EMPLOYMENT TRIBUNALS

Claimant: **Ms J Lowther**

Respondent: **1. Trade Mark Owners Assoc Limited**
2. Paul Hayman
3. IPOA Limited
4. Ian McGarry

Heard at: London South **On:** 26th January 2024

Before: Employment Judge Reed

Representation
For the claimant: Mr T Kibling, Counsel
Fort the 1st respondent: Did not attend
For the 2nd respondent: Mr S Stevens, Counsel
For the 3rd and 4th respondent: Mr A Griffiths, Counsel

RESERVED JUDGMENT

The 3rd and 4th respondents are ordered to pay a contribution to the claimant's costs in the sum of £3,000 on a joint and severable basis.

REASONS

Background

1. Ms Lowther brings complaints of disability discrimination, sex discrimination, victimisation, payments due and protected interest disclosure detriment against the above respondents.

2. The claims were the subject of a case management hearing on 8th June 2023. At that hearing Employment Judge Rice-Birchall consolidated the three claims set out above and made appropriate case management orders.

3. These orders included listing a one-day preliminary hearing to consider a) whether there had been a TUPE transfer between the 1st and 3rd Respondents and b) the claimant's disability status.

Procedure, documents and evidence

4. I was provided with a bundle of 267 pages, prepared by the claimant. References to page numbers within these reasons are to that bundle unless otherwise indicated.

5. Mr Kibling provided written submissions in advance of the hearing, which also set out the claimant's application for costs

6. This hearing has not involved any witness evidence.

Law

7. To put the Employment Tribunal's costs powers in context it is useful to compare them to the rules applicable in most civil litigation where costs follow the event. Where costs follow the event, the successful party will generally recover their costs from the unsuccessful party. This means that awards of costs are routine.

8. Costs do not follow the event in the Employment Tribunal and are the exception. In the vast majority of cases parties bear their own costs. This reflects the nature of the Tribunal, which was designed to operate as a cost-free and user-friendly jurisdiction (see Lord Justice Sedley in *Gee v Shell UK Ltd* [2003] IRLR 82).

9. The current Employment Tribunal Rules provide for costs at rule 74 – 84. Rule 76 sets out the limited circumstances in which an award can be made. The material part of the rules for this application is as follows:

   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

10. Costs in the Employment Tribunal involve a three stage consideration. First, has the statutory threshold to award costs set out in rule 76 been met, i.e. does the Tribunal have power to award costs? Second, if there is power to award costs, should that discretion be exercised? Third, what amount of costs should be awarded.

11. The purpose of any award of costs must be to compensate the party in whose favour it is made. A costs order must not be made in order to punish the paying party, either for their conduct in the litigation or anything arising from the underlying claim (see *Davidson v John Calder (Publishers) Ltd and Calder Educational Trust Ltd* [1985] IRLR 97.

12. I also accept the submission made by the 3rd and 4th respondents that, equally, a costs order must not be made to benefit the receiving party because they are deserving, vulnerable or otherwise in difficulty. It would be an error, for example, to take into account the possibility that a party was impecunious or might have difficulty in continuing to pay for representation when considering a cost order. The purpose of a costs order can only be to provide compensation to the party who may receive it.

13. Rule 84 provides that, when considering whether to make a costs order and in what amount, the Tribunal may have regard to the potentially paying party's ability to pay.

14. The threshold tests set out by rule 76 remain the same whether or not a party is represented. At the same time, whether a party is represented may be important context to both the threshold test and the exercise of discretion. A tribunal 'cannot and should not judge a litigant in person by the standards of a professional representative' (see *AQ Ltd v Holden* [2012] IRLR 648). It follows that the converse is also true: a professional representative should not be judged by the standards of a litigant in person. At the same time, professional representatives are not expected to be paragons without flaw. There is an important distinction between behaviour which, carefully analysed later, falls short of the ideal and behaviour which is unreasonable.

Application for costs

15. The application for costs is set out at ¶21(a)-(p) of Mr Kibling's skeleton argument. Mr Kibling elaborated on his application orally.

16. In summary, the application for costs argues that the 3rd and 4th respondent's behaviour has been unreasonable in two regards:

    a. That the 3rd and 4th respondent's concession on the TUPE issue had been unreasonably delayed.
    b. That the 3rd and 4th respondent's letter of the 18th January 2024, seeking to relist the one-day hearing intended to deal with the claimant's disability status was unreasonable.

TUPE

17. I will deal briefly with the points arising from the TUPE point. It appears to me that this has been conceded by the 3rd and 4th respondents rather later than it might have been, given the documentation and advice available to them. The Sales Agreement I have been provided, which was signed by the 4th respondent, on behalf of the 3rd respondent, is explicit that the agreement would constitute a TUPE transfer and liability in respect of the previous employer would transfer.

18. However, I do not find that this reaches the high threshold of unreasonableness required by rule 76. I accept Mr Griffiths submission that the live issue related to whether regulation 8(7) of the TUPE Regulations applied, rather than the

bare fact of whether there had been a relevant transfer. Most importantly, the concession was clearly made in the letter of the 18th January 2024, in advance of the preliminary hearing then listed for the 26th January 2024. The first correspondence I have been taken to from the claimant, inviting a concession on TUPE, was the email of the 10th October 2023. The main issue of that email is the claimant's disability status, rather than TUPE. That email was followed up by the claimant on 24th October 2023 (page 246), but that email remains drafted in general terms.

19. This does not seem to me to be an inordinate or unreasonable delay in all the circumstances. It may fall short of ideal. When subjected to forensic analysis it is hard to justify why a similar concession could not have been made at a much earlier point. In practice, however, it is common for points to be conceded relatively shortly prior to a hearing, as a parties attention becomes more focused. In the absence of a greater delay or an earlier detailed warning letter from the claimant, I do not find that it passed the threshold for costs to be awardable.

Disability Status and 18th January 2024 letter

20. The substance of the 18th January 2024 letter was an application, by the 3rd and 4th respondent, to relist what was then the one-day preliminary hearing to a closed case management hearing.

21. That request was granted, meaning that this hearing, which would have been a one-day preliminary hearing to resolve the issues relating to TUPE and the claimant's disability status at the relevant time was instead a short case management hearing.

22. The request was made on the basis of two points of concession. First, in relation to the TUPE transfer, as set out above.

23. The second concession, in relation to disability, was as follows:

> The Third and Fourth Respondent further concede that the Claimant has a disability, being long covid. The Third and Fourth Respondent continue to deny knowledge, or that the Claimant was disabled at the material time. However, they are of the view that this will need to be dealt with as a matter of fact at a final hearing to consider the circumstances rather than as a stand-alone issue for a preliminary hearing.

24. The difficulty with the 3rd and 4th respondent's concession was that it was restricted to a matter – whether the claimant was disabled as of January 2023 when the letter was written – which was not to be determined at the preliminary hearing and, for that matter, was not an issue in the proceedings.

25. Mr Griffiths argued that, in fact, the wording in EJ Rice-Birchall's order referred to whether the claimant was disabled and this was reasonably understood by the solicitors acting for the 3rd and 4th respondent as referring to the current position, rather than her status at the time of the subject matter of the claim.

26. I have concluded that this is not a fair reading of the order as a whole. It is correct that ¶5 of the order refers to the preliminary hearing determining 'whether the claimant is disabled'. Read in isolation that is capable of being misunderstood.

27. The rest of the order, however, makes it clear that what is relevant is the claimant's disability status at the relevant time.

    a. ¶17, when dealing with the claimant's disclosure refers to 'GP and other medical records that are relevant to whether she had the disability at the time of the events the claim is about' and 'any other evidence relevant to whether she had the disability at that time'.
    b. ¶18 orders that 'The respondent must write to the Tribunal and the claimant by 27 July 2023 confirming whether or not it accepts that the claimant had a disability and, if so, on what dates. The respondent must deal with each impairment separately. If the respondent does not accept that the claimant had a disability on any relevant date, it must explain why.'

28. Further, the order must be read in the context of the claims brought by the claimant and the applicable law – bearing in mind that at all stages the 3rd and 4th respondent were legally represented.

29. It should have been apparent to any qualified lawyer dealing with a claim for disability discrimination that the relevant issue was whether the claimant was disabled at the relevant time. With the exception of a small number of cases (such as those brought on the basis of perceived disability or discrimination by association) the question for the Tribunal will always be whether the claimant was disabled when the alleged acts of discrimination occurred. In cases of perceived disability or discrimination by association, the claimant's disability status at any time would not be relevant.

30. The fact that this is obvious is precisely why lawyers and judges will often speak in more colloquial terms, such as referring to 'the claimant's disability status'. The strictly more accurate, but more verbose formula, of 'the claimant's disability status at the relevant time' is unnecessary, because that is always what is meant by 'disability status' in the context of Employment Tribunal proceedings.

31. The question of whether a claimant was disabled at the present day, after the time of the events of the claim, would never be a relevant issue in claims before an Employment Tribunal (although it might, in more general terms, be relevant to questions of remedy or how a hearing was conducted).

32. Mr Griffiths submits that, in this case, those acting for the 3rd and 4th respondent believed that the preliminary hearing had been listed to determine whether the claimant was, at that time, disabled. I have not heard evidence on this point and make no findings of fact on it. The correspondence from those acting for the 3rd and 4th respondents, which I consider in more detail below, seems to suggest that, at least at some stages of the proceedings they appreciated that the relevant issue was the claimant's disability at the relevant time.

33. It is sufficient for these purposes, however, to conclude that, if that was their understanding, it was not one that a qualified lawyer, giving proper thought to the claim and to the order as a whole could reasonably have reached.

Previous correspondence

34. On the 28th July 2023, the 3rd and 4th respondents wrote to the Tribunal and other parties as follows: 'At this point R3 and R4 do not concede disability and look for this to be determined at the preliminary hearing listed for October 2023', page 226.

35. I note that this did not amount to compliance with the Employment Tribunal's order, which clearly required that, if the Respondents did not accept that the Claimant had a disability on any relevant date, they must explain why.

36. On 3rd August 2023 the claimant wrote to the Tribunal, copying the other parties, suggesting that the respondent had not complied with the order and suggesting that an unless order be made, page 227-228.

37. The 1st Respondent wrote conceding that the claimant was disabled from 6th July 2021 on 7th August 2023, page 230.

38. The 2nd respondent wrote conceding that the claimant had been unable to perform her duties at work for '12 months or more' and that disability was conceded on 7th August 2023, page 229.

39. The claimant wrote to all respondents on 17th August 2023, suggesting that a) the 1st respondent should explain why they were unwilling to concede she had been disabled prior to 6th July 2021 and b) that the 3rd and 4th respondents should explain the basis on which they contested her disability status, page 231.

40. The 1st respondent then conceded that the claimant had been disabled from June 2020 on 21st August 2023, page 232.

41. The Employment Tribunal wrote to the parties on 28th September 2023, indicating that Employment Judge Leith directed that 'The Third and Fourth Respondents must, within 7 days, write to the Tribunal and the other parties explaining why they do not accept that the claimant had a disability, as required by paragraph 18 of EJ Rice-Burchell's Case Management Orders of 8 June 2023'

42. The 3rd and 4th respondents replied on the 4th October 2023 as follows (page 233):

> *We note the Tribunal correspondence and make reference to the case management orders of 8 June 2023 and our confirmation in relation to disability and position on disability on 28 July 2023.*
>
> *Our client remains of the view that while the Claimant may have developed a disability over time, being Long Covid, it remains to be a matter for judgment as to if this has a substantial effect on her day to day activities within the meaning of Section 6 of the Equality Act 2010.*

The Third and Fourth Respondent further note that, while the Claimant may have a disability at the time of the next preliminary hearing, being 27 October 2023, it remains firmly in dispute that the Claimant was disabled, or could have been known to have been disabled, at the material time of the alleged acts the Claimant complains of and this for the preliminary hearing to consider.

43. This failed to make the 3rd and 4th respondents' position entirely clear. In particular, the claimant would generally only be disabled if her condition had a substantial effect on her day-to-day activities (the exceptions, such as deemed disabilities or conditions likely to reoccur do not appear to be applicable). It is therefore hard to follow what is meant in the second paragraph.

44. It does appear, however, that at least on the 4th October 2023, the 3rd and 4th respondents understood that the crucial issue for the preliminary hearing was whether the claimant was disabled at the time of the acts she complained of.

45. The claimant wrote again on the 10th October 2023, criticising the 3rd and 4th respondents' approach and suggesting that they were in breach of the order. In particular, she complaints that 'no explanation is provided as to why your clients are continuing to dispute that I was disabled at the time of the act complained of'.

46. On 13th October 2023, the claimant sought an adjournment of the preliminary hearing, then listed on 27th October, page 237-240.

47. The 3rd and 4th respondents replied on the 19th October 2024. I note that, at that time, they wrote that 'It is asserted that the Third and Fourth Respondent have clearly set out the position in relation to disability and complied with the Tribunals requirements. Any further issues around this will need to be considered at the relisted preliminary hearing given the position outlined. It is for the Claimant to establish that she has a disability at the material time of the allegations raised. This remains in dispute.' Again, it appears that at this stage the 3rd and 4th respondents appreciated that the crucial issues was whether the claimant was disabled at the time of the acts she complained of. The assertion that the 3rd and 4th respondents had complied with the Tribunal's order remained inaccurate, since there had not been any explanation of the basis for their position.

48. Although there was subsequent correspondence between the parties, in my view it took the position no further.

49. It seems to me that the following points are significant from this correspondence:

    a. The 3rd and 4th respondents had been told, on a number of occasions, by the claimant that in her view the crucial issue to be determined at the preliminary hearing was whether she had been disabled at the relevant time.
    b. They had made no objection to that and, indeed, repeated the same point themselves.

c. The claimant had repeatedly drawn the 3rd and 4th respondents' attention to the terms of the Tribunal's order regarding disability and, in particular, its requirement that, if they did not accept disability, to explain why.
d. The 3rd and 4th respondent had taken the position that they were not in breach of the order, but this was plainly not sustainable. There had indeed been a failure to explain the basis on which they did not accept that the claimant was disabled.

50. I also note that the letter of 18th January 2024 was written unilaterally. There does not appear to have been any attempt to discuss with the other parties whether the concession meant that the preliminary hearings was unnecessary.

51. In my view the 3rd and 4th respondent did act unreasonably by seeking an adjournment on what they should have recognised was a false basis. The essential submission in the 18th January 2024 letter is that the preliminary hearing should be vacated, because it was unnecessary in light of the concessions made by the 3rd and 4th respondents.

52. The second concession was, however, largely meaningless because it concerned an issue that was not to be determined at the preliminary hearing and was not, in fact, an issue in the claim at all. The 3rd and 4th respondents could not have reasonably believed that the concession rendered the preliminary hearing superfluous.

53. It is commonplace for parties to write to the Tribunal indicating that a hearing has become unnecessary, because of developments in the case. It is particularly common for hearings dealing with a preliminary point to be vacated on the basis that, as a result of disclosure, discussion or simply further consideration, the issue is no longer in dispute between the parties.

54. It is not reasonable, however, to communicate to the Tribunal that a hearing should be vacated because it is unnecessary due to a concession, when no relevant concession has actually been made. The commonplace nature of such applications should not obscure the potentially serious consequences. Once a hearing has been vacated or changed it is rarely possible to recover the original listing – the Tribunal's resources, both in terms of rooms (whether virtual / video or physical), clerking and judicial time will have been allocated elsewhere. T is likely to be delay in re-listing (and, in venues like London South with a substantial backlog of cases this may be substantial). Other parties may well have incurred costs in relation to the original hearing, which they may not be able to recover. Delay and the associated prolonging of a claim is, in any event, of significant detriment to the parties even if there is no direct financial cost. Inviting the Tribunal to vacate a hearing is a significant step. It should not be done lightly or without consideration. If there is any doubt as to whether the hearing remains necessary, this should be discussed with the other parties and made clear to the Tribunal.

55. I note that the 3rd and 4th Respondent's letter, read carefully, does communicate that the issues of their knowledge and whether the claimant was disabled at the material time, remained in dispute. This is not, therefore, a situation in which a party had directly mislead the Tribunal about the nature of the concession. A perfectly proper application could have been made on the basis that the issue

of the claimant's disability status at the relevant time would be better determined at a final hearing, rather than as a preliminary issue.

56. Nonetheless, in my view the letter remained unreasonable, because it failed to make clear that no relevant concession had, in fact, been made in relation to disability and that therefore what was really being requested was for the Tribunal to reconsider the order of Employment Judge Rice-Birchall that disability be determined at a preliminary hearing. While I make no finding of an intention to mislead the Tribunal on the part of the 3rd and 4th respondents, the letter was nonetheless was misrepresentative of the true position. This may have arisen, as Griffiths suggested, from a misapprehension as to what the hearing was to determine. Whether it did or not, I find that the 3rd and 4th respondents acted unreasonably.

57. I have been referred to an email sent on behalf Acting Regional Employment Judge Khalil on the 26th January 2024, which indicated that the issue of disability could be considered at the final hearing. I do not think that this takes the matter any further. I do not read that email as suggesting that Employment Judge Khalil had reached a final decision on how disability should be determined. Rather it indicates one of the possibilities considered at this hearing. Regardless it is in no way an endorsement of the 3rd and 4th respondent's actions.

58. For the avoidance of any doubt, I have not considered whether the 3rd and 4th respondent should have made any greater concession in relation to the claimant's disability or whether a failure to do so was unreasonable. I have no evidence in relation to the claimant's disability before me and cannot therefore reach any determination on these issues.

59. I have to go on to consider whether, having reached the threshold condition costs should be awarded.

60. No argument or evidence has been presented in relation to either the 3rd or 4th respondent's means or ability to pay and I cannot therefore take that into account.

61. I have concluded that costs should be awarded. First, the 3rd and 4th respondents' actions have lead to a necessary hearing being vacated and now re-listed. This has mean that an additional case management hearing has occurred today, which would have been unnecessary, since the necessary issues could have been dealt with as part of the preliminary hearing. I accept that the claimant has incurred legal costs in respect of this hearing. Second, although the principal grounds on which costs are sought in relation to the disability point is in relation to the 18th January 2024 letter, the 3rd and 4th respondents acted unreasonably in earlier correspondence by a) failing to comply with the Tribunal's orders in relation setting out their position while b) seeking to insist to the claimant that they had done so. This is therefore a matter of an ongoing failure, rather than a single incident. That failure also appears (at least on the 3rd and 4th respondent's case that they had an understanding of the issue for the preliminarily hearing that I have found to be unreasonable) to have contributed to their later unreasonable behaviour. This is because a proper consideration of their position on the disability status question should

have led them to a better understanding of the true issue in the claims and therefore for the preliminary hearing.

62. The sum claimed in costs is £2,500 plus 20 % VAT, being the brief fee payable to claimant's counsel to attend the preliminary hearing to deal with the TUPE and disability issues. This is a reasonable fee for work of this nature, given the complexities of this claim. It has not been suggested to me that it is an unreasonable sum.

63. Costs should be some relation to the unreasonable conduct involved, but need to be specifically related or equivalent. Nonetheless, I conclude it is proportionate to order the 3rd and 4th respondent to pay a contribution to the claimant's costs of £3,000 on a joint and severable basis.

Employment Judge Reed
05 April 2024

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