EMPLOYMENT TRIBUNALS

Claimant: Ms K Leamon

Respondent: Sunnyleigh Limited and Trosmaen Limited (trading as The Bridges Dental Surgery)

Heard: by video **On:** 28 May 2021

Before: Employment Judge S Jenkins

Representation
Claimant: Not present or represented
Respondent: Mr G Hine

JUDGMENT having been sent to the parties on 28 May 2021, and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. At a hearing on 21 December 2020, I dismissed the Claimant's claim of breach of contract, when it became clear, after a very short hearing, that she had been paid in lieu of her notice entitlement and that her contract had not been breached in any way. Her complaint was, in essence, one of unfair dismissal, but she had insufficient service to pursue such a claim.

2. Up to the hearing, the Claimant was advised by a Mr Philip Moles, a friend of hers, but someone who describes himself in his emails as a "Pro Bono Employment, Medical & Accident Negligence Consultant". I was shown correspondence from prior to the hearing between the Respondent's solicitor and Mr Moles, in which it was made clear to Mr Moles that the Claimant had no basis for her claim, and that if it was pursued and defeated, as it ultimately was, a costs application would be pursued.

3. The Claimant had been notified of this hearing on 21 April 21, but had written in response, indicating that she would not be attending due to medical issues and also that she was unable to work for the foreseeable future. She noted that, if the Respondent continued to pursue the matter she would take a case against them for defamation of character, commenting that that was, "*the way the case should have been directed*

from the offset (I suspect that should have been "*outset*")". The Tribunal subsequently pointed out to the Claimant that the hearing would take place by video and would last no longer than an hour and therefore hopefully she would be able to participate. It was pointed out to her that if she wished the hearing to be postponed, she would need to provide medical evidence confirming that she was unfit to attend and, if so, when she would be likely to attend.

4. The Claimant responded by saying that she would was in no position to attend at any time and would provide her medical records. She then wrote further, saying that she was not able to afford to provide her medical records.

5. Rule 47 of the Employment Tribunals Rules of Procedure ("Rules") notes that a Tribunal may proceed with a hearing in the absence of a party, having considered any information available to it, after making any enquiries that may be practicable about the reasons for the party's absence. In the circumstances of the Claimant's indication that she would not attend the hearing, I considered it appropriate to proceed in her absence.

Law

6. Rule 76 of the Rules provides that a Tribunal may make a costs order, and shall consider whether to do so, where it considers that a party, or a party's representative, has acted unreasonably in either the bringing of the proceedings or the way that the proceedings have been conducted, and the application was made on that basis.

7. The Employment Appeal Tribunal ("EAT"), in Hossaini v EDS Recruitment Ltd [2020] ICR 491, confirmed that that involves a three-stage test: (i) Whether Rule 76(1) is engaged; (ii) If so, whether to award costs in the circumstances, that being at the discretion of the Tribunal; (iii) If so, how much to award.

8. Rule 84 provides that, in deciding whether to make a costs order and, if so, in what amount, the Tribunal may have regard to the paying party's ability to pay. In this case the Claimant was not present and therefore no evidence of her ability to pay was provided, although, as noted above, an email she sent to the Tribunal noted that she is currently suffering with an ill health and is unable to work for the foreseeable future.

Conclusions

9. Taking the three steps of the Hossaini test in turn, my conclusions were as follows.

10. I was satisfied that the terms of Rule 76(1)(a) had been made out. In my view, the case had always been doomed to fail, and therefore the Claimant, or more accurately her representative, did act unreasonably in bringing the proceedings and/or in not withdrawing them when put on notice of the claim's deficiencies.

11. I then considered whether it would be appropriate to make a costs order. I noted that if I had been looking at a wasted costs application against Mr

Moles under Rule 80, then I would have felt that an order against him would have been clearly appropriate, as a result of his unreasonable acts. He had purported to be a consultant on employment matters, and yet demonstrated himself to be completely unaware of some basic essentials of employment law, and completely unwilling to appreciate the points being put to him by the Respondent's representative. However, Mr Moles had confirmed that he was acting on a pro bono basis, and wasted costs orders can only be made against representatives who are acting in pursuit of profit. A wasted costs order could not therefore be made.

12. I therefore had to address the conflicting positions of the Respondent and/or its insurer being out of pocket in respect of a claim it should not have had to face, and that of the Claimant who appeared to have been ill advised by a friend, providing her with advice of some sort, but on an unpaid basis. I had to consider whether I should require the Claimant to pay costs which arose by virtue of her friend's poor advice.

13. I noted that the EAT, in AQ Ltd v Holden [2012] IRLR 648, had indicated that a Tribunal should not apply professional standards to lay people who are likely to lack the objectivity and knowledge of the law of the professional adviser. I considered that was applicable in the context of the Claimant who appeared to have placed her trust in a friend who purported to be in a position to advise her, when his actions indicated that he was not at all equipped to do that.

14. I was also conscious that, having taken the Claimant through her claim at the hearing on 21 December 2020, she quickly accepted that it should not proceed, and the whole hearing had taken approximately 25 minutes. I also noted that the Claimant, in her email to the Tribunal referred to above, had accepted that an employment tribunal had not been the appropriate course of action for her to take.

15. In my view, the Claimant bought the proceedings due to misguided advice from a friend, when, had she pursued the claim entirely alone, she may well have been convinced by the arguments of the Respondent's representatives about the weakness of her claim, as she was prepared to accept my explanation of that at the hearing in December 2020.

16. In circumstances where the Claimant appears not to be in receipt of income beyond state benefits, I felt that it would be inappropriate to burden her with an obligation to pay costs. Whilst I recognised that that caused something of an injustice to the Respondent and/or its insurer, in my view the balance of justice lay in favour of not granting the application. I therefore dismissed it.

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Employment Judge S Jenkins

Date: 14 June 2021

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FOR THE TRIBUNAL OFFICE Mr N Roche