EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
P	**v**	**Q (1)** **R (2)** **Messrs Stephensons LLP Solicitors (3)**

Heard at: Watford **On**: 18 March 2021

Before: Employment Judge R Lewis
Mrs N Duncan
Mr W Dykes

Appearances

For the Claimant: Mr AP, her brother
For the Respondents: Ms N Gyane, Counsel for R1 and R2
Mr L Bronze, Counsel for R3

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

"This has been a remote hearing which was not objected to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents referred to were in an agreed bundle,

JUDGMENT

1. Messrs Stephensons' application for a costs order against R1 and R2 is refused.

2. The claimant's application for reconsideration of the judgment of 2 and 3 December 2020 is refused.

REASONS

1. This Judgment and Reasons should be read in conjunction with our Judgment and Reasons of 2 and 3 December 2020. As stated in that judgment, this hearing was listed on that day, to deal with Messrs Stephensons' costs application.

2. By letter of 25 January 2021, the claimant applied for reconsideration, which the present judge did not refuse under Rule 72(1) and listed to be heard at this hearing in accordance with Rule 72(2).

3. There were accordingly, two separate adjudications, and we deal with them separately below. This hearing proceeded by CVP. We heard Stephensons' application first, and then adjourned. After a short adjournment we gave judgment. We released Mr Bronze, although he remained as a non-participating observer for the reconsideration hearing. Both Mr Bronze and Ms Gyane had prepared written submissions, which the tribunal had read. Each spoke briefly to the respective submission. We are grateful to both for a focussed hearing.

4. When we came to the reconsideration hearing, it seemed to us more appropriate to proceed in dialogue with AP and the claimant (they joined us together on the same screen). We therefore directed AP through the evidential points underpinning the application, and asked for clarification and submission on matters which troubled us. Although the claimant answered a number of questions, and in effect added to the evidence, we confirmed that we proceeded by way of submission, and therefore that Ms Gyane would not have the opportunity of cross-examination. AP's submissions therefore took over an hour; Ms Gyane in reply spoke briefly to her written submissions.

5. After judgment on reconsideration had been given, Ms Gyane asked for written reasons for the costs decision, and AP for written reasons for the reconsideration decision.

The costs application

6. In these reasons we refer to our judgment of December 2020 as simply 'J'. If we refer to J60, that refers to paragraph 60 of that Judgment.

7. Messrs Stephensons today applied against R1 and R2 for the costs incurred in defending their application for wasted costs. The tribunal's reasons for rejecting the wasted costs application are set out J69-J75. We caution that those paragraphs should be read in context, and cannot be isolated from the remainder of our judgment.

8. Mr Bronze's application was set out in a skeleton supported by a costs breakdown; Ms Gyane replied in a skeleton argument.

9. We record at the outset two matters which we wholly disregarded. The first was the language in which Mr Bronze pitched his submissions. His

choice of adjectives about his opponents and their advisers included all of: vague, meandering, scantily reasoned, wanton, far-fetched, baseless, less than discerning, wild, rash, nonsensical. We find that language neither justified nor helpful, but we did not base our decision on it, or on our distaste for it. Secondly, as indicated at J12, it was not clear to us that the costs application had been properly made to the tribunal in accordance with Rule 77. If we are right to understand that the first (and only) time that R1 and R2 knew of this costs application was when Mr Bronze told Ms Gyane of it moments before the start of the hearing on 2 December, that was not a proper application.

10. Mr Bronze's point was at heart straightforward. He submitted that R1 and R2's wasted costs application had not only failed, but had been pursued unreasonably and vexatiously. He stressed that the test and burden of a wasted costs application is high. He referred to authority, of which perhaps the most recent and germane is KL Law Limited v Wincanton Group UKEAT/0043/18.

11. Mr Bronze touched on the following points:

    11.1 As the claimant was funded through public funding, Messrs Stephensons had had reporting obligations to a third party funder, and an application for wasted costs therefore implied financial impropriety or, he submitted, was "tantamount to fraud".

    11.2 There were sound public policy reasons why the tribunal should be reluctant to order wasted costs in a public funding case.

    11.3 That the tribunal had, in its analysis of the application, essentially found that Stephensons' conduct of proceedings had not departed from the range of reasonable tactics in hostile litigation;

    11.4 That Stephensons had co-operated in anonymising any reference to children;

    11.5 That as the tribunal had found, Ms Gyane based part of her application on a mis-reading, and while the criticisms of the s.19 claim were well made, they were a modest part of the case.

    11.6 There are, as the tribunal had acknowledged, inherent difficulties in litigation which involves a conflict of oral evidence.

    11.7 The schedule of costs claimed had been scaled down from an earlier draft, and nevertheless, was a total in excess of £18,000 (Ms Gyane's application for wasted costs had been in the region £3,500).

12. Ms Gyane in reply reminded the tribunal that in this jurisdiction costs are the exception and do not ordinarily follow the event. She reminded us of the guidance in Yerrakalva v Barnsley MBC, 2011 EWCA Civ 1255, that

the tribunal in looking at costs must "look at the whole picture of what had happened in the case and to ask whether there had been unreasonable conduct…." Her submission followed the tribunal's analysis, to the effect that there had been hostile and aggressive litigation, but that there was nothing to show the exceptionality required by a costs application.

13. Ms Gyane reminded us that the outcome of this case was that apart from a modest amount of holiday pay, the respondents had succeeded on every part of the claim, and had been awarded costs against the claimant. She submitted that in the reality of that picture as a whole, it would not be just to compensate Messrs Stephensons. She submitted that Messrs Stephensons relied on clawing back from the respondents the costs to be paid to them by the claimant. Ms Gyane submitted that, taking the whole picture, that would be an unjust outcome.

14. Although we indicated that we would approach the matter as an application for a discretionary fixed figure, Ms Gyane challenged some specific elements in the bill of costs.

15. In our judgment, the first step is to ask whether the test of unreasonable conduct (including the other terms used in the rule) has been met. We find that the application for wasted costs does not meet that test. We have referred in our earlier judgment to the conduct of acrimonious litigation. Where litigation is acrimonious, anyone with a sharp tongue also needs to have a thick skin. We note that the wasted costs application was narrow, and focussed on a modest, specific element of the respondents' costs. While it faced logical difficulties, we cannot say that making the application of itself crossed the threshold of unreasonable conduct.

16. While that is determinative, we add that if we had to consider the interests of justice, we would accept Ms Gyane's submission that in the context of this litigation, we could see no interest to justice in ordering costs against respondents who had acted in person and had been successful on every point of substance, and unsuccessful in relation to a modest sum of holiday pay. We add that if we had had to conduct an assessment, we would have been concerned by proportionality; even in its slimmed down version, Messrs Stephensons' bill of costs was more than five times the amount of wasted costs applied for.

17. The application for costs failed.

Reconsideration

18. AP presented the reconsideration application in the same courteous and thoughtful manner which we noted at J24 and J32. It is no criticism of AP to say that he appeared at times slightly diffident to invite the tribunal to reconsider its judgment. He had no need to be: it is the tribunal's duty to accept reconsideration as an essential element in case management because it is an opportunity to correct error or injustice. However, as Ms

Gyane reminded us, it is not an opportunity to give a party a "second bite" at submissions already made.

19. The application expressly invited us to reconsider only the amount of the award of costs, not the principle, which AP accepted in submission. AP directed us to J54 to J68, although in fact, his submissions focussed on J58, J59 and J64.

20. The application was supported by written submissions and a bundle in which the claimant had put a witness statement, exhibits and some additional documents which we had not previously seen.

21. There were two elements to AP's submission and we deal with them separately. He submitted that the tribunal had misunderstood both the claimant's medical evidence and her financial information.

The medical issue

22. At J58 and 59 we had made findings to the effect that there was no clinical medical evidence, and that we drew no inference about disability from the claimant's Universal Credit assessment.

23. AP's submission was that both points were wrong in a number of respects; that there was medical evidence of disability; and that the tribunal's understanding of the UC assessment was mistaken.

24. The bundle for this hearing included a letter from Mr Newton, an NHS CBT Therapist, written in September 2018 (33), in which he reported the claimant's 'anxiety difficulties,' particularly in anticipation of meeting R1 in a pending court hearing. The bundle also included an assessment of the claimant by Communicourt in 2019 (36, previously 563), which reported 'high levels of anxiety.' Neither of these led us to change the findings at J58.

25. The claimant was assessed for Universal Credit by telephone on 10 August 2020. On 4 November, the claimant emailed her contact at the job centre, and was told that dates for the next UC assessment in 2021 had not yet been allocated and she did not have to apply for work because of her condition (32).

26. The assessment of August 2020 was required to be carried out by a doctor, nurse or physiotherapist who had been accredited to do so (21). The claimant told us that she understands that her assessor was a doctor. There was no other evidence that he or she was.

27. The August 2020 assessment led to an undated work capability assessment decision (13), which was that the claimant had "limited capability for work". This term was defined by the DWP (21, emphasis added) as "the extent to which a claimant's health condition or disability affects their capability for work". The claimant was told that this "means

you wont have to look for work, but you will need to meet with your work coach to take steps to prepare for work in the future. We call these work-related activities."

28. Work related activity, "could include learning how to write your CV or going on training courses to learn new skills. These activities will help you to start thinking about the types of work you could do" (13).

29. We understand that limited capability for work-related activities implies a more serious level of incapacity than limited capability for work, because it means a claimant or appellant is not even ready to start preparing for work, eg by writing up a CV.

30. The claimant submitted that the reference to disability quoted above formed part of her assessment such that the tribunal was in error when at J59 we wrote, "it appeared that she had no disability element."

31. We remain of that view. We read the words 'health condition or disability' as expressing possible alternatives, not a finding. We find that the claimant was not paid an additional sum designated by the DWP as related to disability. We see that the monthly sum paid into her bank account in February 2021 was the same as that broken down in the November 2019 summary (28) which does not show any disability assessment. We think that this point is simply a mis-reading on the claimant's part, not helped by the drafting of J59.

32. We accept that in August 2020, the claimant was told that she had limited capability for work, and that that position did not require assessment for another year. We accept that the reference in the second half of the final sentence of J59 to the current state of public services was less than clear, but we do not think it was material. We have understood the position to be that the claimant's Universal Credit assessment was that of August 2020, which would not be revisited for another year.

33. Our findings on medical evidence at J58 remain the same. There was indirect evidence that the claimant was spoken to by a clinician in August 2020. In reply to questions from the judge, the claimant left the CVP screen, fetched her medication and gave the names and prescriptions of what she was receiving. She said that she renewed her prescriptions without a consultation, and having been referred some time ago for NHS therapy, had found it unhelpful and had continued with the private practitioner, Ms Patel, referred to in our previous judgment. There remained no evidence before the tribunal of any medical consultation, or any of the other matters set out at J58.

Financial information

34. When we consider the financial information dealt with in the second half of J64, we note two matters. While we had more documentation about the claimant's finances at this hearing than we had in December, the

observation at J54 appears to us still to be made good. There was, for example, no document which updated the claimant's Universal Credit payments. (Page 27 in today's bundle was over 18 months old.)

35. Ms Gyane invited us to speculate about possible hidden assets. We were taken to a potential line of argument about whether the claimant owned a car that was registered in the name of her mother. This line of speculation seemed to us no more than that (and we noted that there had been a similar line of inquiry at J64 in relation to alleged work commitments). We attach no weight to that material.

36. The claimant put before the tribunal at this hearing Halifax bank statements up to February 2021, which show simply income from Universal Credit per month, and outgoings, such that at the end of each month, she has between £20 and £40 to her credit. We accept that her finance is very tight indeed, and that that may be an understatement.

37. These matters seem to us the full extent of the application for reconsideration. At the heart of this application, as there had been in December, was the balancing exercise which we have tried to summarise at J65 to J68.

38. The claimant has put before us today no material in evidence or submission on which we consider that the interests of justice require us to depart from or revisit what we have said in our earlier Judgment. We find that our findings about medical evidence are unchanged. We accept that our findings at J59 were not all well expressed, but we do not go on to find that as a result there is an interest of justice which requires us to revoke our previous decision and take it afresh. We remain of the view that the evidence before us about UC and personal finances leads us to the same views as previously expressed, and to the same findings.

39. AP appeared to suggest that the claimant could and would accommodate a figure for costs of up to £5,400. He put forward no explanation or justification for that figure, and we attached no weight to it.

40. In the circumstances, the application for reconsideration is refused.

Employment Judge R Lewis

Date: 6 / 5 / 2021

Sent to the parties on: .....

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For the Tribunal Office