EMPLOYMENT TRIBUNALS

Claimant: Mrs L Vivian-Jones

Respondent: Parity for Disability

Heard at: Watford (by CVP) **On:** 10 January 2022

Before: Employment Judge Dobbie (sitting alone)

Representation
Claimant: In person
Respondent: Mr S Crawford (counsel)

RESERVED JUDGMENT

1. The Claimant's application for preparation time costs is refused.

REASONS

Procedural Background

1. The matter came before the tribunal on 10 January 2022 for a one-day preliminary hearing to determine whether the Claimant was a disabled person within the meaning of s.6 Equality Act 2010 at the material times relevant to her claims. Having heard evidence from the Claimant and having received further documents during the course of the hearing (about which see below) I found that she was disabled at the material times.

2. The Claimant's substantive claims proceeded to be determined before EJ Hawksworth sitting with members and a reserved judgment dismissing all claims was sent to the parties on 11 November 2022. The Claimant thereafter applied for a preparation time order ("PTO") for costs in respect of the preliminary hearing before me on 10 January 2022 only (not the final hearing).

3. The application was said to be 'to compensate myself and my 3 witnesses for the time and impact of the preparation process for the hearing on 10th January 2022.'

4. The basis for the application is stated to be that: 'during the hearing on the 10th January 2022. I would refer to comments made on the day by their Counsel Mr Crawford who advised that if had he had a copy of my Medical report provided by the respondent in the case he would have advised the respondent to concede and therefore this hearing would not have been necessary.'

5. The medical report referred to is a letter of a Consultant Gastroenterologist dated 7 October 2021 ("the Report"). The Claimant's application therefore appears to be that the Respondent should have conceded the issue of disability by reason of the Report without the need for her to have attended or prepared for the hearing on 10 January 2022 and that its failure to do so was unreasonable and she should be compensated for the preparation time costs entailed.

6. The Respondent maintains that it was not given a copy of the Report until part-way through the hearing on 10 January 2022, such that it cannot be criticised for failing to have regard to it prior and that therefore contesting disability was reasonable.

7. I received numerous submissions from both parties on the Claimant's application, into late February 2023.

Findings of fact

8. Prior to the hearing on 10 January 2022, I had been provided with: (1) a short bundle comprising 88 pages of evidence; (2) an email from the Claimant, dated 21 October 2021, to the tribunal and Respondent with approximately 50 attachments, not all of which would open; and (3) an email from the Respondent's solicitors dated 19 August 2021 stating that the Respondent did not concede the disability issue and giving reasons why.

9. At the outset of that hearing, I confirmed what documents I had and the parties confirmed they were the totality or documents to be considered. However, in respect of the Claimant's email of 21 October 2021, she stated that all attachments should open and she was concerned that some of the attachments did not open. I therefore took a break to enable her to send the original email (as sent to the Respondent's solicitors) directly to me to see if the attachments worked in the email sent to the Respondent. I adjourned from 10:35 to 10:55 to do so. Upon reconvening, it was agreed that the parties would break until noon to allow Mr Crawford to review the approx. 50 attachments and check he had already seen them and if not to adjust his cross examination accordingly.

10. One attachment which had been attached to the original email (and could be opened) and which was also attached to the re-sent email (and could be opened) was a Word document called 'cons letter for tribunal edited.docx'. This was a Word version of most (but not all) of a Consultant Gastroenterologist's letter to the Claimant dated 7 October 2021, namely the Report.

11. The cover email (of 21 October 2021) from the Claimant to the Tribunal and Respondent containing the approx. 50 attachments stated:
'I have not enclosed the full medical report by my Consultant to ensure my GDPR is upheld I have shared some extracts as attached to this email. I do not consent to my confidential detailed Colonoscopy report being shared with your client. Please delete my confidential medical report from all of your records with immediate effect. I do not consent to you keeping it on file and would like written confirmation that this has been completed.'

12. On 28 October 2021, the Respondent's solicitors wrote to the Claimant stating:
'Please note that I have included your medical report from Consultant Gastroenterologist at pages 300-301. Please can you confirm if we can share this with our client. If we cannot share this with our client then we will have to remove it from the bundle'.

13. The Claimant replied the same day stating:
'I have in my previous email confirmed that all my medical evidence will be shared directly with the court only. Please confirm that you have deleted my medical reports from you records as previously requested to do on 21/10/21 @ 02.11am. Please confirm that these have Not been shared with your client. For clarity you and your client do not have my consent to retain any of my personal medical reports on your files now or at anytime. Once I have received your confirmation of redaction and or deletion regarding confidential information I will look through the bundle.'

14. The Respondent sent a draft bundle to the Claimant and she replied on 02.11.21 stating:
'Thank you for confirming you have not shared my confidential medical reports with your client I do not consent to them being shared by yourselves at anytime with anyone whatsoever, I would like them to be deleted from you files and confirmation by return email as I do not consent to you retaining them on file'

15. It is not clear from these emails if the Claimant had sent the Respondent the original Report (on headed paper) or whether what she referred to in this correspondence was the transcribed version she had produced as a Word document (which was incomplete) as attached to the email of 21 October 2021. In any event, whichever document it was, she was clear to the Respondent that she did not give consent for that document to be used by the Respondent.

16. On 10 January 2022, the matter then came before me for determination based on the evidence stated above. At 12:10, the Claimant was sworn in to give evidence and cross examination commenced at 12:12. During her live evidence, when being cross examined on the Word document called 'cons letter for tribunal edited.docx' (the incomplete Word version of the Report) counsel for the Respondent put to the Claimant that she had typed that document herself, which she denied. She stated it was the 'exact letter that my consultant wrote. The tribunal has been given a complete copy of that letter with my NHS number etc included. But for protecting my GDPR rights I have typed it out.'

17. I intervened to inform the Claimant that there cannot be two sets of evidence: one for the tribunal to see confidentially and one for the Respondent. I informed her that if she wanted to rely on the original Report, she would either have to send an original copy to the Respondent or rely solely on the typed one that she had already provided to the tribunal and the Respondent. The Claimant confirmed she was 'happy to provide the original document in its entirety' she added that 'this was discussed at some length in initial hearing that I was entitled to redact parts, so I apologise.'

18. It was agreed that she would send this document over the lunch break and Mr Crawford could cross examine her on it after.

19. It was not until 13:13 on 10 January 2022, during the lunch break, that the Claimant provided the tribunal and the Respondent with an unedited copy of the original letter from the Consultant Gastroenterologist dated 7 October 2021 (the Report). It was on headed paper and contained significant relevant evidence which indicated that the Claimant did satisfy the s.6 Equality Act 2010 definition of a disabled person. The judgment on this issue relied heavily on the content of this Report.

20. Also during the hearing on 10 January 2022, around 13:40, it transpired that the Claimant had sent an email to the tribunal on 2 November 2021, not copying in the Respondent, and attaching various documents which were said to include medical reports and urging the tribunal to keep them confidential and not share them with the Respondent. I did not have a copy of the email itself, just screenshots as supplied by the Claimant part way through the hearing on 10 January 2022. Therefore, I cannot know what the attachments were. In any event, given that the Respondent had not been copied into the communication, it would not therefore have been appropriate for the tribunal to have considered and/or relied on them.

21. The hearing on 10 January 2022 reconvened at 14:00 and the Respondent Counsel was given an opportunity to ask any further questions arising from the Report but declined that opportunity. In submissions, Counsel for the Respondent intimated that if the Report had been disclosed prior, with permission to view it, the preliminary hearing may well not have been needed. He did not go so far as to say the Respondent would have conceded disability, but had he done so it would have been perfectly reasonable and understandable (given the content of the Report) and his inference was thus.

22. I found in favour of the Claimant's contention that she was disabled in law in reliance on evidence contained in the Report.

23. The matter proceeded to a trial in August 2022 before EJ Hawksworth and members, following which the claims were dismissed in a reserved judgment sent to the parties on 11 November 2022.

Law on preparation time orders / costs

24. The power to make costs orders and preparation time orders is set out in rules 75 to 79 of the Employment Tribunals Rules of Procedure 2013, which state:

Costs orders and preparation time orders
75….

(2) A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

…

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; [or

(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins]…

…

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

25. In employment tribunals, costs are the exception not the rule (unlike in the civil courts where costs follow the event). However, in **Power v Panasonic (UK) Ltd [2003] IRLR 151**, it was noted that, while costs are exception rather than the rule, this did not mean that the facts of a case have to be exceptional for a costs order to be made. All that is necessary is that the relevant test is satisfied.

26. A tribunal may make a costs or preparation time order, and must consider whether to do so, where it finds that: 'A party, or their representative, has acted vexatiously, abusively, disruptively, or otherwise unreasonably in the bringing or conducting of the proceedings, or a part of them' or where 'Any claim made in the proceedings by a party had no reasonable prospect of success' (Rule 76(1)(a)-(b)).

27. Whether conduct is unreasonable, vexatious etc is a matter of fact for the tribunal. Unreasonableness has its ordinary meaning and should not be taken by tribunals to be the equivalent of vexatious (**Dyer v Secretary of State for Employment UKEAT/183/83**).

28. The tribunal must not move straight from a finding that conduct was vexatious, abusive, disruptive or unreasonable to the making of a costs order, without first considering whether it should exercise its discretion to do so. Hence, even if the tribunal finds that one of the tests is met such that it *can* award costs, there is a discretion to be applied as to whether costs *should* be awarded: it is a two-stage determination.

29. As to the second stage, the discretion, case law has emphasised that the tribunal has a wide and unfettered discretion and the EAT will not use 'legal microscopes and forensic toothpicks' to 'tinker' with it **Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78**.

30. In exercising a discretion whether to order costs, the tribunal does not have to find a precise causal link between any relevant conduct and any specific costs claimed. However, the Court of Appeal's guidance in **Yerrakalva** stated that: '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.'

Conclusion

31. In the present case, as found above, the Claimant had not provided a copy of the original Report to the Respondent before the hearing on 10 January 2022 and/or had she done so in the email of 21 October 2021 (i.e. if the attachments had included the original Report and had those links been effective) she had not given the Respondent authority to rely on it, use it, or place it in a bundle of evidence. All that she had agreed was use of the Word document which recorded some but not all of that report and which was not recognisable as an authentic consultant's report / letter.

32. The Claimant must have produced the Word document (either by having typed out or cut and pasted from the original Report) and edited it by removing parts she wished to redact. Of course, claimants are entitled to withhold consent to disclose medical records and/or parts of medical records. They are entitled to redact parts. However, rather than blacking out the parts she had wanted to redact in the original headed letter (on headed paper), the Claimant had instead produced an entirely separate document which was not on headed paper and which transcribed the parts she did want to rely on and omitted the parts she wished to retain confidentiality in respect of. Many of the parts she had edited out were highly relevant to the issue of long-term nature of her condition and ultimately informed the decision made by me that she was disabled within the meaning of s.6 Equality Act 2010 at the material times. It would have been to her benefit to have granted the Respondent permission to view and rely on the full original Report.

33. I do not consider that the Respondent acted unreasonably by contesting disability up to 10 January 2022 on the basis of the material that the Respondent had been authorised to view up to that time. This is because it had not been given (or had not been given permission to rely on) the full content of the original Report. It had been given a Word document which the Claimant stated was an accurate partial transcript of a letter from a consultant. It is not unreasonable for the Respondent to have doubted the document's authenticity given that it was not in fact a redacted copy of the original. From the other documents that had been provided and which were originals, the question of disability was not as clear.

34. Therefore, I find that there was no unreasonable, vexatious etc conduct by the Respondent in respect of its approach to the issue of disability on the documents that the Respondent had been given authority to view / rely on up to the date of 10 January 2022. Accordingly, the first stage for the test for awarding PTO costs is not met and the application fails.

35. I wanted to apologise to the parties for the delay in getting this decision to them. The matter was not referred to me until some time after the application had been made (given that I had not presided over the final hearing). Thereafter, there was some delay entailed by ensuring the Respondent had an opportunity to reply to the application in writing. The Respondents' counsel's availability impeded a very swift reply. The Claimant replied thereafter in mid February 2023 and then the Respondent replied further in late February 2023. I then dealt with the matter as soon as I was able to.

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Employment Judge Dobbie

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Date 20 April 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

21 April 2023

FOR EMPLOYMENT TRIBUNALS