EMPLOYMENT TRIBUNALS

Claimant: Ms P Malpeli

Respondent: Gen2 Property Ltd

Heard at: London South (on the papers) **On: 8 October 2021**

Before: Employment Judge Khalil sitting with members
Ms A Boyce
Mr P Morcom

Appearances

For the claimant: Mr Price, Counsel
For the respondent: Mr Wilding, Counsel

JUDGMENT ON COSTS

Unanimous Decision

The respondent is Ordered to pay the claimant costs of £2,821.

Reasons

1. The claimant makes an application for costs under Rule 76 (1) (a) of the ET Rules 2013. This says:

   (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.

2. The claimant specifically relies on the claimant's conduct being disruptive and/or unreasonable.

3. In assessing whether a party or representative has acted unreasonably, the Court of Appeal in ***Yerrakalva v Barnsley Metropolitan Borough Council and another*** **2012 ICR 420** held that the vital point in exercising the discretion to order costs (or a PTO) is to look at the whole picture. The Tribunal has to ask whether there has been unreasonable conduct by the paying party in bringing, defending or conducting the case and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had.

4. In summary, the premise of the claimant's application is that the respondent had acted unreasonably in either advancing a case on the admissibility of evidence under S.111 ERA 1996 which was the opposite of its case or one which had not been advanced before. This the claimant says led to the final Hearing being postponed once the Tribunal had raised it with the parties.

5. The Tribunal had the claimant's written application for costs dated 3 August 2021 and the respondent's submissions in opposition dated 4 August 2021. It is not necessary to set out and repeat, they were read thoroughly and duly considered.

Relevant Findings of fact to this application

6. The Tribunal found the following findings of fact, on a balance of probabilities, relevant to and proportionate to the application for costs only.

7. The final Hearing was due to take place over 4 days beginning 2 August 2021.

8. Due to judicial resourcing, it had been reduced to 3 days.

9. Following extensive discussion with the parties about timetabling, it was agreed that all the reading and evidence could be completed within 3 days. The time was tight and there would need to be regular CVP breaks and possible sitting until 5.00pm.

10. The Tribunal read the witness statements and other essential pre-reading of documents in the bundle on the morning of the 2 August 2021 (Monday).

11. The Hearing would have commenced at 2.00pm on day 1 had it not been for the issues raised by the Tribunal in relation to the admissibility or otherwise of documents/evidence having regard to the common law principle of without prejudice ('WP') and/or S.111A ERA 1996 about pre-termination discussions.

12. The parties had not forewarned the Tribunal that these matters might or were in dispute, either in writing before the Hearing or on the morning of the Hearing (as a preliminary matter) or at the case management Hearing.

13. The issue of WP and S.111A had been expressly referenced by Solicitors acting for the claimant in a letter dated 4 February 2019 (page 133).

14. There had been a further email dated 11 March 2019 (page 149) which letter had also referred to the alleged protected disclosure though not in such legal terminology.

15. In neither communication was there any reference to the admissibility of the pre-termination discussion because of alleged improper behaviour.

16. The email summarising the meeting at which the alleged WP and/or S.111A discussion had taken place was at page 130 of the bundle. On any reading, the Tribunal found, under 'alternative arrangements' there was evidence of an offer made or discussions held with a view to the employment being terminated. The Tribunal does not repeat its decision and findings contained in its case management summary sent to the parties on 4 August 2021.

17. When confronted with this issue, the claimant did seek to rely on improper behaviour and contested that the meeting attracted WP privilege.

18. The respondent's counsel said it had not considered the point and needed to take instructions, but owing to hospitalisation of the person from whom he needed to take instructions, this was not possible until the following morning.

19. Upon taking instructions, on day 2, the respondent said that it was accepted that the discussion was a pre-termination discussion and thus not admissible. It conceded that WP privilege did not apply as there was no pre-existing dispute.

20. By this time, the Tribunal considered there to be inadequate time remaining to start and finish the evidence. It went on to deliberate on the S.111A issue in so far as this was possible.

Conclusions and analysis

21. The Tribunal first considered if the threshold for making a costs Order was met i.e. was the respondent's conduct unreasonable and/or disruptive.

22. The Tribunal had regard to the non-consideration of this matter at any time pre-trial. There was also no pleading to the effect that there was a S.111A discussion, the Tribunal concluded that it was more likely than not because the respondent was aware that part of the meeting on 29 January 2019 attracted inadmissibility under S.111A.

23. The Tribunal considered it was 'out in the open' as a possible issue given it had been expressly referenced in the correspondence from the claimant's Solicitors dated 4 February 2019.

24. When the issue was raised, the response from Mr Wilding was he had not considered the point. It could have been said, but was not, that it was an issue the respondent would address in submissions and subject to that, the trial could commence. The need to take instructions on a point which was potentially to the respondent's advantage was very surprising to the Tribunal, contributed to the delay and demonstrated ill preparation before trial.

25. The respondent's subsequently conveyed position on the S.111A issue was not remarkable having regard to content of the email of 30 January 2019 even if the assertion of improper behaviour was disputed. This could and should have been foreseen and/or contemplated and instructions sought beforehand with a clear procedural submission to the Tribunal.

26. Thus, the Tribunal concluded, the respondent's conduct was unreasonable, which led to an inability to commence the Hearing on the afternoon on day one.

27. In considering whether to exercise its discretion to make a Costs order, the Tribunal had regard to the respondent being represented by Counsel and also by Invicta Law leading up to the Hearing. Whilst the respondent

submits that it was a matter raised by the Tribunal and thus once seized of it, it was required to resolve it, it was not, having regard to the foregoing, a particularly technical or obscure point. No evidence was provided to the Tribunal not to exercise its discretion to award costs by reason of the respondent's financial position.

28. However, the Tribunal did consider that some blame was to be apportioned to the claimant, who though had only recently instructed Counsel, had previously instructed Solicitors and this matter had not been properly considered. It was possible, that had Mr Price, proactively explained his position to the Tribunal on the admissibility of evidence and/or the reliance on improper behaviour; or that it could be dealt with in submissions; that the respondent might have been able to proceed without instructions, or it could have forced the Respondent's hand to do so. After all, this was a matter of the admissibility of evidence on what was a well-known and critical meeting in this case.

29. Following deliberation, the Tribunal concluded, unanimously, that while both parties could/should have raised the issue of S.111A and the potential impact of WP proactively, it was primarily a responsibility of the Respondent, who had arranged/undertaken the meeting and who would be the party placing reliance on the consequential inadmissibility of discussions and the Respondent's inability to address this issue on the day, led to the hearing being delayed, so the apportionment of blame lay 70%, in the Tribunal's view, with the respondent.

30. The claimant seeks costs of £4,560, but no breakdown was provided. The Tribunal assessed the overall cost to the claimant of these proceedings (having regard to the additional January listing) to be £9,000 – based on an approximate cost of £4,500 (for the initial Final Hearing) and an approximate estimated cost of the January Hearing of £4,500 (the brief fee reduced to a re-reading fee of about £1,500 and 3 x £1,000 refresher fees). The extra cost to the claimant is thus £3,500 (£9,000 minus £5,500 (if the Hearing had proceeded over 3 days 2-4 August 2021).

31. The 70% respective calculations come to £3,192 and £2,450. Taking an average of the two, the award for costs is £2821.

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Employment Judge Khalil

8 October 2021