Case Number: 2202328/2020

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT (sitting alone)**
BETWEEN:

Ms D Hubert

Claimant

AND

One Call 24 Limited

Respondent

ON: **19 February 2021**
Appearances:
For the Claimant: **Ms B Venkata, counsel**
For the Respondent: **Ms R White, counsel**

COSTS HEARING HELD REMOTELY

JUDGMENT ON COSTS

The Judgment of the Tribunal is that the claimant shall pay the respondent's costs of considering the claimant's amended witness statement and in dealing with the claimant's postponement applications made on or after 8 February 2021, in the total sum of **£1,178.50.**

REASONS

1. This decision was given orally on 19 February 2021. The claimant requested written reasons.

2. A preliminary hearing was originally listed to take place on Thursday 14 January 2021 to deal with the issue of disability status but was postponed due to technical difficulties experienced by the on the I made a claimant. It was re-listed for 21 January 2021 and was again postponed as set out below. It took place on 18 February 2021 with day 2 (today) being used to deal with costs.

The format of this hearing

3. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The tribunal considered it as just and

equitable to conduct the hearing in this way during the circumstances of this pandemic and in circumstances where the tribunal building for London Central is currently closed for safety reasons.

4. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended on 19 February 2021.

5. The parties were able to hear what the tribunal heard and see the witness as seen by the tribunal during her evidence. From a technical perspective we had some sound quality issues for witness Ms Mhondoro at the point of re-examination of her evidence when counsel had one question for her. Ms Venkata, counsel for the claimant, said that she could deal with the point in submissions. I asked her to take instructions from Ms Mhondoro that she wished the matter to be dealt with in that way and we paused for Ms Venkata to make a phone call. We were told that Ms Mhondoro was content with that approach.

6. The participants were told that is was an offence to record the proceedings.

The issue for this preliminary hearing

7. The issue for this hearing was to consider the respondent's application for costs and costs raised of the tribunal's own volition and/or wasted costs in relation to the two postponements of the preliminary hearing originally listed for 14 January 2021, postponed to 21 January 2021 and further postponed to 18 February 2021 when it took place.

Witnesses and documents

8. The tribunal heard evidence from Ms Melissa Mhondoro, the claimant's solicitor. The tribunal did not hear evidence from the claimant whose position was that at all time she acted on legal advice.

9. There was a costs bundle of 79 pages from the respondent. There was a costs bundle from the claimant of 38 electronic pages.

10. The tribunal had written submissions from the claimant to which counsel spoke and oral submissions only from the respondent. The respondent had no dispute with the propositions of law set out in the claimant's written submissions. All submissions and any authorities referred to were fully considered whether or not expressly referred to below.

<u>Background as to the claimant's application to admit an amended witness statement and a postponement</u>

11. On 20 January 2021, the day before the postponed hearing (second postponement), the claimant sought leave to introduce an amended witness statement. The claimant said that the changes simply addressed and

responded to the respondent's letter of 13 January 2021 which set out for the first time why they said the claimant was not disabled. It included page references and clarified some aspects of the claimant's disability. The claimant said it would avoid need to ask supplementary questions in chief or re-examination.

12. The previous postponement was for technical reasons with no suggestion of the need for amendment. The amendment was substantial. The respondent was not instructed to resist the application on grounds that they were unable to deal with it. I was told that the respondent's solicitor had spent an extra hour on the matter and an additional hour for counsel.

13. The claimant said they had only discovered on 13 January 2021 why the respondent did not concede disability and the respondent chose to wait until the last moment.

14. It then became apparent that the claimant did not have a hard copy of her amended witness statement and said that she had read it briefly the night before on her phone. I was concerned about this particularly as the reason we had postponed last time was that it was considered unsatisfactory for the claimant to try to read the documents on her phone where the screen would be too small. The very purpose of the postponement was to ensure that the hearing was fair to the claimant.

15. The Order made on 14 January 2021 was that the claimant was to ensure that for the hearing on 21 January she had a hard copy of the bundle available to her and that at least 48 hours before the hearing she ensured that she had the necessary functioning technology in order to participate in the hearing. It was not known on 14 January 2021 that the claimant would also wish to rely on an amended statement, so no order was made in relation to a hard copy of this.

16. Ms Venkata's instructions were that the statement was posted to the claimant the day before the hearing by special delivery. This only guarantees delivery by 1pm the following day so it was not available to the claimant at the start of that hearing and could have been if preparations had taken place earlier as envisaged by the previous Order.

17. We took a short minute break and on return from the break counsel for the claimant said that her client had just received a copy of the amended statement on her iPad and could read it. The difficulty that then arose was that the claimant did not know how to unmute her sound to participate in the hearing.

18. After a further discussion with both counsel we took a further break of half an hour, for the claimant to read her amended statement and say whether or not it was approved or if any correction was necessary and also to deal with the sound problems.

19. When we came back from the break it had not been possible for the claimant

to resolve the sound difficulties. There was therefore no alternative but to postpone the hearing.

20. I converted that hearing to a closed preliminary hearing in private and the member of the public who had joined the open hearing on 21 January was asked to leave.

Findings related to Ms Mhondoro's evidence

21. Ms Mhondoro is a solicitor with Thompsons. She told the tribunal that it was not until 12 January 2021 that the claimant learned from the respondent of the reasons why they contested disability.

22. In paragraph 12 of her statement Ms Mhondoro said that the claimant's amended statement dealt the respondent's position on disability. The respondent said that the matters in the amended statement should have been in the original statement in the first place.

23. Ms Mhondoro said that the statement was to expand on matters in the first statement as well as to deal with the respondent's position. Paragraph 2 of the amended statement was only to say that the claimant was relying on her medical notes. There was no reason why this could not have been in the statement in the first place. In paragraph 3 there was a reference to pages and a reference to when the claimant started to take a particular medication. These were matters that could have been in her first witness statement. It was always the purpose of the disability impact statement to deal with such relevant matters. It was not tied to the respondent's position. Ms Mhondoro said the purposes was to expand upon and clarify matters in the first statement.

24. Paragraph 4 dealt with an episode of ill health that was highly material to the case. Ms Mhondoro said that these were matters that were "*already known to the respondent*" and was in the medical notes. The purpose of the statement is also to assist the tribunal in making a determination on the issue of disability and is not just to clarify matters that may or may not have already been known to the respondent. It was a highly material matter for the disability impact statement which is the claimant's evidence in chief.

25. An addition to paragraph 6 was made in terms of identifying certain people. Again I find this was not contingent upon the respondent's position on disability. Paragraphs 14, 15 and 16 were entirely new and dealt with what the claimant did post dismissal in going to Spain for two months. These were matters known to the claimant when she prepared the original statement.

26. Paragraph 18 gave substantially more information about a matter that was in the original statement. The claimant's solicitor said it was "*expansion and clarification*".

27. The statement was prepared according to the Order of Judge Walker at a time when disability was in issue and the purposes of the statement was to

support the claimant's case that she was disabled.

28. The claimant's solicitors position was that it only became apparent that the respondent was challenging disability "*at the very last moment*".

The postponement from 14 January 2021 to 21 January 2021

29. Ms Mhondoro agreed that she did not go through a process of testing the IT with the claimant or to see whether she could access the documents she needed for this hearing. She relied upon the claimant saying that she could access the Cloud Video Platform and sending her hard copy documents. Ms Mhondoro said that in hindsight she could have gone through a process with the claimant to ensure she could access what was necessary.

30. The claimant had technical difficulties with her iPad on the evening on 13 January 2021. Ms Mhondoro believed that the claimant would be able to access the documents.

31. On 14 January 2021 I ordered that the claimant was to ensure that for the hearing on 21 January 2021 she had a hard copy of the bundle available to her and that at least 48 hours before the hearing she ensured that she has the necessary functioning technology in order to participate in the hearing. The claimant had a hard copy of the bundle available to her for the hearing on 21 January 2021. What the claimant did not have was a hard copy of her witness statement. She was not strictly in breach of the Order. I have set out above the reasons why that hearing had to be postponed.

The postponement application for the 18/19 February 2021 hearing

32. The claimant applied on 8 February 2021 for the hearing on 18 and 19 February to be postponed. On 21 January 2021 I had explored with the parties the option, in view of the technical difficulties, of the claimant going to her solicitors offices to take part in the hearing where she might have more help with the technology – a suggestion that met with approval at the time. The claimant now says that she felt "*pressurised*" by this suggestion.

33. The application made on 8 February said that the claimant could not attend her solicitors offices due to health and safety concerns connected with the pandemic. The application was strongly opposed by the respondent on 9 February

34. The application was considered by Employment Judge Goodman who refused it in a detailed reasoned decision sent to parties 11:31 on 12 February 2021.

35. The claimant's solicitors renewed their application at 12:33 on 12 February responding to Judge Goodman's decision. This was again opposed by the respondent on 12 February. The respondent set out a number of very practical steps that could be taken by the claimant and her solicitors to enable the hearing to go ahead. The claimant's solicitors responded to this in a

further letter of 12 February.

36. The claimant made a fair point that the Order made on 21 January was that she should attend her solicitors offices for the purposes of what was always intended to be a CVP hearing. However, there was nothing to prevent her seeking a variation so she could do this from home. The issue was always how to overcome the practical difficulties so that the hearing could go ahead, which ultimately they were.

37. The claimant's solicitors wrote to the tribunal again on 16 February and the respondent responded on 17 February. The claimant's renewed application was considered by me. I refused the application for the same reasons as given by Judge Goodman and the decision was sent to the parties at 10:56 on 17 February 2021. The hearing went ahead on 18 February with the claimant being able to participate in the hearing by CVP from her home.

38. The claimant's written submissions dated 11 February 2021 were prepared on the basis that it was not appropriate for the claimant to participate in a remote hearing. A remote hearing happened successfully on 18 February 2021 with the claimant able to give evidence and be cross examined. The claimant was able to access all the relevant materials.

39. The claimant had a camera problem when judgment was delivered but this did not affect the progress of the hearing as the claimant confirmed that she was able to hear the decision as it was delivered.

40. Ms Mhondoro in evidence said solutions were found to the technological difficulties "*at the last minute and with a lot of effort*". It was put to Ms Mhondoro that it would have been better to put the efforts into resolving the difficulties rather than pursuing applications to postpone. Ms Mhondoro said that in hindsight they could have done this, but not all hearings are suitable for CVP.

The costs applications

41. The costs application fell into four parts: The first was the costs of and occasioned by the amended statement that appeared just before the hearing on 21 January 2021; the second is the postponement of the hearing on 21 January 2021; the third is the costs hearing of the hearing on 19 February 2021 which flows from the postponement on 21 January 2021 and the fourth is in respect of dealing with the unsuccessful postponement applications related to 18 and 19 February 2021.

42. The first and fourth are the respondent's applications and the second and third are of the tribunal's own motion.

43. Category 1: relates to the respondent's costs of considering the claimant's amended statement. Employment Judge Walker ordered at paragraphs 4.3 and 4.4 of the Case Management Order of 29 September 2020:

> *The Claimant must also by 3 November 2020 provide the Respondent with a witness statement stating, in relation to the impairment relied on (anxiety and depression), during the period when it is alleged the Claimant was a disabled person because of that impairment; explaining, by specific reference to schedule 1 to the EQA and any relevant provision of any statutory guidance or Code of Practice, what the effect of the alleged disability (or disabilities) was on the ability of the Claimant to carry out normal day to day activities. The Claimant is referred to the part of the Presidential Guidance issued on General Case Management, referred to above, that relates to disability.*
>
> *The Respondent must by 17 November 2020 inform the Tribunal and the Claimant of the extent to which the disability issue is conceded, and if it isn't conceded in full, set out briefly the reasons why.*

44. The claimant accepts that she submitted her impact statement two weeks late, on 18 November 2020. The delay was due to the claimant being in Spain. An extension for the respondent was proposed for 2 December 2020 and the respondent did not comply until 13 January 2021 at 14:17 with the reasons why they did not conceded disability. This was the day before the preliminary hearing on 14 January 2021.

45. The claimant submitted that "indulgence" should have been shown to her as the respondent was given "indulgence" when Employment Judge Walker gave them an extension of time for the ET3. Judicial decisions are not on the basis of giving indulgence, but on consideration of the merits in each individual situation.

46. I have considered the relevant paragraphs (set out above) of Judge Walker's Order made on 29 September 2020. Whatever delays took place, the sequence was for the claimant to submit a disability impact statement followed by the respondent stating whether or not it conceded disability. There was no provision in the Case Management Order for the claimant to submit a further statement once she had been informed of the respondent's position.

47. It was the claimant's decision to submit an amended witness statement; it did not fall within the scope of the Case Management Orders. I find, based on the respondent's submissions and Ms Mhondoro's evidence that the bulk of the amendments to the statement were for "*expansion and clarification*" of matters which could reasonably have been included in the claimant's original witness statement.

48. I do not accept the reason given by the claimant that the purpose of the amended statement was to respond to the lack of concession on disability. The matters included within the amended statement were within the claimant's knowledge at the time she prepared the original statement and should have been included in that statement. My finding is that it was therefore unreasonable conduct on the part of the claimant to effectively seek to improve her witness statement just before the 21 January 2021 hearing date. It was inevitable and part of their professional responsibilities, that the respondent's solicitor and counsel would need additional time to consider the

amended statement. I therefore award the respondent the costs of considering the amended statement.

49. Category 2: This relates to the costs of an occasioned by the second postponement on 21 January 2021. The respondent said that it was unreasonable for the claimant not to have been ready on 21 January 2021. Hearings by CVP have been a feature of Employment Tribunal proceedings since about late spring 2020. Some Regions of the Employment Tribunal took the lead from about April 2020, London Central followed a little later. There is guidance available to practitioners as to how to deal with these hearings. Ms Mhondoro's evidence was that this was only her second CVP hearing although doubtless Thompsons as a firm have plenty of experience of such hearings.

50. The claimant submits that the circumstances of the pandemic should be taken into account and I agree with this. The reasons for the postponement on 21 January 2021 were as a result of a number of unfortunate issues. I accept the claimant's submission that they complied with the Case Management order of 14 January 2021 in that the claimant had a hard copy of the bundle available to her on 21 January 2021. What was missing was a hard copy or a sufficiently readable copy of her witness statement.

51. When we returned from a break at 10:45am claimant was able to access the statement on her iPad. She needed time to read it and there were sound problems. After a second break when we came back at 11:30 the claimant had not been able to unmute her sound. Although this was rectified by 11:45 a decision had already been made to postpone. A member of the public had been asked to leave and I had concerns about following the principle of open justice. Even though counsel for the claimant suggested that the tribunal might be able to track down the member of the public there was no way of knowing how long this might take or whether it might be possible and I did not consider it to be a practical suggestion.

52. I have to consider the situation against the tests in Rules 76 and 80. Whilst the claimant's solicitor accepts that she could perhaps have done more in terms of testing the equipment with the claimant in advance, I am unable to find that this meets the very high threshold test in ***Ridehalgh v Horsefield.*** This was not conduct which amounted to any significant breach of a substantial duty imposed by relevant code of professional conduct. It was not conduct which did not permit a reasonable explanation – Ms Mhondoro had ascertained that the claimant could access the Cloud Video Platform and she had provided the claimant with hardcopy documents and understood – although incorrectly as at the start of the hearing, that the claimant could access her amended witness statement. It was not negligence as she did not fail to act with the competence reasonably to be expected of ordinary members of the profession.

53. Ms Mhondoro accepts that she could have done more, but this is not the test. These are, to use a cliche, "*unprecedented times*". Litigants and lawyers are not expected to become IT experts and are not expected to know how to

resolve unforeseen IT issues instantaneously. My finding is that the postponement on 21 January 2021 arose out of an unfortunate sequence of events on that date. Although I accept that this has an unfortunate financial impact on the respondent I am unable to find that the costs threshold is met in these circumstances.

54. Category 3: This is the consequence of the 21 January 2021 postponement in that there is a costs hearing today. The respondent said it is completely blameless in this respect and I agree. However, the employment tribunal is primarily a "*no costs*" jurisdiction and the costs in this category flow from the decision in relation to the postponement on 21 January 2021. As I have found that the threshold test is not met for 21 January 2021, I am unable to find that the threshold is met in relation to the additional day for this costs hearing.

55. Category 4: This is the respondent costs of dealing with the claimant's postponement applications in relation to this hearing.

56. Ms Mhondoro said that very shortly after the 21 January 2021 hearing the claimant told her that she felt "*pressured"* into the arrangements set out for 18 and 19 February 2021 – although at the time both parties had consented to and agreed with the suggestion I put forward that the claimant may wish to attend her solicitors' offices to have help with a CVP hearing. Notwithstanding this, the application for a postponement was not made until 2.5 weeks later on 8 February 2021.

57. The claimant had a decision from Judge Goodman by 12 February 2021. It was a fully reasoned decision. The claimant continued to pursue the application. It was lengthy correspondence between the parties. The respondent did not consent to the postponement and was obliged to spend time dealing with its opposition to these applications. I dealt with the claimant's second attempt at this application and a decision was sent to the parties on 17 February 2021. I upheld Judge Goodman's reasons.

58. Ms Mhondoro's evidence to the tribunal was that solutions were found to the technological difficulties "*at the last minute and with a lot of effort*". It was put to Ms Mhondoro that it would have been better to put the efforts into resolving the difficulties rather than pursuing applications to postpone. Ms Mhondoro said that in hindsight they could have done this, but not all hearings are suitable for CVP.

59. I agree that if the effort had been put in to resolving the difficulties at an early stage, shortly after 21 January 2021, these postponement applications and the costs of considering and responding to them would not have been necessary. This would have avoided the need to deal with it "*at the last minute*" when it became clear that the tribunal would not agree to the postponement and would have avoided the unnecessary and unreasonable cost of dealing with postponement applications.

60. This required a co-operative approach on the part of the claimant and her

solicitors as envisaged in Rule 2, the overriding objective, where parties are required to cooperate generally with one another – with a view to ensuring that the litigation can proceed smoothly. I find that it was unreasonable conduct on the part of the claimant to pursue postponement applications in preference to sorting out the practical issues at the last minute. Whilst the claimant says that she was acting upon legal advice at all times, these were practical and not strictly legal matters and a postponement application can only be made on her instructions.

61. In these circumstances I find that the threshold test is met in terms of acting unreasonably in the conduct of the proceedings and the claimant shall pay the respondent's costs of dealing with the postponement applications.

62. In relation to the claimant's means, I was told that if an award of costs was made against the claimant it would be paid by Unison and in those circumstances I did not consider it necessary to consider any further the claimant's ability to pay an award of costs (Rule 84). The point made by the claimant's solicitors is that the union's funds could be better deployed elsewhere.

The relevant law on costs

63. Costs do not follow the event in employment tribunal proceedings and an award of costs is the exception and not the rule (Lord Justice Mummery in ***Barnsley Metropolitan Borough Council v Yerrakalva 2012 IRLR 78***).

64. The power to award costs is contained in Rule 76 of the Employment Tribunal Rules of Procedure 2013 which provides that:

> *(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; ….*
>
> *(2) A Tribunal may also make an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.*

65. The Court of Appeal held in ***Yerrakalva*** (above) that the vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there was unreasonable conduct in bringing and conducting the case and in doing so, to identify the conduct, what was unreasonable about it and what effects it had. There does not have to be a precise causal link between the unreasonable conduct in question and the specific costs being claimed.

66. The EAT in ***Raggett v John Lewis plc 2012 IRLR 906*** held that where a party is registered for VAT and able to recover VAT on its counsel's fees and solicitors' costs as input tax, to award costs including VAT would represent a

bonus to that party compensating over and above the costs incurred and would represent a penalty to the paying party.

67. The claimant relies (inter alia) on the observation of Thorpe LJ in ***McPherson v BNP Paribas 2004 EWCA Civ 569.*** that the tribunal should not adopt a practice on costs, which would deter applicants form making sensible litigation decisions. This case concerned a withdrawal of proceedings. The case also makes clear that the crucial question is whether, in that case withdrawing the claim, the claimant has conducted the proceedings unreasonably. In that case it was not whether the withdrawal of the claim was itself unreasonable..

Wasted costs Rule 80

68. Under Rule 80 a wasted costs order may be made as a result of any improper, unreasonable or negligent act or omission on the part of the representative or which, in the light of any such act or omission occurring after they were incurred the tribunal considers it unreasonable to expect the receiving party to pay.

69. General guidance on wasted costs was given by the Court of Appeal in ***Ridehalgh v Horsefield 1994 Ch 205*** approved by House of Lords in ***Medcalf v Mardell 2002 UKHL 27.***

70. The three stage test identified in ***Ridehalgh*** is as follows:

> *(i) to recognise that wasted costs is an exceptional jurisdiction to be exercised with great care adopting a staged approach, and requiring consideration of what specific conduct is said to be improper, unreasonable or negligent;*
> *(ii) to consider whether the particular conduct caused the opposing party unnecessary costs;*
> *(iii) to consider whether in all the circumstances it is just to order the legal representative to compensate the receiving party for the whole or any part of the relevant costs?*

71. In ***Medcalf*** the HL commented that the jurisdiction as to wasted costs must be approached with considerable caution so as not to impinge upon the constitutional position of the advocate and the contribution he (or she) is required to make on behalf of his/her client in the administration of civil justice.

72. The representative must have an opportunity to make representations before a such an Order is made (Rule 82).

73. The case law was reviewed by Simler P in the EAT in ***Wentworth-Wood and others v Maritime Transport Ltd EAT/0184/17***. The importance of adopting the three stage test was highlighted and the need to consider the constitutional position of the solicitors. It is important to identify a high degree of impropriety beyond mere negligence and to recognise that the making of a wasted costs order is a last resort (judgment paragraph 35).

The costs awards

74. A break was taken for counsel to discuss the figures arising from the above decision.

75. The overall sum was agreed at £1,178.50. The parties did not consider it necessary to break the figure down given that it was agreed.

76. I expressed my thanks to both counsel for the very high standard of their work, advocacy and cooperation in this case.

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Employment Judge Elliott
Date: 19 February 2021

Judgment sent to the parties and entered in the Register on: 22 Feb. 21
_____ for the Tribunal