



## EMPLOYMENT TRIBUNALS

### Claimant

### Respondent

Miss A. Joumana

v

Spicehaart Group Services Limited

### RECORD of a PRELIMINARY HEARING IN PUBLIC

**Heard at:** Watford Employment Tribunal

**On:** 17 August 2023

**Before:** Employment Judge Coll

### Appearances

for claimant: Ms. A. Fadipe, counsel

for respondent: Ms. G, Razie, counsel

## JUDGMENT

1. The respondent's application for a costs order under Rule 76 of the Employment Tribunals (Constitution and Rules of Procedures) Regulations 2013 is dismissed.
2. The respondent's application for a wasted costs order under Rule 80 of the Employment Tribunals (Constitution and Rules of Procedures) Regulations 2013 is dismissed.

## REASONS

### INTRODUCTION

1. The claimant issued a claim in the Employment Tribunal on 18 August 2022 for constructive unfair dismissal, direct sex discrimination, harassment related to sex and victimisation.
2. On 27 March 2023, the Tribunal held a preliminary hearing which was attended by the claimant, counsel for the claimant and the respondent and the solicitor for the claimant up. EJ Craft made a direction, in the Case Management Order dated 16 April 2023, requiring the claimant to provide Further and Better Particulars for all her claims, including each and every factual assertion upon which the claimant relied in relation to each claim, including when and where the event happened and who was present. The claimant provided a Further and Better Particulars document. The respondent

was satisfied with all but the Further and Better Particulars for the constructive unfair dismissal claim.

### **RESPONDENT'S APPLICATIONS**

3. On 2 June 2023, the respondent made an application for a costs order against the claimant and a wasted costs order against her solicitor and asked again for a preliminary hearing to particularise the allegations in the constructive unfair dismissal claim and to hear these applications [173]. A preliminary hearing was listed, time estimate one day for 17 August 2023.
4. The respondent's application for a costs order was made under Rule 76 of the Tribunal's rules of procedure. Rule 76 provides that the Tribunal has a discretion to make a costs order in circumstances where a party has acted vexatiously, disruptively, or otherwise unreasonably in the bringing or conducting of the proceedings, or a part of them (Rule 76(1)). I have had regard to Rule 76.
5. The respondent submits that the claimant's conduct in failing to particularise the constructive unfair dismissal claim, despite a direction after the March 2023 Preliminary Hearing and various written requests from the respondent is conduct to justify the Tribunal making a costs order on the basis of the relevant parts of Rule 76 as referred to above. In particular, the respondent stated:
  - 5.1 The claimant has failed to clearly identify what breaches she seeks to rely upon as the basis of her claim for constructive unfair dismissal [175].
  - 5.2 Following receipt of Further and Better Particulars on 28 April 2023, the respondent sent the claimant's representative a revised draft list of issues on 24 May 2023. This email acknowledged that as the List of Issues was directed to be agreed between the parties on 29 May 2023 (a bank holiday) the claimant should revert prior to the bank holiday weekend with comments [175].
  - 5.3 The claimant's representatives returned the draft List of Issues on the bank holiday, 29 May 2023. It was immediately evidence on review of the draft List of Issues that the pleaded repudiatory breaches relied upon by the claimant were not consistent with what had previously been pleaded in the particulars of claim and the Further and Better Particulars, which also differed from each other [176].
  - 5.4 A table comparing the particulars of claim, the Further and Better Particulars in the claimant's draft list of issues was set out [176].
  - 5.5 In particular, the respondent noted that the List of Issues and the Further and Better Particulars differed in the following ways:
    - 5.5.1 The number of alleged breaches of contract have increased;
    - 5.5.2 Allegations a. and d. of the Further and Better Particulars appear to have been abandoned by the claimant;
    - 5.5.3 the following allegations did not appear in the Further and Better Particulars, but have been added in the list of issues:
      - 5.5.3.1. the conduct of Mr Clasby in removing properties from the claimant's book;

- 5.5.3.2. the failure to address the conduct of Mr Clasby
  - 5.5.3.3. the failure to address the issues raised in the fourth grievance in respect of delayed promotion at or shortly after the grievance meeting 27 April 2022; and
  - 5.5.3.4. the failure to engage with the claimant subject access request within the statutory period [176 – 177].
  - 5.5.4 Introduction of new details in two allegations of repudiating breach (examples given).
6. The respondent accused the claimant/the claimant's representative of being at fault in their set of Further and Better Particulars because:
- 6.1 it was presented late at the fault of the claimant's representative and delivered after the expiry of the agreed extension [178 1a.]
  - 6.2 It was expressed in an unreasonably obtuse manner which did not reflect the legal test each head of claim pursued [178 1b.]
  - 6.3 It did not reflect the particulars of claim [178c.] and
  - 6.4 referred to repudiate a breaches for the purpose of a constructive unfair dismissal claim is a finite list but also included references to breach of trust and confidence elsewhere in relation to other heads of claim [178 1d.].
7. The respondent summarises their view in their application: *"it is blatant that the manner in which the claimant's claim for constructive unfair dismissal has been pleaded is erratic, whether in a deliberate attempt to repeat the claim by careless choice of words or a lack of understanding of the claim itself"* [177].
8. The respondent's application for a wasted costs order was made under Rule 80 of the Tribunal's rules of procedure. Rule 80 provides that the Tribunal has a discretion to make a wasted costs order against a representative in favour of any party where that party has incurred costs (a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative (b) which in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay. I have had regard to Rule 80.
9. The respondent submits that the claimant's representative's acts/omissions in failing to particularise the constructive unfair dismissal claim, despite a direction after the March 2023 Preliminary Hearing and various written requests from the respondent are acts/omissions which justify the Tribunal making a wasted costs order on the basis of the relevant parts of Rule 80 as referred to above. The claimant's representative is accused of failing to properly particularise the claimant's constructive unfair dismissal claim in a manner which amounts to an improper, unreasonable or negligent act or omission. In particular, it was unreasonable to:
- 9.1 expect the respondent to be in the position to agree the list of issues on the bank holiday [179 3a]

9.2 set a deadline for respondent's reply giving until noon on 30 May 2023, which was a disproportionately short deadline [179 3b.]

9.3 draft so poorly such that the draft list of issues was an attempt to re-plead the basis of a number of allegations and to plead a new set of repudiating the breaches [179 3 c. and d.].

9.4 Failed to reply to the respondents who complied with the deadline of 30 May 2023, until 1 June 2023, when they asserted they would not correspond with the respondent further on the outstanding. This was an abandonment of the duty to cooperate in preparation of the case [179 4]

### **ALLEGED UNREASONABLE CONDUCT**

10. The tenor of the respondent's applications, written and oral submissions is this: there has been little or no particularisation. In a document separate to the bundle, the respondent presented a table based on the particulars of claim [18 - 34], the directed Further and Better Particulars [98 – 103], a letter from the claimant's representative dated 22 May 2023 [126 – 128] and the latest version of the list of issues dated 10 August 2023 from the claimant's representative [199 – 204]. On their case, this comparative table shows that there are four different iterations, none of which can be said to be particularised and that some allegations are new and the claimant should be directed to make an application to amend in relation to them. They also criticise the tone and approach of the claimant's representative's correspondence with them, which they submit has been counter-productive and obstructive. In their view, the claimant's representative has failed to elicit from the claimant sufficient detail, despite considerable effort having been put into this by the respondent's representatives. It is their view that any competent solicitor would have been able to achieve this and therefore the claimant's representative has been negligent. When asked to specify upon which type of conduct in Rules 76 and 80 the respondent relies, I was told that all apply.

11. The claimant submits that neither has the claimant acted vexatiously, disruptively or otherwise unreasonably in her conduct of the proceedings, nor have there been any improper, unreasonable or negligent acts or omissions on the part of her representative. There have been genuine attempts to particularise the constructive unfair dismissal claim but this has from an early stage been critically hindered by the respondent's tone and approach. It has therefore not been possible to produce anything which has satisfied the respondent.

### **SCHEDULE OF COSTS**

12. The respondent enclosed a signed Statement of Costs. The respondent stated that it had incurred £11,069 in costs (since the provision of the Further and Better Particulars) in attempts to obtain adequate further and better particulars for the constructive unfair dismissal claim. It seeks an order that the claimant or in the alternative, the claimant's solicitor, pay that amount.

## THE DOCUMENTS

13. I had before me the appellant's bundle and the respondent's bundle [219 pages]. They were identical save for the fact that the appellant's bundle had some extra pages at the back (of correspondence). I also had the benefit of most helpful opening notes/skeleton arguments and oral submissions from both counsel. The following were key documents during the hearing:

13.1 Claimant's representative's letter with annotated list of issues commenting on respondent's representative's annotations, dated 10 August 2023 [199 – 204 with particular reference to 201 and 203];

13.2 Particulars of claim dated 18 August 2022 [18 – 34 with particular reference to 20, 22 -24, 27 paragraph 8 (i) – (v), 28 paragraph 11 and 29 paragraph 22, 31 paragraphs 31 – 33 and 33 paragraphs 40 – 48].

## THE HEARING

14. The CVP (remote) hearing was attended by the claimant, the claimant's solicitor and counsel for both parties. There were breaks during the hearing to enable both counsel to take instructions. The first part of the hearing was an interactive discussion between the FTT and both counsel, using five allegations in the list of issues annotated by the claimant's representative dated 10 August 2023 [paragraph 19 (a) to (e), 203] ("List of Issues 10 August 2023"). This was compared in the discussion to the particulars of claim and cross-referenced with a different part of the list of issues 10 August 2023 – paragraph 7a) e) and k). During the second part of the hearing, I heard submissions from both counsel on the costs applications. Due to lack of time, I reserved my decision.

## APPLICABLE LAW

15. I remind myself of the test which I must apply when considering a costs order, and that I should look at the whole picture: see paragraph 41 of *Barnsley MBC v Yerrakalva* [2012] IRLR 78: "***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.***"

16. I am aware of the test which I must apply when considering a wasted costs order: see *Ridehalgh v Horsefield and another* [1994] Ch 205. I also bear in mind *Mitchells Solicitors v Funkwerk Information Technologies York Ltd* UKEAT/0541/07 for the need to exercise great caution.

## DECISION-MAKING

15. The standard of proof that I apply when making my findings of fact is that of the balance of probabilities.

16. I took into account all of the documentary evidence presented to me. I also took account of the written opening notes/skeleton arguments and closing oral submissions of both parties.
17. I do not record all of the evidence and arguments in these reasons, but only my principal findings of fact, those necessary to enable me to reach conclusions about the application of Rules 76 and 80.

## **FINDINGS OF FACT**

### **Particulars of Claim**

18. After detailed discussion with both counsel iteratively and a close examination of the five allegations in the 10 August 2023 list of issues, paragraph 7 in the same document and the particulars of claim, I find that:

- 18.1 Six allegations concerning repudiatory breach have been agreed and will be inserted into the list of issues (by the claimant's solicitor).
- 18.2 The reference to each of these allegations is already in the particulars of claim and I illustrate this below.
- 18.3 These references show that for the 1<sup>st</sup> to 5<sup>th</sup> allegation, the detailed content is also in the particulars of claim. I illustrate this also below.
- 18.4 The 4<sup>th</sup> allegation has its own headed section in the particulars of claim.
- 18.5 The 2<sup>nd</sup> allegation is set out in the section on Constructive Unfair Dismissal [page 33 paragraph 44].

#### **1<sup>st</sup> allegation: removal of property from Claimant's book**

19. This has been particularised as follows: on 10 March 2022, removing 60 Lincoln Road, Enfield from the Southgate book and putting it into the Enfield book.

20. The particulars of claim refer to this at page 20: "10/03/2022 the property 60 Lincoln Road, Enfield, Middlesex, EN1 1JS has been changed over to the Enfield book by Adam Clasby [branch manager at Enfield] to re-let, although he was requested to call me beforehand to prevent damage to the Southgate book...please see email dated 11/03/2022.

#### **2<sup>nd</sup> allegation: lack of timely response to grievances**

21. This has been particularised as follows: failure to respond to the claimant's four grievances by 9 May 2022 but in fact responding with an outcome only on 11 August 2022.

22. The particulars of claim refer to this at page 29 paragraph 27: "*The respondent failed to follow their own grievance procedure. Haart's grievance policy states a 7-working day expectation between meeting and outcome [extract is quoted]. This was an obvious procedural failure. The claimant should have been notified of the outcome on 9 May 2022.*

3<sup>rd</sup> allegation: failure to allocate certain properties to the Claimant's book

23. This has been particularised as follows: in August 2020, Mr. Browne directed the claimant to tell a client that his six properties would need to go onto the Enfield book and by implication, could not go onto the Southgate book.
24. The particulars of claim refer to this at page 22: *"In August 2020, a multi-landlord of mine requested that I let units of his in the EN2 area – I was strictly advised by Nicholas Browne that I am not permitted to let these and I would need to advise the Landlord that we are able to offer the same deal under the Enfield office. If the Landlord did not agree, then we as a company would not be able to take the business. As a result, Enfield have 6 occupied units from the Landlord"*.

4<sup>th</sup> allegation: lack of timely response to DSAR

25. This has been particularised as follows: failure to respond within the articles of GPDR to DSAR dated 14 and 23 March 2022 by the end of the statutory period. The parties are in dispute over when the statutory period ended, in light of the fact that there were multiple (that is two) requests.
26. The particulars of claim refer to this at page 31 paragraphs 31 – 33: *"The claimant raised a data subject access request via email to the respondent's privacy department and Data Protection Officer on 14 March 2022 and 23 March 2022 requesting all information and communication relevant between the claimant and the necessary agents of the company, namely Mr. A. Clasby and Mr. N. Browne. The DSAR to date [18 August 2022] has not been dealt with, in breach of the ICO guidelines. This has resulted in further undue stress and uncertainty for the claimant. The claimant has pursued this request but to date the respondent has not responded. The ICO guidelines state that the DSAR must be complied with without undue delay and at the latest within one month of the request, we note that the respondent has failed to comply with this time limit "*.

5<sup>th</sup> allegation: failure to reprimand Mr. Browne

27. This has been particularised as follows: failure to reprimand Mr. Browne, the Area Manager and the claimant's line manager, for an alleged discriminatory comment (that a woman employee was a "hoover") made at a meeting of managers on 8 March 2022, following the claimant's email to the Regional Director, Ms. Casey on 13 March 2022.
28. The particulars of claim refer to this alleged comment at page 23-24: *"An incident occurred on 8 March 2022 during the M1/North London managers' meeting in the Beford Office. Mr. Browne was required to attend an Area Directors' call during the managers' meeting to submit figures. Once the call had ended, a conversation had commenced in regards to a member of staff, at this point I don't believe the conversation was inappropriate, until Nicholas Browne turned around and called the female member of staff "a hoover" at which point some of the men in the room were joking about this. At this point, I*

*did not know what this means, I asked out loud “what does it mean” and no one responded. I asked is it a “sexual comment” no one responded. I looked at Nicholas Browne, who just raised his eyebrows at me. I asked are you implying she slept her way to her position and no one responded.*

29. At page 28 paragraph 15, the particulars of claim state: *“the respondent...failed to take adequate steps to investigate and discipline the individual concerned”.*

6<sup>th</sup> allegation: unfair investigation meeting

30. This has been particularised as follows: ineffective investigation meeting (of grievances) by Mr. Taylor on 28 April 2022 through Mr. Taylor’s lack of preparation, failure to provide him with copies of the claimant’s attachments to her grievances and the note-taker not being physically present at the meeting but listening on the telephone.
31. The particulars of claim refer to this at page 29 paragraph 22: *“The respondent failed to appropriately handle the serious concerns of the claimant by not **effectively** investigating the grievances immediately and in a reasonably practicable manner”.*

Climate of engagement and drafting style

32. I have been taken to various letters/emails between the claimant’s and respondent’s representatives. Ms. Adipe in her written submission has drawn my attention to a number of items of correspondence with dates, emboldened quotes and page references where the respondent’s representatives have responded quite combatively. I also include the claimant’s representative’s responses. These are as follows but this is not intended to be exhaustive:

- 32.1 In the application and correspondence dated 15 May 2023, on receipt of the Further and Better Particulars on 28 April 2023, the respondent alleged that the claimant’s representatives had been “negligent” [109].
- 32.2 On 20 May 2023, the claimant’s representatives expressed disappointment with being described as negligent and asked for a retraction [114 – 115].
- 32.3 In correspondence dated 22 May 2023, the respondent’s representatives stated that the claimant’s representatives should show the correspondence of 15 May 2023 to her managing partner and or professional indemnity insurers [129].
- 32.4 In correspondence dated 22 May 2023, the respondent’s representatives stated that they had made an application for costs, which they said explained the reference to negligence [122]. No application had been made at that date.
- 32.5 On 22 May 2023, the claimant’s representative wrote to the ET stating that the respondent’s approach was unreasonable [126 – 128].
- 32.6 Various correspondence was exchanged in the period 24 May – 1 June 2023 over attempts to finalise the list of issues. On 1 June 2023, the respondent’s representatives stated that their application for costs orders



- would be filed if the list of issues were not agreed by EOB on 2 June 2023 and referred to the “confused constructive dismissal claim” [156].
- 32.7 The respondent’s representatives deleted the whole section of the constructive dismissal claim in the latest list of issues (the one which they intended to file with their application) [150 – 155].
- 32.8 On 1 June 2023, the claimant’s representative emailed that she would send to the ET a version of the list of issues which incorporated the claimant’s comments and the deleted section [162].
- 32.9 Between 14 – 17 July 2023, the legal representatives discussed disclosure for the Final Hearing (listed for 12 – 16 August 2024). On 28 July 2023, the respondent’s representatives suggested amending the disclosure deadline to 31 August 2023 and the bundle’s electronic issue to 14 September 2023. The claimant’s representative sent a holding email on 31 July 2023 explaining that she was in court but would revert in due course [195].
- 32.10 On 9 August 2023, the respondent’s representatives stated that the claimant’s representative had engaged in “poor litigation conduct” because a response was still awaited [195].
- 32.11 On 10 August 2023, the claimant’s representative described the respondent’s language as “aggressive” [194] and referred to the claimant’s forthcoming surgery as being a reason for delay.
- 32.12 After more correspondence, on 10 August 2023, the respondent’s representatives asked if there was a claimant’s and claimant’s representative’s witness statement and evidence of the claimant’s financial status for the Preliminary Hearing and if not, the ET would be asked to draw an adverse inference [214].
- 32.13 In reply, on 11 August 2023, the claimant’s representative wrote that there was no ET order for witness statements. In reply on the same date, the respondent’s representatives wrote that the ET would be asked to disregard unsupported submissions or draw relevant adverse inferences in the absence of witness statements concerning their conduct.
- 32.14 I note that the claimant’s representative during the various correspondence has at one point accused the respondent’s representatives of being “deliberately obtuse” and of failing to engage.
33. I find that both representatives have found the other to be lacking in co-operation relatively early on in the proceedings and a cycle of response and counter-response has set in. This has created a climate of hostility in which it would be difficult to agree anything, let alone finely-worded amendments.
34. I find that the format of the claimant’s particulars of claim was not necessarily easy to follow for the following interrelated reasons and made it appear that there were omissions with regard to the 1<sup>st</sup> to 5<sup>th</sup> allegations:
- 34.1 All the factual assertions relate to more than one claim. For example, the 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> allegations concerning the movement of 60 Lincoln Road to the Enfield book, the refusal to allow the claimant to keep the six Enfield properties of her “multi-landlord” client and the failure to reprimand Mr. Browne also feature in the sex discrimination and harassment relating to sex claims in the particulars of claim [pages 21 –

23 (ii) and page 23 - 24 (iii)]. The 2<sup>nd</sup>, 4<sup>th</sup> and 6<sup>th</sup> allegations concerning DSAR and the grievances also feature in the victimisation claim in the particulars of claim [page 32 paragraph 38].

34.2 Setting out the full text of the four grievances which in the original were not paragraphed, making it difficult to pick up that these contained the detail of each factual assertion (save for the 6<sup>th</sup> allegation).

34.3 Instead of repeating the detail of the factual assertions in the sections “Resignation” on page 31 paragraphs 34 – 36 and “Unfair Dismissal (Constructive)” [pages 32 – 33 paragraphs 40 – 48], the claimant has used a general description at page 33 paragraph 37.

35. Nevertheless, despite this less than perfect drafting of the particulars of claim, a more harmonious relationship between the two representatives would have resolved any apparent omissions without too much difficulty or time. In other words, the standard of drafting was not so poor as to be negligent or even unreasonable, as alleged.

### **Unreasonable conduct?**

36. As Ms. Rezaie has stated that the respondent considers that the claimant has behaved vexatiously, disruptively or otherwise unreasonably, I must consider whether any of these apply.

37. I do not find that the claimant’s conduct was vexatious, disruptive or otherwise unreasonable because she provided all the detail to her representative for the drafting of the particulars of claim (save for the way in which the investigation meeting was ineffective).

38. As Ms. Rezaie has stated that the respondent considers that the respondent had incurred costs as a result of improper, unreasonable or negligent acts or omissions of the claimant’s representative, I must also consider whether any of these apply.

39. I do not find that the claimant’s representative’s acts or omissions were improper, unreasonable or negligent because:

39.1 All the details of the 1<sup>st</sup> to 5<sup>th</sup> allegations and reference to the 6<sup>th</sup> allegation were in the particulars of claim.

39.2 The particulars of claim could have been better organised or edited but the standard of drafting was not vexatious, disruptive or otherwise unreasonable.

39.3 The inability to respond effectively to the respondent’s written demands for further particularisation after the Further and Better Particulars was a product of the fractured relationship which developed between the two representatives. Both representatives played a part in it and I cannot find that the claimant’s representative must take full

responsibility for it and find her to have acted improperly, unreasonably or negligently.

**CONCLUSIONS**

40. I find that the tests in Rule 76 and 80 are not met. I therefore make no costs order/wasted costs order in relation respectively to the claimant and the claimant's representative.

**I confirm that this is my written Order with reasons in Joumana v Spicerhaart Group Services Limited No: 3310850/2022 and that I have approved the Order for promulgation.**

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Employment Judge Coll

Date: 23 August 2023

Sent to the parties on: .12 October 2023

For the Tribunal Office