



EMPLOYMENT TRIBUNALS

Claimant

Mr J Nowicki

Respondent

v British Telecommunications PLC

Heard at: London Central

On: 29 March 2022

Before: Employment Judge B Beyzade
Ms G Carpenter
Mrs N Sandler

Representation

For the Claimant: Mr T Gracka, Consultant
For the Respondents: Ms L Gould, Counsel

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the tribunal is that:

- 1.1. The claimant has permission to rely on a new document titled "*New_and_old_responsibilities.*"
- 1.2. The respondent's application for a postponement of the final hearing which was listed to take place between 29 and 31 March 2022 succeeds. The final hearing is re-listed **for 3 days** and shall take

place by Cloud Video Platform (“CVP”) at London Central Employment Tribunal at 10am on 30 November 2022, 1 December 2022, and 2 December 2022. The final hearing shall be listed before an Employment Judge and two members. The final hearing is listed to determine matters relating to both liability and remedy.

- 1.3. the respondent’s application for an order for costs under Rule 76(2) of Schedule 1 to the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013* succeeds. **By not later than 4pm on 26 April 2022**, the claimant shall pay to the respondent the sum of £500.00 (FIVE HUNDRED POUNDS) by way of costs.
- 1.4. the respondent’s application for an order for wasted costs under Rule 80 of Schedule 1 to the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013* is dismissed.

REASONS

Introduction

1. By a claim form dated 19 March 2020 the claimant presented a claim for failure to make reasonable adjustments in relation to the claimant’s disability. The claimant’s Particulars of Claim states that he was diagnosed with an initial phase of multiple sclerosis in early January 2018, and he informed his line manager of his condition on 21 January 2018. He claimed that following a reorganisation (originating from a TUPE transfer), there were changes to his role and an increase in his workload and hours with which he could not cope because of his underlying medical condition.
2. The respondent entered a response denying the claimant’s claim and that it failed in terms of any duty to make reasonable adjustments. The respondent did not dispute that the claimant was disabled at the relevant time.

3. A Preliminary Hearing took place on 27 September 2021 during which case management orders were made by Employment Judge Burns and the final hearing was listed, in preparation for which parties were required to exchange documents by 23 November 2021 and witness statements were to be exchanged by 10 February 2022. The list of issues that require to be determined at the final hearing were set out in an Appendix to the case management orders.
4. The final hearing in this case was scheduled for three days on 29, 30 and 31 March 2022 by CVP.

Claimant's application to rely on a new document

5. At the outset of the hearing the claimant's representative applied to adduce a new document which was titled "*New_and_old_responsibilities.*"
6. The document set out the claimant's Commercial Finance Manager responsibilities (and referred to a Job Description at page 172 of the final hearing bundle). There was also a list of responsibilities within the Business Partnering and Commercial Finance Manager post which were said to be taken from Mr D Lotte, Mr C Barnett, and recently from Mr R Johnson.
7. Following submissions from both parties' representatives, permission was granted for the claimant to include that document in the evidence that had been prepared by the claimant for the final hearing. This was because the document seemed to have at least some relevance to the issue to be investigated and determined by the Tribunal particularly as set out in paragraph 7b of the list of issues. We had not read the parties' witness statements, or the documents referred to therein. The claimant's representative maintained that this was an important document and the respondent's representative submitted that it may be pivotal as the claimant had not previously described in any detail what tasks he performed before and after the TUPE transfer.

Respondent's postponement application

8. After having granted permission for the claimant's new document to be included within the evidence, the respondent's representative applied for the final hearing to be postponed. The respondent's representative submitted that the claimant's new document was provided late in the day, the respondent had not had time to consider this and to provide instructions to their counsel, and the respondent may require to adduce evidence in reply. We were initially asked to consider whether the respondent's representative could deal with the new document in evidence in chief and provide instructions to their counsel during the first day of the final hearing, but it became clear that this was not feasible. The claimant's representative therefore did not object to the request for a postponement and he commented that the delay to the proceedings will not be material in the circumstances. The claimant's representative said this would allow time for parties to consider the new evidence and for directions to be made in respect of the new evidence. The respondent's representative indicated that the respondent would seek to recover their counsel's fees in terms of attendance at today's hearing in the sum of £750.00. The claimant's representative stated that the claimant accepted that if the postponement application were granted the claimant will be at risk of being required to pay the respondent's costs for attending today's hearing.

9. We granted the respondent's postponement application. We considered that the respondent required a reasonable opportunity to consider the new evidence and to provide any evidence in rebuttal, and that this was in accordance with the overriding objective (Rule 2). By consent the final hearing was re-listed for 3 days to take place by CVP before an Employment Judge and two members at 10.00am on 30 November 2022, 1 December 2022, and 2 December 2022. The final hearing is listed to consider matters relating to both liability and remedy.

Respondent's costs applications

10. Thereafter the respondent's representative presented an oral application in terms of rule 76(2) of the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013* ("the Rules"). The respondent sought the claimant to pay the costs of its counsel's attendance at today's hearing in the amount of £750.00.
11. Alternatively the respondent's representative presented an oral application in terms of rule 80 of the Rules. The respondent sought a wasted costs order in the amount of £750.00.

Findings of fact

12. On the documents and oral evidence presented the Tribunal makes the following essential findings of fact restricted to those necessary to determine the respondents' costs applications –
13. The claimant's net earnings are approximately £3300.00. He is still employed by the respondent. His wife earns a similar income, albeit she is at risk of losing her job as her place of work is expected to be sold soon which will lead to her being made redundant. The claimant previously received a lump sum of money of between £60,000 - £70,000 in respect of critical illness insurance cover.
14. The claimant makes mortgage payments in the amount of £1800.00 per month.
15. The claimant also makes payments in respect of one-to-one tuition costs (approximately £670 for his children in respect of March 2022 alone due to the specialised needs of his children) and he pays £200.00 a month for his daughter's attendance at gymnastic classes.
16. In addition to normal expenses for food, the claimant spends around a further £500.00 per month due to his special dietary requirements and

£300.00 on supplements he needs to consume as a result of his health condition.

17. In addition the claimant pays his healthcare treatment costs. A single treatment costs £335.00 (for one day treatment). The claimant travels to Poland where he can receive longer term treatment over 4 to 5 weeks of around twenty infusions for £2500.00 and he also incurs flight ticket costs of £300.00-£400.00. In addition he makes payment towards physiotherapy costs.

Observations

18. We found the claimant's evidence he provided during the hearing in relation to his means to be credible and consistent. Whilst the claimant appeared to be in receipt of significant income, we observed that the claimant incurred substantial additional expenses as a result of his special dietary requirements, supplements, and his healthcare costs, and the specialised needs of his children, all of which we considered in terms of assessing his ability to pay a costs order.

Relevant law

19. To those facts, the Tribunal applied the law –

20. Rule 74(1) defines “costs” as “fees, charges, disbursements or expenses incurred by or on behalf of the receiving party...”

21. Rule 76 of the Rules provides:

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

(b) any claim or response had no reasonable prospect of success.

(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.

22. Rule 78 of the Rules provides that:

78.—(1) A costs order may—

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

23. The terms of Rules 80-82 are as follows:

When a wasted costs order may be made

80.—(1) A Tribunal may make a wasted costs order against a representative in favour of any party (“the receiving 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; or

(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.

Costs so incurred are described as “wasted costs.”

(2) “Representative” means a party’s legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit.

(3) A wasted costs order may be made in favour of a party whether or not that party is legally represented and may also be made in favour of a representative’s own client. A wasted costs order may not be made against a representative where that representative is representing a party in his or her capacity as an employee of that party.

Effect of a wasted costs order

81. *A wasted costs order may order the representative to pay the whole or part of any wasted costs of the receiving party, or disallow any wasted costs otherwise payable to the representative, including an order that the representative repay to its client any costs which have already been paid. The amount to be paid, disallowed or repaid must in each case be specified in the order.*

Procedure

82. *A wasted costs order may be made by the Tribunal on its own initiative or on the application of any party. A party may apply for a wasted costs order at any stage up to 28 days after the date on which the judgment finally determining the proceedings as against that party was sent to the parties. No such order shall be made unless the representative has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application or proposal. The Tribunal shall inform the representative's client in writing of any proceedings under this rule and of any order made against the representative.*

24. Furthermore Rule 84 of the Rules states:

84. 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 (or, where a wasted costs order is made, the representative's) ability to pay.

25. *Ridehalgh v Horsefield 1994 3 All ER 848 CA*, a Court of Appeal decision in relation to the application of section 51(7) of the *Senior Courts Act 1981*, upon which Rule 80 is based, emphasized that a legal representative should not be held to have acted improperly, unreasonably, or negligently simply because he or she acts on behalf of a party whose claim or defence is doomed to fail. In addition, the court said that negligent conduct should be understood in a non-technical way

to denote failure to act within the competence reasonably to be expected of ordinary members of the profession.

26. *Radcliffe Duce and Gammer v L Binns (t/a Parc Ferme) EAT 0100/08* is an EAT decision in which Mr Justice Elias said that where a wasted costs order is concerned, the question is not whether the party has acted unreasonably, but a more rigorous test. It is necessary to demonstrate that the representative's conduct amounted to an abuse of process. In that case, there was no evidence that the claimant would have withdrawn the claim even if advised to do so by the legal representative, and therefore there was no basis for inferring that any costs had been incurred as a consequence of any misconduct.

27. The Tribunal reminded itself of the Court of Appeal's guidance in *Medcalf v Weatherill 2002 UKHL 27* and *Mitchells Solicitors v Funkwerk Information Technologies York Ltd UKEAT/0541/07*. The Tribunal also referred to the case of *Highvogue Ltd, N Morris v Davies UKEAT/0093/07*. That case related to a representative persisting with points when they had not been raised in the written case, documentation, witness statements or cross examination, and an award of costs was made.

Parties' Submissions

28. Parties made detailed oral submissions which the Tribunal found to be informative. Each party's representative had an opportunity to respond to the representations of the other. Parties did not refer the Tribunal to any authorities. References are made to essential aspects of the submissions and in addition to any authorities which the Tribunal considered to be relevant with reference to the issues to be determined in this judgment, although the Tribunal considered the totality of the submissions from the parties.

29. The claimant gave evidence about his ability to pay and the respondent's representative asked questions to the claimant by way of cross examination, following which the respondent's representative made oral submissions. The respondent's representative submitted that the claimant had presented a new document which led to a postponement. She applied for a wasted costs order acknowledging that under Rule 82 the claimant's representative with conduct of the case would need to be given a reasonable opportunity to make representations and Mr Gracka who did not have conduct of the claim prior to today's hearing could not do that. The respondent's representative further submitted that the claimant and his wife earned an income of about £6600, she was sympathetic to his treatment costs, and pointed out that the claimant had received a significant amount of money from an insurance lump sum payment. The respondent's representative contended that supposition should not be given any weight and that there was no suggestion that the claimant's wife could not obtain alternative employment if she were made redundant and that plainly the claimant could meet a costs award of £750.00. She also suggested that any concern about time to pay is a matter for the County Court prior to any enforcement action.

30. The claimant's representative said that there was no comprehensive list of the claimant's work duties, these were summarised in the claimant's grievances and in related documents, and that the respondent should have supplied information relating to this.

31. The respondent's representative replied that the new document was only provided to the respondent's representative at 08.44am today, which was the first day of the full merits hearing, although according to the properties of the Word document it was produced the previous day at 6.04pm. The respondent's representative said that the claimant did not set out anywhere in his pleadings or witness statement what he did before or after the TUPE transfer, and it was not for the respondent to create a document that did not exist. The claimant was working from

home before the pandemic started and his line manager did not have visibility of the tasks he performed. The document listed twenty-one different roles, and it was in the interests of justice and proportionate to grant the costs of the adjournment. The fact that Mr Gracka identified the issue late is not in the respondent's submission an excuse. He was consulting for the same law firm as the representative who had been assisting the claimant with case preparation. The respondent's representative pointed out that the claimant is not a litigant in person, he has been represented prior to the hearing, although it appeared he only instructed Mr Gracka at a late stage. The respondent may be required to provide further disclosure and supplemental witness evidence which would take time.

32. The respondent's representative relied on Rule 76(2) in terms of applying for an order for costs against the claimant and submitted that the new document produced today was not made available during the disclosure process and this was not addressed in the claimant's witness statement. In the alternative the respondent's representative submitted that the lawyer with conduct of the case did not tell the claimant to include this material at an earlier stage (albeit it was acknowledged that the lawyer in question was not present during today's hearing).

33. The claimant's representative replied that the new document did not exist prior to yesterday evening, and the new information within the document became clear when he met the claimant in conference yesterday. He denied the respondent's suggestion that the lawyer with conduct of the case did not tell the claimant to include this material at an earlier stage, and he contended that he was simply helping the claimant to explain his position more clearly following the recent client conference. The claimant produced the new document yesterday and in his view he disclosed it in accordance with his continuing duties of disclosure. The claimant's position was changed from a Commercial Finance Manager to a Business Partner without any documentary

evidence on the part of the respondent to confirm what his job description was in his previous role and his current role. The claimant's representative pointed out that the witness evidence was exchanged late in any event. He stated that Mr Osomo's witness statement was sent to the claimant a day after the claimant had provided his statement. He said the claimant realised during the conference with him that he could have explained his case better in relation to his work duties.

34. The claimant's representative took the position that the respondent's witnesses could familiarise themselves with the new document and be asked to deal with this in examination in chief during the listed hearing dates as Mr Osomo who was due to give evidence was the claimant's line manager. However, the respondent's representative indicated that Mr Osomo left his employment with the respondent in early 2021, he would require sight of documents to refresh his memory, and it would cause prejudice to simply ask him questions during examination in chief during the hearing.

35. The claimant's representative submitted that although time was required to prepare any submissions in relation to any allegation of misconduct, he believed that the claimant's representative had acted reasonably. He observed that there were matters that came up following his discussions with the claimant, the claimant realised that certain matters could require a better explanation, and that those matters were not new matters but rather an expansion of the issues that were already mentioned in the claimant's witness statement. He pointed out that he had been frank and he ensured that all cards were on the table.

36. The respondent's representative sought costs in the sum of £750.00 (the cost of her refresher fee for the first day of the final hearing). The respondent is registered for VAT purposes. This was on the basis that she would be able to conduct the final hearing as any new counsel would require a pre-trial conference fee. The respondent's representative submitted that it was appropriate to delay the hearing until November

2022 to allow the respondent to use the same representative given the circumstances.

37. The claimant's representative did not seek to argue that the amount of costs sought by the respondent was unreasonable or disproportionate and he acknowledged that the claimant was aware of his potential costs liability and any potential delay. He stated that although the claimant's gross earnings were £60,000.00 per annum, in terms of his ability to pay, we should consider the fact that the claimant supports his two children, his medical expenses, that his family live in London which gives rise to higher living costs, and his other expenses including the claimant's mortgage in relation to his house.

Discussion and decision

38. On the basis of the findings made the Tribunal disposes of the respondents' costs applications as follows –

Costs application against the claimant

39. We referred to the Rules. The application was that the claimant was in breach of the Tribunal's orders (Rule 76(2)), which led to the final hearing being postponed.

40. Even if the grounds for the costs order are made out we are not obliged to make the order.

41. We turned to consider whether the conduct of the claimant fell within Rule 76(2).

42. We observed that the final hearing was not postponed as a result of a postponement application made by the claimant. However the postponement was reasonably required given the late presentation of the new document (described above) that the claimant sought to rely upon. Paragraph 7 of the orders of Employment Judge Burns' referred

to above required disclosure of documents by 23 November 2021. The claimant created the new document recently and it was akin to evidence supplemental to his witness statement.

43. Witness Statements were due to be exchanged by 10 February 2022. Parties agreed to extend the date for exchange of witness statements and provided their statements to each other during the last week prior to the final hearing. If the claimant's additional evidence were supplied to the respondent at the same time that witness statements were exchanged, the respondent would have at least had some time to review this, and a postponement may well have been avoided. We were satisfied that there was a breach of the Tribunal's orders by the claimant and that the claimant's conduct in terms of the late presentation of the new document were contrary to the overriding objective (Rule 2).

44. In determining whether to make an order under this ground we considered the nature, gravity, and effect of the claimant's conduct. We identified the breach on the claimant's part as producing a new document on the first day of the final hearing. It appeared that the claimant had not included the detail he provided within the new document in his witness statement. This had the effect that the respondent received the new document on the first day of the final hearing. Looking at the totality of the circumstances we considered that the claimant breached the Tribunal's directions, and this necessitated the respondent's application for a postponement.

45. We had discretion whether to actually award costs. Costs in the employment tribunal are the exception rather than the rule. The claimant received legal advice and assistance prior to the final hearing.

46. It is unfortunate the respondent incurred costs which could have been avoided. However, in all the circumstances we decided to exercise our discretion and make an order for costs. We considered that the new document was a document that the claimant had prepared, and he had

ample time to prepare and send this to the respondent prior to the final hearing. Accordingly, the respondent's application for costs of today's hearing to be paid by the claimant was successful.

47. We accepted the respondent's costs it sought of £750 was reasonable and proportionate. The claimant knew that this was the amount that the respondent will be seeking at an early part of today's hearing, he had an opportunity to discuss this matter with his representative, and the claimant's representative insisted on the claimant's application to adduce the new document.

48. The claimant said that he has income of £3300.00 per month. His wife has a similar income albeit she may soon be losing her job. He is also in receipt of a substantial critical illness insurance payment. He told us his expenses included his mortgage of £1800 per month, tuition and gymnastics classes for his children, his special dietary requirements and supplements, and significant medical treatment expenses he was required to pay. We considered the totality of his income and expenses, and we concluded that the claimant would have £500.00 disposable income to discharge a costs order. We do not believe the claimant has any significant savings in addition to his income and he did not have any loans. The respondent still employed him. We proceeded on the basis that the claimant is not impecunious, but we were mindful that any costs order will need to be paid within 28 days from the date that this decision is promulgated, and we do not want to put the claimant under any unjustifiable financial strain to meet this obligation.

49. We therefore order that the claimant pay the respondent's costs in respect of counsel's attendance on the first day of the final hearing in the amount of £500.00 **by not later than 4pm on 26 April 2022**. We were satisfied that the claimant could afford to pay this amount of money based on the evidence we heard from the claimant.

Wasted costs order

50. We also considered the respondent's application for a wasted costs order which was made in the alternative.
51. The 3-stage test outlined by the authorities is the correct test to apply. Even if a Tribunal is satisfied that elements 1 and 2 of the test have been met, it is appropriate that discretion is exercised, and consideration is given to whether it is just to make an award in the circumstances.
52. The House of Lords in *Medical* confirmed that "*negligent*" should be understood in a non-technical way to denote failure to act with the competence reasonably to be expected of ordinary members of the solicitors' profession.
53. It is relatively unusual for there to be a wasted costs order application. It is never a happy situation when such an application is made. The possibility exists, however, of such an order being sought and indeed granted. As is confirmed in *Mitchells Solicitors*, it is a jurisdiction which requires to be exercised with great caution and as a last resort.
54. There was, for clarity, in this case no evidence from the lawyer with conduct of the claimant's case before the Tribunal including any evidence as to ability to pay. Also, there was no issue as to that lawyer being a "*representative*" against whom a wasted costs order might be made in terms of the Rules.
55. Costs are sought from the claimant's representative with the conduct of the case prior to today's final hearing. The basis for any such award requires to be the conclusion of the Tribunal that a party has incurred costs, "*as a result of any improper, unreasonable or negligent act or omission on the part of the representative.*" Another situation where wasted costs may be awarded is if the costs are ones "*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.*"

56. Mr Gracka was candid in saying that the matters in the new document were raised with him during the conference that took place a day prior to the final hearing, the document was produced the same evening, and sent to the respondent the following morning. He was only recently instructed, and he had no prior conduct of the claimant's case.
57. There was no evidence before the Tribunal on the part of the claimant's representative who had conduct of the claim that they were acting specifically upon client instructions having tendered certain advice to their client. There was not said to be any issue of potential client confidentiality therefore with which the Tribunal required to wrestle.
58. The respondent's contention that the claimant's representative who had conduct of the claimant's case prior to the final hearing was an allegation and it was unsupported by any evidence of fact. The respondent's representative did not ask any questions to the claimant or seek permission to do so in relation to the preparation of the new document or his previously prepared witness statement, or indeed, the extent of any legal assistance received by the claimant.
59. The Tribunal also recognised the complexities involved in this situation where there had been an internal grievance process and the claimant's employment was ongoing.
60. The grounds on which the application was made were not seen by the Tribunal as involving improper, unreasonable, or negligent conduct by any of the claimant's legal representatives. The issues over documents and over opposition or not to the introduction of new evidence were not particularly unusual in course of a case running. It is certainly true that there were better ways of managing these matters and more timeous communication of the claimant's position on the issue would have been desirable on the claimant's part. We have found that the claimant was in breach of the Tribunal's orders. Bearing in mind the high bar in the test

under Rule 80, and on the information the Tribunal had as to events, we were not persuaded that the conduct of the claimant's representative either at today's hearing or any conduct in relation to eliciting the information prior to the final hearing contained in the new document produced today was improper, unreasonable, or negligent.

61. In examining this area, the Tribunal concluded that the standard of improper, unreasonable, or negligent actions on the part of the lawyer with conduct of this case had not been met. It was the view of the Tribunal that a substantial degree of time had been taken up on the first day of the final hearing. It was difficult to see a valid basis for the position adopted for the claimant in terms of the late presentation of the new document at the outset of the merits hearing. Tested however against the standard required before Rule 80 is triggered, the Tribunal concluded that any allegation in terms of the behaviour involved fell short of that. It was not viewed by the Tribunal as being unreasonable, improper, or negligent.

62. If we are wrong in terms of our view and the failure by the claimant to produce the information contained in the new document prior to the first day of the full merits hearing was to be regarded as negligence, applying the third leg of the test, exercising our discretion as to whether it is just to make the order, we did not regard it as being just to make that order. Any alleged negligence was based on what would amount to a one-off oversight. It has no doubt been frustrating for the respondent to see a significant gap between the final hearing listed in March 2022 and the re-listed hearing dates in November 2022. That is a consequence which both parties will have to bear in the unfortunate circumstances. There is a degree of inconvenience and expense through that, however progress in the case has not been very significantly slowed. That is not to say that any alleged oversight and its consequences can be treated lightly.

63. For these reasons therefore had we been persuaded that the actions or oversight of any of the claimant's representatives (either at today's hearing or prior to today's hearing) constituted negligence, we would, nevertheless, not have granted the application.

64. The respondent's application for a wasted costs order is therefore dismissed.

Conclusion

65. The claimant's application to adduce the new document titled "*New_and_old_responsibilities*" in evidence succeeds.

66. The respondent's application for a postponement of the final hearing succeeds.

67. The respondent's application for the claimant to pay the respondent's costs succeeds and the claimant is ordered to pay the sum of £500.00 to the respondent.

68. The respondent's application for a wasted costs order is not well-founded and is hereby dismissed.

Employment Judge B Beyzade

Dated: 2 August 2022

Sent to the parties on:

03/08/2022

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For the Tribunal Office