EMPLOYMENT TRIBUNALS

Claimant: Miss Sophie Ashley

Respondent: Grayfords Law Limited

Heard at: London Central (in Chambers) **On:** 19 June 2024

Before: Tribunal Judge Jack, acting as an Employment Judge

JUDGMENT

The judgment of the Tribunal is as follows:

1. The claimant shall pay to the respondent costs in the sum of £ 410.00.

2. The claimant's application for a preparation time order is dismissed.

REASONS

Applications

1. Following a one-day full merits hearing on 14 February 2024, the Reserved Judgment dated 13 March 2024 was sent to the parties on 22 March 2024. I dismissed the claimant's complaint of breach of contract in respect of SQE fees, dismissed the respondent's complaint of breach of contract in respect of QLTS course fees, and upheld the respondents complaint of breach of contract in respect of the claimant's failure to return a key fob. The claimant was ordered to pay the respondent £42.00 as damages.

2. The respondent applied for costs on 4 April 2024.

3. On 11 April 2024, at my request, the Tribunal Office wrote to the claimant inviting her to give reasons why the application for a costs order should not be granted, by 30 April 2024.

4. The claimant's response to the costs application was sent to the tribunal on 29 April 2024. The claimant annexed to her response a small number of documents.

5. On 14 May 2024 I received a copy of the claimant's application for a preparation time order. The application had been sent to the tribunal on 17 April 2024.

Background

6. The claim was presented on 7 March 2023, alleging breach of contract and detriment suffered for asserting employment rights. The response included an employer's contract claim for QLTS course fees and failure to return a key fob.

7. A preliminary hearing took place before EJ Elliott on 25 May 2023. Much of the hearing was taken up discussing and identifying the issues in the case. EJ Elliott recorded that the respondent had given the claimant a costs warning. Directions were made. In particular each party was to send the other a list "a list of all documents that they wish to refer to at the final hearing or which are relevant to any issue in the case". The parties were to exchange witness statements on or before 14 September 2023. The complaint of detriment was dismissed following withdrawal by the claimant. A full merits hearing was listed for one day on 28 September 2023.

8. On 23 August 2023 the respondent's contract claim was accepted. EJ Elliott directed that the original claim and the employer's contract claim would be heard together, and that the case remained listed for hearing on 28 September 2023.

9. Disclosure took place. In particular, the parties exchanged written records of a meeting on 22 November 2022. However the claimant did not disclose the existence of the covert recording of that meeting, from which her written document had been prepared, until 19 September 2023, after the accuracy of her written record was challenged, and after the respondent's evidence had been finalised. She then delayed sending the recording to the claimant on the basis that she intended to exhibit the recording to her witness statement.

10. On 19 September 2023, the claimant applied for a postponement of the hearing on 28 September 2023. Her grounds were that she was unable to secure legal representation and her health situation had deteriorated and she had been advised to have an urgent MRI scan. At 11:41 on 19 September 2023 the claimant asked the respondent to confirm when they would be in a position to exchange statements, but at 15:26 the same day she emailed the respondent saying that they would have seen her email to the Tribunal regarding a postponement and that she was at this stage unsure whether she would be in a position to exchange witness statements at 4 pm on 21 September for health reasons (claimant's bundle, p.22). The claimant did not mention to the Tribunal that her witness statements were not yet ready for exchange.

11. On 21 September 2023, in a two page letter headed postponement application the claimant said that she only became aware on 19 September that the Free Representation Unit would not be able to find her a representative. With respect to her health she said that "This is ultimately a private matter though my doctor can provide a letter if absolutely necessary" (claimant's bundle p. 16-17).

12. Also on 21 September 2023, the claimant responded to the respondent's application for her claim to be stuck out and applied for the response and counterclaim to be struck out and/or for a deposit order. The application was seven pages long and supported by a bundle of 36 pages (claimant's bundle p. 23-66).

13. Also on 21 September 2023, the respondent sent the claimant their witness statements (password protected). The claimant did not send the respondent her witness statements.

14. On 26 September 2023 EJ Adkin refused the first postponement request with the following reasons:

> "The Claimant has had notice of the hearing for months. I am not satisfied that a further delay is likely to lead to her being able to obtain legal representation. As to the medical grounds, I have not got medical evidence before me from a medical practitioner which suggests that the Claimant is unable to participate in the hearing, giving a timescale in which it would be realistic to list a postponed hearing."

15. Following this, on 26 September 2023, the respondent sent the claimant the passwords to its witness statements.

16. On 27 September 2023 the claimant sent a second application for a postponement of the final hearing listed the next day. This stated that she had now been offered an appointment for an urgent MRI scan on the day of the hearing, which she needed to attend. She sent supporting medical evidence to the Tribunal but not to the respondent: a letter from her GP and confirmation of her appointment letter for her MRI brain scan. She said that as the documents contained confidential patient information she had forwarded them to the Tribunal Judge marked as strictly private and confidential. These documents have since been made available to the respondent and are in the claimant's bundle at page 106 and following. Her GP's letter, dated 27 September 2023, stated that she was currently suffering gastrointestinal problems, chronic anaemia causing fatigue and visual problems. This letter specifically stated - and I accept - that she was not physically or mentally well enough to attend the Tribunal on 28 September 2024.

17. The Tribunal wrote to the parties on 27 September 2023 stating that the second application for a postponement would be dealt with at the start of the hearing on 28 September 2024.

18. The respondent's representative and the respondent's witnesses attended the hearing. The claimant did not. She attended her appointment for an MRI head scan at 12:30 at Croydon University Hospital. As I have said, I

accept that she was not physically or mentally well enough to attend the Tribunal on 28 September 2024

19. EJ Knowles postponed the final hearing. EJ Knowles said in the record of the hearing on 28 September 2023 that "The Claimant should be aware of the risk she faces in respect of costs, particularly in the light of the situation in relation to statements" (paragraph 50).

20. In accordance with EJ Knowles' Case Management Order, the claimant provided a response to that Order on 12 October 2023. She said that her statements had been essentially ready but time had been lost leading up to the deadline due to various faults on the respondent's part (paragraph 45, respondent's bundle, p. 223). Attached to her response is a letter from her GP dated 2 October 2023 (claimant's bundle, p. 225) which now stated that as a result of her significant health issues she was currently not physically or mentally well enough to attend the tribunal "and it has also meant that she has felt too unwell to prepare for the tribunal".

21. In accordance with EJ Knowles' Case Management Order, the respondent provided a response to that document on 19 October 2023.

22. The claimant has been a litigant in person throughout these proceedings. At the full merits hearing her father presented her case. However prior to these proceedings she had completed the Bar Professional Training Course, and was employed by the respondent as a trainee solicitor. She is not an employment law specialist. She has now qualified as a solicitor.

The Law

23. Rule 76(1) and (2) of the Employment Tribunal Rules state:

(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;
>
> (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.

(2) 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.

24. Rule 77 states:

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.

25. Rule 84 states:

> 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 … ability to pay.

26. The following propositions may be derived from the case law:

a) In the Tribunal costs orders are the exception rather than the rule. The Tribunal's power to order costs is more sparingly exercised and is more circumscribed by the Tribunal's rules than that of the ordinary courts (*Yerrakalva v Barnsley Metropolitan Borough Council and anor* 2012 ICR 420, CA).

b) There are three stages in the exercise when an Employment Tribunal considers an application for a costs or time preparation order. The Tribunal must (i) consider whether one of the preconditions for making such an order in Rule 76 has been established; (ii) consider whether the Tribunal should exercise its discretion to make an award of costs: and (iii) assess the amount of any award. (*Abaya v Leeds Teaching Hospital NHS Trust* UKEAT/0258/16 EAT.)

c) The preconditions in Rule 76 are the same whether a party is represented or not. However, it is appropriate that litigants in person usually should be judged less harshly in terms of their own conduct than those who are professionally represented: *AQ Ltd v Holden* [2012] IRLR 648, EAT.

d) The term 'vexatious' has the meaning given by Lord Bingham in *Attorney General v Barker* [2000] 1 FLR 759 QBD at paragraph 19 (and cited with approval in *Scott v Russell* [2013] EWCA Civ 1432 CA at paragraph 30):

> "...the hallmark of vexatious proceedings is in my judgment that has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process."

e) "Unreasonable" has an ordinary, everyday, objective, meaning: *Dyer v Secretary of State for Employment* EAT 183/83.

f) In *McPherson v BNP Paribas* [2004] ICR 1398 CA, at paragraph 40, Mummery LJ said this:

> " … the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring [the applicant for costs] to prove that specific unreasonable conduct by the applicant caused particular costs to be incurred. … the tribunal's discretion [is not limited] to those costs that are caused by or attributable to the unreasonable conduct of the applicant."

g) In *Yerrakalva v Barnsley MBC* [2012] ICR 420 CA, at paragraph 41, Mummery LJ gave further guidance on the correct approach:

> "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. The main thrust of the passages cited above from my judgment in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment Tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances".

h) The test for reasonable prospects of success is whether the claim or defence had no reasonable prospect of success, judged based on the information that was known or reasonably available at the start of proceedings. The mere existence of factual disputes in the case, which could only be resolved by hearing evidence and finding facts, does not necessarily mean that the tribunal cannot properly conclude that the claim had no reasonable prospects from the outset, or that the claimant could or should have appreciated this from the outset. That still depends on what the claimant knew, or ought to have known, were the true facts, and what view the claimant could reasonably have taken of the prospects of the claim in light of those facts: In *Radia v Jefferies International Ltd* UKEAT/0007/18 EAT, paragraphs 67 and 69.

i) For the purposes of Rule 76, each separate statutory cause of action is a complaint. The correct approach is therefore to assess whether each separate statutory cause of action has no reasonable prospects of success: *Opalkova v Acquire Care Ltd* EA-2020-00345-RN, EAT, paragraph 15.

j) Costs awards are compensatory, not punitive: *Lodwick v Southwark London Borough Council* [2004] ICR 884, CA.

k) Under Rule 84 of the ET Rule, the tribunal may, but is not obliged to have regard to the paying party's ability to pay in deciding the mount of any costs order. A tribunal had, however, to act judicially in deciding not to do so and if it chose not to have regard to means it should have

a reason for doing so and say what the reason was. However, where the costs award may be substantial, the tribunal must proceed with caution before disregarding the paying party's means: *Doyle v North West London Hospitals NHS Trust* [2012] ICR D21, EAT.

l) If there is a realistic prospect that the claimant might at some point in the future be able to afford to pay a substantial amount, it is legitimate to make a costs order in that amount so that the respondent is able to make some recovery when and if that occurred: *Vaughan v Lewisham LBC* [2013] IRLR 713, EAT.

Analysis and Conclusion

27. Both the respondent's application for costs and the claimant's application for a preparation time order were made within the period of 28 days after the judgment finally determining the proceedings.

28. The respondent seeks costs in the amount of £2719.53. The claimant had the opportunity to make written representations before I decided whether or not to make a costs order.

29. The claimant seeks a preparation time order in the amount of £2,665.00 The respondent did not have the opportunity to make written representations in respect of the claimant's application for a preparation time order time. Having reviewed that application I was not minded to make a preparation time order and providing the respondent with the opportunity to respond would have increased costs and been disproportionate.

Rule 76

30. The respondent argues that the claimant's claim for breach of contract had no reasonable prospects of success. My assessment is that a hearing with oral evidence was required to determine that claim. Judging the reasonable prospects on the basis of the information that was known or reasonably known at the start of the proceedings, I do not consider that the claimant's breach of contract claim had no reasonable prospects of success.

31. The claimant completed the Bar Professional Training Course and was employed by the respondent as a trainee solicitor before the events in issue. She is not an ordinary litigant in person.

32. The claimant failed to disclose the existence of the covert recoding until 19 September 2023. That was a breach of the Tribunal's orders – which required disclosure of all documents relevant to the issues in the case. It was also unreasonable. Someone who was already legally qualified and had worked as a trainee solicitor should have understood that her disclosure obligations extended to all documents relevant to the issues and not only to documents which she planned to rely on. Only when a dispute arose about the competing written records of the meeting arose did she disclose its existence, and even then she said that it would be exhibited to her witness statement and seems to have thought that that would be sufficient. It is no answer that the claimant had disclosed the

written record of the meeting that she planned to rely on, or that she did not initially plan to rely on the recording itself. (The claimant continues to argue that since she had disclosed her written record of the meeting, she did not fail to comply with her disclosure obligations regarding the recording. That is incorrect.)

33. The claimant applied on 19 September 2023 for a postponement of the full merits hearing on 28 September 2023. She considered whether or not to supply medical evidence, but decided not to. On 21 September 2023 (7 days before the hearing) she said that "This is ultimately a private matter though my doctor can provide a letter if absolutely necessary". When the tribunal rejected her application, stating that it was not supported by medical evidence, she was able to obtain medical evidence which stated in terms that she was not well enough to attend the hearing. The failure to obtain medical evidence earlier was unreasonable. In saying this I take into account the fact that the claimant is legally qualified and could not reasonably have expected the tribunal to postpone the hearing without evidence to support her assertions. Had she obtained medical evidence earlier it may very well be that the respondent would have been spared the expense of attending the hearing on 28 September 2023.

34. The claimant failed to send the respondent her witness statements on 21 September 2023. This was a breach of the deadline in the Tribunal order, as extended by the parties agreement, and also unreasonable. The GP's letter of 2 October 2023 states that her significant health issues had meant that "she has felt too unwell to prepare for the tribunal". However the claimant has told the tribunal that her statements had been essentially ready. Further, she was well enough to do significant work on her case on 21 September 2023. She prepared a two page letter in support of the postponement application she had made two days earlier, and prepared a carefully crafted seven page response to the respondent's application for her claim to be stuck out and application for the response and counterclaim to be struck out and/or for a deposit order, supported by a bundle of 36 pages. She was not too ill to finalise her witness statements on 21 September 2023, but chose to concentrate on other matters.

35. When the claimant did obtain medical evidence, she sent it to the Tribunal but did not did not share it with the respondent. That was unreasonable (and ultimately she has had no objection to sharing a lightly redacted version of that evidence with the respondent). The claimant says that it was unreasonable of the respondent not to accept the need for an adjournment despite knowing that she was unwell and unable to attend. Given that the respondent did not have sight of her medical evidence either before or indeed at the hearing on 28 September 2024, I do not accept that. As I have said, it was unreasonable of the claimant not to send her medical evidence to the respondent prior to the hearing on 28 September 2023 (or a redacted version of it), when she sent it to the Tribunal.

36. The failings in respect of disclosure and exchange of witness statements are significant and serious and that is so despite the fact that they did not prevent the respondent ultimately succeeding. They clearly caused the respondent expense in e.g. pursing the disclosure issue. The respondent attended a hearing which may very well have been postponed had the

claimant obtained medical evidence in a timely manner. The respondent was also put to the expense of preparing written submissions after the hearing on 28 September 2024, addressing the disclosure issue and the sequential exchange of witness statements. Time was spent at the beginning of the full merits hearing which took place on 14 February 2024 on the issue of whether a fair trial was still possible, given the history in respect of disclosure and witness statements (see the Judgment dated 13 March 2024 at paragraph 8).

37. The claimant argues that the employer's contract claim had no reasonable prospects of success. In fact it succeeded, in respect of the failure to return the key fob. And focusing on the part of the employer's breach of contract claim that related to QLTS course fees, by the end of the full merits hearing this was pursued without much vigour and the respondent made clear that it could succeed only if I made findings supportive of the claimant's case. But my assessment is that a hearing with oral evidence was required to determine that part of the claim, and that it was not unreasonable to bring the claim in the first place. Judging the reasonable prospects on the basis of the information that was known or reasonably known at the start of the proceedings, I do not consider that the breach of contract claim had no reasonable prospects of success.

38. The claimant makes a number of assertions about the conduct of the respondent and its representative in her application for a time preparation order which, on the material before me, I consider to be mere assertion. I have not seen correspondence from the respondent which I consider to have been unreasonable or vexatious. There is no evidence before me on the basis of which I could find that the claimant was intimidated into withdrawing her detriment claim. The preliminary hearing on 25 May 2023 was needed to clarify the issues, and not due to the respondent's intransigence.

39. The claimant's application for a preparation time order therefore fails.

40. With respect to the respondent's application for a costs order, I have found that the claimant acted unreasonably in the way that part of the proceedings have been conducted.

41. I must next consider whether to exercise the discretion to make an award of costs, and assess the amount of any award.

42. It is clear from the claimant's response to the costs application that she understood the three stage process. She gave detailed submissions as to why none of her conduct met the s. 76 threshold and was aware that, should the Tribunal reach a different conclusion, it would need to move onto the next two stages of the exercise i.e. whether the tribunal's discretion should be exercised in favour of costs and, if so, how much those costs should be. She decided not to address the next two stages of the exercise, requesting that she be able to reserve her right to provide submissions on the final two stages should the Judge decide that the first threshold has been crossed (claimant's response to the cost application, paragraph 26 & 27). My own assessment is that she has already had a reasonable opportunity to make representations in writing in response to the application for a costs order. On 11 April 2024 the Tribunal Office wrote

to the claimant inviting her to give reasons why the application for a costs order should not be granted by 30 April 2024. She did not take the opportunity to address the next two stages, but did not suggest that she had been unable to do so in the time available.

Discretion

43. The failings identified above in respect of disclosure and exchange of witness statements are significant and serious.

44. The claimant completed the Bar Professional Training Course and was employed by the respondent as a trainee solicitor before the events in issue. She is not an ordinary litigant in person. She makes the point that she is not an employment law specialist. But none of the failings identified above involve points of employment law. They are general matters regarding e.g. the need to comply with Tribunal orders and disclosure obligations.

45. The claimant was given costs warnings, including by EJ Knowles.

46. In the light of this I consider that it is appropriate to make a costs order.

Amount

47. In the light of the respondent's cost schedule I estimate that the time spent by the respondent's representative on the disclosure issue and related applications, attending the hearing on 28 September 2023, drafting related submissions on whether a fair trial was still possible, and the time spent on these issues at the hearing on 14 February 2024 to be 10 hours. The representative's chargeable hourly rate is £41.00. So the total amount should be £410.

48. The claimant had the opportunity to provide details about her means, but chose not to take it. In any event, £410 is not a large sum. The claimant is now a solicitor. Even if she is currently unemployed, there is a realistic prospect that she will in the future be able to afford this amount.

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Employment Judge Andrew Jack

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Date 19 June 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

27 June 20024

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FOR EMPLOYMENT TRIBUNALS

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