EMPLOYMENT TRIBUNALS

Claimant: **Mr J. Banerjee**

Respondent: **Royal Bank of Canada**

Heard at: **London Central** **On:** **17 October 2017**

Before: **Employment Judge Goodman**

Representation
Claimant: Mr C. Glyn, QC

Respondent: Ms J. Mulcahy, QC

PRELIMINARY HEARING
COSTS ORDER

The respondent is ordered to pay the claimant's costs in the sum of £8,100.

REASONS

1. At a hearing on 14 September 2017, the tribunal ordered that the final hearing due to start of October 2017 was postponed, and relisted 23 April 2018 with a 13 day time estimate. The claimant has now applied for the costs of the postponement.

2. The application was made on these grounds:

    2.1.1 under rule 76 (2): "the tribunal may also make such an order where party has been in breach of any order or practice direction or whether hearing has been postponed adjourned on the application of the party". The claimant applies in respect of each limb of that subsection, that is both breach of order and postponement on application;

2.1.2 under rule 76 (1) “the tribunal may make a costs order preparation time order, and shall consider whether to do so, where it considers that ..a party has acted vexatiously, abusively disruptively or otherwise unreasonably in …the way the proceedings have been conducted.

3. The claimant had not instructed solicitors. Counsel is instructed under the direct access scheme. It was clarified that this is an application for costs, not preparation time.

Factual Summary

4. This summary is taken from the two volume bundle of orders and correspondence available for this hearing.

5. The claim was started in March 2017. The tribunal then listed an eight-day final hearing starting 10 October, and gave directions which included sending each other documents by 12 July 2017.

6. There was a preliminary hearing for case management on 21 June. The disclosure order was varied so that parties had to disclose by both copy and list by 21 July and, in the words of the order: “the parties shall comply with the disclosure given above, but if despite their best attempts, other documents come to light (or are created) after that date, the documents shall be disclosed as soon as practicable in accordance with the duty of continuing disclosure” (para 2.4).

7. At the same time orders were made for final hearing bundle by 4 August, and exchange of witness statements by 12 September.

8. The parties agreed to extend the deadline from 21 to 25 of July because the claimant has suffered a bereavement.

9. On 25 July the claimant sent three lever arch files of documents and the respondent sent about 11 files. The respondent said: “our client is continuing its searches for discoverable documents. We anticipate that will be providing additional disclosure shortly in accordance with the respondents continuing disclosure obligations as referred to at paragraph 2.4 of the tribunal’s orders of 21 June 2017”.

10. On 4 August 2017 the respondent delivered a further 11 files of documents to the claimant.

11. On 12 August 2017 the respondent sent another 2 lever arch files of documents.

12. By this stage each batch of documents had been delivered with its own index. There was no consolidated index. The documents were not paginated to any index The claimant complains that as a result documents from the same date were scattered across three, which increased the magnitude of the task of reading them.

13. On 17 August 2017 the claimant applied to the tribunal for a postponement of hearing. He complained that because he did not have all the documents until 12 August, and then in a form which made a lot of extra work, still with no final hearing bundle, he was now having to do a lot of last minute work on the documents, had not even finished reading them, and would be in difficulty preparing a witness statement on time. He said the parties were not on an equal footing because the respondents would have known about the contents of the documents long before he did.

14. While this was going on the claimant was also seeking specific disclosure of documents he thought were missing. On getting the third batch he told the respondent he would tell them by 29 August what should go in the hearing bundle, but he was not ready to do this when the respondent sent him a trial bundle on 1 September. As the claimant then pointed out, on 7 September, the respondent had only included a small number of the claimant's documents, and most had been omitted. On realising what had happened, the respondent agreed to support the postponement application, and wrote accordingly to the Tribunal on 8 September. The letter lists a number of matters outstanding to be decided, but made no mention of late disclosure as the reason why the parties were not ready.

15. At a hearing listed for 30 minutes on 14 September, the case was three weeks from the start of the hearing, and the hearing bundle, then 23 lever arches from the respondent, and a potential three from the claimant, had yet to be weeded for duplication and the final content agreed. The final hearing was postponed, on the basis that it was unrealistic to expect a litigant in person without solicitors and paralegal staff to do this and prepare his own witness statement in time. It was relisted with a larger time estimate, with a view to adding consideration of Polkey and contribution to the issues to be decided then.

Submissions

16. The claimant argues that the need to postpone the hearing arises solely from the respondent's knowing failure to comply with the order to disclose documents on time. Although complying in the letter by disclosing documents on 25th of July, they did not do so in spirit because they were still looking, so this was not in fact a case of documents coming to light which have been overlooked, but respondent knowing that they have not completed the search. The claimant did not in fact get full disclosure until 12 August. On that basis he made his application to postpone. The respondent made it worse by preparing a hearing bundle which did not include any but a few of the claimant's own documents, and it was their realisation that had occurred that made them consent to postponement, though still without admitting to the tribunal that their own delay and error was largely responsible.

17. The respondent argues that costs are the exception, not the rule, and an award of costs following postponement is discretionary and compensatory; the claimant had applied for postponement well before the omission of his documents from the hearing bundle, and himself disclosed nine emails relating to mitigation after 25th of July.

18. The claimant replied that any documents disclosed after 25 July had come into being after that date.

Discussion

19. Rule 76 sets out the grounds on which the tribunal may make a costs order. Rule 76 1 (a) is that the proceedings are being conducted "otherwise unreasonably". Rule 76(2) also provides that such an order may be made where parties been in breach of order, or a hearing postponed, without requiring this conduct be unreasonable. Both provide that tribunal "may" make an order meaning that it is an exercise of discretion, with regard to the overriding objective to deal with cases fairly and justly, including so far as practicable, ensuring that the parties are on an equal footing, dealing with cases in ways which are proportionate to the complexity and importance of the issues, avoiding delay, saving expense. (Rule 2)

20. Examining rule 76 (2) first, I find that the respondent was in breach of the order to give disclosure by 25 July 2017 (the date of the agreed extension). It is clear from the letter from the respondent of that date that the respondent knew that disclosure was in no way complete.

21. The respondent relied in their letter on the wording of the Tribunal order providing for continuing disclosure. The wording of the tribunal order for disclosure was in standard form, and is designed to inform unrepresented parties, or representatives unfamiliar with the civil procedure rules, that the duty to disclose documents continues even after substantial compliance. I find it hard to believe that the respondent, represented by very experienced litigators, did not know this when it wrote that letter. In terms of volume, if not in numbered items, there was at least as much to come as had already been disclosed.

22. This put the unrepresented claimant at a substantial disadvantage. Unlike firms of solicitors he did not have experienced paralegals to sort material, and while litigants in person do not always appreciate how much time they need to set aside to deal with disclosure, this claimant was faced with the added difficulty of documents for similar dates being placed in three separate bundles, none of the bundles they paginated, so he would need to resort them all to make sense of it. He could not ask counsel to do this work.

23. It was at this point that he made his application to postpone. The application was not referred to an employment judge at the time, but it is by no means clear to me that postponement would have been granted at that stage. Tribunals are familiar with last-minute pressures on and anxieties of the parties, and with the need on the Tribunal's part to hold the line with listings for multi-day cases which may otherwise not get another hearing until six months later. It is more likely at that stage that respondent would have been ordered to sort the documents into a proper trial bundle by an early date, so the parties could focus on preparation of witness statements. Although it might not have been possible to meet the

exchange date envisaged (11 September) there was still room for slippage before the hearing began 10th of October.

24. As respondent's solicitors themselves recognized when pointed out to them by the claimant on 7 September, it was the failure to sort (for duplication) and include the claimant's documents in the hearing bundle that led them to agree to the postponement, and the tribunal to accede to the request, given that the bundle was still not in usable form.

25. For those reasons I hold that the respondent was responsible for the need to postpone the hearing. Discretion has to be exercised as to whether a costs order is appropriate even if the responsibility was theirs. Unforeseen factors may often dog preparation for hearings, not all delay leads to a postponement and not every breach sounds in costs. Relevant factors are that the respondent knew from the pleaded case that there were a number of different protected disclosures, and many people involved. It would be a document heavy case. They knew from directions made 3 May that they would have to finalise disclosure by mid-July. It is not known why respondent was not able to complete the search until mid-August, but lack of resources on the part of the respondent of the solicitors does not seem to be a difficulty, and no explanation has been given.

26. Another factor relevant to the exercise of discretion is that while the respondent's representatives were well resourced, the claimant, who acted in person, was on his own, and on the face of it needed more time to read and sort what he received. The respondent's lack of consideration for the claimant was aggravated by their failure to keep him informed so that he could plan when to do the work. It would have been possible to indicate how much was likely to come. The respondent should have told the claimant that they would not be able to meet the deadline and negotiate an extension, and that would not stop them disclosing material ahead of the deadline if that would ease the burden. The claimant's anxieties about what was missing, reflected in his requests for specific disclosure of texts and messages, not included in the first batch, would have been allayed. All these were compounded by failure to include the claimant's documents in the hearing bundle, which if the hearing were not postponed would lead to him spending much extra time and effort preparing a supplementary bundle. The tribunal does not say that inequality of resources should always mean that claimants get more time and latitude in preparing disclosure, and many claimants fail to understand the time they must spend and the hard work they will have to do sorting disclosed documents, but these experienced and well-resourced solicitors did not comply with the order, have not explained why they did not comply with the order, and did not involve the claimant in agreed adjustments to the timetable, so causing him additional anxiety, to the point where he instructed another body to sort material for him, at some expense. This was contrary to the overriding objective which also provides: "the parties and their representatives shall assist the tribunal to further the overriding objective and in particular shall cooperate generally with each other and with the tribunal".

27. For these reasons, this is a case appropriate to exercise discretion and make an order that the respondent pay the claimant's costs of the postponement which resulted from the breach of the order.

28. Having made that order I do not consider necessary to consider whether the respondent acted "unreasonably", although their conduct in failing to cooperate with the claimant about slippage in the timetable, which given the volume of documents involved, had a very substantial impact on the other party, is likely to have amounted to unreasonable conduct.

29. As to the amount of costs, the claimant sought the following (claims for photocopying were withdrawn before the hearing):

23.1 £,8625 paid to Whistleblowers UK to sort the documents into chronological order, at £150 per hour, invoice dated 1 September 2017

23.2 payment to junior counsel for correspondence arising out of disclosure – £1,208.33 plus VAT

23.3 payment to junior counsel advising and drafting application to adjourn 17 August £1,750 plus VAT
23.4 first tranche of junior counsel's brief fee incurred 11 September – £5,000 plus VAT.

30. No material was before the tribunal as to the cost of today's hearing, which dealt both with specific disclosure and the costs application.

31. Before the costs application was heard I raised with the parties that I was concerned to establish whether the invoice from Whistleblowers UK covered regulated services as listed in regulation 4 of the Compensation (Regulated Claims Management Services) Order 2006, made under the Compensation Act 2006, which created offences, as if so, it did not appear at first sight that Whistleblowers UK, a company limited by guarantee, was registered as a charity or was a regulated claims manager, and it might be necessary to consider their status when deciding whether it was lawful or contrary to public policy to order payment of their costs. The claimant had not taken this point, but had argued that the invoice was not for legal services but represented preparation time, and the claimant could not claim both that and costs.

32. In the course of the hearing, without further discussion, the claimant withdrew the claim for the Whistleblowers UK invoice. This left the claims for junior counsel's fees.

33. Counsel's fee notes were not available, though junior counsel was present at the hearing. Mr Glyn stated he had seen the fee notes, further, that the claimant had paid them.

34. The payment for the application to adjourn is causatively related to the respondent's conduct leading to the postponement and recoverable. So is the payment of the first tranche for the hearing, which was to reserve those dates in her diary, and cannot be recouped in preparation work for the relisted hearing. The payment for correspondence arising from disclosure is not allowed, it being too difficult to disentangle, without more detail, from the parallel correspondence about specific disclosure.

35. There being no challenge to the amount of the fees, the respondent is ordered to pay the claimant costs in the sum of £8,100. This includes VAT, and assumes the claimant himself is not registered for VAT.

Employment Judge Goodman on 17 October 2017