Case No. 2405186/2016
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EMPLOYMENT TRIBUNALS

Claimants:
1. Mr David Denton
2. Mr Andrew Gilligan
3. Miss M Toolan
4. Mrs Lowri Denton

Respondent: Govdata Limited

HELD AT: Liverpool **ON:** 19 October 2018

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimants: Mr D Flood, counsel
Respondent: Mr S Jagpal, consultant

JUDGMENT

JUDGMENT having been sent to the parties on 31 October 2018 and written reasons having been requested on 31 October 2018 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Preamble

1. This is a hearing to consider the application made on behalf of the claimant's set out above for a cost and preparation time order following promulgation of the Judgment and Reasons ("the promulgated judgment") on 22 March 2018 in respect of the first, second and third claimant. With reference to the fourth claimant the judgment was promulgated on 10 October 2017 with an order that her application for costs would be dealt with at a later hearing.

2. On 18 April 2018 the claimants applied for costs and a preparation time order pursuant to Regulation 75 of the Employment Tribunal Rules of Procedure 2013 ("the 2013 Regulations") in respect of costs incurred by the first claimant since 2016 and preparation time orders in respect of the second and third claimant for the period leading up to and including the postponed hearing of 6 December 2017 and final hearing of 5 March 2018. The basis of the costs and time preparation application lies in Regulation 76(1)(a), (b), 76(2) and 76(4) of the 2013 Regulations. In short, it is maintained the respondent has acted vexatiously, abusively or otherwise unreasonably in the way it has conducted the proceedings.

3. In a letter dated 9 July 2018 the respondent resisted the costs application setting out its grounds for doing so, in short submitting it had a reasonable prospect of success and postponements were sought on medical grounds, or were due to the claimants being uncooperative. It made the valid point that the costs sought were "an exceptionally high amount of money claimed for the nature and complexity of the claim" and there was no guarantee this would be recovered. It was further alleged the claimants were uncooperative in relation to the bundle, and it was the "claimants who sought to delay and make the process of litigation more difficult than it needed to be, and it was "unlikely" the first respondent had paid £23,021.76 personally.

4. The claimant's claims are for unlawful deduction of wages, breach of contract, accrued holiday pay and failure to provide a statement of terms and conditions of employment in accordance with the Employment Rights Act 1996 as amended. They were relatively straightforward claims and listed fast track, but following the delayed filing of the ET3 and an extension of time application heard at a preliminary hearing, the matter became more complex. The respondent maintained the first claimant had fabricated his claim for wages and expenses, it was denied he worked the hours claimed and alleged he had "purposely" taken business from the respondent during his employment and he had resigned. With reference to the second respondent it was alleged he had been dismissed for "gross misconduct" and under the legal principle "ex turpi causa non orilur centric" was not entitled to money; he was under criminal investigation, he had made fraudulent claims and "fraudulently signed in and business bank accounts." With reference to the third claimant gross misconduct was also alleged.

5. There have been numerous occasions when the respondent had failed to comply with case management orders, final hearings have been adjourned as a result of applications made by the respondent and this has extended the litigation from the first listing of the trial on 17 January 2017 to the hearing on 14 March 2018, some 17 months later and the Tribunal accepts this has resulted in additional costs being incurred by the claimants. The Tribunal does not intend to repeat the chronology in any detail, it is noted from the file despite an extension of time being granted, the respondent failed to lodge the ET3 and given the claimants' objection to a further extension and the exchange of a substantial amount of correspondence between the parties and the Tribunal, a reconsideration hearing took place. During this period, in an email dated 9 March 2016, the respondent confirmed civil actions had been prepared and there was a current criminal investigation by the police into "obtaining property by deception, conspiracy to defraud and Computer Misuse Act." Other similar correspondence followed, and given the serious allegations there was much acrimony between the parties. It became apparent at the liability hearing that there was evidence on the part of Mr Hugo, of some spite or desire to harass the claimants by these allegations. Mr Hugo was improperly motivated, and it was not simply the case of him being misguided when he represented the respondent without seemingly having initially taken legal advice. It also became apparent, contrary to the respondent's written submissions set out in the 9 July 2018 letter, the grounds set out in the Response had little or no discernible basis in law and its effect was intended to frighten away the claimants from the litigation, and subject them inconvenience, harassment and expense out of all proportion of the real issues in the case. The fact that all the claims were dealt with at the same time, and the other claimants relied to a great extent on the legal advice received by the first claimant, resulted in an increase in the amount of costs. The Tribunal has factored this fact into its assessment on costs and preparation time.

6. Coupled with Mr Hugo's less than truthful evidence, the Tribunal was satisfied the respondent's defence and the manner in which it conducted its defence, involved an abuse of the process of the Tribunal. Objectively, Mr Hugo should have known the respondent's defence was groundless and his intention was simply to harass by the highly personal and damaging nature of the allegations that were entirely without substance. Mr Hugo's demeanour before the Tribunal gave the impression that he had no belief in the genuineness of the defence, and indeed he was found to have been" an inaccurate historian" who made serious and unsubstantiated allegations that amounted to unreasonable conduct, and there is a direct correlation with the manner in which this litigation was dealt with by Mr Hugo and the substantial costs incurred by the first claimant.

7. The respondent applied for an adjournment of the reconsideration hearing, which was granted and followed by correspondence sent on behalf of the first claimant to the effect that the respondent had deliberately misled the Tribunal in its application and costs were sought. On 26 June 2017 the extension of time in which the respondent presented its response was granted and case management orders

were made. A 2-hour preliminary hearing took place on 2 October 2017, originally the date for the liability hearing, and this was followed by a number of judgments, including one in favour of the third claimant in respect of her wrongful dismissal. It became apparent the case was not ready for trial as the respondent was in default of earlier case management orders and there were issues with disclosure and the claimant's understanding of the respondent's defence, which it clarified as set out in the Case Management Order sent to the parties on 10 October 2017. The respondent confirmed it relied on the response set out in the ET3, and clarified its case against that second claimant was that he should not benefit from an illegal act of fraud, the first claimant had resigned and it followed there could not have been a wrongful dismissal.

8. Confusingly, the respondent (who was legally represented at the time) also confirmed the second claimant had carried out his duties but not worked, and as a result an application was made to strike out the respondent's defence with regards the second claimant's unlawful deduction claim or order a deposit. The strike out application was listed for 6 December 2017; but as matters transpired the hearing did not proceed on that basis. The remedy hearing was listed for 26 January 2018.

9. At the 6 December 2017 hearing the first claimant and respondent were legally represented, the second claimant was not but was assisted by the first claimant's legal representative. In respect of the second claimant the respondent conceded it had unlawfully deducted the second claimant's pay but disputing holiday pay claim based on an overpayment, a defence that had not been raised in the ET3 and an application to amend the Response was made and granted in the interests of justice with the respondent being forewarned on behalf of the claimants that should it fail in its defence costs would be sought. The issues were discussed and the respondent continued to make allegations of fraudulent behaviour and gross misconduct. Judgment by consent was issued in favour of the second claimant for unlawful deduction of wages and the pension contribution claim dismissed on withdrawal by the second claimant. A Case Management Order was sent to the parties on 3 January 2018 that reflected the discussion, and the agreed issues which included whether the respondent was entitled to dismiss the second claimant as a result of his breach of contract and whether or not the respondent was entitled contractually not to pay the first claimant's notice pay amongst other matters. Reference was again made on behalf of the claimants to a costs application against the respondent.

10. On the 17 January 2018 the respondent applied for an adjournment of the 26 January 2018 hearing, which the claimants refused to consent to in various emails. Nevertheless, the respondent's application was granted and the hearing took place on 5 March 2018 following which judgment was reserved to in chambers hearing held on 13 March 2018. The reserved judgment and reasons was promulgated on 22 March 2018 and under the heading "Evidence" some of Mr Hugo's responses to questions put to him under cross-examination were recorded. In relation to the first respondent's claim for unpaid expenses Mr Hugo, who gave evidence on behalf of

the respondent, did not dispute the mathematical calculation or the fact that the expenses had been incurred, his case was that other options would have been cheaper i.e. Mr Hugo picking up the first claimant instead of a taxi. This was not specifically pleaded in the ET3, and Mr Hugo gave the impression of giving evidence which suited him at the time, evidence that had no basis in any reality. He was not found to have been a credible witness, and the case put forward in evidence at the liability hearing was unrecognisable to the pleaded defence. For example, there is a difference to the first claimant having allegedly fabricating his claim for wages and legitimately expenses to claiming expenses, which are attacked on the basis that first claimant could have taken up other options, such as cheaper notary fees. It was denied he worked the hours claimed but there was no satisfactory evidence to this effect, and alleged he had "purposely" taken business from the respondent during his employment for which there was no satisfactory evidence the first claimant had been guilty of misconduct.

11. The first claimant primarily contended the respondent's defence to his claim had no reasonable prospects of success, and the 5 March 2018 Judgment supported this view at paragraphs 5(4), 7, 8, 11, 16, 17 and 18. The Tribunal, based on the evidence before it, agreed. The respondent had no defence to the first claimant's unlawful deduction of wages claim and it would have been aware form the outset that the first claimant had worked hours for which he had not been paid. Despite the threat of costs made at various junctures throughout these proceedings, the respondent continued to press its defence putting the first claimant to a great deal of costs as a result of the protracted litigation touched upon above. The respondent late in the afternoon on the liability hearing conceded the first claimant's claims and this late concession, given the factual matrix of the litigation, amounted to the respondent acting vexatiously, abusively or otherwise unreasonable in the way it has conducted these proceedings, especially given the content of the ET3 which resulted in the first and second claimant concerned as to the extent of disclosure necessary to defend the respondent's allegations, and querying what documents should be included within the trial bundle.

12. Turning to the second claimant's claim for costs, the Tribunal repeats its observations above. It was submitted that as the respondent had conceded at the 6 December 2017 hearing an element of the unlawful deduction of wages claim, and given the amendment to the ET3 pleading the respondent had overpaid 6.5 days holiday, the second respondent incurred wholly unnecessarily preparation time and time off work. The Tribunal accepts the submission that the respondent produced little if no supporting evidence that the second claimant had committed an act of gross misconduct, or any basis why the overdraft fees he incurred should not be met by the respondent given the causal nexus between those fees and monies legitimately payable by the respondent to the second claimant. In assessing the preparation time, the Tribunal has taken into account the fact that whilst the second claimant was not legally represented, he was greatly assisted by the first claimant's legal representation. The same point applies to third and fourth claimant.

13. Turning to the third claimant, it was correctly submitted the respondent did not present any evidence in defence of her claim for wrongful dismissal and outstanding holiday pay, conceding late on in the litigation the third claimant was owed the money despite the defence set out in the ET3.

14. Finally, with reference to the fourth claimant it was submitted the respondent improperly withheld sums owing to her without reason, and its defence had no reasonable prospects of success. The Tribunal agreed.

Law

15. The Employment Tribunal Regulation 2013 ("the 2013 Regulations") set out in Rules 74-79 the provisions by which the Tribunal has a discretion to make a cost or preparation time order. Rule 76(1)(a) provides that: "A Tribunal must consider whether to make a costs order against a party where he or she has acted unreasonably in the bringing or conducting of proceedings".

16. Rule 76 of the Tribunal Rules 2013 imposes a two-stage exercise for a Tribunal in determining whether to award costs. First, the Tribunal must decide whether the paying party (and not the party who is seeking a costs order) has acted unreasonably, such that it has jurisdiction to make a costs order. If satisfied that there has been unreasonable conduct, the Tribunal is required to consider making a costs order and has discretion whether or not to do so. Fees for this purpose means fees, charges, disbursements or expenses incurred – rule 74(1) Tribunal Rules 2013.

17. In Employment Tribunal proceedings costs do not ordinarily follow the event, unlike County Court and High Court actions.

Conclusion

18. The Tribunal is aware that it is "rare" for costs orders to be appropriate in Employment Tribunal proceedings; they do not follow the event as in the ordinary course of litigation. Having regard to the nature, gravity and effect of the unreasonable conduct as identified by the Tribunal above, factors relevant to the exercise of the discretion, and bearing in mind the respondent through its managing director Mr Hugo, had also behaved unreasonably in the manner set out above, it is just and equitable to make a cost award taking into account means.

19. The Tribunal accepts the validity of the submissions made on behalf of all the claimants that the respondent deliberately deployed delaying tactics and intentionally raised a number of serious allegations so as to de-rail these proceedings by upsetting the claimants with its references to alleged civil proceedings (which never materialised) fraud (which never materialised), police investigations (which never materialised) and so on. The Tribunal was reminded the respondent attempted to adjourn the 5 March 2018 hearing some 4-days before it was due to be heard, albeit unsuccessfully as the adjournment was refused.

20. The Tribunal is satisfied the respondent has acted unreasonably in defending the proceedings, and in the manner in which its defence was set out within the ET3, including the serious allegations of fraud and a criminal investigation, e.g. the reference to Andrew Gillighan fraudulently "signing in and business accounts" and David Denton's alleged gross misconduct and fabrication of expenses. As indicated in the 5 March 2018 judgment there are numerous references to Christian Hugo, the CEO, giving contradictory and disingenuous evidence. He did not give credible evidence, and late on in the day fundamentally conceded the expenses were incurred, but disputing the amount. As set out in paragraph 17 of the promulgated judgment, Kelly Hugo's evidence resulted in a concession that an unlawful deduction of wages had taken place. Paragraph 18 made the observation that had the respondent addressed mind properly in the case, it would have realised there was no defence to the unlawful deduction of wages. It is marked a number of claims were settled sometime after proceedings were issued, and the respondent's inability to produce any satisfactory evidence at the liability hearing of the alleged misconduct and fraud was notable.

21. The Tribunal has considered the schedules of costs filed and notes a great deal of time and expense was spent drafting correspondence in additional to dealing with the various hearings. Mr Jagpal was persuasive in is argument that the respondent's various applications to adjourn resulting contentious party-to-party correspondence was indicative of the distrust between the parties, and the Tribunal agreed with this analysis. However, Mr Jagpal was unfortunately not the advocate at the liability hearing, had he been so, it would have become apparent to him that there existed real issues in respect of Mr Hugo's credibility when he attempted to unsuccessfully justify seeking an adjournment. An example of Mr Hugo's lack of credibility was evidenced by reference to contemporaneous documentation before the Tribunal produced in support of the adjournment application from which it appeared he booked football tickets followed by flights in order that he could attend a football match and this was the reason for the adjournment. In the letter dated 9 July 2018 the submission made on behalf of the respondent that its request for postponements were sought on medical grounds was unsupported by the contemporaneous documentation.

22. An employment tribunal also has a discretion to make a costs order or preparation time order (PTO) where it considers that a claim or response has no reasonable prospect of success — rule 76(1)(b) Tribunal Rules 2013. A two-stage test applies requiring the tribunal to consider (1) whether this ground is made out, and (2) exercise a discretion as to whether or not to actually award costs. Whether or not the party has received legal advice or is acting completely alone may be an important consideration when deciding whether or not to make a costs order or PTO against him or her. The Tribunal took the view that Mr Hugo, when he filed the ET3 on behalf of the respondent, on an objective assessment of the evidence, should have realised there was no rational basis for him to conclude the defence had any prospect of success at any time. He had, or should have had, knowledge that there

was no reasonable defence, and sought instead to muddy the waters by a raft of unmeritorious allegations that were untrue. This continued throughout the proceedings until the liability hearing, even when the respondent was represented by legal advisors, presumably acting under the instruction of Mr Hugo. In short, the Tribunal is satisfied the respondent's defence did not have a reasonable prospect of success either at the time of conception or during the course of the litigation.

23. Considering Mr Hugo's behaviour and that of the respondent, it is a nigh on impossible exercise to allocate precisely those costs incurred as a result of the adjournments and the general unreasonable behaviour of Mr Hugo throughout these proceedings without carrying out a detailed assessment. An agreement was reached with the parties that the Tribunal would deal with costs taking a broad brush as to quantification, and it had done precisely this, mindful of the fact at all times a costs order is unusual, it is not a punishment for bad behaviour and given the amounts involved in this litigation, the sum of £19,000 finally awarded in the first claimant's favour is recognised by the Tribunal to be a substantial amount of money, and not one easily ordered to be payable by the respondent. This was an exceptional case.

24. It can be seen from the schedule of costs produced on behalf of the first respondent, a considerable proportion of the time and expense was uncured by the David Denton progressing his complaint, and the other claimants hung onto his coat tails. The majority of the costs, if not all, were incurred by David Denton and Lowri Denton, to a lesser extent. The Tribunal learnt that some of Lowri Denton's costs were met by the insurer, and a small proportion of David Denton's costs; £3879.57, were also covered. The Tribunal has not reimbursed the insurer for its legal costs incurred within this litigation, and the costs ordered relate to David Denton's personal expenditure which was in excess of £20,000. Justice would not be met if the first claimant's damages recoverable against the respondent were subsumed in their entirety, given the fact the respondent through Mr Hugo, had acted vexatiously, abusively or otherwise unreasonable in the way it has conducted the proceedings throughout, including up to the liability hearing. The Tribunal was satisfied, despite the respondent's submissions to the contrary, the first claimant had incurred legal costs in excess of £20,000 and it was just and equitable, in all of the circumstances in this exceptional case, for the respondent to pay a contribution of £19,000 towards the first respondent's costs. In arriving at this decision, the Tribunal did not accept the validity of all the written submissions made on behalf of the respondent. From its perusal of the Tribunal file, there was no evidence of the claimant's being especially uncooperative given the various applications made by the respondent to adjourn, extend time limits, amend pleadings and so on. There was no evidence the claimants' sought to delay the litigation process and liability hearing, to the contrary, it was Mr Hugo on behalf of the respondent who in the words of the respondent (aimed at the claimants' behaviour) "sought to delay and make the process of litigation more difficult than it needed to be."

25. Mr Jagpal submitted that early in the litigation following the extension of time for the ET3 to be filed and the respondent's failure to do so, the claimant's legal

advisors took an overly unnecessarily aggressive approach, and the Tribunal agreed that to a limited extent this appeared to have been the case. This accordingly has been factored in and reflected in the costs order. It revisited the copy party-to-party correspondence on file which was marked on both sides by aggression and distrust. Nevertheless, it was the respondent who had acted "vexatiously, abusively, disruptively and otherwise unreasonably (Section 26(1)(a) of the 2013 Regulations) throughout this litigation, and from the outset its Response had no reasonable prospects of success with regards the main issues in contention, ignoring peripheral claims such as pension contributions. It is the Tribunal's view that considering the entire factual matrix of this ligation the respondent has met the threshold test for a costs order having regard to all the circumstances, even making an allowance for the fact that Mr Hugo was not legally qualified when he drafted and filed the ET3, a pleading that was unreasonable in content and inflammatory within the litigation, as were subsequent emails form Mr Hugo reinforcing the serious allegations made. This is not the case of a managing director responding to proceedings in an inexperienced and naïve fashion, Mr Hugo's lack of objectivity went much deeper resulting in wild allegations of fraud and breach of contract. In arriving at its judgment on costs, the Tribunal took into account that the minor unsuccessful claims did not undermine the basic premise that the respondent had lodged a defence and proceeded to deal with the claims on that basis when a more reasonable respondent, acting objectively, would not have acted in such an unreasonable manner. In short, all of the first respondent's claims succeeded and he was awarded compensation 20 months after the monies became due, and 19 months after he had served the ET1. With the exception of a £30.00 expense claim, all of the second claimant's claims succeeded, as did the third claimant, with the exception of the pension contribution claim that had a negligible value. Finally, the fourth claimant's claims were successful, and she was awarded monies owned to her 14 months after they became due, and 11 months after the ET1 was served.

26. With reference to the second claimant's application for a time preparation order, given the fact that he had benefitted by the first respondent's handling of the litigation and the costs incurred on behalf of the first respondent, taking into account the time spent by the second claimant on a broad brush basis and reducing that time considerably, the Tribunal concluded it was just and equitable to award the second claimant a contribution in the sum of £500 reflecting the fact that he was facing a complex defence raised by the respondent involving damaging allegations of fraud and threats of criminal and civil action that never transpired.

27. With reference to the time preparation order relating to the fourth respondent, the Tribunal agreed with the respondent and concluded the time spent was excessive given the first respondent's input, and it did not order any contribution of costs towards the preparation of time spent. The fourth claimant's husband, the first claimant, was represented and the Tribunal took the view she benefitted from this. A costs order can only be made in favour of a represented party (either legally represented or represented by a lay representative) and a PTO can only be made in favour of a party who has not been legally represented — i.e. an individual who is

representing him or herself or a party who has a lay representative. It is not possible to make both types of order in favour of the same party in the same proceedings according to Rule 76(3).

28. Accordingly, the respondent was not ordered to pay time preparation costs to the fourth claimant, and her application is dismissed.

29. The Tribunal took into account the respondent's means; there was no evidence before it that the respondent could not afford a costs order in the sums set out below. For the avoidance of doubt, when arriving at its decision to award costs and a time preparation order if favour of the claimants, it took into account the whole picture of what happened in this case, concluded that there had been unreasonable conduct on the part of the respondent in defending and conducting the case as set out above, and the fact that a costs award against a party is not a punishment.

30. In conclusion, the respondent is ordered to pay to the first claimant, Mr David Denton, a contribution towards legal costs in the sum of £19,000. The respondent is not ordered to pay legal costs to the fourth claimant, Mrs Lowri Denton, and her application for costs is dismissed. The respondent is ordered to pay a contribution towards preparation time in respect of the second claimant. Mr Andrew Gilligan, in the sum of £500.00.

31. The respondent is ordered to pay a contribution towards preparation time in respect of the third claimant. Miss M Toolan, in the sum of £300.

Employment Judge Shotter

21 December 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

02 January 2019

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FOR THE TRIBUNAL OFFICE