Case No: 3305972/2018

EMPLOYMENT TRIBUNALS

Claimant: Mrs Gemma Stoate

Respondent: British Airways plc

Heard at: Watford **On:** 9 December 2020

Before: Employment Judge McNeill QC

Representation
Claimant: Mr N. Stoate (Claimant's husband)
Respondent: Ms M. Tutin (Counsel)

JUDGMENT

1. An extension of time is granted to the Claimant for the making of her application for a preparation time order or, in the alternative, a costs order, to the date when the application was made.

2. The Claimant's application for a preparation time order or, in the alternative a costs order, is dismissed.

REASONS

1. The Claimant brought a number of claims to the employment tribunal arising out of her employment and its termination by the Respondent. Her claims were heard over three days on 1-3 October 2019.

2. One of the Claimant's claims, that the Respondent acted in breach of contract in not granting her voluntary redundancy, was upheld. Her other claims, in respect of underpayment of holiday pay and other alleged breaches of contract, were dismissed. There was an alleged failure to provide a statement of particulars of employment pursuant to s1 of the Employment Rights Act 1996 that was not pursued.

3. At the conclusion of the hearing, a judgment with reasons for the judgment was given orally. A judgment dated 3 October 2019 was sent to the parties on 1 November 2019.

4. On 11 November 2019, the Claimant requested written reasons for the judgment. Reasons dated 25 November 2019 were sent to the parties on

5. On 7 January 2020, the Claimant, who has at all times been represented by her husband, who is a solicitor and a partner in the firm Taylor Wessing, made an application for costs against the Respondent. Although describing the application as an application for "costs", in the submission in support of the application, the Claimant stated that there was "no need to distinguish between a costs order and preparation time order". This statement foreshadowed an issue that has been contentious between the parties. That issue is whether a Tribunal that decides to make an order in accordance with rule 76 of the Employment Tribunals (ET) Rules of Procedure in favour of a party who has been represented by a person who is, as a matter of fact, a solicitor but is not representing a party in that capacity, should be entitled to a costs order or a preparation time order (PTO).

Issues

6. There have been three key issues in this costs application. I set these out in what I consider to be a logical order, rather than following the order of submissions of either party.

   a. Should the time for making a costs application be extended?
   b. Did the Respondent or its representatives act unreasonably and/or abusively in the way that the proceedings were conducted and, if so, should the Tribunal exercise its discretion to make an order under rule 76 of the ET Rules of Procedure?
   c. If an order is to be made, should it be a costs order or a PTO?

Extension of Time

7. Pursuant to rule 77 of the ET Rules of Procedure, an application for a costs order or PTO should be made: "at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties". The judgment in this case was sent to the parties on 1 November 2019 and any application should have been made by 29 November 2019. The application was in fact made on 7 January 2020. It was therefore out of time and the Claimant did not seek to argue otherwise in oral submissions.

8. The Tribunal has a power to extend time and the Claimant contended that an extension should be granted in this case. At the conclusion of the hearing on 3 October 2019 and after the Claimant had learned the outcome of the case and had heard the reasons for the decision, the question of written reasons was raised by the Claimant. The Claimant having succeeded in her case, I indicated that this may be a matter that the Claimant wished to reflect on, drawing the Claimant's attention to the judgments online database, which is accessible to the public, and to the time factor involved in the provision of written reasons. It was explained that the Claimant had the option of requesting written reasons at the hearing or once the judgment was received. The Claimant elected not to pursue a request for written reasons there and then. The Claimant submitted that this decision was taken "in a good faith effort to limit the burden on the

Tribunal and the public purse" and I accepted this.

9. The Claimant submitted that an application for costs could not be made until the written reasons were received, which was on 10 December 2019. She honestly believed that the 28 day deadline ran from this time and she complied with it.

10. The Respondent submitted that the Claimant's application was made 28 days after the deadline for making a costs application should have been made and that it was therefore significantly out of time. The first time that an extension of time was requested by the Claimant was in a letter dated 24 January 2020. It was submitted that I should look at the Claimant's submission in relation to her understanding of the time limit with a critical eye, given the clear knowledge of the Claimant and her husband of the relevant legislation and rules and their ability to carry out research.

11. The Respondent submitted that it was not in the interests of justice to extend time for the making of the application. The parties had been given detailed reasons for the decision at the hearing and there was no explanation as to why the application was not made in time. There was no need for the Claimant to have sight of the written reasons in order to make a costs application. The Respondent was entitled to finality and certainty in the litigation, which would be undermined by an extension of time. In any event, the application was meritless.

Conclusion

12. I considered that the Claimant's stated reasons for making the application out of time were genuine and that she had not realised that she must make an application within 28 days of the sending out of the judgment. While oral reasons were given at the hearing, it is was reasonable to want to see the written reasons before deciding whether to make a costs application. I did not consider that the application was without merit and, although the policy of finality and certainty in litigation is an important one, the interests of justice were in favour of allowing the extension of time in this case. An extension is therefore granted to the date when the application was made.

Unreasonable and/or abusive conduct

13. The Claimant submitted that the proceedings were conducted aggressively by the Respondent with the intention that she would not pursue her case; that this caused extreme stress to the Claimant; and that this conduct was not reasonable. Other employees, who supported the Claimant, were unwilling to give evidence at the Tribunal or, in some instances, even to disclose their names.

14. In oral submissions, the Claimant focused on four matters in particular:

    i. That Mr Wilding, the Respondent's main witness on the issue of whether voluntary redundancy was offered to the Claimant, lied to the Tribunal;
    ii. That the Respondent's witness, Mr Stonebanks, gave evidence to the Tribunal that was not true;

iii. Correspondence sent by the Respondent which was "without prejudice save as to costs", which the Claimant submitted was threatening, a bullying tactic, unreasonable and abusive;

iv. The cross-examination of the Claimant which the Claimant described as "aggressive".

15. In relation to the first two matters, the Claimant relied on the decision of the Employment Appeal Tribunal (EAT) (Wilkie J sitting with non-legal members) in **Daleside Nursing Home Limited v Mrs C. Mathew** UKEAT/0519/08/RN for the proposition that where a witness lies in relation to a matter that goes to the heart of what the case is about, that is unreasonable conduct. In the current case, it was submitted, Mr Wilding lied about whether a promise of voluntary redundancy was made by the Respondent to employees at a consultation meeting, a matter which lay at the heart of the case. Mr Stonebank lied about whether he had a highly relevant letter dated 26 May 2017 available to him at the grievance hearing.

16. The Respondent disputed that it had acted unreasonably. There was no finding that Mr Wilding or Mr Stonebank had lied. The Tribunal preferred the Claimant's evidence to that of Mr Wilding and Mr Stonebank but that did not amount to a finding that either Mr Wilding or Mr Stonebank had been dishonest in their evidence. Mr Stonebank was not found to have been lying in relation to the letter which he said that he had seen at the grievance hearing. The Respondent said that it could no longer locate that letter, in spite of the Claimant having requested the Respondent to retain relevant documentation within days of the disciplinary hearing but there was no finding (and no basis for finding) that documents had been destroyed.

17. The Respondent submitted that **Daleside** was distinguishable from the current case. In **Daleside**, an allegation of explicit racial abuse lay at the heart of the claim. The finding by the Tribunal in that case amounted to "a clear finding by the Tribunal that the allegation of explicit and offensive racial abuse was false, and that it had been made up…..[as] a method of deflecting attention from disciplinary matters which the Claimant was anticipating". The EAT described the Tribunal's factual finding as a finding that the allegation was "a deliberate and, to an extent, cynical lie". Later in the judgment (paragraph 20), the EAT stated that the case was one in which there was a "clear-cut finding that the central allegation of racial abuse was a lie".

18. In relation to the correspondence, the Respondent submitted that there was nothing improper in the Respondent's correspondence aimed at achieving settlement. It was neither heavy-handed nor oppressive.

19. In a skeleton argument, prepared by the Respondent's Counsel, she submitted that her cross-examination was well within the boundaries set out in the BSB Code of Conduct. I did not invite oral argument on this issue. I had a clear recollection of the cross-examination which was firm but did not overstep any proper boundaries. Had I considered the cross-examination to be inappropriately aggressive, I would have intervened at the time. The Claimant did become distressed when she was being cross-examined and a short break was taken. Being cross-examined is a process many witnesses find distressing. I had every sympathy for the Claimant's distress

but did not consider that the cross-examination was improper.

Conclusion

20. In considering whether to make a costs or preparation time order, I reminded myself that such orders are the exception rather than the rule in the Employment Tribunal. I should consider first whether there was conduct falling within rule 76(1)(a) and secondly, if there was, whether I should exercise my discretion to make a costs order. In considering whether conduct was unreasonable or abusive, I should look at the whole picture of what happened, including what may have been unreasonable or abusive about the conduct. It is also permissible to look at the effects of the conduct: **Barnsley MBC v Yerrakalva** [2011] EWCA Civ 1255.

21. I concluded that **Daleside** was distinguishable from the current case. Although the question of whether voluntary redundancy was promised went to the heart of the case, I did not make a finding that Mr Wilding or indeed Mr Stonebanks had been dishonest or that documents had been destroyed. I preferred the evidence of the Claimant to that of Mr Wilding as stated in the written reasons provided. The fact that I preferred the Claimant's evidence is not equivalent to a "clear-cut finding that the central allegation….was a lie", as in **Daleside**. I do not find that unreasonable conduct is made out on this ground.

22. I noted that certain individuals identified by the Claimant as potential witnesses did not attend the Tribunal to give evidence on her behalf but I did not have evidence which would enable me fairly to draw the conclusion that those individuals chose not to attend the Tribunal or to make statements because of any unreasonable conduct by the Respondent.

23. In relation to the "without prejudice save as to costs" correspondence, the Claimant offered to settle her claim on 21 March 2018 on terms that she would withdraw her claim if the voluntary redundancy payment was made to her. That offer was not accepted. On 21 August 2019, she modified her previous offer by offering to withdraw her claim on the basis that she was paid £14,000, a little less than the full voluntary redundancy sum.

24. On 23 August 2019, the Respondent made an offer to the Claimant headed: "WITHOUT PREJUDICE SAVE AS TO COSTS – COSTS WARNING". The offer began with a statement that if the Claimant continued to pursue her claims against the Respondent, the Respondent would make an application for a costs order against her. Rule 76(1) of the Rules of Procedure was then set out. The Respondent then stated that the Claimant's claims had no reasonable prospect of success. Five reasons were set out as to why the Claimant was acting unreasonably in bringing and continuing to pursue her claims. The Respondent stated that its costs at that point were £20,000 plus VAT and rising. The Claimant was advised to obtain independent legal advice from and employment law specialist in relation to the merits of her claim. It was stated again that the claim had no reasonable prospects of success and an offer was made that if the Claimant withdrew her claim, the Respondent would not pursue her for costs.

25. I considered that the Respondent's letter was heavy-handed. It caused the

Claimant to feel stressed. Some claimants, conducting their cases without assistance, may have felt on receipt of this letter from an organisation of the size and with the resources of BA plc that they had little realistic option but to withdraw their claim. Access to justice would then have been prevented. The Respondent must have known that the current case would largely turn on the determination of a dispute of fact and that it was not apt to describe the case as having no reasonable prospects of success.

26. I do, however, take into account in the current case, that the Claimant was proceeding with the assistance of her husband, who is a partner in Taylor Wessing solicitors. She had previously, with her husband's assistance, brought a claim in the Reading Employment Tribunal which progressed to a full hearing. The Respondent was aware of the nature of the Claimant's assistance. Although the Claimant's husband is not an employment lawyer, he has been able to research her case fully and provide detailed reasoned submissions grounded in relevant case law. The letter did not have the effect of deterring the Claimant from pursuing her case,

27. Looking at the whole picture in this particular case, I do not consider that the Respondent's letter was unreasonable or abusive. On different facts and with a claimant in a different position who was prevented or deterred from pursuing their claim by such a letter, I may have taken a different view.

28. For these reasons, I do not consider that the threshold for making a costs order or PTO is met. Were I wrong about that, I would not, for the reasons stated, exercise my discretion to make a costs order or PTO.

Costs order or PTO

29. In view of my findings above, it is unnecessary for me to consider the interesting question of whether the appropriate order in this case would have been a costs order of a PTO, given the definition of "legally represented" in rule 74(2) of the Rules of Procedure.

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Employment Judge McNeill QC

Dated: 16 December 2020

SENT TO THE PARTIES ON

.....6/1/21.....

.....Miss M Elliott.....
FOR THE TRIBUNAL OFFICE