EMPLOYMENT TRIBUNALS

Claimant: Miss J Riley

Respondent: JET2.COM

Heard at: Leeds (on the papers) **On:** 13 July 2021

Before: Employment Judge Evans (sitting alone)

JUDGMENT

The respondent's application for costs fails and is dismissed.

REASONS

Preamble

1. The claimant brought a claim for disability discrimination and unfair dismissal on 3 December 2020 following her dismissal on 16 September 2020. She withdrew that claim by an email which her father sent to the Tribunal on 16 February 2021 and her claims were dismissed by a judgment dated 12 March 2021 sent to the parties on 15 March 2021.

2. On 1 April 2021, the respondent made an application that the claimant pay its costs in the sum of £6,111.88 ("the Application"). The claimant resisted the Application by a letter emailed to the Tribunal on 7 April 2021.

3. On 10 May 2021, the Tribunal wrote to the parties asking whether they wished the Application to be dealt with at a hearing or on the basis of written submissions. Both the respondent and the claimant confirmed that they were content for it to be dealt with on the basis of written submissions by emails to the Tribunal dated respectively 11 and 10 May 2021.

4. The claimant and respondent have providing competing bundles for the Application. The bundle of the respondent runs to 72 pages. The pagination of the claimant's bundle runs to 73 pages. The contents of the bundles are essentially the same but that of the claimant does not have a page 62 or 63 and the "placeholder for recording" item listed on the index is therefore missing. The respondent has also provided a copy of a recording.

5. The Application came before me in the afternoon on 13 July 2021 but the hearing I had earlier in the day overran and I had to reserve my judgment in relation to the Application.

The Application

6. The Application is made on the following grounds:

6.1. The claimant and/or her representative has acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing the proceedings, namely her claims of unfair dismissal and disability discrimination ("the Claims");

6.2. The Claims had no reasonable prospects of success.

7. This part of the Application is therefore an application for costs pursuant to Rule 76(1)(a) and (b).

8. The Application goes on to say that "the Respondent has incurred costs in defending the Claims as a result of the above and/or the improper and unreasonable acts of the Claimant and/or her representative; and/or it would be unreasonable to expect the Respondent to have to pay those costs in the circumstances." This appears to be an application for wasted costs pursuant to Rule 80. However the claimant was represented by her father who was not, I find, acting in pursuit of profit with regard to the proceedings. He is not therefore a representative as defined in Rule 80(2) and consequently a wasted costs order may not be made in these proceedings. I do not therefore consider the issue of wasted costs any further.

9. The basis for the Application is set out over three further pages, but may reasonably be summarised as follows:

The dismissal

9.1. At around 11pm on 5 September 2020 the claimant had contacted the respondent by telephone to inform it that she was not fit to attend her rostered duty the following day. In her ET1 she said that she was "not able to report for work on the 6th September due to sickness". However in the respondent's view the claimant was not sick: rather she was under the influence of alcohol and therefore in breach of the respondent's drugs and alcohol policy and Part A section 1.4 of the respondent's operations manual relating to alcohol consumption (together "the Policies").

9.2. The phone call on 5 September 2020 had been recorded ("the Recording"). The claimant did not comment on the Recording when given a chance to do so during the disciplinary process but acknowledged that she was drunk and could not recall how much alcohol she had consumed.

9.3. The respondent concluded that the claimant had breached the Policies, that her conduct amounted to gross misconduct, and summarily dismissed her on 16 September 2020.

9.4. During her appeal against dismissal the claimant contended that the Recording was inadmissible. The respondent therefore obtained a witness statement from the employee who the claimant had spoken to on 5 September 2020. That colleague said that the claimant had said that she was hungover, that she had used an expletive, and that the telephone call had taken longer than usual because the claimant was struggling to speak.

Abusive, vexatious, disruptive or otherwise unreasonable conduct

9.5. In her appeal against dismissal and in the claim form the claimant contended that the Recording had been made in breach of the General Data Protection Regulation and the Data Protection Act 2018 (together "the data protection legislation") and was consequently inadmissible both in the internal proceedings and in these proceedings. The respondent's position is that the Recording was not made in breach of the data protection legislation and is admissible. The respondent contends that the claimant has by seeking to rely on the data protection legislation acted **unreasonably.**

9.6. The respondent contends that the claimant withdrew the Claims the day after a case management hearing on 15 February 2021 during which the Employment Judge had

expressed the view that the Recording was admissible. The respondent contends that the claimant's representative was "disheartened" by this and that it was "telling" that the Claims were then withdrawn within 24 hours. The Respondent contends that the claimant withdrew the Claims at that point because:

> *… she had realised that, through a combination of the Recording, the [statement of the colleague with whom she had spoken on 5 September 2020] and her own evidence under oath, the Claimant would not be able to continue with the pretence that her sickness was "genuine and absolute" as alleged in the ET1 or at all. On the contrary, it would be plain for all to see that the Claimant was, at best, "hungover" and, at worse still intoxicated when she had telephoned the Respondent's Crewing Department. The Gross Misconduct would, therefore, be justified and substantiated. A copy of the Recording is available to play to the Employment Tribunal at any hearing to consider the Application.*

9.7. The respondent contends that by acting in this way the claimant demonstrated that she "had no confidence in her position" and that the Claims were submitted in a manner which was **abusive, vexatious, disruptive or otherwise unreasonable.**

No reasonable prospects of success

9.8. The respondent contends that the claim of disability discrimination – explained at the preliminary hearing on 15 February 2021 as being in respect of a failure to make reasonable adjustments – had no reasonable prospects of success.

9.9. The respondent contends that the claimant was well aware of the reason for her dismissal and on "any reasonable analysis" would have understood that she was in breach of the Policies and had committed an act of gross misconduct. Consequently she either knew, or should have known, that her claim had no reasonable prospects of success.

The claimant's response to the application

10. The claimant's father responded to the application for costs by an email dated 7 April 2021. The response contains a significant amount of irrelevant material but the relevant points may reasonably be summarised as follows:

    10.1. The claimant had not lost the claim; rather she had chosen to withdraw it;

    10.2. The claimant was "genuinely suffering from sickness on the 6th of September 2020". She had informed the respondent of this within the required timeframes and had never been in breach of the Policies;

    10.3. In reaching its decision to dismiss the respondent had taken insufficient account of the possibility that the claimant's drinks had been spiked;

    10.4. The claim had had every reasonable prospect of success;

    10.5. The reason for its withdrawal was that the claimant's father (i.e. her representative) was:

    > *my extremely stressful experience of the PH (and the ensuing [sic] weeks of preparation) this stress was/is affecting my health. If it pleases the tribunal, I do not wish to share my health issues with [the respondent's representative] but suffice to say since 2015 I changed my employment status to alleviate ongoing acute stress. I am, however, willing to share my personal medical record with the tribunal on a confidential basis if needs be, to demonstrate why I withdrew the claim. I am not legally trained, qualified or experienced, I did what I thought was best for my daughter (as any caring father would) given the grossly unfair situation she was subjected to be Jet2, I regret not*

being able to continue the tribunal process but I simply have to put my health first. My daughter and family support me in my decision.

10.6. The respondent had not at any point issued a costs warning to the claimant;

10.7. The claimant suffers from dyslexia and, as had been said at an earlier preliminary hearing, had two "Dyslexia assessment certificates". Jet2 had failed to make reasonable adjustments to the disciplinary process, despite being well aware of her dyslexia. Such awareness was evidenced by the fact that she was allowed a reader and more time during the annual competency assessments;

10.8. The respondent had not shown that the Recording had been lawfully made. It has failed to provide the claimant with a copy of the privacy notice.

11. The parties wrote various further emails in relation to the application for costs, including emails sent on 11 May 2021 (respondent), 21 May 2021 (claimant) and 12 July 2021 (claimant).

The Law

Costs

12. Rule 76 of the Tribunal's Rules of Procedure deals with the Tribunal's power to make a costs order or preparation time order in certain circumstances. It provides where relevant:

> *(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; or*
>
> *(b) any claim or response had no reasonable prospect of success…*

13. As such, the Tribunal has an obligation to considering making a costs order when it is of the view that any of the grounds for making one have been made out. However, whether or not to make an order in such circumstances is still a matter for the discretion of the Tribunal. Awards of costs are the exception rather than the rule in Employment Tribunal proceedings. Costs do not follow the event.

14. The threshold tests set by Rule 76(1) for making a costs order are the same whether a party is a litigant in person or professionally represented. However, in applying those tests the status of the litigant is a matter which the Tribunal must take into account (AQ Ltd v Holden [2012] IRLR 648 EAT).

15. When considering an application for costs under Rule 76(1)(b), a Tribunal must decide whether a claim had no reasonable prospect of success on the basis of the information that was reasonably available at the start. The focus is on how things would have looked when the claim began (Radia v Jefferies International Ltd EAT 0007/18).

Covert recordings

16. The respondent seeks to rely upon the Recording in this case. The parties have not provided documentation which would enable me to form a view on whether in all respect the Recording was made lawfully or with the claimant's knowledge. It is however helpful to set out briefly the law in relation to covert recordings.

17. A recording is not inadmissible simply on account of being covert, i.e. made without the other party's knowledge (Chairman and Governors of Amwell View School v Dogherty [2007] IRLR 198.)

18. The first question to consider when a party seeks to rely on a covert recording is whether it is relevant to the issues in the case (Dogherty) and, further, it must be of sufficient relevance to be necessary for the fair disposal of the proceedings.

19. If relevance is established, the covert recording will be admissible unless there is some other public policy principle that would justify the exclusion of the evidence. The policy interest in dissuading people from obtaining evidence by clandestine means is insufficient to justify excluding otherwise relevant evidence.

Findings and conclusions

20. The first issue for me to consider is whether the Recording is admissible evidence. It should be noted that no decision was taken in relation to this at the preliminary hearing on 15 February 2021. Rather it was one of two issues that the Employment Judge ordered be considered at "the next hearing" (the other being the preliminary issue of disability). The preliminary issue was described as follows:

> *Whether the Respondent should be permitted to put in evidence a recording of the phone call made by the Claimant reporting her sickness absence.*

21. The Recording is obviously relevant: it is a recording of a phone call made during the course of the claimant's employment which led to her dismissal. The respondent denies that it was made covertly but, even it had been, there is no sufficiently strong public policy reason which would justify its exclusion. It is admissible.

22. I have therefore listened to the recording. The call was made at around 11pm on Saturday 5 September 2020. In it the claimant describes herself as hungover but then goes on to say that she has been feeling ill since the *previous* day. She goes on to say that she does not really think it is a hangover and believes that in fact she has a sickness bug because she has a very upset stomach. She says it is the first time she has rung up in four years and that she will be well enough to work on the Monday. The person with whom she speaks says that she will record her as sick of the Sunday.

23. In the ET3 the respondent denies:

> *that the Claimant was sick or that such sickness was "genuine and absolute" as alleged in the ET1 or at all. On the contrary, the Respondent was of the view that the Claimant was in breach of the Company's Drugs and Alcohol Policy and Part 1, section 1.4 of the Company's Operations Manual relating to alcohol consumption.*

24. The respondent conducted a fact-finding meeting with the claimant on 7 September 2020 and held a disciplinary meeting on 16 September 2020 before reaching a decision to dismiss her for gross misconduct.

25. The Application is not, however, supported by any documents included in either of the costs hearing bundles relating to or arising out of the disciplinary process. In particular I do **not** have before me:

    25.1. Any letter to the claimant setting out the disciplinary charge against her;

    25.2. The notes/minutes of the fact-finding meeting;

    25.3. The notes/minutes of the disciplinary hearing;

    25.4. The Policies (so I do not know what exactly they say about when and how much alcohol may be consumed prior to an employee going on duty);

    25.5. The dismissal letter;

    25.6. The witness statement of the employee who took the phone call from the claimant on Saturday 5 September 2020.

26. In light of the lack of such evidence, I consider first what findings of fact I may reasonably make on the basis of having listened to the Recording (which lasts for 3 minutes and 15 seconds). I approach this task cautiously, given that I have not had the opportunity to hear the claimant give oral evidence (so I do not know how she normally speaks) or to hear her explanation for what she said in the phone call. I find that the Recording:

    26.1. Suggests that the claimant was suffering from a severely upset stomach when she made the phone call;

    26.2. Shows that the recording suggests the claimant is unsure how this state of affairs has arisen. It seems she attributes it in part to being hungover from the *previous* day but is not sure if that is the explanation;

    26.3. Suggests that the claimant *may* be intoxicated during the call. However, what the claimant says does not provide a clear explanation for any intoxication. Her hangover is from the previous day (she says) so it is not clear why she would be intoxicated at 11pm on the following day. In short, if she was intoxicated, that *might* have been caused by alcohol. Alternatively, she *may* have sounded intoxicated as a result of illness.

27. It may well be that if I had been presented with the documents listed above and other documents then I would have been able to make clearer and more far-reaching findings of fact in relation to the circumstances in which the claimant made the phone call to the respondent on 5 September 2020 but I have not been. I find that the respondent has failed to prove on the balance of probability that the reason that the claimant was unable to attend work on 6 September 2020 was the consumption of alcohol outwith its policies.

Conclusions

Abusive, vexatious, disruptive or otherwise unreasonable conduct

28. I conclude that the claimant did not act abusively, vexatiously, disruptively or otherwise unreasonably by beginning the Claims on 3 December 2020 and continuing with them until 16 February 2021 by reference to the points made by the respondent in support of the Application for the following reasons:

    28.1. A party is entitled to contend that certain pieces of evidence are inadmissible. Recordings of phone calls may in certain circumstances be inadmissible. The claimant was wrong about that in this case but she did not act unreasonably, vexatiously, disruptively or otherwise unreasonably by taking the point;

    28.2. Further and separately, the respondent draws a direct causal link between the comments of the Employment Judge at the preliminary hearing on 15 February 2021 and the withdrawal of the claim. This is simplistic and I make no similar finding for the following reasons. First, the question of the admissibility of the Recording was not, as set out above, decided. It was expressly reserved for a later date. Secondly, many claimants who are unrepresented, or who are represented by family members, have second thoughts about pursuing their claim after the first hearing in it at which they experience for the first time the reality of facing a professional opponent in the formal setting of a Tribunal hearing. Thirdly, the claimant's father has provided a coherent and plausible explanation for the decision to withdraw related to his own health.

29. To cut to the heart of the matter, the underlying point of the Application in this respect is that the claimant knew (or should have known) that she was guilty of gross misconduct because she knew that the reason she was unable to work on 6 September 2020 was either that she was hungover or that she was impermissibly intoxicated. Consequently she acted abusively, vexatiously, disruptively or otherwise unreasonably by pursuing a claim on the basis that she was in fact ill on 6 September 2020. However I have found

above that the respondent has quite simply failed to prove that this was the case, in light of the very limited evidence provided to me.

No reasonable prospect of success

30. The focus of Rule 76(1)(b) is on the claim itself and on how matters would or should have reasonably looked to the claimant when she began the claims. I do not find that the Claims had no reasonable prospect of success for the following reasons:

    30.1. In light of the very limited evidence available to me, I do not find that the Claimant knew that she had been guilty of gross misconduct when she began the Claims and that for that reason her claim of unfair dismissal had no reasonable prospect of success (which is really how the respondent has put the Application).

    30.2. It may be that if I had been presented with the evidence relevant to the claimant's dismissal as set out above I would have reached a different conclusion in this respect, but I have not been.

    30.3. Further and separately, the Claimant has raised issues in her claim form which were capable of going to the fairness of the dismissal: for example, the alleged lack of notice given for the factfinding meeting and the alleged failure of the respondent to take account of her dyslexia in its conduct of the disciplinary proceedings against her (and the fact that she has dyslexia is not in dispute).

    30.4. Further and separately, the claimant was pursuing a claim of disability discrimination as well as a claim of unfair dismissal. I do not have evidence before me which would lead me to conclude that the claim in respect of reasonable adjustments had no reasonable prospects of success. In particular, the claimant's contention that she was placed at a substantial disadvantage because of her dyslexia by the way in which the disciplinary hearing was conducted by Microsoft Teams appears to be a respectable argument. Because the claimant withdrew her claim the respondent was never required to present and serve an amended response dealing with the details of this claim.

31. The Application therefore fails and is dismissed.

Employment Judge Evans

Date: 19 July 2021