EMPLOYMENT TRIBUNALS

In the London South Employment Tribunal

Claimant: **Ms A Osborne**

Respondent: **Xace Limited**

JUDGMENT ON COSTS

The Judgment of the Tribunal is that the Respondent's application for costs is unsuccessful.

REASONS

1. On 6 May 2022 Employment Judge Self wrote:

> *"1. By no later than 7 June 2022 the claimant shall (a) confirm the exact condition which is said to amount to a disability, and when this was first diagnosed; (b) confirm whether this was disclosed to the respondent, and if so to whom and when; and (c) serve on the respondent the following: (i) any medical notes, reports and any other evidence on which the claimant relies for the purposes of proving the diagnosis and nature of this disability; and (ii) an "Impact Statement", that is a witness statement limited to 1,000 words dealing with the effect of the alleged disability on the ability of the claimant to carry out normal day-to-day activities. This should be by reference to the statutory definition of disability in section 6(1) and Schedule 1 EqA and any relevant provision of any statutory guidance or Code of Practice…"*

2. The Claimant provided an impact statement and three documents of medical evidence.

3. The Respondent wrote to the Tribunal on 24 June 2022 expressing the view that the evidence was insufficient.

4. By an Order I made at a Preliminary Hearing on 8 January 2023, the Claimant was to either confirm that the three pages of medical evidence was all that she relied

on, or if not she had to provide the additional documentation by 22 February 2023. A one day Preliminary Hearing was to be listed and subsequently was listed for 3 July 2023.

5. The Claimant provided 7 medical documents, she did not provide her GP records.

6. The Respondent wrote again on 7 March 2023 to the Tribunal saying that the evidence provided was insufficient and that disability was not conceded.

7. On 19 June 2023, two weeks before the one day Preliminary Hearing was to take place, the Claimant provided an Occupational Health report that had been commissioned prior to her employment with the Respondent. The Respondent describes this report as "compelling medical evidence" that the Claimant was "disabled" for the purposes of the quality Act 2010 by reason of her stress, anxiety or depression-related issues. The Respondent then conceded disability on 26 June 2023 and made an application for its costs, later quantified as totalling £12,166.53.

8. The Respondent's costs application is based on "unreasonable conduct" Rule 76(1)(a) and Rule 76(2), because the Claimant is in breach of the Orders to provide her medical disclosure by a certain date. The Respondent requested that the costs application be heard at the final hearing, due to commence on 18 March 2024.

9. The Claimant's representatives responded to the application on 5 July 2023 saying that the medical documentation already provided was sufficient to show she was "disabled", the Claimant had been significantly unwell since March 2023, she had forgotten about the existence of the report and when she remembered she requested it. The Claimant's response said £12,166.53 was disproportionate and that she had been out of work intermittently and had limited funds as a result.

10. The Claimant and Respondent have been professionally represented throughout.

Relevant Law

11. Rule 2 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the "Rules") provides:

> *"2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*
>
> *(a) ensuring that the parties are on an equal footing;*
>
> *(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
>
> *(c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
>
> *(d) avoiding delay, so far as compatible with proper consideration of the issues; and*
>
> *(e) saving expense.*
>
> *A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."*

12. Rule 75 of the Rules provides:

"75.—(1) A costs order is an order that a party ("the paying party") make a payment to—

(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative…"

13. Rule 76(1) of the Rules provides for when a costs order or a preparation time order may 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 …"

14. Rule 76 (2) provides:

"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"

15. Costs orders in the Employment Tribunal are the exception rather than the rule (*Yerrakalva v Barnsley Metropolitan Borough Council and anor* 2012 ICR 420, CA). The discretion afforded to an Employment Tribunal to make an award of costs must be exercised judicially (*Doyle v North West London Hospitals NHS Trust UKEAT/0271/11/RN*. The Employment Tribunal must take into account all of the relevant matters and circumstances.

16. 'Unreasonable' has its ordinary English meaning (*Dyer v Secretary of State for Employment* EAT 183/83). A tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct (*McPherson v BNP Paribas (London Branch) 2004* ICR 1398, CA). This was clarified by Lord Justice Mummery in *Yerrakalva:*

"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." (paragraph 41)

17. When considering an application for costs the Tribunal should have regard to the two-stage process outlined in *Monaghan v Close Thornton* by Lindsay J at paragraph 22:

"Is the cost threshold triggered, e.g. was the conduct of the party against whom costs is sought unreasonable? And if so, ought the Tribunal to exercise its discretion in favour of the receiving party, having regard to all the circumstances?"

18. Rule 77 provides:

"77. 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 judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application."

19. *Rule 84 states that:*

"84. In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay."

Conclusions

20. In accordance with Rules 2 and 77 I have decided the application on the papers. In particular deciding the application without a hearing ensures the parties are on an equal footing, avoids delay and unnecessary expense and is fair and proportionate.

21. The Claimant had provided 3 pages of medical disclosure in 2022 and then 7 documents in 2023 (with some duplication). They showed evidence from the Claimant's GP, a counselling psychologist and a consultant psychiatrist. The Claimant had also provided a detailed disability impact statement. These documents show diagnoses that had lasted for a number of years and in respect of the 9 months in question, show that the Claimant had relevant consultations on 12 occasions and had a number of MED3 certificates. Given the legal test as set out in s.6 of the Equality Act, it is surprising that the Respondents did not concede that the Claimant was "disabled" at that point. Nevertheless, they chose not to do so. The Occupational Health report adds little to the picture that the previous medical evidence had already provided.

22. I note that Rule 76(1)(c) provides one of the grounds for the making of a costs order against a party where a hearing has been postponed or adjourned on the application of a party made less than seven days before the date on which the relevant hearing begins. In the current case the Claimant provided the Occupational Health report 2 weeks prior to the Preliminary Hearing, double the time that is envisaged in the Rules under Rule76(1)(c).

23. The Claimant recalled that she had an OH report at her previous employment and she then made efforts to obtain it. It arrived and it was disclosed to the Respondent 2 weeks prior to the final hearing. It is correct that she should have recalled it existed in 2022 after Judge Self wrote to the parties. She should also have recalled it existed and sought to obtain it after I Ordered her to provide her medical evidence by 22 February 2023. However, I accept the submissions of her representatives that she did not have it in her possession and had forgotten about it. She had also been unwell.

24. Should she have remembered/obtained it at an earlier date? Yes. Was it "unreasonable" (in the ordinary meaning of the word) that she had not sought to obtain it earlier in the context of her impairments and the medical evidence she had already produced? The effect of the late disclosure was not significant, the earlier

medical documents had already shown the diagnoses and the difficulties that the Claimant faced, this was another piece of supporting information. Taking in to account the whole picture of what happened in the case and what was unreasonable about the conduct and what effects it had I conclude that it was not unreasonable. The first part of the test set out at *Monaghan* therefore fails – the Claimant's conduct did not fall within rule 76(1)(a).

25. I must also consider whether to exercise discretion to award costs under Rule76(2) for breaching Tribunal Orders. There is a continuous obligation to disclose documents if they come to light later in proceedings, there is a duty to provide them, even if that means that the party is in breach of an Order. In this case the Claimant did not have possession of the report and had to request it. The impact of the breach was not significant, particularly when considering that the Claimant had already provided medical evidence, the OH report simply added to that existing evidence and that the Respondent had 2 weeks' notice of the new OH report. I therefore decline to exercise discretion to award costs in these circumstances.

26. For the above reasons the Respondent's application for costs is refused.

Employment Judge Burge
17 July 2023