EMPLOYMENT TRIBUNALS

Claimant: **Miss D Threader**

Respondent: **The Chief Constable of Gwent Police**

Heard at: **Cardiff (by video)** **On: 12 December 2022**

Before: **Employment Judge C Sharp (sitting alone)**

Representation:
Claimant: Mr Banham (Counsel)
Respondent: Mr Wynne (Counsel)

JUDGMENT having been sent to the parties on 13 December 2022 and reasons having been requested by the Claimant in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

1. This is a decision about whether the conduct of the Respondent during these proceedings has been unreasonable and should result in a costs order under Rule 76. The Claimant complains of two matters:

    a. that the Respondent persisted until today's hearing with the application to strike out the claim/rejection of claim under Rule 12 due to an issue about the ACAS Early Conciliation certificate and the Respondent's name in the ET1 when neither was the correct legal name of the Respondent and;
    b. the application by the Respondent to have the Police Federation of England and Wales added as a Second Respondent.

2. I have reminded myself that the definition of "*unreasonable*" bears its natural or normal English meaning; it is often said that a Tribunal knows whether something is or is not reasonable by looking at it. It is not inherently unreasonable to withdraw a claim or application, and in fairness the application

made on the Claimant's behalf has not been put forward on that basis. What Mr Banham has submitted is that the costs incurred by the Claimant by attending today were effectively thrown away when the Respondent did not withdraw the ACAS early conciliation issue until after the discussion between the parties and with myself.

3. It is relevant for me to note that ground 1a, above, was raised at a preliminary hearing before Employment Judge S Jenkins, who recorded in his Order of 11 August 2022:

   "*I indicated to the parties that I could see the potential arguments relating to the first two grounds*" [the first two grounds included in this application]

4. I have struggled with this particular matter because on reading Rule 12(1)(f) and on looking at the ACAS Early Certificate and the ET1, the Respondent's argument was not made out. The same name of "*Gwent Police"* is used in the Certificate and the ET1, and that is all that Rule 12(1)(f) requires. It does not deal with the scenario where the wrong name was used in the ACAS Certificate and therefore effectively the Claimant is put in the position where to get through the rejection stage, they need to put the wrong name in the ET1 and state in the rider to the ET1 the correct name. This is what happened in this case.

5. It is my view that there was no breach of Rule 12(1)(f) and the argument that there was by the Respondent was doomed to fail.

6. However, I take account of the fact that the Respondent persisted with the application in circumstances where a Judge previously recorded the point as being arguable. I consider this a relevant factor when examining the reasonableness or otherwise of the Respondent's conduct.

7. It is also fair to reflect that any professional advocate when faced with a Judge whose opening remarks are along the lines of "*I don't quite understand how this application works having looked at the Rules and the relevant documents*" is acting reasonably and in accordance with the overriding objective to take advantage of the offer of a short adjournment to reflect, take instructions and, where appropriate, withdraw.

8. In these circumstances, I do not consider the Respondent's conduct to be unreasonable in respect of ground 1a.

9. I considered separately the issue of the Respondent's application to add the Police Federation of England and Wales as a Second Respondent. This arose after Judge Jenkins dealt with the matter in August and arises in correspondence from the Respondent dated 18 November 2022 and then amplified on 7 December 2022.

10. In response to the letter of 18 November 2022, the Claimant responded on 1 December 2022 saying that it was unclear the legal basis on which the Respondent contended that joining the Police Federation into the proceedings. The letter also said that the Claimant did not support the application, but not in strong terms – the disagreement was evident though. This morning I asked Mr Banham on behalf of the Claimant whether the Claimant resisted the application; the answer was unequivocally yes. I further asked if the Claimant understood the potential risk that she was running; again, I received an unequivocal affirmative. Despite the clear position of the Claimant's Counsel this morning, Mr Wynne (on instructions I accept) persisted with the application to try to add a second respondent whom the Claimant did not wish to pursue. It therefore seems to me that it would have made no difference had the Claimant's solicitors' response on 1 December gone beyond saying the Claimant does not support and said in the same unequivocal way as Mr Banham this morning that the Claimant will not bring a claim against the Police Federation of England and Wales. If the Respondent was going to proceed with the application this morning after confirmation of the Claimant's position, it is fair to say on the balance of probability that it would have persisted in doing so in any event.

11. Mr Wynne appropriately and professionally drew my attention to the precedent of ***Beresford -v- Sovereign House Estates and another*** **[2012]** ICR Digest D9 & D10. As the reasons for my Order refusing to add the proposed second respondent set out, this case is binding upon the Tribunal and is not supportive of the Respondent's application. It echoes the common-sense concerns that I had raised at the hearing about how a claim against the Police Federation would operate in the teeth of the unequivocal resistance of the Claimant. In the circumstances, I conclude that persisting with the application in light of the obvious practical problems, the letter of the Claimant's solicitor of 1 December 2022 and *Beresford,* was unreasonable conduct of the proceedings by the Respondent.

12. The next stage of a costs order is whether I should use my discretion to make a Costs Order. I heard submissions on this point after making my stage 1 decision. I concluded that I would not exercise my discretion to make a costs order against the Respondent.

13. I have a wide discretion, but my discretion is not unfettered. I am required to consider the relevant factors. One of the relevant factors that occurred to me at the end of Stage 1, but I considered it to be more appropriately a matter for this stage was realistically working out the costs that were incurred due to the unreasonable behaviour identified; I thought that it would be difficult to do so for a number of reasons. First, I have already found that making and persisting with the ground 1a until today was not unreasonable.

14. In addition, it was not until this morning that I was notified that there was a second claim against the Respondent by the Claimant regarding the matters in dispute between them; the Respondent did not know until I told it of the second claim. Due to the need to consolidate the claims as they are based on common facts, it means that case management matters cannot now be addressed today, and a further case management hearing will be required for both claims.

15. I considered wider issues. It is relevant that the Respondent is a large organisation, and is a publicly funded organisation. Do the circumstances justify the making of a costs order to be paid from public monies in these straightened times? I have also borne in mind that Mr Banham has explained that the Police Federation is funding the Claimant's litigation; a factor in exercise of my discretion may a greater weight in favour of granting the order if a private individual is funding their own costs, as opposed to a trade association. Again, though this point does not take me very far because if the conduct is unreasonable and it is just and appropriate for a costs order to be made, I should do so regardless of the fact that the Claimant's litigation has been funded by the Federation or the fact that the Respondent is a public organisation.

16. Stepping back and taking everything into consideration, and bearing in mind that costs in this jurisdiction are the exception, rather than the rule, I am not persuaded that it is appropriate in the circumstances to grant a costs order. This hearing would have taken place in any event. While costs have been incurred in preparing a bundle and for the hearing, the bundle has not been of much assistance (I have had to use the administration file to see all the relevant correspondence); I doubt I would have awarded much for preparation I the circumstances those instructing Mr Banham. At its highest, the most I was likely to award was Mr Banham's costs of attendance today. Given the conclusion that today's hearing would have taken place as the Tribunal Judges were unaware of the second claim until today, the costs of attendance would have been incurred in any event. Accordingly, no costs order will be made against the Respondent in respect of its unreasonable conduct of the proceedings identified in this decision.

Employment Judge C Sharp
Dated: 3 February 2023

REASONS SENT TO THE PARTIES ON 6 February 2023

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche