



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs J Llewelyn  
**Respondent:** Oyster Bay Systems Ltd  
**Dated:** Monday 16<sup>th</sup> May  
2022  
**Before:** Employment Judge A Frazer

## JUDGMENT ON COSTS

The Claimant's application for costs is dismissed.

## REASONS

1. By way of a document that was sent to the Tribunal on 18<sup>th</sup> February 2022 the Claimant applied for costs under Rule 76 of the Employment Tribunal Rules of Procedure on two bases: firstly that the defence was misconceived and secondly, that the Respondent had conducted proceedings unreasonably.

### The Law

2. Under Rule 76 of the Employment Tribunal's Rules of Procedure a Tribunal may make a costs 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.'

### Findings

### Correspondence

3. I have considered the correspondence in this matter relating to the alleged litigation conduct on the part of the Respondent. This case was postponed owing to the COVID pandemic. It was originally listed for a day but the listing was extended to three days. During the course of the litigation the Respondent raised an argument that the letter of Michael Breach dated 8<sup>th</sup> June 2019 was without prejudice as it was an attempt to settle an extant dispute between the parties. Witness statements were due to be exchanged on 26<sup>th</sup> March 2020 but the Respondent deferred the date for exchange and wrote to the Tribunal on 14<sup>th</sup> April 2020 to request that the issue concerning the without prejudice letter ought to be resolved prior to exchange of witness statements.
4. The dispute about the letter was determined by the Tribunal by way of a preliminary hearing and a judgment was handed down on 29<sup>th</sup> April 2020 which dismissed the Respondent's application for the letter to be without prejudice. On 15<sup>th</sup> June 2020 the Respondent then appealed that decision (which was subsequently rejected on 13<sup>th</sup> July 2021). By a case management order dated 29<sup>th</sup> April 2020 EJ S Jenkins ordered the Respondent provided the parties with a paginated hard copy of the trial bundle by 26<sup>th</sup> May 2020 and for witness statements to be exchanged by 23<sup>rd</sup> June 2020.
5. The Claimant sought to secure exchange on 23<sup>rd</sup> June 2020 in compliance with the case management order. The Respondent was chased on 2<sup>nd</sup> July 2020 and on 9<sup>th</sup> July 2020.
6. On 10<sup>th</sup> July 2020 the Respondent applied for a stay of proceedings pending the appeal but this was rejected by EJ Harfield on 3<sup>rd</sup> September 2020. EJ Harfield confirmed that the current directions applied. Following this the Claimant's representative wrote to the Respondent and invited exchange of witness statements by 11<sup>th</sup> September 2020. On 4<sup>th</sup> September 2020 Ms Prais for the Respondent responded to say that she was unable to give a definite response but that there was some additional disclosure that she wanted to make. By email sent at 5.14pm Ms Prais requested exchange take place on 18<sup>th</sup> September because of absences and other commitments.
7. On 29<sup>th</sup> September 2021, the Respondent not having exchanged statements, the Claimant's representative wrote to the Tribunal asking for an unless order.
8. On 2<sup>nd</sup> October 2021 the Respondent wrote to the Tribunal and the Claimant's representative apologising for the delay in exchange. It stated that the previous case handler had left the business which had caused some slippage with the timetable. It was explained that a new consultant

had been assigned and would action the witness statement on his return from leave on 16<sup>th</sup> October. On Friday 16<sup>th</sup> October the consultant wrote to the Claimant's representative asking if they were happy to exchange the following Monday. The consultant was off sick on the Monday and did not forward the Respondent's witness statements on until 20<sup>th</sup> October. The Claimant's representative subsequently chased for signed and dated copies of the witness statements as the original statements sent in were not signed and dated.

9. Moving forwards to October 2021 the Claimant's representative chased for the signed witness statements and an index to the bundle. The Respondent was chased again for signed witness statements by the Claimant's representative on 8<sup>th</sup> November 2021.
10. On 12<sup>th</sup> November the Claimant's representative wrote to the Tribunal seeking an Unless Order for the Respondent to provide signed witness statements, a paginated hard copy of the bundle and the costs of that application within 7 days. The Claimant's representative sent a chasing email to the Respondent on 19<sup>th</sup> November.
11. On 29<sup>th</sup> November the Respondent's representative indicated that he was going to upload the bundle and witness statements that afternoon and he sought confirmation of the hard copy requested. There was then some further correspondence about documents that were not in the bundle.
12. On 30<sup>th</sup> November the Respondent applied to postpone the hearing, due to take place on 6<sup>th</sup> December owing to the illness of one of the witnesses. The Claimant objected.
13. On 2<sup>nd</sup> December EJ Brace directed the Respondent to send a copy of the bundle to the Claimant's representative by 4pm on 3<sup>rd</sup> December.
14. On 3<sup>rd</sup> December the Claimant's representative noticed that the bundle that the Respondent had uploaded contained without prejudice documentation and attached the correct index. The bundle that had been sent over was missing two documents.

### **The Claimant's Submissions as to Litigation Conduct**

15. The Claimant made submissions that the Respondent's conduct was unreasonable in that the Respondent delayed service of the witness statements; the Respondent uploaded documents containing without prejudice information; the Respondent produced a bundle which did not contain the key letter from the Respondent's witness notwithstanding the admissibility point had been dismissed by the EAT; the fee earner for the Respondent changed five times over the course of the litigation and that the

Respondent refused to settle the case. It was submitted that the Claimant's solicitors had wasted costs seeking compliance and copies of the bundle had had to be printed and re-printed. It was submitted that had the Respondent behaved reasonably they would have settled the matter at an early stage.

### **The Respondent's response regarding Litigation Conduct**

16. On behalf of the Respondent it was submitted that the Respondent served its statements on the Claimant two years prior to the hearing and that witnesses do not need to sign the statements but can confirm their truth at the hearing. The Respondent accepted that two documents were not in the final bundle but the week before it was agreed that these documents would be sent to the Tribunal and used. As concerned the offer to settle, the Claimant's offer was greater than what the Claimant came out with at trial and in any event a failure by a party to settle is not unreasonable conduct. There were five fee earners because of the time the case took to get to trial.

### **Findings on the Unreasonable Conduct and Costs**

17. In this case there were delays to the case management timetable which were at first caused by the Respondent's desire to exclude correspondence which it said was without prejudice. The Respondent genuinely viewed the correspondence as being without prejudice and even though this was not accepted by the Tribunal and the EAT this was not an unreasonable position to take in the context of litigation. While it was unsatisfactory for the Respondent to have not inserted this correspondence into the bundle for the hearing it was not wholly left out and indeed became part of the evidence before the Tribunal at the hearing upon which findings were made. Again, this was not in my finding unreasonable.
18. The Respondent failed to comply with the case management timetable as to the index of documents and witness statements. This was unsatisfactory and unreasonable. There were departures of fee earners who had conduct of the file. However, the tribunal's directions are there to be observed and it is incumbent on professional representatives to ensure that any handovers are done in a way that file deadlines are carried out. However I decline to exercise my discretion to make a costs award in the circumstances. The Respondent generally sought to vary the timetable by agreement and the case was ready for trial by 6<sup>th</sup> December 2021. The Respondent sought agreement about the bundle albeit that this was very last minute. The Respondent did in fact exchange witness statements well in advance of the hearing. It is not unreasonable that the statements were not signed or dated as the witnesses' evidence was confirmed at trial.

19. Having regard to the correspondence in the round I do not consider that there is anything over and above the normal *inter partes in litem* correspondence that would normally be expected to be generated on a case of this nature. In addition the case was ready for trial and proceeded to be heard during the listed window. There were some additional documents to be inserted in the bundle but this is not out of the ordinary. I do not consider that the litigation conduct of the Respondent warrants a costs order in the circumstances.

20. As regards the offers to settle, I do not consider the Respondent's decision not to settle to be unreasonable conduct. In the event the Claimant was awarded less than the offer that was made.

21. Having regard to the conduct as a whole I decline to make a costs award.

### **Defence 'Misconceived'**

### **Claimant's Submissions**

22. The letter sent to the Claimant from one of the Respondent's directors admitted that she had been bullied by a superior in the company and her duties taken away. Once it had been accepted that the Claimant had been bullied, mistreated and lied to, the Claimant's acceptance of that repudiation was bound to found a claim of constructive dismissal. The points taken by the Respondent that Mr Breach exaggerated his letter, that the Claimant had been disingenuous and had lied and that the Claimant concocted a fraudulent reason for sick leave were hopeless.

### **Respondent's Submissions**

23. The Respondent's perspective was that the letter of Michael Breach in June 2019 was an attempt to repair the relationship after it had removed Ms Rose from the Respondent's premises. The issues were whether there was a fundamental breach and whether the Respondent's actions by way of its letter in June could repair the relationship. It was submitted that there were some prospects of this argument succeeding.

### **Findings on Misconceived and Costs**

24. I have had regard to my conclusions at paragraph 45 onwards of the judgment.

25. I went on to find at paragraph 48 that communication from the other director was such that it was such a U turn from the letter from Michael Breach. I found that there was still no unification within the company and that this

sealed the breach of trust and confidence so as to entitle the Claimant to resign, which she did.

26. The Respondent ran as part of its defence that the real reason she left was to further her career with Simpsons and that she did not resign in response to any breach. It also sought to argue that both Michael and Martin Breach were intending to repair what had gone before and that the smoothing of the ways by both directors was inconsistent with conduct likely to damage the relationship of trust and confidence.
27. The burden is on the Claimant to prove that she was dismissed. In addition there was no application to strike out under rule 37. There was a requirement for the Tribunal to hear evidence and to make findings of fact about whether the conduct alleged on the part of the Respondent constituted a fundamental breach of contract, when that breach crystallised and whether the Claimant resigned in response.
28. While in my finding the merits of the response were weak, particularly in the face of the letter of Michael Breach and the evidence of the conduct of Ms Rose towards the Claimant, it cannot be said that it had no reasonable prospects of success. I had to carefully consider and evaluate the evidence that I heard in order to make the findings that I ultimately made. Therefore I do not make an award for costs on this basis.
29. The costs application is dismissed.

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Employment Judge A Frazer  
Dated: 16<sup>th</sup> May 2022

SENT TO THE PARTIES ON 17 May 2022

FOR THE SECRETARY OF EMPLOYMENT  
TRIBUNALS Mr N Roche