EMPLOYMENT TRIBUNALS

Claimant: Ms L Greenwood

Respondents: (1) Coeliac UK
(2) Ms Hilary Croft
(3) Robin Steele

Heard at: Watford **On: 23 June 2022**

Before: Judge Bartlett

Representation
Decided in chambers on the papers

COSTS JUDGMENT

1. The first respondent has acted unreasonably in part of its conduct of the proceedings. The first respondent (Coeliac UK) is ordered to pay £3,000 in respect of the claimant's costs under rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

REASONS

The Application

1. In an email dated 6 January 2022 the claimant's representative made an application for a costs order under rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. This application was sent to Judge Bartlett on 16 June 2022. No response or submissions has been received from the respondents.

2. At a preliminary hearing which took place on 27 October 2021 the claimant indicated that she may wish to apply for a costs order against the respondents. I directed that if she wished to do so, she should do so in writing and that the application would be heard on the papers unless either party provided written reasons objecting to that. No objections to hearing

the costs application on the papers has been received and therefore I have decided the application on the papers.

3. In brief summary the claimant's application is based on the respondent disputing all or at least some of her disability from the submission of her ET1 up to and including the second preliminary hearing held on 27 October 2021.

4. The claimant's application is for an order under rule 76 on the basis that the following behaviour of the respondents' was unreasonable:

    a. The respondent making late concessions on the issue of disability;
    b. once the concessions were made the second preliminary hearing served no real practical purpose;
    c. the claimant wrote to the respondents on 3 April 2022 inviting them to make concessions and they did not;
    d. the respondent made substantial concessions five working days before the 27 October 2021 preliminary hearing.

5. The claimant's application notes that the claimant's costs are considerable and requests that the Tribunal summarily assesses costs.

6. The application was accompanied by a bundle running to 125 pages which included a costs schedule and copies of correspondence both without prejudice and open between the parties.

7. The claimant's costs schedule sets out total costs of £22,299 which included a council's brief fee of £3,250 and a counsel's fee drafting the cost submissions of £850.

Background

8. The claimant submitted her ET1 on 16 June 2020 this provided some detail about her claims of disability which are multifaceted. It is also fair to say that further information that was provided about the claimant's disability was substantially more detailed. The ET1 also detailed that the claimant received diagnoses of conditions in January and February 2020. The latter post dated the end of her employment with the respondent.

9. In their response, the respondents did not admit that the claimant was disabled identifying lack of particularisation of the claim's by the claimant. They reserved their position. On 28 October 2020 the Tribunal ordered the claimant to provide further information about the impairments on which she relied, relevant medical records and any other information supporting her disabilities. The respondents were ordered to confirm whether or not they accepted the claimant's disability and, if not, why not.

10. On 16 December 2020 the claimant submitted a statement on disability and medical records.

11. On 11 January 2021 the respondent stated that they had insufficient information to assess their position on disability and applied for specific disclosure and an extension of time to take expert advice on disability and

obtain a privileged report for their exclusive use.

12. There was some correspondence from the claimant objecting and further correspondence from the respondent including a communication to the Tribunal on 10 February 2021 setting out that they did not accept the claimant's case on disability and the reasons why not.

13. On 25 February 2021 the respondent confirmed that it no longer sought specific disclosure.

14. The first preliminary hearing took place on 19 March 2021 at which it was ordered that the claimant provide a second statement of disability by 16 April 2021, the respondent to inform the Tribunal and claimant by 14 May 2021 of their position in relation to disability and listing a preliminary hearing to determine the issue of disability with a time estimate of one day.

15. The claimant provided a second statement of disability. The respondent confirmed on 14 May 2021 that their position had not changed.

16. On 20 October 2021 the respondent wrote to the Tribunal accepting that the claimant was disabled at the material time as a result of all but one of the impairments on which the claimant relied. The impairment relating to her memory and concentration was the one that was not conceded. It

Judgement on Disability following 27 October 2021 Preliminary Hearing

17. The following is an extract of my Judgement from the 27 October 2021 hearing:

"20. As is set out above the respondents accept that the claimant suffers from several impairments which amount to disabilities under the Equality Act 2010. Ms Denton made it clear that the respondents did not accept that the claimant's impairments to her memory or concentration amounted to a disability within the Equality Act 2010….

"26. When all the circumstances of the claimant's complex situation are considered I do not think that it is helpful to try to isolate the aneurysm or ongoing effects of the aneurysm and treatment from all her other conditions. In particular whilst the claimant identifies that the aneurysm operation and circumstances were traumatic and this trauma has caused the difficulty with short-term memory and concentration I do not accept that that event can be isolated from the other traumatic events in her life.

27. Therefore I do not accept that the aneurysm is the impairment. Instead I consider that the short-term memory and concentration problems are the impairment. Therefore I must consider what are the effects of the short-term memory problems and difficulties with concentration.

28. There is limited evidence from 2008 and 2013 that the claimant had some problems with short-term memory and concentration. I do not accept that these were significant issues at that time. I recognise that in the immediate aftermath of the operation the claimant had other issues such as her pain that

took priority and needed dealing with however, if her short-term memory and concentration were as badly affected as she appears to claim, I do not accept that she would not have raised it with her doctor in France. In evidence the claimant repeatedly stated how thorough the French medical treatment was and how fulsome their investigations. She saw a number of specialists about the aneurysm, the cervical ribs and her thyroid. She received treatment for all of these and the depression. In this country there are specialist memory clinics and I do not accept that she would not have raised with her GP in France that she had problems of her short-term memory and concentration which was significantly affecting her.

29. The claimant's evidence was that numerous factors affected her memory and concentration such as sleep, stress and depression. By 2019 claimant had a number of different stressors in her life largely arising from her personal life but also because of full-time work and its pressures. I find that Whats App message from the claimant on 13 June 2019 which states "as per usual my memory failed" and the email from the claimant dated 13 November 2019 which refers to the claimant's difficulties with memory are evidence that she had been suffering from problems with her short-term memory and concentration from at least early June 2019. I find that the claimant's evidence was that problems with her short-term memory and concentration increased after she started full-time work with the first respondent and I accept that. I find that it is only from that point onwards that the problems became so significant that they had a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities.

30. I find that the claimant's short-term memory problems and difficulties with concentration had an adverse effect on normal activities. She identified problems with, for example, cooking, feeding her dogs, following verbal instructions and memory problems and having a conversation. These are day-to-day activities. Further, the effects on them were adverse.

31. In relation to whether or not there was a substantial impairment I remind myself that substantial means more than minor or trivial and that it is a low standard. The claimant has identified interference with her ability to carry out normal day-to-day tasks and I find that that interference was substantial. Forgetting what is said in conversations, forgetting about cooking food, forgetting to feed one's animals all have a more than minor or trivial effects on an individual's life.

32. I find that at the material time the effect of the impairment was long-term because it would be expected to last for many years because such problems are largely only treatable with coping strategies rather than any sort of cure or suppression of symptoms.

33. I find at the material time the claimant had a disability in that her short-term memory and concentration were impairments and that this is a disability within the meaning of the Equality Act 2010."

<u>The Tribunal Rules relating to costs</u>

18. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 at rules 74 to 78 set out the principles and processes

that must be applied in relation to costs orders.

19. Paragraph 77 sets out "*A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgement finally determine the proceedings in respect of that party were sent to the parties*."

20. Paragraph 76 sets out:

When a costs order or a preparation time order may or shall be made

76.—(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.

(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.

Decision

21. It is important to remember that the Tribunal's power to make an order under rule 76 is a discretionary power. If I conclude that a party has acted unreasonably then I have a duty to consider making an order but a discretion as to whether or not to actually make a costs award.

22. The first question I must consider is whether the respondent's conduct is unreasonable (the claimant does not assert that it is any of the other grounds set out in rule 76(1)).

23. The claimant's claim that she suffered from impairments leading to disabilities within the meaning of the Equality Act 2010 is complex and multifaceted. The claimant has relied on a number of conditions which have arisen at different times and from multiple causes.

24. The claimant's costs schedule includes fees incurred from the 13 November 2020. I mention this because it was on 28 October 2020 that the Tribunal ordered the claimant to provide further information to support her claim about her disabilities. Whilst I understand that the claimant's position is that the respondent should have conceded disability when it drafted its ET3 I do not share this view. The tribunal made the order for further information of its own violation and I do not consider that the respondent asking for further information was unreasonable in any way.

25. On 20 October 2022 the respondent's representative wrote to the tribunal to confirm that they did not contest that hyperthyroidism, depression and

acute anxiety and stress amounted to a disability within the meaning of section 6 of the Equality Act 2010 but they contested that the subclavian artery aneurysm amounted to a disability within the meaning of section 6 of the Equality Act 2010.

26. I do not consider that the respondent asking for further information can be categorised as unreasonable conduct. Indeed, the claimant's claim is that it was the late concessions that were the cause of wasted costs. She argues that if the concessions had been made substantially earlier then there would have been a much reduced or no need for the 27 October 2021 one-day preliminary hearing to take place.

27. Some of the difficulties in this case arise from the complexity of the claimant's disabilities both in terms of her long medical history and the numerous medical conditions on which she relied. It is quite common that a complex case requires more time to be spent on it. Further, as can be seen from my Judgement following the 27 October 2021 hearing I did not find that the claimant's aneurysm was a disability and that the disability arose from the impairment which was short-term memory loss and concentration problems. As set out in my Judgement from 27 October 2021 I found that these amounted to a disability because it was likely that they would last for 12 months rather than, as the claimant had argued, they had lasted for the preceding 12 months.

28. The parties have engaged in considerable correspondence about disability issues. If the respondent had conceded some of the disability issues earlier there may have been less correspondence and therefore less cost.

29. The issue then to consider is was it unreasonable for the respondent to concede the majority of the disabilities on 22 October 2021 rather than some earlier date. I find that it is completely untenable to suggest that the respondent should have made any concessions before 12 May 2021 as it was entitled to wait for receipt of the respondent's disabilities statements and her medical records. I recognise that the 12 May 2021 statement was to some extent an update of the 20 April 2021 statement but I also accept that it added in additional information which the respondent said was required because of the orders from the first preliminary hearing.

30. As the issues are complex, I consider that it is reasonable for the respondents to take a period of time to consider the evidence in its position. However, between 21 May 2021 and 20 October 2021, the respondent were not given any further information to note about the claimant's disability. Given the substantial evidence that was provided by the claimant, I find that it was unreasonable to make the concessions so many months after it was provided with the evidence and so close to the preliminary hearing.

31. However, I do not agree that the preliminary hearing would not have been necessary if the concessions had been made earlier. There was an outstanding issue about disability and I did not make a judgement that was entirely in accordance with the claimant's case because I found that her impairment was short-term memory loss and concentration rather than the

aneurysm. This reflects the approach both parties adopted to the question of disability which was using medical conditions rather than impairments. It is also quite likely that the preliminary hearing would have remained listed for one day even if the respondents had made their concessions some months in advance of the Hearing. This is because it still considered whether the claimant suffer from a disability in respect of one area of impairments and it is extremely unlikely that the preliminary hearing would have been vacated if this was a live issue. I also consider that it is unlikely that the preliminary hearing would have been shortened as it is quite standard for a preliminary hearing on the issue of disability to last for one day. The claimant's representative seems to labour under the common misapprehension that the hearing is listed for the length of time that the parties are in the Tribunal room. This is incorrect the listing is for reading in time and the time it takes to write the decision. Therefore, I do not accept that there was much waste of time or costs in relation to the actual preliminary hearing itself.

32. I do however accept that a much earlier concession would have greatly reduced the preparation time relating to the preliminary hearing and reduced the number and volume of correspondence between the parties in the months prior to the preliminary hearing. I recorded in my Judgement following the 27 October 2021 preliminary hearing that the bundle ran to almost 500 pages and included a very substantial amount of medical documentation most of which related to over 10 years ago and/or after the date of termination of employment. At the 27 October 21 hearing the claimant's representative stated that most of the bundle was irrelevant and identified six pages or sections that were relevant.

33. To summarise the above, I conclude that:

a. the respondents were unreasonable in making the concessions about most of the claimant's disability five working days before the preliminary hearing on 27 October 2021 when they had been provided with all the information on which they could make their decision by 12 May 2021; and
b. that this did result in some wasted costs in relation to the preparation for the preliminary hearing on 27 October 2021.

34. The respondents have provided no reason as to why the concession was made so late.

35. As I have decided that the respondents have acted unreasonably in part of the way they have conducted this case I must then consider whether I should exercise my discretion to make a costs award. Two of the respondents are individuals and I have no information about their personal circumstances. I am not prepared to exercise my discretion to make a costs awarded against them. However, I have decided to make a costs order against the first respondent (Coeliac UK) in the amount of £3,000. I consider that the first respondent has failed to act in the interests of rule 2 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. I note that the first respondent is a charity but I have been provided with no information to argue that they would have a difficulty paying this award.

Employment Judge **Bartlett**

Date 29 June all 2022

JUDGMENT SENT TO THE PARTIES ON

16/7/2022

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FOR THE TRIBUNAL OFFICE