EMPLOYMENT TRIBUNALS

Claimant: **Ms D Mocorro**

Respondent: **Healthcare Homes LSC Limited**

Heard at: **East London Hearing Centre (in private, via CVP)**

On: **26 February 2024**

Before: **Employment Judge K Scott**

Representation

For the claimant: Mr Street (Solicitor)

For the respondent: Ms Annand (Counsel)

RESERVED COSTS JUDGMENT

The respondent's application for an award of costs is refused.

REASONS

Factual history

1. At the end of the preliminary hearing on 26 February 2024, Ms Annand applied for costs on behalf of the respondent pursuant to ET Rule 76(1)(a) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013. There was insufficient time to give an oral decision on the day.

2. Reference should be made to the Record of a Preliminary Hearing sent to the parties on 30 March 2022 and the Record and revised List of Claims and Issues sent to the parties on 14 March 2024, following the 26 February 2024 hearing.

3. The claimant submitted her claim in September 2021. On 28 March 2022, a Case Management Preliminary Hearing took place (the claimant was not represented at the hearing), and the claimant was ordered to provide further information about her claim by 6 April 2022, which was to include further information with respect to the hostile behaviour she said that she suffered on her return to work in April 2021 (section 15 complaint). On 4 April 2022, the claimant provided further details of her Claim. On 29 April 2022, the claimant appeared to try to amend the List of Issues to add an additional protected act to her victimisation complaint. On

30 May 2022, Employment Judge Jones wrote to advise the claimant that she would need to submit an application to amend her claim, if she wished to add another protected act to her claim and that if she wished to do so, it should be made as soon as possible, explaining why it was not part of the original claim. The claimant did not subsequently make an application to amend. On 14 August 2022, the respondent submitted amended Grounds of Resistance pursuant to the Orders made by Employment Judge Housego at the Preliminary Hearing on 28 March 2022. On 10 August 2023, witness statements were exchanged between the parties. On 12 October 2023, the parties were advised that the hearing listed for August 2023 was postponed and relisted to take place in person on 24 to 26 January 2024, following an application made by the respondent. The parties were ready for that hearing to proceed.

4. On 1 December 2023, Mr Street wrote to the Tribunal, copied to the respondent, to formally advise that he was representing the claimant. On 9 January 2024, Mr Street applied to amend the claimant's claim to add further acts of 'unfavourable treatment' to her s.15 disability arising from discrimination complaint. The application sought to add the respondent's decision to investigate, discipline and dismiss the claimant. The application suggested that the respondent agree to '*this relatively minor amendment'*, given that the claimant was '*a layperson when her claim was prepared*'.

5. On Friday 12 January 2024, the parties were notified by the Tribunal that in response to the claimant's application for amendment, the final hearing listed for 24-26 January 2024 would be vacated and instead the matter would be listed for a preliminary hearing to consider the application to amend. The preliminary hearing was listed for 26 February 2024. On 15 January 2024, the respondent's representative wrote to the claimant and the Tribunal to advise that they did not agree to the claimant's application to amend. They also attached an application to set aside the case management order vacating the final hearing:

    1. *The Claimant's representative asserts that the Claimant "did not have the benefit of legal advice" and this is the basis the application is made. However, the Respondent asserts that, from a review of the Claimant's Particulars of Claim, the Claimant clearly received legal assistance. Further, the Claimant has herself admitted to receiving assistance when formulating her Claim (see further details below).*

    2. *The Claimant has acted unreasonably and not in line with the overriding objective in making a second application to amend her Claim following a preliminary hearing where the Claimant was afforded the opportunity to provide further details of her Claim (which she did).*

    3. *The Claim was submitted on 16 September 2021, i.e., 845 days before this application to amend the Claim was made.*

    4. *Two of the witnesses no longer work for the Respondent and, therefore, the longer the delay the less likely they will still be willing to provide evidence for a previous employer.*

    5. *The Respondent was not given the reasonable opportunity to make representations in accordance with Rule 29 ET Rules prior to the order sent by the Tribunal on 12 January 2024, vacating the hearing and listing a second preliminary hearing.*

6. The Respondent will be put to expense as it has already incurred 50% of its Counsel's brief fee for attendance at the Hearing (£2,500 plus VAT) and put to the expense of £1,500 plus VAT for attendance at a further preliminary hearing, for the Claimant to make a second application to amend her Claim 15 days before the Hearing.

7. The Respondent submits that the application to amend the Claim could be dealt with as part of the preliminary matters at the Hearing.

8. The Respondent submits that the Claimant will not suffer any prejudice by the Tribunal not vacating the Hearing and for it to proceed as intended on 24 to 26 January 2024 inclusive. The Respondent submits that this would be in accordance with the overriding objective, namely by avoiding unnecessary formality and seeking flexibility in the proceedings and by saving expense, in particular by the parties not being put to the further expense of a second preliminary hearing if it is not necessary. The Respondent further submits that this would be in accordance with the overriding objective, namely avoiding delay.

The Respondent submits that this would be in accordance with the overriding objective, namely by avoiding unnecessary formality and seeking flexibility in the proceedings and by saving expense, in particular by the parties not being put to the further expense of a second preliminary hearing if it is not necessary.

The Respondent further submits that this would be in accordance with the overriding objective, namely avoiding delay.

6. The parties were not consulted about the decision to vacate the final hearing. The respondent had, in its email of 15 January 2024 (above), asked the Tribunal to permit the final hearing to proceed and determine the claimant's application at the start of the hearing. They did not receive a response to that email. On 16 January 2024, the respondent made an application for costs, which included a costs schedule. On 20 January 2024, the Tribunal wrote to the parties to confirm the respondent's application for costs would be considered at the 26 February preliminary hearing. On 12 February 2024, the claimant's solicitor, Tom Street, wrote to the Tribunal noting the claimant's proposed amendment was minor and opposing the application for costs. At the hearing on 26 February 2024, I granted the claimant's application to amend her claim to include a claim that the respondent's decision to investigate, discipline and dismiss the claimant was unfavourable treatment because of something arising as a consequence of disability, for reasons given orally on the day.

The Issue

7. The first issue to be determined by the Tribunal is whether the claimant's and/or her representative's conduct in applying to amend the claimant's claim so close to the date of the final hearing amounted to unreasonable or disruptive conduct of the proceedings within rule 76(1)(a) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("ET Rules")?

The Law

8. Rule 75(1) of the ET Rules provides:

> *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 ….*

9. Rule 76(1) of the ET Rules provides that:

> *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….*

10. Under Rule 76, the first stage is for the tribunal to consider whether the grounds for costs put forward by the party making the application are made out. If they are, the second stage is for the tribunal to consider whether to exercise its discretion to make an award of costs, and, if so, to consider the amount of any costs payable. At the second and third stages, the Tribunal may consider the claimant's ability to pay (Rule 84).

11. Costs orders in the Employment Tribunal are the exception rather than the rule (*Gee v Shell UK Limited* [2003] IRLR 82). In determining whether conduct under rule 76(1)(a) is made out, a tribunal should take into account the 'nature, gravity and effect' of a party's conduct (*McPherson v BNP Paribas (London Branch)* [2004] ICR 1398). However, it is not necessary to analyse each of these aspects separately, and the tribunal should not lose sight of the totality of the circumstances. At paragraph 41 of *Barnsley Metropolitan Borough Council v Yerrakalva [2012] ICR 420)*, Mummery LJ emphasised that: *"[t]he 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 … conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it has*." The Employment Appeal Tribunal held in *Dr Osonnaya v Queen Mary University of London* UKEAT/ 0225/11 that the use of the word "unreasonable" requires a high threshold to be passed before a costs order is made.

12. In *AQ Ltd v Holden* 2012 IRLR 648 the EAT stated that the threshold tests governing the award of costs are the same whether a litigant is or is not professionally represented, but that the application of those tests should take this factor into account. However, a litigant in person can be found to have behaved unreasonably even when proper allowance is made for their inexperience and lack of objectivity. There is also Presidential Guidance on costs (*Presidential Guidance - General Case management (Guidance Note 7: Costs)*).
13. The burden on establishing that the costs jurisdiction is engaged is on the party seeking costs, in this case the respondent (*Haydar v Pennine Acute NHS Trust* EAT 0141/17).

Submissions

14. Ms Annand's oral submissions were in supplement to the respondent's written application for costs dated 16 January 2024 and Ms Annand's written submissions dated 23 February 2024.

16 January Application:

The Respondent submits that the Claimant's representative applying to amend the Claim 15 days before the Hearing was due to be heard, is both disruptive and unreasonable pursuant to Rule 76(1)(a) of the ET Rules.

Consequently, the Respondent requests that the Employment Tribunal order the Claimant and/or the Claimant's representative to pay the Respondent's costs for:

1. *Counsel's 50% brief fee, which has been incurred irrevocably due to the Hearing now being vacated, incurred on 10 January 2024 of £2,500 plus VAT;*

2. *the cost of a Second Preliminary Hearing to consider the application; and*

3. *the costs of this application (as set out in the Costs Schedule).*

The Respondent relies on the following in support of its application:

1. *On 16 September 2021, the ET1 Claim Form was submitted by the Claimant to the Tribunal 845 days before the application to amend the Claim that this costs application relates to was made. The Claimant's ET1 Claim Form was submitted with accompanying Particulars of Claim.*

2. *At 5.30 pm on Tuesday, 9 January 2024 (at the end of normal business hours), the Claimant's representative made an application to amend the Claimant's Claim.*

3. *The reason provided was the fact that the Claimant "When her claim was prepared, she did not have the benefit of legal advice and she realises now that she wishes to claim that the above acts were because of something arising from her disability, namely the time that she had off work in connection with her disability and in particular, her need to shield".*

4. *The Respondent asserts that the Claimant did receive legal advice when she submitted her Claim, which contradicts the Claimant's application.*

5. *On 28 March 2022, a Case Management Preliminary Hearing took place and Rebecca Hughes of Birketts LLP was in attendance alongside Counsel ('the Preliminary Hearing'). The Claimant was*

ordered to provide further information about her Claim by 6 April 2022, which included further information with respect to the hostile behaviour she says she suffered on her return to work in April 2021 (which related to her claim for disability pursuant to section 15 of the Equality Act 2010. On 4 April 2022, the Claimant provided further details of her Claim.

6. *On 29 April 2022, 30 days after the case management orders were sent to the Claimant, the Claimant tried to amend the List of Issues by amending her claim of victimisation. On 30 May 2022, Employment Judge Jones wrote to the parties to advise the Claimant that she would need to submit an application to amend her Claim, and if she wishes to do so, she must make the application as soon as possible and explain why it was not part of the original Claim. On 2 June 2022, the Claimant wrote in response to the letter of 30 May 2022 to advise that "the person who help me in writing my claim in better English fail to understand me when I was talking to him what I really meant….It would appear there was a misunderstanding when the individual who was assisting me to".*

7. *At no time did the Claimant's representative inform us separately that they wished to make an application for an amendment of the Claim prior to the Hearing.*

8. *On 1 November 2023, Tom Street & Co Solicitors emailed Rebecca Hughes at Birketts LLP advising they were instructed to act on behalf of the Claimant in this Claim although they confirmed they were not formally on the record "yet".*

9. *On 1 December 2023, Tom Street & Co Solicitors sent an email to formally go on the record as acting on behalf of the Claimant and, at 12.58 pm, emailed the East London Employment Tribunal to confirm this. They delayed 39 days before making the application to amend.*

10. *The Respondent assert that the late application to amend the Claim appears to have been made as a tactical move and not in line with the overriding objective.*

Under Rule 76(1)(a), the Respondent submits that the Claimant and the Claimant's representative have both acted disruptively and unreasonably by requesting to amend the Claim at such short notice, only 15 days before the Hearing, particularly given that the Claim Form was submitted 845 days earlier, and that the Claimant has confirmed previously throughout proceedings she did, in fact, receive help in preparing her Particulars of Claim.

Therefore, the Respondent respectfully requests the Tribunal to review this costs application carefully in line with the overriding objective and ensure that the Respondent is not disadvantaged by the vacation of the Hearing and the listing of a second Preliminary Hearing following the Claimant's

application to amend her Claim, which is not the first application to amend made by the Claimant. Under Rule 76(1)(a), the Respondent submits that the Claimant and the Claimant's representative have both acted disruptively and unreasonably by requesting to amend the Claim at such short notice, only 15 days before the Hearing, particularly given that the Claim Form was submitted 845 days earlier, and an earlier application to amend was made.

….

23 February note:

51. An employment tribunal has a discretionary power to make a costs order under rule 76(1)(a) of the Tribunal Rules where it considers that 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. A tribunal can make an order against a party, not only based upon the party's conduct, but also based upon his or her representative's conduct.

52. The Respondent submits that it was unreasonable for the Claimant and her representative to have made an application to amend the Claimant's claim so close to the date of the final hearing, particularly when the Claimant's claim had been submitted in September 2021 (2 years and 4 months earlier). The Claimant's solicitor did not specify in the application that he was asking for the Tribunal to deal with the application at the outset of the final hearing.

….

15. Annand submitted that the claimant did have the benefit of legal advice when she made the claim. The claimant must have known that making an application 15 days before a final merits hearing would incur additional costs for the respondent. Costs have, as a matter of fact, increased. Moreover, the Claimant's solicitor did not specify in the application that he was asking the Tribunal to deal with the application at the outset of the final hearing.

16. Mr Street's oral submissions were made in supplement to the content of his email of 12 February 2024:

On the subject of costs, we note that the Respondent's representative has made an application for costs against the Claimant and/or ourselves. In response to the application for costs, we oppose this.

Firstly, we didn't apply for an adjournment of the hearing. We simply sought to make a minor change to the way that the Claimant's claim is being presented, now that she has the benefit of legal advice.
We would respectfully suggest that appropriate response to this application (in accordance with the overriding objective), would have been to accept it under Selkent, rather than to vehemently oppose it and seek an order for costs.

> *In terms of our involvement as the Claimant's representative, we were initially instructed to assist the Claimant regarding other aspects of this case prior to going on the record. After we went on the record, it was apparent that (without benefit of advice) the Claimant had unnecessarily limited her section 15 claim, technically excluding the dismissal itself. We sought to remedy this as soon as it became clear to us, having taken the Claimant's instructions.*
>
> *We therefore deny the Respondent's suggestion that either ourselves or our client have acted disruptively or unreasonably and we resist the application for costs.*

17. Mr Street accepted that the claimant did, contrary to his written application, have legal representation in preparing the grounds of complaint. However she was not, he reminded the Tribunal, represented at the first Preliminary Hearing, nor when she provided further information in response to the Tribunal's Orders. He was surprised that the Tribunal had vacated the final hearing in response to the amendment application before the respondent had a chance to respond to the application.

Conclusion

18. The first question for me is whether there has been unreasonable or disruptive conduct by the claimant or her representative in making the late application to amend. We do not know why the complaint was not included in the claim by the claimant's first representative. I do not consider it unreasonable for the claimant, as a litigant in person thereafter, not to have identified the omission. The original grounds of complaint included a s13 disability discrimination complaint in relation to dismissal and a s15 complaint in relation to behaviour other than dismissal.

19. Having identified what he considered to be a 'missing piece of the jigsaw'; Mr Street made the application on 9 January 2024 (he was formally instructed on 1 December 2023). When he made the application, the consequence of the application was not known. The respondent *might* have consented to the application. Or the Tribunal *might* have directed that the application be dealt with on Day 1 of the final merits hearing. In that case the Tribunal *might* have granted the application on Day 1 but been able to continue with the final hearing, or it *might* have refused the application on Day 1, or the claimant might have withdrawn the application on Day 1, if, for example, there was a risk of the final hearing being postponed and costs sought as a result. But none of those outcomes transpired because on 12 January 2024 the Tribunal vacated the hearing and listed the matter for a preliminary hearing without consulting the parties and, significantly, before the respondent had responded to the claimant's application. Neither the claimant nor her representative suggested that a postponement or another preliminary hearing was necessary or preferable. Whilst Mr Street did not state in his application that it could be dealt with on Day 1 of the final hearing, he did suggest that it was a minor amendment which he hoped could be agreed. The respondent's subsequent request that the case management

order vacating the final hearing be set aside, so that the hearing could proceed as planned with the claimant's application to be dealt with on Day 1 did not receive a response from the Tribunal. Given that the claimant was not represented, save in respect of preparing the original grounds of complaint, and that Mr Street was only formally added to the record on 1 December 2023, I have concluded that neither the claimant's conduct nor that of her representative in making a late application to amend in January 2024 was unreasonable and/or disruptive. It is unfortunate that the application did not occur earlier, but making the late application to amend did not, in this case, cross the high threshold required for an award of costs. Nor does the fact that the Claimant's solicitor did not specify in the application that he was asking for the Tribunal to deal with the application at the outset of the final hearing make the application unreasonable and/or disruptive in my view. Mr Street suggested in his application that the respondent should agree the amendment. However, the respondent's view was not sought before the Tribunal vacated the final hearing and listed a preliminary hearing. In conclusion, making the amendment application on 9 January 2024 does not meet the threshold of unreasonable and/or disruptive conduct when considering the nature, gravity and effect of the conduct as a whole.

20. I would add that *if* I had decided that the claimant and/or her representative had acted unreasonably or disruptively in making the late application, I would not have exercised my discretion to award costs because it was the Tribunal that took the decision to vacate the final hearing and list the 26 February preliminary hearing, without consulting the parties. Neither the claimant nor her representative, nor the respondent, suggested that was necessary; indeed the respondent asked the Tribunal to set aside its decision to vacate the final hearing, so that the claimant's application could be dealt with on Day 1 of the final hearing. Whilst the claimant's application was the catalyst for the Tribunal's decision, it was not an inevitable consequence of it. Accepting that there is no need for an applicant for costs to prove a causative link between unreasonable conduct and an award of costs, I would nonetheless have concluded that the claimant should not bear any of the costs incurred by the respondent as a result of the Tribunal vacating the final hearing and/or listing the second preliminary hearing.

Employment Judge K Scott
Date: 15 April 2024