Case Number: 2301915/2018

EMPLOYMENT TRIBUNALS

Claimant: **Ms M Goodsell**

Respondent: **Mrs D Barclay-Bernard and Mrs N Hiller t/a Ellenwhorne Equestrian Centre**

Heard at: **London South (by CVP)** **On:5th & 6th September 2022.**

Before: **Employment Judge R F Powell (sitting alone)**

Representation:
Claimant: Mr Foster, solicitor
Respondent: Mr Hoyle, legal consultant

JUDGMENT

The Respondents are ordered to pay the claimant's costs, to be assessed if not agreed, as a result of their unreasonable conduct of the liability proceedings

REASONS

Introduction

1. The Claimant makes applications for an order for costs arising from the conduct of the respondents in these proceedings. There are two arguments, which for the purpose of introduction I will set out in summary:

2. The respondent Mrs Barclay- Barnard was a witness in these proceedings and her evidence asserted that the claimant had resigned from the respondents' employment on 12th February 2018. She denied that she had dismissed the claimant.

3. Mrs Barclay Barnard was the only witness for the respondent who was able to give direct evidence on the issue of dismissal because only she and the claimant were party to the verbal exchange which led to the termination of the claimant's contract of employment.

4. In the employment tribunal's Findings of Fact document it is evident from the findings set at in paragraphs 72 to 76 that I concluded that her evidence was unreliable and, contrary to her statements in her witness statement and her oral evidence, I found that she had expressly dismissed the claimant.

5. In the claimant's submission those findings of fact prove that Mrs Barclay-Barnard had lied.

6. The claimant submits that had Mrs Barclay- Barnard been truthful from the outset of these proceedings the respondent would have had not alternative but to admit liability in its ET3; the act of dismissal being the pleaded breach of contract. Thus the duration of the liability and Remedy hearing which took place on the 4th 7 5th February 2021 was unreasonably extended by the respondent's untruthful denial of the breach.

7. The consequences of that untruthful denial were the sole cause of the claimant's preparation of witness statements, documents and cross examination on the issue of liability. Further the duration of the February 2021 hearing would, but for Mrs Barclay-Barnard dishonesty, been solely concerned with remedy.

8. The second argument rests on the late application by the respondents to assert that the employment tribunal did not have jurisdiction to determine the breach of contract claim. The claimant asserts that the argument was wholly without merit and it was thereby unreasonable conduct.

9. The claimant asserts that, but for the late application the hearing in February 2021 the tribunal would have been able to determine all matters of liability and possible received all the evidence and submissions on remedy (albeit the judgment would have been reserved). As a consequence the claimant has incurred additional legal costs.

10. Further the claimant asserts that but for the jurisdiction argument, the February 2021 case would have been able use the lost time to reach a decision on liability and hear evidence on remedy. Even if a further hearing was necessary; one day would have been sufficient.

11. Further, and in any event, the claimant has been put to the expense of research, drafting and a telephone preliminary hearing which were solely a consequence of the late, and untenable, jurisdiction argument.

The Respondents' resist the applications on the following grounds.

12. The conduct of the parties on the 12th February was fraught and undocumented; it was far from clear what had happened and needed an objective assessment; that is clelarly so given the Findings of Fact.

13. In any event, it was not unreasonable to resist the claim or to put the claimant to proof.

14. The Findings of Fact did not conclude that Mrs Barclay -Barnard was dishonest. She was found to be unreliable; unreliability does not equate to unreasonableness, that is particularly so in this case.

15. Secondly, the claim would, regardless of a hypothetical admission of the breach of contract, have required the determination of the jurisdiction point and the remedy point.

16. The remedy issues , taking into account the witness evidence and oral judgments of the 5th and 6th September 2022 hearing would have occupied at least a day, more likely a day and a half in any event.

17. That the application to amend the response to assert a lack of jurisdiction was reasonable conduct; the point was a novel one, it was one which I had allowed to be determined, and that it failed did not make it unreasonable at all.

Discussion

18. It is necessary for this judgment to be read in the context of five other documents; the Findings of Fact, dated 24th February 2021, the amended response, the Judgment on jurisdiction dated 2nd March 2022 and the Judgment and Reasons from the 5th& 6th September 2022 remedy & costs hearing.

19. I have for my own part also considered the evidence put before me at the liability hearing of February 2021.

20. There are two broad themes in the applications and I set out aspects of the documents which lie at the core of the parties' respective submissions. The pertinent paragraphs from my Findings of Fact document stated:

"*72. I found Mrs Barclay- Bernard to be the least reliable of the witnesses. On a number of occasions, she failed to answer direct questions and took the opportunity to make a statement tangential or at a distance from the question asked.*

73. She was not able to adequately explain the conflict between her correspondence of the 17th and 22nd February and her evidence in chief.

74. Her evidence indicated that at the time of her telephone call to the claimant on the 12th February she had lost trust in the claimant and had it in mind to take some form of disciplinary action against her. I also find that the sudden loss of the income from the livery of the claimant's horses was most unwelcome to her. I also find that she was of the view the claimant had lied about her sickness absence.

75. Taking all of the above into account and, reminding myself that it is the claimant that bears the burden of proof, I consider that the claimant's account, to some extent corroborated by her father's actions and the written evidence of Ms Beeching. is more likely to be true than the account of the respondents.

76. I have concluded that Mrs Barclay-Bernard, on learning from her granddaughter of the claimant's alleged dishonesty, coupled with alleged poor time keeping and the removal of her horses decided that the claimant was untrustworthy and showed no loyalty to the business. That was conduct which Mrs Barclay-Bernard could not tolerate. I find that she rang the claimant to inform her that she was dismissed and then promptly informed Keits of her decision; that the claimant's employment had come to an end.

77. For the above reasons, I find that the respondents dismissed the claimant on the 12th February 2018."

21. With respect to the respondent's jurisdiction arguments, in my Findings of Fact I recoded:

"*2. The case was listed for two days to hear the evidence from eight witnesses and to determine liability and remedy, if appropriate. The respective pleaded cases were clear. Before commencing the hearing, the respondents asserted that the Employment Tribunal did not have jurisdiction to determine the wrongful dismissal claim consequent to a combination of provisions of the Education Funding Act 2001 and dicta in an Employment Tribunal decision which was not immediately available.*

3. Mr Foster was not on notice of the point and it was, on Mr Hoyle's short synopsis, novel.

4. Had the respondents' proposed argument been other than a matter of jurisdiction, I would have likely rejected such a very late application.

5. As some time had been lost to technical issues of access to the CVP hearing I decided it was not likely that I would manage to hear all the evidence, submissions and give judgment on liability and, possibly remedy in the available time. I therefore directed that I would hear the evidence and reach my findings of fact but I would not give judgment until the merits of the respondent's jurisdiction point had been determined. This enabled the witnesses to complete their part and, if I concluded that the claimant could not prove the facts upon which the necessary foundation for her claim rested, then the claim would likely be resolved without considering the jurisdiction of the Employment Tribunal."

22. In my judgment on the jurisdiction issue, relevant to the issue now before me, I concluded as follows:

"

24. I note that the Respondents do not argue that the breach of contract claim was out with the Employment Tribunal's jurisdiction.

25. It is also notable that the Respondents' argument makes no reference to the Extension of Jurisdiction order.

26. There is no point put forward in the Respondents' argument which asserts that a claim for breach of contract is not within the Employment Tribunal's jurisdiction. There is no argument that the claim before me falls out with Article 3 of the Extension of Jurisdiction order.

27. On the face of the Respondents' argument (which does not address notice periods set out in the Claimant's Apprenticeship Agreement) there is no suggestion that the Claimant could not maintain a claim damages for the period of one week.

28. I have taken sometime to consider Article (3)(3) and find no evidence that the claim before me falls within any of the exemptions.

Conclusion

29. The whole of the Respondent's submission is an assertion that the claim for seventy one week's loss of income has no reasonable prospect of success.

30. In my judgment the respondent's submission is not an argument on jurisdiction, it is an argument on quantum."

23. None of the above findings or conclusions have been subject to appeal or an application for reconsideration.

The relevant employment tribunal rules

24. The relevant principles to be considered are as set out in the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 and, particularly, Rule 78 which provides as follows:

25. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 apply to all tribunal proceedings after 29 July 2013, whenever those proceedings commenced.

26. Schedule 1 Rule 76 provides that a Tribunal may make a costs order and shall consider whether to do so where the Tribunal is of the view that a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing or conducting proceedings or if the claim or response had no reasonable prospect of success.

27. Accordingly it is apparent that there is a duty upon the Tribunal to consider making a costs order where one of the circumstances set out above has arisen, but then there is discretion whether to do so or not.

28. As is well known there is no general principle in the Employment Tribunal that costs follow the event, in other words that the losing party should pay the winning party's costs. In fact the approach has been that the making of a costs order should be exceptional see Gee v Shell UK Ltd. [2003] IRLR 82. All depends on the exercise of the above discretion.

29. Schedule 1 rule 78 then addresses the question of the amount of a costs order. Different approaches are required dependent on whether the Tribunal is going to specify a sum that does not exceed £20,000 or instead has in view awarding a sum in excess of that.
30. In this case the claimant's cost schedule do not exceed the sum of £20,000.00

31. Schedule 1 rule 84 provides that the Tribunal may have regard to the paying party's ability to pay when considering whether it should make a costs order or how much that order should be.

32. I have a discretion to make an Order for costs where a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing or conducting of the proceedings.

33. Equally, the discretion is engaged where a party pursues either a claim or defence which has no reasonable prospect of succeeding or, to put it as it was termed previously, where a claim or defence is being pursued which is "misconceived".

34. Conduct is vexatious "if an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive" (ET Marler Ltd v Robertson [1974] ICR 72).

35. With regard to unreasonable conduct it is necessary for the Tribunal to consider;

    "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."

    (Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78).

36. It should be noted that merely because a party has been found to have acted vexatiously, abusively, disruptively or unreasonably or where a claim or response has no reasonable prospect of succeeding, it does not automatically follow that an Order for costs should be made.

37. Accordingly it is apparent that there is a duty upon the Tribunal to consider making a costs order where one of the circumstances set out above has arisen, but then there is discretion whether to do so or not.

38. As is well known, there is no general principle in the Employment Tribunal that costs follow the event, in other words that the losing party should pay the winning party's costs. In fact the approach has been that the making of a costs order should be exceptional see Gee v Shell UK Ltd. [2003] IRLR 82. All depends on the exercise of the tribunal's discretion.

39. Once relevant conduct has been found, a Tribunal must then go on to consider whether an Order should be made and, particularly, whether it is appropriate to make one.

40. When deciding whether an Order should be made at all and, if so, in what terms, a Tribunal is required to take all relevant mitigating factors into account.

41. With the above in mind I turn to the two applications made by the claimant.

The Respondent's Amendment Application

42. At the outset of the February 2021 hearing, some time was taken in addressing the respondents' proposed amendment to their Response and, in particular, trying to identify the nature of the jurisdictional argument they made. With hindsight, it has become apparent why it could not easily be understood at that time. Time was also occupied with the claimant's objection and her criticism of the respondent's delay in raising a matter of jurisdiction in February 2021; in respect of a claim that had been presented to the employment tribunal in May 2018.

43. At the heart of the claimant's submission is my finding that the respondents' "jurisdiction" argument was not concerned with jurisdiction at all; it was an argument on the quantum of loss. Had that been articulated in the February 2021 liability hearing the process of restricting the liability hearing to "fact finding" would not have occurred, nor would the subsequent steps which lead to the judgment on jurisdiction of March 2022

44. Mr Hoyle is correct that I gave the argument some credence and I made the subsequent directions to enable the determination of the respondents' jurisdictional argument. However, my decision was based on a degree of confidence that a professional employment law practitioner's assertion was correct, insofar as it was asserted as a matter which went to the employment tribunal's jurisdiction to determine the claim before it.

45. With regard to unreasonable conduct it is necessary for the Tribunal to consider:

"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." Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78**).**

46. It should be noted that merely because a party has been found to have acted vexatiously, abusively, disruptively or unreasonably or where a claim or response has no reasonable prospect of succeeding, it does not automatically follow that an Order for costs should be made.

47. Once such conduct or issue has been found, a Tribunal must then go on to consider whether an Order should be made and, particularly, whether it is appropriate to make one.

48. In my March 2022 judgment I concluded that the respondents' argument did not articulate, nor even assert, a want of jurisdiction; it was an argument that the claimant's quantum of loss arising from dismissal was nothing or negligible. It was an argument on one aspect of the claimant's remedy.

49. I find that it was unreasonable to assert an argument on an aspect of quantum of loss amounted to want of jurisdiction to determine the whole claim for breach of contract .

50. That is particularly so when the respondents' have had the benefit of expert employment law advice, from two different advisors, since July 2018 and pleaded jurisdictional points in their ET3.

51. The consequences of that unreasonable conduct was the loss of about 40 minutes hearing time in February 2021 and the cost to which the claimant was put in addressing the jurisdiction issue up to the receipt ,and reading of , the March 2022 Judgment.

Is it just and equitable to consider making a cost order in this case?

52. I take into account that the respondents were legally advised and so I presume, in the absence of any submission to the contrary, they were advised on this issue, and understood the merits of the argument which they instructed Mr Hoyle to present.

53. I find that the consequence of the respondents' unreasonable conduct was a considerable amount of additional legal costs which the claimant incurred.

54. I therefore find that it is just and equitable to afford the claimant redress for this unreasonable conduct of the respondents.

55. The Respondents own and run an established equine business with a house, additional buildings and a substantial parcel of land. On her evidence in February 2021, Mrs Hillier was in receipt of a wage from employment.

56. On the information before me there is no reason to consider that an award, the sum of which has yet to be determined, could not be paid to redress the expense the claimant has incurred consequent to this aspect of the respondents' unreasonable conduct.

57. I have therefore concluded that a costs order will be made against the respondents with respect to their unreasonable assertion of a jurisdiction issue.

58. I have considered the claimant's cost schedule but it is not possible to deduce which items are costs incurred as a consequence of respondents' jurisdiction argument or what part of the costs incurred in making this application are attributable to this aspect of the respondents' conduct.

59. Accordingly, I have made directions in respect of the above.

The Conduct of Mrs Barclay- Barnard

60. The principle dispute between the parties was whether Mrs Barclay-Barnard had lied in her evidence before the tribunal and, given the claimant seeks her costs from the date on which she issued the ET1, whether the respondents unreasonably denied the dismissal of the claimant in the ET3.

61. The respondent referred to the guidance in HCA International Limited v JL May-Bheemul UKEAT/0477/10/ZT, in which Cox J said, at paragraph 39:

"...a lie on its own will not necessarily be sufficient to found an award of costs. It will always be necessary for the Tribunal to examine the context and to look at the nature, gravity and effect of the lie in determining the unreasonableness of the alleged conduct."

62. The respondent also referred to the guidance found in Kapoor v The Governing Body of Barnhill Community High School [2013] UKEAT/0352 where it is made clear that a finding that a party lied is not sufficient to find unreasonable conduct; there must be a factual exploration of the importance of that untruth to the particular proceedings.

63. The Court of Appeal decision in Yerrakalva v Barnsley MBC [2012] ICR 420, in which the main Judgment was given by Mummery LJ, at paragraphs 39-41 he said:

"39. I begin with some words of caution, first about the citation and value of authorities on costs questions and, secondly, about the dangers of adopting an over-analytical approach to the exercise of a broad discretion.

40. The actual words of Rule 40 are clear enough to be applied without the need to add layers of interpretation, which may themselves be open to differing interpretations. Unfortunately, the leading judgment in McPherson [McPherson v BNP Paribas (London Branch)] delivered by me has created some confusion in the ET, EAT and in this court. I say 'unfortunately' because it was never my intention to re-write the rule, or to add a gloss to it, either by disregarding questions of causation or by requiring the ET to dissect a case in detail and compartmentalise the relevant conduct under separate headings, such as 'nature' 'gravity' and 'effect.' Perhaps I should have said less and simply kept to the actual words of the rule.

41. 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. The main thrust of the passages cited…from my judgment in McPherson was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission, I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances."

64. The issue that Mummery LJ was addressing was to distinguish between the principle of relevance, which means that the Tribunal must have regard to the nature, gravity and effect as factors relevant to the exercise of its discretion, from a requirement that the Respondent

had to prove that specific unreasonable conduct by the Applicant caused particular costs to be incurred. The former is necessary the latter is not.

65. The respondents correctly identified that I did not expressly state that Ms Barclay-Barnard had lied in her evidence. That, of itself would not be a determinative submission, where such a conclusion is the natural reading of the findings of fact: Daleside Nursing Home Ltd v Mathew UKEAT/0519/08, [2009] All ER (D) 99.

66. Further in cases where a tribunal expresses a conclusion that a witness did not lie, that does not exclude a finding of unreasonable conduct in the proceedings: Topic v Hollyland Pitta Bakery UKEAT/0523/11, [2012] All ER (D) 250.

"[27] What emerges, in our judgment, from the authorities to which we were taken is this: first that the fact that a Claimant has based his or her claim on lies does not lead automatically to a finding either that the proceedings have been conducted unreasonably or that they have been commenced and conducted on the basis that they were misconceived; secondly, the fact that there have been no lies, equally, does not mean that there cannot be a finding that the proceedings have been brought or conducted unreasonably or as misconceived; and thirdly, it is a question in each case for the tribunal, in making their findings within r 40(3) of Sch 1 to the 2004 Rules and in exercising their discretion, if they have found as a matter of fact that there has been unreasonableness in conducting the proceedings or that the bringing or conducting of the proceedings has been misconceived, to look at the whole picture, bearing in mind that costs are rarely awarded in the Employment Tribunal and that the ordinary common law principles under the CPR do not apply."

67. The question that I have to determine is whether Mr Barclay- Barnard's untrue assertion (that the claimant resigned) was unreasonable?

68. At the liability hearing, and in my consideration of this application,n I have taken into account the comments of Mr Justice Leggat in Gestmin SGPS S.A. v Credit Suisse (UK) Limited (2) Credit Suisse Securities (Europe) Limited, High Court 2013. His comments were in the context of a commercial trial, and although now adopted as guidance in one part of the Civil Procedure Rules, they are not in any sense a direction for employment tribunals. At paragraph 15 of his judgment he stated:

"15. An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.
While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.

16. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In

fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory)."

69. I take into account the fallibilities of the human memory in the context of the fact that, in July 2018, five months after the dismissal, the Respondents were able to articulate the view that the claimant had resigned and to deny dismissal.

70. I also take into account that, on the witnesses' evidence and my findings, the parties were in an emotionally charged state and the dismissal was neither planned nor well considered or documented soon after the event.

Conclusions

71. Mrs Barclay-Barnards evidence that the claimant resigned was not, in my judgment, true.

72. The consequence of her statement was the respondents' denial of a breach of contract, by reason of Mrs Barclay-Bernard's dismissal of the claimant. That in turn lead to contested proceedings on liability, effectively up to the 24th February 2021. In that period the claimant incurred considerable legal costs to establish that the respondent's denial of her dismissal was untrue.

73. This was not a case where, on the evidence, there was any credible scope for confusion; one party asserted an express, and unambiguous, statement of dismissal, the other; an express and unambiguous resignation.

74. Mrs Barclay Bernard did not indicate she had any difficult in her recollection, or was otherwise uncertain of what she had said to the claimant.

75. The fact that I did express a finding of Mrs Barclay-Bernard's motivation for her untrue statement of fact, does not, of itself, make the untrue statement reasonable.

76. Taking into account all of the above, in my judgment the conduct of the respondents, through Mrs Barclay-Barnard's untrue denial of a dismissal, was unreasonable conduct.

Should a costs award be ordered.

77. As I have noted ,above, the consequence of the respondents' unreasonable behaviour was the denial of the breach of contract. The denial of that breach amounted to a denial of

liability for those claims which stemmed from the dismissal and necessitated the liability hearing in February 2021 for which a substantial number of witness statements were served.

78. The presence of unreasonable conduct does not of itself justify an award of costs; the effect of the unreasonable conduct must have a had a sufficient effect upon the proceedings to warrant the exercise of the tribunal's discretion in favour of the receiving party and the mitigating circumstances of the potential paying party must also being weighed. I have noted the potential mitigating circumstances which I have identified.

79. Had the breach been admitted, as some of the smaller claims were, it is more likely than not that the claim would have been resolved at a one day in 2021.

80. I also remind myself that cost awards are, and should remain, the exception in employment tribunal proceedings.

81. Having set out all of the material factors present in this case; in my judgment it is in the interests of justice to make an award of costs in respect of the unreasonable conduct of the respondent's untrue denial of their dismissal of the claimant.

82. Accordingly, unless the parties reach a settlement a further hearing will take place to determine that amount of the costs to be paid. A separate directions order will be sent to the parties.

Employment Judge R F Powell
Dated: 02 December 2022