



EMPLOYMENT TRIBUNALS

Claimant: Mr D Chumbu

Respondent: The Disabilities Trust

Heard at: London South via CVP **On:** 14, 15 & 18 June 2021

Before: Employment Judge Khalil sitting with members
Ms Oates-Hinds
Mr K Murphy

Appearances

For the claimant: in person

For the respondent: Mr Uduje, Counsel

JUDGMENT ON COSTS

Unanimous decision:

The claimant must pay to the respondent costs in the sum of £1875 (inclusive of VAT) by reason of his unreasonable conduct pursuant to Rule 76 Employment Tribunals Regulations 2013

Reasons

Findings of Fact

- (1) The case was listed for a 6 day Hearing on 11 December 2019.
- (2) At the outset of day 1, the Tribunal raised with the parties a significant issue relating to the claimant's witness statement; that is that it contained a single page of narrative and then multiple pages of schedules of tables and boxes only, cross referencing documents in the bundle.
- (3) The respondent's counsel helpfully directed the Tribunal to documents in the bundle which may be able to explain/support the evidence the claimant gives in relation to his claims. These were his schedule of loss at pages 167-173 and his further and better particulars at pages 67-97.

- (4) The Tribunal had already observed as part of its pre-reading, that the Case Management Hearing of 11 December 2019 appeared to contain the agreed list of issues following a number of earlier hearings and having regard to claims which were determined as being out of time and thus no longer before the Tribunal (pages 116-119).
- (5) In submissions on day 1, the respondent's counsel said the claimant's witness statement was a source of concern, he had not seen one like that before, that the claimant's witness statement didn't provide evidence to establish his claims and that the shortfalls were of the claimant's own making.
- (6) The claimant said in his submissions that he was intending to explain all of the tables/graphs in his witness statements. When asked when, he said before he was to be cross examined.
- (7) The Tribunal found and concluded as follows following its reading and deliberations.
- (8) Dealing first with the schedule of loss document in the bundle:
 - There was a sex discrimination allegation relating to NVQ training between September 2011 and 2018 which appeared to be out of time/did not appear to be an issue before the Tribunal in the agreed list of issues.
 - There was an allegation of race discrimination about collusion and dishonesty which did not appear to be in the agreed list of issues.
 - There was a protected disclosure issue about a grievance of 29 March 2017 which did not appear to be a protected disclosure relied upon
 - There was a protected disclosure issue about unpaid/forced labour which did not appear to be a protected disclosure detriment in the agreed list of issues
 - There was a protected disclosure issue about the refusal to allow the claimant back to work which did not appear to be a protected disclosure detriment in agreed the list of issues
 - There was a protected disclosure issue about grievances to Ms Lovatt which did not appear to be a protected disclosure detriment in the agreed list of issues
- (9) In relation to the claimant's further and better particulars:
 - There were 'discrimination' allegations in paragraphs 1-19 (pages 68-69) which did not appear to be part of the agreed list of issues
 - There was a race discrimination allegation relating to 'Andrew' who was asserted to have a problem with the claimant because he is black and detriments of not being offered counselling because the claimant is black

and whether shifts could have been rearranged to protect the claimant from Andrew. This did not appear to be part of the agreed list of issues (page 71)

- There was a race discrimination allegation regarding the claimant's request for annual leave which did not appear to be part of the agreed list of issues (page 75)
 - Paragraphs 1-19 on pages 79-80 did not appear to be part of the agreed list of issues
 - Pages 82-91 did appear to be a reasonable match to the constructive unfair dismissal agreed list of issues from which the Tribunal could establish the claimant's primary evidence
 - The unauthorised deductions claim did not appear to be part of the agreed list of issues; the holiday pay claim was (page 92)
 - There were a number of protected disclosures relied on in 2014 & 2016 and paragraph 21 on page 94 referred to these being qualifying protected disclosures but these did not appear to be part of the agreed list of issues
 - Paragraphs 25-48 on pages 95-97 did provide a close match with the protected disclosure agreed list of issues but there were references to additional detriments e.g. pretending/falsely claiming to not being aware of the 'bed' matter (paragraph 33) and an alleged back to work detriment (paragraph 47, page 97) which did not appear to be part of the agreed list of issues
- (10) The upshot of the Tribunal's analysis was that it regrettably concluded that this case was not ready for trial and should be postponed. Before reaching this decision the Tribunal considered carefully if it could Order the claimant to produce an amended witness statement overnight dealing only with the those matters which appeared to be the agreed issues in this case but concluded that this would cause significant pressure and burden to the claimant as a litigant in person and also having regard to his health. The claimant had explained to the Tribunal in the context of needing regular breaks and needing questions repeated, that he was on medication for his condition which was causing him side effects such as profuse sweating and hot flushes. He was also experiencing memory problems.
- (11) The overriding objective requires cases to be dealt with fairly and justly and the Tribunal ultimately concluded that proceeding in the current sitting would be of greater prejudice to the claimant than to the respondent caused by the postponement and notwithstanding what was likely to be a lengthy delay. The Tribunal had strong reservations of constructing the claimant's actual evidential case before the Tribunal. The claimant carries the initial burden of proof in relation to his claims. The claims are across multiple jurisdictions: constructive unfair dismissal, sex discrimination, race discrimination, protected disclosure

detriment/dismissal and holiday pay. The Tribunal said no more at this point in respect of the costs occasioned by the postponement today. The Tribunal did have regard to the respondent's submission that at least 2 of the respondent's witnesses are no longer/will no longer be employed and to the passage of time.

- (12) The Tribunal considered that a considerable steer and guidance was required to the claimant in relation to the future production of his witness statement. He said he had been unsuccessful in obtaining legal advice to date.
- (13) There was also a need to revisit the list of issues. There were many missing dates and for example it was not clear which alleged detriments were said to flow from which alleged protected disclosures.
- (14) Against the above background and decision on postponement the respondent made an application for costs as it believed the reason for the postponement was because of the claimant's inadequate witness statement. The respondent says this was unreasonable conduct and the statement served was in breach of the Tribunal's Order of 11 December 2019. Orders 7.1 to 7.4 said:

It is ordered that oral evidence in chief will be given by reference to typed witness statements from parties and witnesses.

The witness statements must be full, but not repetitive. They must set out all the facts about which a witness intends to tell the Tribunal, relevant to the issues as identified above. They must not include generalisations, argument, hypothesis or irrelevant material.

The facts must be set out in numbered paragraphs on numbered pages, in chronological order.

If a witness intends to refer to a document, the page number in the bundle must be set out by the reference.

Applicable Law

- (15) Rule 76 says:

When a costs order may or shall be made:

(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 such 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.

- (16) Under Rule 84 a Tribunal *may* have regard to the paying party's ability to pay in determining whether to make a costs Order and if so in what amount.

Conclusions and analysis

- (17) The Tribunal observed that the claimant had submitted a comprehensive narrative of his assertions in his further and better particulars document which spanned 30 pages and was divided in to his heads of claim. The claimant had also provided narrative in his schedule of loss. This was at complete odds with his witness statement, which was the most important document of the three.
- (18) The Tribunal did not feel able to proceed on the basis of the statement submitted; alternatively that it would not be able to decipher the key evidence of the claims which remained; alternatively, that the postponement if not considered and decided at the outset, would inevitably have followed or was highly likely to have; alternatively, that proceeding would have been significantly prejudicial to the claimant, particularly as a litigant in person. All of these reasons/outcomes were because of the witness statement.
- (19) The Order to exchange witness statements was clear, in particular that the statement needed to be full, it needed to set out all *facts* about which the claimant intended to tell the Tribunal, the *facts* needed to be set out in numbered paragraphs in chronological order. The Order to cross refer to documents in the bundle was on no reasonable reading of the Order an order or direction to produce a witness statement by doing only that.
- (20) There was no query to the Orders made and no clarification sought.
- (21) The respondent relies on ***Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78:***
- "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 has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had."* (Paragraph 41)
- (22) Viewed holistically, the Tribunal is satisfied that the threshold of unreasonable conduct is met because of the unreasonable nature and content of the claimant's witness statement and which was not in compliance with the Tribunal's Order of 11 December 2019.
- (23) The Tribunal made an enquiry of the claimant's means. The claimant worked in his second job (as a support worker) and increased his hours to 40 hours per week from September 2018 to September 2019. He ceased to work from September 2019 as he elected to become a full time student. He worked for 20

hours per week in the summer holidays (2020). His pay throughout in this job is at NMW. The claimant intends to work 20 hours per week this summer too. He is in receipt of a maintenance grant of £12,000 per year. He has no savings and does not have any disposable income. He relies on family for additional support as required.

- (24) The Tribunal took into account that the claimant said his health, in particular the medication for his condition, had caused him to lose focus and hindered his ability to prepare a proper witness statement. The Tribunal accepted that this would have impacted the claimant, though this was not said before the final Hearing, or on day 1 or day 2 and was not in fact raised until just before the applications for Costs (and a Deposit Order) were concluding on Friday 18 June 2021 (day 3), which undermined the degree of that. However the Tribunal accepted this would have some impact on him and the Tribunal did receive, as Ordered, some medical evidence to support his on-going treatment. The Tribunal had regard to the respondent's comments on this too. Although the evidence from June 2020 specifically referred to his treatment impacting on his cognition, memory, energy levels and general life, there was no specific more recent evidence in the period leading up to the exchange of statements, however the evidence showed on-going reliance on substantial medication at least from 5 May 2021 onwards and on-going treatment.
- (25) The Tribunal also had regard to the claimant's own belief, as a litigant in person, that his statement was good enough, with the additional documents referred to and that the respondent had not itself upon service of the witness statement said anything to the claimant or Tribunal in writing. The Tribunal concluded that was partially opportunistic, partially a desire to have the case heard. The Tribunal concluded it was opportunistic because the respondent would know that the claimant's witness statement, as served, would have prejudiced the claimant's case significantly: it had said in submissions that the statement didn't provide evidence to establish his claims.
- (26) With these factors in mind, the Tribunal decided that it was fair and reasonable to Order the claimant to pay 25% of the respondent's likely re-reading fee which the Tribunal estimated to be 50% of his brief fee for this hearing: that is, 25% of £7,500 (being 50% of Mr Uduje's current brief fee of £15,000). The Tribunal noted that the respondent, a charity, had dis-instructed its Solicitors and thus Mr Uduje was instructed on a direct access basis. This inherently makes the respondent's costs more proportionate. The costs ordered to be paid to the respondent is thus £1,875.

Employment Judge Khalil

Date: 21 June 2021

Public access to Employment Tribunal decisions

All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.