EMPLOYMENT TRIBUNALS

Claimant: **Ms L Wyles**

Respondent: **Cygnet Healthcare Limited**

Heard at: **Leeds** **On:** **5 July 2024 and 11 July 2024 in chambers (without parties)**

Before: **Employment Judge Miller**
Mr W Roberts
Mr L Priestley

Representation
Claimant: In person
Respondent: Ms R Senior (counsel)

RESERVED JUDGMENT

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

REASONS

The application and response

1. At the start of the remedy hearing the claimant made an application for a preparation time order. The basis of her application was as follows.

2. The respondent's conduct was disruptive in respect of their failure to disclose relevant documents.

3. Specifically, the respondent had failed to disclose documents relating to the respondent's freedom to speak up guardian. The claimant had requested copies of all the concerns that she had raised with the freedom to speak up guardian and these were never disclosed.

4. It was not the claimant's case that she was relying on any of her reports to the freedom to speak up guardian as protected disclosures, but that the

documents would have provided a more detailed context for the claimant's concerns.

5. It is relevant that the claimant initially put her complaint about this as related to her pursuit of a Subject Access Request under Data Protection provisions.

6. That Mr Wilmott was obstructive in cross examination.

7. In respect of the allegation about Mr Wilmott, the claimant relies on paragraph 55 of our liability judgment in which we say, “On a number of occasions, we found Mr Wilmott to be evasive in his oral evidence and sometimes answers had to be dragged out of him”.

8. In the same paragraph we note that Mr Willmott had failed to disclose a file note relating to the minutes of the resuscitation committee meeting of 13 January 2022.

9. However, in paragraph 56 we go on to make findings about the matter in dispute and acknowledge that Mr Wilmott’s apparent evasiveness might have arisen from the passing of time and his numerous responsibilities.

10. That the respondent’s defence to the indirect discrimination claim had no reasonable prospects of success.

11. The basis of this application was that workplace stress, the factual basis underlying the claimant’s indirect disability discrimination claim, is a common risk and employers have a legal obligation to protect employees form stress, or the negative health impacts of stress. The claimant says, therefore, that the respondent was never going to be able to successfully defend their position that an ad hoc stress management process was a proportionate means of achieving a legitimate aim.

12. That the respondent had acted unreasonably in not calling Clare Heaton to give evidence in circumstances where the claimant's application for a witness order for Ms Heaton had been refused.

13. This is on the basis that the respondent’s witnesses who did attend were unable to answer some questions which were said to be for Ms Heaton to answer. Despite this, the respondent had failed to call Ms Heaton to answer those questions.

14. The claimant has set out a schedule of the time spent preparing her case which totals 118 hours and 35 minutes.

15. The respondent’s response to the application was broad and there is no criticism of the respondent for that. The application was made orally and the response was also made orally by Mr Proffitt who was not at the liability hearing.

16. They said that taking an overall view, the claimant lost 8 out of 9 claims and even the claim that the claimant won the tribunal found that Ms Barnes acted sympathetically and considerately and the discrimination was unintentional.

17. They say that if the only issue that had been pursued was the indirect discrimination, the 8-day hearing would have been only 2 days. It was, they say, perfectly reasonable for the respondent to defend the claim in the way they did.

18. They say that the claimant has not shown any evidence of actual failures to disclose relevant documents in respect of the allegation about the freedom to speak up documents.

19. The respondent says that the refusal to grant the witness order addresses the reasonableness of the respondent's decision not to call Ms Heaton – there is nothing to show that Ms Heaton was a relevant witness in any event.

20. In respect of Mr Wilmott's evidence, Mr Proffit observed that there is a difference between the tribunal being unimpressed by a witness and the witness acting abusively or unreasonably.

21. There is no link, in any event, between the conduct complained of and the incurring of extra coasts – although Mr Proffitt said that such a link was not strictly necessary it is a relevant factor.

Law

22. The starting point is rule 76 of the Employment Tribunal Rules of Procedure 2013. This says, as far as is relevant:

> (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

23. Rule 75 defines a preparation time order as

> … an order that a party ('the paying party') make a payment to another party ('the receiving party') in respect of the receiving party's preparation time while not legally represented. 'Preparation time' means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

24. Rule 79 says

> "(1) The Tribunal shall decide the number of hours in respect of which a preparation time order should be made, on the basis of—
>
> (a) information provided by the receiving party on time spent falling within rule 75(2) above; and

(b) the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required.

(2) The hourly rate is £33 and increases on 6 April each year by £1.

(3) The amount of a preparation time order shall be the product of the number of hours assessed under paragraph (1) and the rate under paragraph (2).

25. As at the date of the application, the hourly rate was £44 per hour.

26. In *Barnsley Metropolitan Borough Council v Yerrakalva, Mummery* [2012] IRLR 78, LJ said

"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 was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET 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".

27. We note that it is necessary, therefore, for there to be some link between the conduct complained of and the costs incurred although it is not necessary to undertake a detailed causal analysis.

Conclusions

28. We consider first the unreasonable behaviour allegations.

29. In our judgment, the alleged conduct of the respondent does not come close to the level of unreasonable behaviour, looked at as a whole, that is required for a costs or preparation time order.

30. We assessed and made findings on Mr Willmott's evidence. His conduct in giving evidence did not cross the threshold into unreasonable behaviour, let alone abusive or vexatious. His reluctance or inability to answer questions was not noticeably disruptive to the proceedings.

31. The documents that were not disclosed were not obviously directly relevant to the issues. Their absence did not impact on the outcome as far as we have been made aware and did not cause any additional work or costs to the claimant. It was frustrating, we accept that, but only because the claimant was not given something she wanted. The claimant had been pursuing the documents, apparently unsuccessfully, as a subject access request outside the tribunal process. Overall, however, the failure to

disclose these documents in the tribunal process was not unreasonable behaviour by the respondent justifying a preparation time order.

32. We agree with the respondent that the decision not to call Ms Heaton was answered by our decision to refuse the witness order. We do not repeat our reasons for that. However, it is in any event a matter for each party which witness to call. The remedy for the other side, in the absence of what they perceive to be a key witness, is to invite the tribunal to draw inferences from the absence of a relevant witness. In this case, Ms Heaton was not wholly irrelevant, but she was not a key person in relation to the issues we were required to make a decision on. The respondent's failure to call Ms Heaton was not unreasonable.

33. In respect of the prospects of success of the indirect discrimination claim, this is not a case where, from the outset, it was clear or even very likely that the respondent would be unsuccessful. It was a fact specific decision that we needed to hear evidence about before coming to our conclusion.

34. It cannot in any way be said that the respondent's defence had no reasonable prosects of success from the outset.

35. For these reasons, the criteria in rule 76 for us to make a preparation time order are not met and the claimant's application for a preparation time order is refused.

Employment Judge **Miller**

2 August 2024