £11,040.00.

REASONS

Background

1. By a claim presented on 14 October 2019, the claimant made claims of unfair dismissal and sex discrimination, following a period of early conciliation that had begun on 1 August 2019 and ended on 15 September 2019.
2. The respondent is a social club that is an unincorporated association. The claimant was initially employed as bar staff and then as bar manager by the respondent from 1 January 2008 until her resignation on 17 July 2019. Her claims of sex discrimination were of harassment against three members of the respondent. Two were committee members and one was an ordinary member.

Her constructive unfair dismissal case was about an investigation and disciplinary proceedings brought against the claimant relating to her entitlement to contractual sick pay. The claimant had produced a contract dated 29 October 2012 that set out her right to contractual sick pay, but the respondent came to believe that the contract was not genuine and had been fabricated by the claimant. At all material times during the life of the substantive proceedings, the claimant was represented by solicitors.

3. The case came before Employment Judge Licorish at a private preliminary hearing in person held on 9 January 2020. EJ Licorish recorded that the claimant's claims of harassment appeared to have been presented out of time, but that it would be disproportionate to split that issue off for a separate preliminary hearing on the time point.
4. EJ Licorish made a series of case management orders dated 13 January 2020 that were sent to the parties on 14 January 2020.
5. The claim was listed for a final hearing in person that was to have taken place over five days on 9, 10, 11, 12 and 15 June 2020.
6. The respondent made an application that the claimant pays its legal costs of the withdrawn proceedings and the costs of this application.

Issues and Law

7. Rule 76(1) of the 2013 Tribunal Rules states:

76. (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; or

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

8. The application for costs by the respondent's solicitors dated 2 September 2020 ran to ten pages and appended a summary schedule of costs and copy bills, a copy of an email from the claimant sent on 16 July 2020; letters relevant to the issue of costs; the lists of documents of both parties; the joint bundle filed by the respondent on 27 March 2020, and; the witness statements prepared by the respondent for exchange on 1 May 2020.
9. Ms Baker sought to rely on the following cases:
 - 9.1. McPherson v BNP Paribas (London Branch) No 1 [2004] IRLR 558;
 - 9.2. Power v Panasonic (UK) Ltd UKEAT/0439/04;
 - 9.3. Vaughan v London Borough of Lewisham and others UKEAT/0533/12;

- 9.4. Mrs D M Chadburn v Doncaster and Bassetlaw Hospital NHS Foundation Trust and Ms J Mann: UKEAT/0259/14/LA;
- 9.5. Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797, and;
- 9.6. Simpson v Chief Constable, Strathclyde Police & Anor UKEATS/0030/11/BI

10. I regard to issues in this application to be:

- 10.1. The principle that costs should be the exception, rather than the rule;
- 10.2. The purpose of costs is compensatory rather than punitive;
- 10.3. A Tribunal may have regard to the paying party's ability to pay;
- 10.4. The extent to which the fact that the claimant was professionally represented should be considered;
- 10.5. The nature of the claim and the evidence, and;
- 10.6. The effect of the claimant's late withdrawal on the question of costs.

Housekeeping

9. The hearing was conducted by telephone. The claimant declined to attend, but submitted an email that served as written submissions.
10. I find that the claimant was aware of the application and had the opportunity to attend and fully participate, but declined to do so. I decided to proceed on the basis of her written submissions.
11. The respondent had prepared a bundle of documents.

Application

12. The respondent's application was initially made by the respondent itself, but in the light of the claimant's response, it re-instructed its solicitors, who produced the following (which I have reproduced below with the names of witnesses anonymised):

"It is alleged that the Claimant has been unreasonable in her conduct of her case in that:

1. *She withdrew her claim at a very late stage, i.e. only 14 days before the final hearing had originally been listed (which only because of COVID would have been a case management hearing but was otherwise anticipated to be a hearing of 5 days, giving an idea of the initial expectation of the evidence to be prepared and produced by that time) and after the Respondent had been required to spend a considerable amount of time and legal costs in preparing their evidence to support their response and their view that the case was*

without merit. Because of this behavior, the Respondent claims all their costs incurred to the date of the withdrawal.

2. *The Respondent has complied with all directions in the original case management directions (order 14th January made largely by consent) and incurred costs in doing so. The Claimant has not complied with all the directions in her own case. The Claimant has never applied for any alteration to the disclosure. See below.*
 - 2.1 *In particular: the Claimant did not provide all the necessary information required in her original claim; the Case management order provided that she must provide further and better particulars (P41 bundle). This caused the Respondent to incur further costs in both asking for those further and better particulars but also in responding to them.*
 - 2.2 *The Case Management order (p41) provided that the claimant must provide by 23rd January a schedule of loss in particular in 5.2"...."the schedule of loss must include the following information: whether the claimant has obtained alternative employment and if so when and what; how much money the claimant has earned since dismissal and how it was earned...". Despite this order, when the schedule of loss was served on 25th February this did not provide any mitigation details and no detail of how much was earned since dismissal. This had to be pointed out to the Claimant and chased repeatedly. Indeed, even by the time of the withdrawal of the claim no evidence of the amount in total earned since dismissal has been provided nor the early payslips. The Respondent has incurred additional costs in asking for all these documents and repeating that.*
 - 2.3 *List of documents. The Claimant sent their documents attached to an email, but many documents were not enclosed and some duplicated. This caused extra cost.*
 - 2.4 *Original contract: The claimant was asked again and again to provide the original contract. While COVID may explain some delay, it has never been sent despite many requests.*
 - 2.5 *The Case Management Order provided that witness statements were to be prepared and exchanged prior to 1st May 2020. The Claimant did not ever make an application to the ET to amend that direction. The Respondent cannot be criticized for carrying out work to comply with the directions of the ET. The Respondent had 8 witnesses. To prepare the witness statements therefore took a considerable amount of time (bill 26.4.2020 - £3000). Copies of those witness statements are attached.*
3. *A main issue in the claim was that the Claimant alleged that the contract upon which she was employed was a contract which provided her with 6 months sick pay. The copy contract she produced was found to have been produced by a internet company called Rocketlawyer. The Respondents made clear in the Grounds of response (and indeed had in the disciplinary hearings) that*

they did not recognize either the contract as being one that they would have produced and further that no committee member either had the ability to access a contract online to draft it (and it was clear that the contract was produced on the Rocketlawyer site as being identical to their proforma) nor did they do so; but more than that no committee member had signed the contract. The Claimant continued to rely upon that contract. Witness Statements were necessary from all relevant committee members that this was the position.

4. *Further the Claimant alleged harassment and abuse from certain committee members. In her further and better particulars she provided some alleged dates and terms of various events to support her allegations about accusations against Mr R including referring to times and dates of phone calls etc. Mr R and the Respondent's solicitors spent a considerable amount of time to provide evidence showing that the dates and times provided were not correct. Mr R provided his telephone bills showing the times of calls made which did not match the Claimants allegations. Further a full detailed statement of Mr R was required as well as from the other parties accused.*
5. *The witness statement of the Claimant and the other witnesses she relied upon (the unnamed person who she alleged witnessed the signing of the contract in the bar – whose name she has not given) and the friend AD who apparently could give evidence to support the harassment allegations, would have been essential to establish the facts and detail of what she relied upon, but also would need in due course to assess her credibility. The Claimant has at all points been very vague about the contract which she says is the correct contract – in the investigative meeting, she said the contract was signed by KS. In the disciplinary meeting she changed her mind when presented with the fact that KS's signature was completely different. Her witness evidence was crucial to a proper assessment of the case.*
6. *It is noted that the Claimant's lawyer says "their [the Respondent's] decision to proceed with drafting witness statements was nonsensical". The decision to proceed with drafting witness statements by the Respondent was because:*
 - 6.1 *The Case Management Order provided these were to be exchanged by 1st May*
 - 6.2 *The hearing was originally listed for 9th June for 5 days*
 - 6.3 *The Respondent needed to be given the factual evidence of the Claimant as to the main issues and harassment and origin of the Contract, which was crucial in view of the number of factual errors in the Claim*
 - 6.4 *The Respondent's witnesses could give valid evidence to counter the allegation that the Contract upon which the Claimant relies was supplied by the Respondent i.e. a fundamental issue in the case and this needed to be expressed.*

- 6.5 *By preparing the Witness Statements for the Respondent it became even more clear that the contract appeared fraudulent.*
7. *As the ET will appreciate it is not for the parties simply to decide whether or not to follow any particular direction of the court, which is what the Claimant seems to suggest.*
 8. *It is the Claimant who failed to follow the Case management order, not the Respondent.*
 9. *It is suggested that it is the fact that the Claimant did not want to prepare and complete her witness statement in the knowledge that it would be supported by a statement of truth and stand as her evidence, and further in the light of the allegations made by the Respondent as to concerns as to fraud concerning the Employment Contract, that is the reason she did not do so.*
 10. *The Respondent had suggested to the Claimant that an application was made for third party disclosure from Rocketlawyer and the Claimant was invited to consent to such a joint application. The costs of such a consent application and enquiry would not have been considerable. It does not follow that witness statements should only have followed such an application. On the contrary the parties witness statements would be necessary to support making such an application; i.e. if the ET had been presented with the statements of the Respondent saying that the contract was not produced by them, nor signed by them, and the Claimant gave statements saying it was; then it would make sense for the company who produced the contract for one or other of the parties to be asked by consent who had instructed them. Rocketlawyer had indicated because of data protection that they would only be able to release such information on consent of the parties (provided it was one of them who had instructed them) or by order of the court.*
 11. *The Claimant's solicitor suggest that it was justified for them not to prepare witness statements and "nonsensical" for the Respondent to follow the case management directions to prepare witness statements but the Claimants representative did not apply to the ET for an order for variation of the order; nor did she ever respond to the request for further documents. The Respondent did not ever make an application for the further documents, we simply invited the Claimant to agree. Had the Claimant been of the view that it would have been better to delay witness statements while making an application to the court, they could have proposed that; they did not; they did not respond to the suggestion of the application; they simply withdrew the claim.*
 12. *List of documents. The Claimant sent their documents attached to an email, but many documents were not enclosed and some duplicated. This caused extra cost.*

13. *Original contract: The claimant was asked again and again to provide the original contract. While COVID may explain some delay, it has never been sent despite many requests.*
14. *The Claimant's representative says that she requested extensions of time to produce the witness statements – she did but only on 27th April, 4 days before the deadline, by which time most of the work had been carried out; we agreed to a reasonable extension to May 11th which would have given her an extra 15 days after she returned to work after she had suffered with COVID. All the letters from the Claimant's representative make it clear that the Claimant intended to produce a statement, just that it would be slightly late; nothing in the correspondence would lead the Respondent to believe that an application would be made that witness statements were not necessary. On the contrary, the Respondent felt they were vital.*
15. *The Claimant alleges that because the Respondent did not want to settle that this was obstructive. It is only obstructive if the Respondent did not engage in the ACAS discussions; they did however. This suggests that the Claimant only issued a claim to try to persuade the Respondent to settle. The Respondent cannot be penalized by not wanting to settle when their position was that there was no reasonable chance of success in the claim. The Respondent engaged with ACAS throughout and discussed the issues. The Respondent was keen for the ET to decide the claim and issues when presented with the evidence. They were prevented from proceeding to this. It is clear now that the Claimant issued simply in the hope of obtaining an offer. When she did not receive an offer, she withdrew. It is submitted that it was not the continued legal costs which were an issue (she has not provided any detail as to how those costs were funded anyway, and whether they were on the basis of a Conditional Fee Agreement), but the fact that she did not want to provide a Witness Statement, nor face the evidence of fraud nor factual errors in her allegations of harassment. The Respondent liaised with ACAS throughout and never shirked such discussion. However, they cannot be made to make an offer if they were satisfied that their response would be successful. They were and it is suggested that the Claimant withdrawing her claim would be supportive of that.*
16. *It is also suggested that the Claimant's claim had no merit and when faced with having to provide factual evidence to support her claim, she withdrew."*

Claimant's Submissions

13. The claimant submitted a response to the respondent's original application as follows (continued on next two pages as cut and pasted images):

Prior to April 2020 I had discussed with the Respondent settlement. The Respondent had indicated that rather than mediation that without prejudice correspondence would be used. The Respondent informed me that they would send their proposal but it was never sent. Our lowest offer at this point was approved in April 2020. I was informed that the Respondent did not want to settle rather "pay the solicitor than pay Rachel". This was obstructive to settling matters. There was also a discussion about sending a witness statement for inspection at Ison Harrison's Otley office. It was sent to them ready for them to inspect but the country was placed on lockdown and the Respondent did not go to inspect it.

1 April 2020 – The bundle was provided by the Respondent.

14 April 2020 – I informed Katherine Baker that I had decided that I would need an extension to exchange witness statements. I requested a long period of an extension because I was unsure how long I would need.

24 April 2020 – Respondent sent an email requesting that I withdraw my late stage applications for an expert report and third party costs. I have caused significant delays to witness statement exchange. It would be nonsensical to have these reports and not to have witness statements. It was on this date they first alleged rocket claims. I had previously brought to my attention about prior to November 2012 and brought to my attention about prior to November 2012.

request for the 2 weeks I had missed and an additional week. I also wrote to the respondent on a without prejudice basis mediation response in order to facilitate settlement and to address concerns in relation to these applications they wish us to do research into their allegations re: the privacy notices and the incorporation date.

(we were coming to a decision about withdrawing your claim drop hands cot3

6 May 2020 – A costs warning was issued by the Respondent with intention to get an expert report.

8 May 2020 – We made a settlement offer to enter into a no one pursues the other for costs and settling all claims costs

15 May 2020 – I received a call from ACAS refusing the CC costs. I made another offer just to do a 'drop hands' cot3 I am not pursuing costs. I wrote to the Respondent on a without prejudice basis to refuse the costs.

19 May 2020 – Again the Respondent wrote to me to refuse the costs.

26 May 2020 – Claims were withdrawn.

Summary

The Respondent has sought to make these allegations

14. The claimant submitted an email on the morning of this hearing as follows:

"I would just like the judge to hear my experience with Otley Conservative Club

I worked there for 13 happy years putting many hours in that I never asked or received payment for because I loved my job and the members and wanted the club to be a success

I became ill in the November and went on sick also around this time I made the decision to end my abusive relationship which I had been in for 25 years

In the February to my horror I was contacted by several members of the club telling me that me Francis was spreading lies about my personal life I felt let down and betrayed by him and put a complaint into the chairman but mr Francis carried on I put more complaints in which did not go down too well I believe mr Francis Would stop at nothing to make my return to work impossible

My life was made hell for months threatening text messages off mr Wellington and calls to my phone and nobody speaking

Last August I met my new partner and started work again and got a bit of confidence back and felt safe to go out again

The reason I decided not to carry on with case was my new partner was being dragged in to the situation mr Pratt was working at the falcon club in otley and would be very rude to my partner and of course myself we also was not happy that mr Brumfitt employs my ex partner and we needed to just put it all to bed and get on with building our life together as I was starting to become unwell again with depression and then suddenly loosing my mum on the 13 April did not help so I contacted eve I said I just wanted it to be over

The committee are fully aware that I only earn 128 pounds a week and receive 67 pound careers allowance for my dad who sadly is on end of life care

I gave 13 years of my life to the club and do not deserve what they did me but I just want to be able to get on with my life and spend what time I have left with my dad not having to worry that they are determined to put me in more financial difficulties.”

Findings and Decision

15. I have not recorded every piece of evidence and submission in this decision. I made a full note of the hearing. I have only recorded in this decision, the matters that I consider relevant to my determination of the issues in the case. I make the following findings:
- 15.1. The claimant’s claim of unfair dismissal was misconceived. It never had any reasonable prospect of success because it was mostly based on the disciplinary proceedings that followed her claim for contractual sick pay. I find that she had no entitlement to such sick pay because it is clear from the documents that either she fabricated the 29 October 2012 contract or that someone else fabricated it and she used it to claim contractual sick pay to which she was not entitled. I accept the respondent’s submissions on this point in their entirety. The claimant never produced the original of the contract and never agreed to allow Rocketlawyer to disclose whether she had downloaded the contract. Rocketlawyer did not start to operate in the UK until after the date of the alleged contract.
 - 13.1. The claimant’s claims of harassment were out of time and had no reasonable prospect of success. Her credibility was severely damaged by the issue of the contract and would have damaged any prospect she may have had of succeeding with the claims.
 - 13.2. The claimant’s claim of victimisation is predicated on protected acts that were not made in good faith.

- 13.3. There is no imperative on a party to agree to settle a case. There was no imperative on the respondent in this case to settle. The claimant appears to have prolonged this litigation whilst failing to meet deadlines with the sole purpose of forcing a settlement.
 - 13.4. The submissions of the claimant are not cogent or compelling. Her representative may have had a period of ill health that explains some delay in compliance, but there is no evidence produced that explains why the claimant proceeded with a hopeless claim which she must have known was predicated on a fabricated document.
 - 13.5. The claimant produced no evidence of her earnings, her capital assets or any savings or other financial details. That is consistent with her failure to provide evidence of her earnings during disclosure. I therefore do not exercise my discretion to consider her means, as she has wilfully failed to provide details of them.
 - 13.6. Even if the claimant has no assets or income at present, there is no indication from her of what the future holds. Her conduct in bringing and pursuing these claims was unreasonable.
 - 13.7. Ms Baker advised me that the respondent is VAT registered, so the amounts claimed in costs should be ex-VAT. I have made an award in those terms.
 - 13.8. I find that the amount claimed in fees and counsel's fees are entirely reasonable, both in the rate that was charged and the number of hours spent on the claim. It is preposterous for the claimant's former representative to say that it was unreasonable for the respondent to spend money preparing witness statements in order to comply with a case management order.
16. I therefore find that the claimant should pay the respondent the sum of £11,040.00 towards its legal costs.

Employment Judge S A Shore
Date 10 September 2020