EMPLOYMENT TRIBUNALS

Claimant: **Mr S Frankland**

Respondent: **Lloyds Motor Ltd**

Employment Judge J M Wade (in chambers)

JUDGMENT

The respondent shall pay to the claimant the sum of £361 pursuant to Rule 79 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) 2013.

REASONS

Introduction

1 The claimant, represented in these proceedings by a lay representative, Ms Bisby, has made a written application for a preparation time order in the sum of £608 (or 16 hours). The claimant's claims are listed to be heard over three days on **20 to 22 November 2018.** The claimant's application was made in accordance with the following order I made at the conclusion of a hearing on 7 August 2018:

"*The claimant may make a written application for a sum to be awarded to reflect any preparation time incurred in the preparation for today's hearing* ***by no later than 21 August 2018*** *and the respondent shall provide any written objections* ***by no later than 4 September 2018*** *indicating whether it considers a hearing is required to determine any application or whether it is content for the application to be addressed by me on paper, or indicating its consent."*

2 The delay it in coming to be decided by me has arisen because of the current pressure on the Tribunal's administrative resources.

The relevant chronology

3 The claimant was dismissed in December 2017; he worked at a land rover dealership. He commenced ACAS conciliation on 19 February 2018 with a certificate issued on 5 March 2018. His claim was presented on 4 April 2018 and the case listed for hearing on 31 July 2018. That is the usual practice for an unfair dismissal case which does not involve Equality Act or other complex issues and is due to be heard by an Employment Judge sitting alone. The response was due on 8 May

2018.

4 The standard case management orders sent to the parties on 10 April were, in summary, as follows: by 8 May the claimant was to set out remedy and provide any relevant evidence in that respect; by 22 May the parties were to send to each other a list of documents to which they wish to refer or which are relevant to the case and shall provide copies if requested; by no later than 5 June the respondent was to prepare a bundle and provide a copy to the claimant; by no later than 19 June the parties were to prepare and exchange written statements of evidence. The claimant was also ordered by 17 April to set out his holiday pay case in more detail. These orders are drafted in terms intended to be understood by litigants in person as well as professional advisers.

5 The response was presented on 8 May together with a request for postponement and unless order (that the claimant present his holiday pay details); that was copied by email to the claimant.

6 That evening the claimant sent details of his remedy case, and his holiday pay case, also attaching an extract from correspondence about his entitlements on dismissal. The claimant sent those documents to the Tribunal and copied them to his former employer. They included that the claimant had applied for jobs and was then employed on a "0.6" part time temporary contract which was factored into his calculation of remedy.

7 On 14 May the respondent's solicitors wrote to the claimant pointing out that attachments to the 8 May email were missing, saying "please provide us with a copy of these documents **by return".** The letter went on to point out in frank terms that the 10 April case management orders requires the provision of mitigation evidence (and described that), telling the claimant **"**You are obliged to provided us with [applications and so on] and your first two months' pay slips with your new employer…you are currently in breach of the Order which has directed that you provide us with these documents by **4pm on 18 May 2018**". The letter went on to say that in default the respondent would be obliged to apply for an unless order albeit it hoped that would not be necessary.

8 On 17 May the claimant copied this correspondence to the Tribunal complaining about the respondent's solicitors conduct which was described as a "form of bullying and harassment", in respect of the respondent's solicitors' "by passing the Tribunal" by writing to him directly. This was not copied to the respondent by the claimant in accordance with Rule 92. The claimant expressed concern that if the respondent had his new employer details they would try to undermine that employment, or words to that effect.

9 On 18 May the parties were sent a letter containing a refusal of the postponement and unless order applications (the 8 May applications) and informing the claimant he must provide the holiday pay details within 7 days (which had in substance been provided on the evening of 8 May).

10 On 20 May the claimant asked the Tribunal by email (not copied to the respondent by the claimant) whether he could amend or add to his holiday pay claim because pay slip information appeared to suggest further details omitted. This correspondence was not referred to an Employment Judge until 4 June, together with the following disclosure related matters.

11 On 22 May the claimant sent an email with heading "Case Management Order 2" and extracting the language of the order; he then listed the documents (37 numbered items) and requested that the respondent send copies by 5 June 2018. This was addressed to the Tribunal but copied to the respondent's solicitors.

12 On 23 May the respondent's solicitors sent two "pdf" files of around 200 pages under cover of an email which said: "We enclose the respondent's disclosure. Index to the respondent's disclosure to follow separately." The email went on to request copies of documents in the claimant's possession on which he wished to rely to assist in bundle preparation and that in order to take instructions, details of the relevance of each document to your claim for unfair dismissal and holiday pay.

13 I note here for convenience that the first item on the claimant's list was: "holiday policy for Lloyds Motors Ltd"; the second "holiday policy for Lloyds Motors Ripon Branch if different from above"; and so on. The relevance of some documentation (but not all) was self-evident.

14 On 29 May the claimant was reminded by the Tribunal of the need to comply with the case management order which clearly set out what was required.

15 On 30 May the respondent applied again for a postponement of the hearing based on pre-booked annual leave. The respondent was directed to provided evidence of the same and the claimant resisted that application, saying he was working to the 31 July hearing date.

16 On 6 June the claimant wrote to the respondent's solicitors setting out the relevance of each of the 37 items requested and observing that it would have been helpful if the request for relevance had been more targeted (that was the gist). The relevance was stated in one line or so for each item.

17 The claimant also wrote to the Tribunal indicating he would apply for an order for disclosure if the documents not provided in the respondent's pdf disclosure were not provided by 13 June; and complaining of a lack of paper documents having been provided as required, he said, by the order for preparation of a bundle by 5 June.

18 On 18 June the claimant made his application for specific disclosure pointing out that the 31 July hearing date was approaching. On 19 June he provided his mitigation documentation, saying he was now in possession of the requested documents, and provided two pay slips, his application letter for a post which he said appeared in Farmers' Weekly in December 2017, saying he commenced on 23 March and had a phone interview in January and face to face interviews in February and March 2018. He said he did not apply for any other posts and did not have a contract or letter of engagement to disclose.

19 On 20 June he applied for an Order to exclude the respondent's statements unless they were provided by return because the respondent was in breach of the case management orders. Also on 20 June the parties were told that I had directed that the respondent's postponement application must have evidence attached and any amendment application by the claimant to his holiday pay complaint would have to be set out in writing with precision (that was the gist).

20 On 21 June the respondent sent its index to disclosure asking for an index to the documents the claimant had disclosed; that email from the respondent's solicitors also said "I will revert to you separately on your request for disclosure once I have

obtained instructions from my client….In relation to witness statements I propose that we exchange statements once we have finalised the bundle".

21 On 25 June the respondent sent evidence to the Tribunal of the booking of the holiday of a witness before the notice of hearing was sent out.

22 On 27 June Employment Judge Bright directed a telephone preliminary hearing on 7 August to "sort out disclosure" and address witness statement compliance and list a new hearing date. She also postponed the 31 July hearing. The claimant asked for conversion to an in person hearing and that Ms Bisby be his lay representative (noting that she has dyslexia); the respondent objected to an in person hearing because the respondent's solicitors were located in Devon.

23 On 2 July the claimant told the Tribunal that the respondent suggested witness statement exchange two days after the deadline fixed by the Tribunal, and that in fact what had happened was that the claimant had provided his statement and there was injustice because the respondents witnesses would have the opportunity of reading his statement before providing their own. He renewed his application to exclude the respondent's statements.

24 On 27 July the parties were informed that an Employment Judge had directed the hearing would take place in person for reasons of reasonable adjustment.

25 On 6 August 2018 at 19.58 the respondent provided an updated list of documents and its response to the 37 items in the claimant's request.

26 There were three additional items added to the respondent's list: the claimant's final pays lip; a calculation of his average commission in 2016 for holiday pay purposes for 2017; and Jaguar Land Rover desk standards. These documents were also attached to the respondent's 6 August email above.

27 The respondent also sent its witness statements to the claimant the night before the 7 August hearing.

<u>The hearing on 7 August 2018</u>

28 I conducted the hearing on 7 August 2018. The chronology above was apparent from the file. My reasons for making the order concerning the submission of a preparation time order recorded as follows:

I have indicated to the parties that I consider the respondent has acted unreasonably in its provision of a response to the disclosure request at the eleventh hour, and its provision of statements at the eleventh hour, and it will be apparent, in its resistance to some of the requests which are plainly material to the issues in the case. More than its opposition though, is its general approach to the case management orders in the face of a litigant in person opponent. Guidance on the obligations of solicitors, barristers and ILEX members when litigants in person or lay parties act is clear. The claimant's lay representative has had to put in unnecessary preparation time which would not have been required had a different approach to the orders and the overriding objective been taken. The request for documents was sent on 22 May 2018 with relevance provided on 6 June. The respondent has not indicated the reason for its opposition until emails at the 11th hour last night; together with witness statements.

29 The context for the indication above, and the order concerning submission of a preparation time order, was that I had refused the claimant's application for the exclusion of the respondent's witness statements, but given directions for witness evidence going forward.

30 My reasons for doing so were that the exclusion of an employer's evidence of reason for dismissal, fairness and holiday pay matters, would be a very draconian response to conduct of litigation, or breach of an order, and would significantly prejudice the equal footing of the parties at a full trial.

31 The breach of the orders by a respondent represented by a professional representative, and one which from the outset of the proceedings had sought to hold the claimant to the orders made without variation, is a matter which I explained to the parties is remediable in costs, if additional and wasted preparation time is established by unreasonable conduct in litigation. That is in lay terms, it was no part of my orders to use a draconian power if there were other measures which would remedy a wrong.

32 The majority of the one hour hearing was taken up with discussion of relevance and necessity for an order for specific disclosure in relation to those of the 37 items pursued. (Some were not pursued as they had by then appeared in any event in the respondent's index).

33 Mr Brown was unaccompanied by solicitors in the hearing. He had taken instructions. He was asked this by me: why were witness statements not provided in accordance with the 19 June deadline? He replied that the bundle was not agreed, and that was a reasonable position to take, when in fact issues of disclosure were not resolved. He also assured the Tribunal that the claimant's statement(s) had not been opened or otherwise forwarded on to the respondent by the respondent's solicitor and had not been looked at prior to the sending of the respondent's statements the night before the hearing.

34 Mr Brown was asked by me why the respondent's position on witness statements had changed; and he replied that the response to the disclosure request had been worked through and the respondent decided to draft and send witness statements so there was no lack of parity for the parties.

35 Ms Bisby agreed that the claimant now had the statements, but said that "they were absolutely not on an equal footing and the respondent should have communicated before 19 June".

<u>The respondent's written submissions in opposition to the making of a preparation time order</u>

36 The respondent requested this matter be dealt with on paper without a hearing.

37 The respondent's response sets out the reason for delay in addressing the the specific disclosure request was the absence of key members of staff to give instructions in the summer period and the writer's (the respondent's solicitor's workload) at the time. (The material delay was from 6 June to 6 August; a period of two months).

38 The respondent points out that 12 items requested were in fact contained in the disclosure provided on 23 May and list on 21 June. The respondent says this was

not a blanket rejection of the claimant's request but opposition to each opposed item was contained in a carefully considered response provided on 6 August, which was worked through by the Tribunal.

39 The response records that of the 25 items pursued only 6 were ordered by me to be disclosed, and says that the hearing would have been required in any event, even had it provided its response sooner.

40 As to witness statement exchange the respondent says it sought to engage the claimant in constructive dialogue about delaying witness statement exchange for reasons of a likely grant of postponement; the remaining as yet unknown scope of disclosure; the need for bundle pagination to incorporate that unknown; and mitigation documents, on which its witnesses needed to comment, only having been provided by the claimant on 19 June.

41 The respondent develops the information provided by Mr Brown to say that statements were provided on a provisional basis the night before the hearing to demonstrate the respondent was actively seeking to comply with orders.

42 The respondent says it has acted reasonably; and that there has been no additional preparation time for the claimant in preparing for and attending a hearing. Further it submits the time claimed is excessive (being 16 hours at £38 per hour); and that the Tribunal should conduct its own assessment if it is against the respondent on the other matters.

43 Finally the respondent says, in effect I should recuse myself from determining this application because I had determined as a fact that Ms Bisby had had to put in additional preparation time because of the approach of the respondent in advance of any application being made. That would suggest that the objective and reasonable observer could conclude there was a real possibility of bias, that is my not approaching the determination of the application in a fair and even-handed manner. The respondent respectfully requests this matter be addressed by another Employment Judge and reliance for that position is to be found in Oni v NHS Leicester City UKEAT/0144/12/LA.

Discussion and Conclusions

Can I deal with this application?

44 The copy of Oni provided to me by the respondent's solicitor was not the 2012 decision of Langstaff P, but that of HHJ Eady in 2014. Oni (both appeals) illustrates facts which could not be further from those in this case: a full liability hearing on Equality Act and unfair dismissal issues; costs for a hospital said to be in the region of £100,000; and a costs appeal which resulted in the matter being remitted to a differently constituted Tribunal, which itself was held to have erred in the analysis of a claim "misconceived", resulting in an order for a third costs determination. I say no more about that.

45 The giving of indications in case management is always a delicate matter. Tribunals are charged with the overriding objective which includes assisting parties to resolve their complaints and it is clear in my indication that this matter might have dealt with by consent in circumstances which were plainly undesirable in litigation. That was not to be, for the reasons expressed in the respondent's opposition.

46 Expressing a concluded view at the conclusion of a hearing that… *The claimant's lay representative has had to put in unnecessary preparation time which would not have been required had a different approach to the orders and the overriding objective been taken…*does no more than reflect factual matters self-evident in the chronology above and Ms Bisby's dyslexia (known to the respondent from 2 July).

47 The informed observer knows that it is the role of a Judge to change views, suspend conscious bias, be alert to subconscious bias, and make decisions on the facts in front of them. Such an informed observer in my judgment would not conclude a real possibility of bias in my deciding this application. Judges are expected to have broad backs and not to yield to unmeritorious recusal applications and I do not do so.

Did the respondent engage in unreasonable conduct (that is cross the Rule 76(1)(a) threshold)?
Did it breach an order? (Rule 76 (2))

48 I weigh all the matters evident in the chronology above and the respondent's submissions, including that the reason for delay is said to be workload and the summer unavailability of instructions.

49 I also take account the approach at the outset of the proceedings – the respondent's early application for an unless order and indication of a further application, indicated powerfully to the claimant, a litigant in person that he must comply with orders. Its approach gave the impression compliance with orders was a "must". The chronology above demonstrates that the respondent did not so comply as to witness statements and the length of delay was substantial.

50 Fair it is to say that there are always reasons why orders cannot be observed: ill health, volume or workload, absence and so on. Professional representatives know that in those circumstances orders can be varied by the Tribunal and ideally variations can be agreed by the parties for the Tribunal to approve (or not). These matters are not easily known to litigants in person unless they are directed to guidance or told by professional representatives. An application could and should have been made by the respondent to vary the order as to witness statements for all the reasons it sets out in its submission as to its position. Of those, additional disclosure and the potential need to include commentary in statements is powerful, commentary on the remedy case not so, because of its brevity.

51 As to responding in a timely way to a disclosure request, again the reason for delay must be set against the impression that the respondent created by its early notice to the claimant that orders must be observed; that the claimant must deal with a request "**by return";** whereas the respondent could take a very long time to deal with the disclosure request substantively. A further example of "one rule for one and one for another" is that the respondent took two months to provide evidence of a holiday booking, delaying a decision on postponement, when the Presidential Guidance (to Rule 30A) is clear that all relevant documents to an application must be provided.

52 I also take into account the following from Litigant in Person guidance to the professionals to which I referred in my reasons above:

"*19. You should adopt a professional, co-operative and courteous approach at all times.* ***Your first contact with a LiP might well set the tone for the way in which the case is dealt with from then on.*** *For example, in a family case, an initial letter from a lawyer might be the first indication the LiP has that the dispute is serious. An initial letter should briefly address the issues and avoid protracted, clearly one-sided and unnecessary arguments or assertions.*
20. In your initial contact, and at other suitable stages in any dispute, you should recommend to a LiP that they seek independent legal advice, or point them to other advice or support agencies. You might wish to consider enclosing a copy of an initial letter to be passed on to a support agency or to any lawyer who is instructed.
21. You should take care to communicate clearly and to avoid any technical language or legal jargon, or to explain jargon where it cannot be avoided: a LiP who is already feeling at a disadvantage may be further intimidated and antagonised by the use of such language.
22. You should take extra care to avoid using inflammatory words or phrases that suggest or cause a dispute where there is none, or inflame a dispute, and avoid expressing any personal opinions on the LiP's behaviour. Correspondence and telephone calls from some LiPs may be emotive, repetitive, and potentially hostile….23[LiPs should be directed to sources of advice or words to that effect].

53 In my judgment the "tone" set by the respondent at the early stage of these proceedings was of rigorous compliance with orders; and unnecessary escalation. The claimant sought to comply. I do not consider workload and summer holiday absence reasonable explanations in this context to justify a delay of two months to substantially reply to a disclosure request which was opposed. I consider that the respondent could and should have applied for an adjustment to the witness statement date in the circumstances it describes.

54 I answer both these questions in the affirmative.

<u>Did the respondent's unreasonable conduct lead to additional preparation time by Ms Bisby?</u>

55 This question involves two matters of fact: would a preliminary hearing have been necessary had a more timely disclosure response been given and statements either exchanged or an order for variation sought? Did the failure to exchange statements and the late response generate extra work for Ms Bisby?

56 I cannot know what would have happened had the respondent provided its disclosure response in a timely fashion, but, given the length of request and time taken to discuss and resolve the disputed matters, the evidence renders it likely that matters could only fairly have been addressed in a hearing. Indeed, I indicated above that the respondent's opposition to some disclosure was the lesser issue. On the other hand, if the response been set out in writing much sooner, with some disclosure given, the application may have been refused on paper without a hearing.

57 The issue concerning witness statement exchange, and the application for exclusion, rendered it certain, given the tone of correspondence, a hearing would be required to resolve matters and this is properly laid at the respondent's door, including setting the tone and expectation in relation to orders, and then to fail itself to comply, as it did. In summary the just approach is to consider the need to prepare for a preliminary hearing to have arisen from the respondent's conduct and breach of orders.

58 It is also clear that due to the respondent's delay in providing any substantive response (but without providing the matters sought either), and not exchanging

witness statements or seeking a variation, part of that preparation rightly includes Ms Bisby or the claimant having had to write to the Tribunal on at least three occasions unnecessarily.

Should I exercise my discretion to make a preparation time order?

59 I raise this issue of my own motion, acknowledging that the claimant has not been entirely complicit with orders: the remedy documentation and explanation of the case on seeking new employment was not provided until 19 June. The claimant set out his reasons for being concerned in providing that information, and he could not disclose documents he did not have. In the round his documents and compliance with orders has been far greater than the respondent's, and he is not professionally advised. In all these circumstances I do consider it just to make an Order.

What is the proportionate amount of time to award (the amount per hour is fixed by Rule 79)?

60 In my judgment in the circumstances described above, I assess half an hour per unnecessary communication. I further assess the reasonable and proportionate time for Ms Bisby to have read and digested the information the night before a hearing in order to advocate in the applications, eight hours. That takes into account both her dyslexia and that she is without any legal training or administrative support to collate and relate documents to the response and so on. I duly award the sum of 9. 5 hours and a sum of £361.

Employment Judge JM Wade

Dated: 4 October 2018

Note: this judgment will be made available on the public register soon after it is sent to the parties.