EMPLOYMENT TRIBUNALS

Claimant: Mrs G Vaughan

Respondent: Modality Partnership

Heard at: London South via CVP **On: 3 November 2021**

Before: Employment Judge Khalil (sitting alone)

Appearances

For the claimant: Mr Sykes, Equity Law Solicitors
For the respondent: Ms Rezaei, Counsel

JUDGMENT UNDER RULES 76-78 WITH REASONS

The claimant is Ordered to pay the respondent's cost following the postponement of the Hearing which was to commence on 10 November 2020 in the sum of £1750.

Under Rule 66, this is to be paid to the respondent within 42 days of today's date.

Reasons

The issue, appearances and documents

(1) This was an application by the respondent for costs incurred and wasted by the postponement of a Full Merits Hearing ('FMH') listed to commence on 10 November 2020 for 6 days. The Costs Hearing had been scheduled to be heard on 2 July 2021, but which Hearing did not take place because of inadequate Hearing time.

(2) The application was made under R 76 (1) (c) alternatively R. 76 (2), Schedule 1 Employment Tribunals Rules 2013.

R. 76 (1) (c) provides:

"A Tribunal may make a costs order and shall consider whether to do so where it considers that a Hearing has been postponed or adjourned on the application of a party made less than 7 days before the day on which the Hearing begins.

(3) R. 76 (2) provides:

"A Tribunal may also make such an Order …where a Hearing has been postponed or adjourned on the application of a party"

(4) The Tribunal had received a witness statement from the claimant and had received an E-Bundle for the Costs Hearing comprising 336 pages in 6 sections (A to F) and had read the respondent's application dated 11 November 2020. The Tribunal had also received a supplementary E-Bundle and a written skeleton argument from Mr Sykes. Ms Rezaei's submissions were delivered orally. The claimant gave evidence and was cross examined.

(5) The claimant was represented by Mr Sykes, Equity Law Solicitors and the respondent appeared by Counsel, Ms Rezaei.

(6) The Tribunal had to intervene twice whilst the claimant was giving evidence as whilst she was sat beside her husband, it was audible that he had attempted to assist her whilst she was giving evidence. This became more concerning, when during an interlude, before which the claimant was cautioned about not taking about the case with anyone, the Tribunal overheard the claimant and her husband discussing the claimant's evidence for several minutes whilst she was under oath. A message was posted into the chat room. Following discission with the parties thereafter, the claimant's husband was asked to leave the room and any further re-examination of the claimant was curtailed as the Tribunal was not satisfied that the claimant's evidence would not thereby be infected.

Relevant findings of fact for this Hearing

(7) The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered the evidence given by the claimant during the hearing, including the documents referred to, and taking into account the Tribunal's assessment of the witness evidence.

(8) Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statement/evidence or in submissions.

(9) The respondent's application was made on 11 November 2020.

(10) The respondent said in summary:

- A costs order can be made under Rule 76 (1) (c) or (2) without needing to establish unreasonable conduct on the part of the claimant

- In any event, it was unreasonable and disproportionate for the claimant to seek a postponement the day before the trial having been invited to consent previously

- The proximity of the appeal to the (second) final Hearing seriously jeopardised the likelihood that the second Hearing could proceed. A successful appeal would mean the respondent would likely be required to amend its pleadings and witness statements and an unsuccessful appeal would mean there was the potential that the claimant would seek to appeal that outcome.

- Finally, had the claimant joined the respondent when an application to postpone was made on 16 October 2020, it is highly probably that such a request would have been granted by the Tribunal and the parties would have avoided the costs of preparing for the second Final Hearing.

(11) The relevant chorological background was as follows:

(12) A FMH was listed to heard on 1 July 2019. That Hearing did not proceed but without fault of either party. At this Hearing EJ Ferguson refused the claimant's application to amend the claim to add 2 additional protected disclosures. Written reasons for that that decision were requested and subsequently provided and sent to the parties on 23 September 2019. The case was also set down for a new Final Hearing for 7 days commencing on 10 November 2020.

(13) The decision to refuse the amendment was appealed.

(14) The EAT Hearing in relation to that was set down for hearing on 6 November 2020, 2 working days before the re-listed FMH. That was known on 14 October 2020 (page B6-7).

(15) On 21 August 2020, the EAT in allowing the application to go to a full Hearing said:

"It is a matter of regret that the appeal going for a full Hearing may put the full Hearing of this matter back yet further" (page A-74).

(16) On 16 October 2020, the respondent applied for the trial to be postponed on the basis that given that the EAT Hearing was not to be heard until 6 November 2020, if the appeal was successful, the respondent would be prejudiced as it would need to amend its grounds of resistance and witness statements and to deal with further disclosure.

(17) The application was strongly opposed. The claimant's letter was at page C3 set out in her WS at paragraph 7.7. As part of her opposition, the claimant referred to the long-listed six-day trial and said she wanted to proceed with the trial. She asserted the respondent's application was ill-founded and misconceived. She

said the case was ready for trial. She referred to her amendments sought was minor with no extra detriments. She also referred to the respondent's application as being an attempt to avoid the evil day of trial. There was also a separate request for EJ Ferguson not to be the presiding Judge to avoid the appearance of bias. No comments were expressed at all on the position if the appeal was unsuccessful.

(18) EJ Ferguson refused the respondent's application on 21 October 2020 which included having regard to the claimant's objection. The case was to proceed as pleaded and in the event of a successful appeal, it was said that further days could be added to the Hearing if required (C-7).

(19) The EAT Hearing proceeded on 6 November 2020 but Judgment was reserved and the parties were advised that Judgment would be handed at 3.00pm on 9 November 2020, the day before the trial was to commence. The EAT had advised this would happen on 6 November 2020 after the Hearing had concluded (B-25).

(20) On 8 November 2020 at 13.46 (B-27), the claimant had also written to the Tribunal objecting to the trial proceeding before EJ Ferguson. In that email, it was stated that the trial was very important to the claimant and that she had waited an additional 18 months since the aborted trial in July 2019. The email was also clearly written in expectation and confidence that the appeal before the EAT would be successful. The claimant invited a re-listing of the trial before another Judge if necessary. This request was pursued again by the claimant's email 15.49 of 9 November 2020 (D-2). The claimant referred to EJ Ferguson as having dealt with the application to amend in a 'pro-Respondent, ill-considered and roughshod' manner (8 November 2020) and with apparent bias and being short-tempered and dismissive (9 November 2020). None of these assertions were contained in the grounds of appeal.

(21) The EAT handed down judgment on 9 November 2020 and dismissed the claimant's appeal (A-92-109). Leave to appeal was also refused (A-115, 116-117).

(22) The claimant then applied to postpone the full Hearing at 17.07 on 9 November 2021 (D-1).

(23) The respondent said in response at 17.39 9 November 2020 that the respondent had been put to further cost and incurred counsel's brief fee and referred back to the claimant's opposition to their application to postpone on 16 October 2020 which they said was unreasonable. They sought their costs if the postponement was granted.

(24) The Tribunal granted the postponement by its letter dated 9 November sent to the parties by email at 17.50. The respondent was asked to submit its application for costs in writing.

(25) In relation to the brief fee the claimant says this was incurred by 11.29am on 9 November 2020 – the claimant relies on the respondent's email of 9 November

at page B-26. The responded said in submissions it was before then but did not offer evidence of the actual date.

(26) The Tribunal was left to decide the issue as a matter of interpretation of the respondent's email of 9 November 2020 and found that it did not mean that Counsel's brief had just been incurred i.e. that morning. That was not plausible and was highly improbable for a 7-day Hearing scheduled to start on 10 November 2020. It was more likely than not that the brief would have been incurred at some point after the decision to refuse the postponement application by EJ Ferguson on 21 October 2020 was conveyed to the parties. The Tribunal noted the respondent's email was written on 9 November 2020 in the context of and in response to the claimant's objection the day before (8 November 2020) to EJ Ferguson hearing the case and to a relisting of the case if another Judge was not available. There was no evidence before the Tribunal that for example of settlement dialogue which sometimes leads to a conscious delay to the incurrence of a brief fee.

Conclusions and analysis

(27) The Tribunal considered there to be more than one reason which had caused the full Hearing due to commence on 10 November 2020 to be postponed and the expense of Counsel's brief fee in particular.

(28) There was a very real litigation risk that the Hearing would not take place in the trial window having regard to the proximity of the appeal listed to be heard on 6 November 2020. It is right that it was not known until after the appeal had been heard that Judgment would be given on 9 November 2020. However, this is an inherent part of litigation. The claimant was professionally represented. It is not uncommon for decisions in the ET and EAT not to be given on the same day as the Hearing. The precise risk of the full Hearing not being in a position to proceed was expressly/explicitly forewarned by HHJ Barklem on 21 August 2020. Mr Sykes said that in his long experience, the practice of Judges in the EAT varied. He was thus obviously alive to the risk of a decision being delayed and/or reserved.

(29) The claimant had a strong belief/expectation that her appeal would succeed. In the eventual circumstances, that belief appeared misplaced. However, the belief demonstrated litigation naivety – it appeared to the Tribunal that the claimant was operating on only 'a one outcome possibility' without regard to what might happen if the appeal failed. There had been no appreciation or contemplation of, or any reference to, the prospect of the claimant's appeal being unsuccessful. This was not a reasonable stance.

(30) The risk to the respondent of a successful appeal had already been addressed when EJ Ferguson had refused the respondent's application to postpone the Hearing – by the addition of Hearing time if required. The greater prejudice of that eventuality lay with the respondent.

(31) It is trite that a Tribunal, when faced with an application for a postponement, will have regard to the other party's views. It is part of the Presential Guidance on

Case Management paragraph 5 as the applying party is expected to discuss the application with the other party, convey the detail of that discussion and if the parties are agreed, to say so. A joint application for a postponement or, an unopposed application would directly impact on the overriding objective to deal with cases fairly and justly especially having regard to the parties being on equal footing. It is also highly probable that had the claimant said, as it ought to have, that in the event of an unsuccessful appeal, leave to appeal/ a further appeal might be considered, the respondent may have commented further and the Tribunal would have factored that in to its decision making.

(32) In these circumstances, the claimant's strong objection to the respondent's application to postpone on 16 October 2020 in circumstances where it was known on 14 October 2020 that the appeal had been set down for 6 November 2020 (leaving 1 working day before trial) without any mention of the claimant's position if the appeal was unsuccessful, was unreasonable as there was a real and proper risk that the trial would not take place. That appeared to be the obvious occasion for the claimant to recognise the risk and uncertainty of the trial not being ready for Hearing because the appeal may fail which decision might be actioned further. It appeared to the Tribunal that the claimant was only focused on its unilateral view that she was home and dry on her appeal. This was borne out by the statement in the 8 November email which says "*it is highly likely this final appeal decision from HHJ Tayler, will like that of HHJ Barklem …find against EJ Ferguson*". That an appeal is arguable and/or has reasonable prospects of success is nothing like an appeal being highly likely to succeed.

(33) The claimant argues that it was critical that the EAT did not hand down its Judgment until 9 November 2020 and not on 6 November 2020 when the appeal was heard. Even if the Tribunal had found that the brief fee was incurred on 9 November 2020 (and not before), the Tribunal did not consider, having regard to the holistic chronology since the appeal against the refusal by EJ Ferguson to permit an amendment to the claim, that it was the decisive or key reason.

(34) Further, the Tribunal concluded that, another contributing reason the trial did not take place on 10 November was because the claimant applied for a postponement as she wished to exercise her right to appeal against the EAT's refusal to allow her appeal or give leave to appeal.

(35) The Tribunal also had regard to the claimant's stated objections, more than once, to EJ Ferguson presiding over the Hearing, in terms that the claimant was prepared to accept a re-listing of the Hearing if another Judge was not available. Although the claimant had appealed against her decision, her alleged conduct as asserted, more than once, was never part of the appeal. REJ Freer said such criticisms were inappropriate and the Tribunal noted the claimant had accepted in her witness statement (paragraph 45) that the direction about that was wholly accepted. There was no meritorious base upon which those assertions ought to have been made. Whilst this did not contribute to the Hearing being postponed, it did undermine and contradict the claimant's objection to the trial being delayed and diluted the strength of opposition to the respondent's application.

(36) Having regard to the foregoing analysis, the Tribunal concluded, in summary, but not by way of substitution or exclusion of the matters referred to, that the reasons the respondent's brief fee (and Final Hearing preparation costs) might have been avoided were if:

- the claimant had adopted a more reasonable approach to the respondent's application to postpone the Hearing dated 16 October 2020, given the timings and litigation uncertainties - (this was unreasonable and blameworthy)

- the claimant had sensibly and reasonably appreciated that her appeal may not succeed and if so, this may be actioned further - (this was unreasonable and blameworthy)

- the EAT had handed down its judgment on 6 November 2020 (*but only on the basis that the Tribunal was wrong in its finding that the brief fee was incurred before but not on 9 November 2020 (and putting aside the Tribunal's conclusions in paragraph 28), putting the claimant's position at its highest*) - (no blame on the claimant)

- the claimant had not exercised her further right of appeal - (no blame on the claimant)

(37) The Hearing was adjourned on the application of the claimant on the eve of the trial. Unreasonableness is not required as this was not an application under Rule 76 (1) (a). However, the Tribunal has found the claimant was in part unreasonable and this was considered to be relevant to the Tribunal's assessment of whether or not to exercise its discretion to make an Order for costs. The Tribunal's discretion is a wide one. Both parties place reliance on ***Ladbroke Racing Ltd v Hickey 1979 IRLR 273*** which is authority that conduct can be a relevant factor.

(38) The Tribunal had regard to the claimant being legally represented by an experienced advocate.

(39) The Tribunal also had regard to the mixed messages being conveyed to the Tribunal about why the claimant was seeking to have the Hearing postponed or re-listed, undermining the absolute position the claimant was taking against a postponement of the Hearing.

(40) The claimant had put forward medical evidence in a supplementary bundle which supported her assertion that she had suffered from work related stress. There were reports dated 3 April 2019, 2 August 2019, 20 November 2020 and 9 August 2021 in the bundle. All reports were consistent in saying that the work-related stress had prevented the claimant from being able to look for another job. This was also what the claimant said in her witness statement (paragraph 67). There was no assertion, information or evidence given that the claimant's health had impacted on the conduct of the litigation, in particular the events leading up to the postponement of the final Hearing.

(41) The Tribunal had regard to the claimant's means under Rule 84 as it felt this was in the overriding objective to do so – to be fair and just. The claimant has not worked since the termination of her employment and is in receipt of an NHS pension of £1097 per month. The claimant has Premium Bonds Savings to the value of £35,500. The claimant had prepared an income and outgoings schedule which showed an income of £1097 (NHS Pension) and outgoings of £1565. However, in response to Tribunal questioning the claimant confirmed that the outgoings represented the totality of her and her husband's expenditure but she had not given credit for her husband's pension income of £754. The claimant accepted a 50% reduction to the outgoings was fair to apply. Her income thus exceeded her expenditure by £314. In addition, the claimant is due to qualify for a state pension in January 2022 albeit at a reduced amount of £694.45 per month but which could go up if she was to make up underpaid NI. Her income over expenditure would then rise to just over £1,000 in about 2 months.

(42) The Tribunal had regard to the claimant's moderate means, but concluded this did not mean it should not exercise its discretion to make a Costs Order. It was instead fair and just to make an Order for costs commensurate to the Tribunal's assessment of the claimant's conduct towards the additional costs mitigated further having regard to the claimant's moderate means. The Tribunal assessed the former to be 50% (having regard to the two areas of unreasonableness and blame referred to and the two factors which were not) and this was reduced further by 50% to reflect the claimant's moderate means.

(43) The schedule of costs sought was at F57-F59. This showed a total sum claimed of £16,357.33. It was largely made up of Counsel's brief fee of £12,000. The balance was Solicitor preparation Costs. It was however unclear why the volume of additional Solicitor cost engaged was required when the case had been trial-ready in July 2019. The Tribunal accepts that there will be some further preparation required for example re-instructing Counsel and/or a new (but shorter) pre-trial conference but without a proper breakdown before the Tribunal, the precise costs could not be ascertained. The Tribunal considered that a broad/general sum of £1,000 could be added in this regard to reflect 6-8 hours work.

(44) In relation to Counsel's brief fee, Counsel would likely charge a re-reading fee for the new listing and it is in that, that the wasted costs will lie. The Tribunal assessed that at 50% of the brief fee i.e. £6,000. The Tribunal had regard to the familiarity of the proceedings and/or continuity of representation. Adding the £1,000, the additional or wasted costs come to £7,000.

(45) Applying the percentages concluded above, the Costs Order is £1750. That is £7,000 reduced by 50% to £3,500, and then further reduced by 50% to £1750.

(46) The claimant sought a 3-month period to pay. The respondent was prepared to accept a 28-day period. The Tribunal concluded that it was fair and just for this to be paid within 42 days, which was closer to the increment in the claimant's increase in pension.

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Employment Judge Khalil

10 November 2021

Sent to the parties on:

10 November 2021

For the Tribunal: