



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106683/2020

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Employment Judge P O'Donnell

Mr J Davidson

Claimant

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Steven Anderson t/a Ashwood Car Service Centre

Respondent

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the Claimant's application for a
20 preparation time order dated 27 July 2021 is refused.

REASONS

Introduction

1. This hearing in chambers was listed to determine the Claimant's application for a preparation time order made during the course of the proceedings.
- 25 2. The application had previously been listed for determination at a hearing in November 2021 along with a reconsideration application which had been made by the Respondents in relation to a judgment striking out the ET3. At that hearing, the Claimant (via his representative) had not insisted on the application for a preparation time order being determined and it was reserved
30 until the end of the substantive proceedings.
3. The substantive proceedings having now concluded, the Claimant confirmed that he did insist on the application being determined and this hearing was listed to do so.

Procedural history

4. The Tribunal considers that a short summary of the relevant procedural history of the case would assist.
5. The ET1 was lodged on 23 October 2020. It set out claims for unfair dismissal in circumstances where the Claimant alleged constructive dismissal, notice pay, holiday pay, arrears of pay and “other payments”.
6. The ET3 was lodged on 20 November 2020 and the Respondents resisted all the claims with the exception of the claim relating to a failure to provide the Claimant with a written statement of main terms and conditions of employment.
7. A telephone case management hearing was listed for 12 February 2021 with the Notice of Hearing being sent to parties on 24 December 2020. The Notice of Hearing was sent to the parties by email as was all the subsequent correspondence outlined below.
8. The Respondent’s agent did not attend the case management hearing on 12 February 2021. A letter was sent by email to the Respondent’s agent on 16 February 2021 seeking an explanation for their failure to attend the hearing. There was no reply.
9. There was then a series of letters sent by the Tribunal to the Respondent’s agent by email during March, April and May 2021 seeking an explanation for their failure to attend the hearing and respond to the correspondence being issued. The correspondence from the Tribunal included a strike-out warning. There was also correspondence from the Claimant’s representative, which was copied to the Respondent’s agent, drawing attention to the failure by the Respondent to reply to the Tribunal correspondence.
10. There was no reply to any of this correspondence until 9 June 2021 when the Respondent’s agent replied to an email from the Claimant’s representative dated 8 June 2021. In the reply, the Respondent’s agent indicated that he had not had sight of correspondence referred to in the email of 8 June 2021. The correspondence was sent by the Tribunal to the Respondent’s agent by

email dated 11 June 2021 and a deadline of 18 June 2021 was given for a response.

11. No response was received and so a judgment striking out the response was issued. This was dated 28 June 2021 and sent to parties on 30 June 2021.
- 5 12. Given that there was now no response to the claim, the Tribunal gave consideration to issuing a judgment under Rule 21. However, there was insufficient information regarding the sums sought by the Claimant and, by letter dated 6 July 2021, he was asked to set out these sums and to provide details of how these were calculated. He replied by email dated 13 July 2021
10 providing this information along with supporting evidence.
13. On 14 July 2021, the Respondent's agent made an application for reconsideration of the strike-out judgment. This application was granted by judgment dated 19 November 2021 and that judgment is referred to for its terms in setting out the reasons why the application was granted.
- 15 14. The application for the preparation time order was made by email dated 27 July 2021.
15. There were subsequent steps in the proceedings but, for reasons which will be set out below, these are not relevant to the determination of the application.

Claimant's application

- 20 16. The application by the Claimant seeks a preparation time order in relation to the following work:
 - a. The preparation and lodging of the ET1.
 - b. Reviewing the subsequent correspondence received from the Tribunal.
 - 25 c. Making a request for documents from the Respondent.
 - d. Preparation for and attendance at the aborted case management hearing in February 2021.

- e. Correspondence with the Tribunal and the Respondents' agent in the period March to June 2021 relating to the lack of contact from the Respondents and their agent.
 - f. Preparation of the schedule of loss requested by the Tribunal in July 2021 as part of the consideration given to issuing a Rule 21 judgment.
 - g. Preparation of a response to the reconsideration application.
 - h. Preparation of the application for the preparation time order itself.
17. The application was made on the grounds that the Respondents had acted unreasonably in the manner in which they had conducted the proceedings, specifically the failure to attend the hearing in February 2021 and the subsequent failure to respond to correspondence.
18. No further submissions were made by, or on behalf of the Claimant, in respect of this application. Parties were given the opportunity to make further submissions in advance of the present hearing but none were received from the Claimant. In particular, the terms of the application (both in relation to what preparation time had been incurred and the grounds on which the application is made) have never been revised or updated.

Respondents' submissions

19. Although the Respondents had indicated that the application was opposed, they have never set out any actual grounds of opposition when the application was made or in advance of the November 2021 hearing.
20. As noted above, parties were given the opportunity to make submissions in advance of the present hearing but none were received by the deadline given to parties.
21. Comments were received from the Respondents' agents by email on the day of the hearing received at 8.48am. Given the high volume of email correspondence received each day, it is not helpful for parties or their agents to lodge written comments for a hearing such as this at the eleventh hour. The Tribunal has noted the explanation given for the late submission.

22. As a result of the failure to comply with the deadline for lodging comments and the very late submission of these, the Tribunal had not had sight of the comments before it reached its conclusion below.

23. The Tribunal did review these comments before finalising this judgment but they made no difference to its decision.

Relevant Law

24. Rule 75 of the Employment Tribunal Rules of Procedure 2013 sets out the definition of a preparation time order:-

(1) ...

(2) *A preparation time order is 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.*

(3) *A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.*

25. Rule 76 sets out the test to be applied by the Tribunal in considering whether to grant a costs application:-

(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

(e) *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.*

...

10 26. Rule 77 sets out the procedure for determining such applications:-

*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.*

15 27. The principle in the Rules is that “costs” (the Tribunal will use this term as
shorthand for both costs and preparation time) do not follow success as they
do in other areas of civil litigation. Rather, the Tribunal has power to make
awards of costs in the circumstances set out in the Rules. In this case, the
relevant provision is Rule 76(1)(a) which gives the Tribunal a discretion to
award costs of the conduct of a party meets the threshold test set out in the
Rule.

20 28. The Tribunal’s discretion to award costs is not fettered by any requirement to
link any unreasonable conduct to the costs incurred (*McPherson v BNP
Paribas (London Branch) [2004] ICR 1398* and *Salinas v Bear Stearns
International Holdings Inc [2005] ICR 1117, EAT*). However, that is not to say
that any issue of causation is to be ignored and the Tribunal must have regard
to the “nature, gravity and effect” of any unreasonable conduct (*Barnsley
Metropolitan Borough Council v Yerrakalva [2012] IRLR 78*).

Decision

29. The Tribunal proceeds on the basis that the application should be determined based on the circumstances as at the point in time it was made. Subsequent conduct of the case is not relevant as the application was specifically related to the circumstances giving rise to the strike-out judgment made in June 2021 and the reconsideration judgment in November 2021.
30. In particular, the application has never been updated or revised so has to be determined on its terms as set out in July 2021.
31. Turning to the consideration of the application itself, the Tribunal notes that a number of the matters for which preparation time is claimed involve work which the Claimant or his representative would have to have done in the normal course of proceedings.
32. The work involved in preparing and lodging the ET1, reviewing correspondence from the Tribunal which is issued in all cases, preparation for the case management hearing and the preparation of the schedule of loss are all pieces of work which are an inherent and inevitable part of the Tribunal process. None of this was necessitated by the lack of contact by the Respondents and their agent.
33. Although there does not need to a causal link between any conduct and the “costs” sought, it cannot be in the interests of justice for an award of “costs” to be made for work which the Claimant and his representative would have to have done in the normal course of proceedings. To do so would be to give the Claimant a windfall which he would not otherwise have received. This goes beyond even the “costs follow success” principle because, at the time of the application, the claim was still to be determined.
34. In such circumstances, the Tribunal would not have been prepared to make an award of preparation time in respect of such matters.
35. In any event, the Tribunal does not consider that the threshold for unreasonable conduct in terms of Rule 76(1)(a) has been met in this case. It is important to bear in mind the explanation provided for the lack of contact

from the Respondents and their agent. This is set out in full in the judgment of 19 November 2021 but, in summary, the Respondents' agent had not attended the February 2021 hearing or replied to subsequent correspondence because he had not had sight of the relevant email correspondence due to an
5 IT error. The email correspondence from the Tribunal was being received in a hidden mailbox on the agent's email servers of which he was unaware.

36. The Tribunal had accepted this as a genuine and valid explanation for the lack of contact in the November 2021 judgment and does so, again, in the context of this hearing. A genuine error of this nature does not, in the Tribunal's view,
10 amount to unreasonable conduct of the proceedings.

37. For these reasons, the Claimant's application for a preparation time order is refused.

15 **Employment Judge: P O'Donnell**
 Date of Judgment: 14 April 2023
 Entered in register: 17 April 2023
 and copied to parties

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