EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Timothy Hayes	**v**	**Marckita Limited**

Heard at: Cambridge **On:** 15 March 2019

Before: Employment Judge Brown

Appearances:

For the Claimant: Mr G Simms, Counsel
For the Respondent: Mr J Parkins, Managing Director

JUDGMENT having been sent to the parties on 5 April 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS ON RESPONDENT'S APPLICATION FOR COSTS

1. I sent my judgment to the tribunal administration on 15 March 2019. I was first informed of a request for written reasons on 25 June 2019, and was on 9 July 2019 first provided with a typed transcript of the reasons which I gave orally on 15 March 2019. It is regrettable that it has taken so long for written reasons to be provided to the parties following their request.

2. These proceedings have a sorry context to them, because Mr Hayes and Mr Parkins are related to one another by the marriage of Mr Hayes to Mr Parkins' mother. Mr Parkins and Mr Hayes were co-directors of the respondent. In July 2017, their relationship appears to have deteriorated. Mr Hayes stopped doing work for the respondent. In September 2017, Mr Parkins issued proceedings in the County Court for payment of sums which were said to be loans by Mr Parkins to Mr Hayes. On 20 September 2017, Mr Hayes started ACAS early conciliation. An early conciliation certificate was issued on 8 October 2017 and on 27 October 2017, he presented a claim to the Employment Tribunals comprising complaints of unfair dismissal, a complaint on a claim that he had not received notice pay, for arrears of pay and for other payments.

3. By a letter dated 1 November 2017, sent by the Employment Tribunals to the claimant and the respondent, the parties were given notice of a hearing to take place on 3 May 2018.

4. Case management directions were made that the claimant should provide a statement of remedy by 29 November 2017, that the parties should disclose documents by 30 December 2017, that the respondent should produce a bundle by 28 December 2017, that witness statements should be exchanged by 10 January 2018 and that if represented the parties should produce a statement of issues shortly before the hearing. That notice of claim in bold text before the Case Management Orders warned the parties firstly of their liability for the commission of a criminal offence if they failed to disclose documents and also that if this order, including the timetable was not complied with, the tribunal could, among other things, waive or vary the requirement, strike out the claim or response, bar a party from participating in the proceedings or award costs in accordance with rules 74 to 84 of the Employment Tribunal Rules.

5. On 28 November 2017, the respondent, by Mr Parkins, submitted a response to the tribunal claim. I am satisfied that Mr Parkins was, in practice, unable to engage lawyers on behalf of the respondent to draft that response because I accept his evidence that lawyers would not act on behalf of the company without the authorisation of both Mr Hayes and Mr Parkins and Mr Hayes was in dispute with the company. On 8 December 2017, Mr Hayes wrote to the Employment Tribunal asking if a response to the claim had been provided. That was some time after the response had been sent to the tribunal on 28 November but it was not until 10 December 2017 that by a letter from the Employment Tribunals the response was sent to the claimant. In any event the claimant had received a copy of the directions, I find.

6. Then on 16 December 2017, following an initial consideration of the claim and response by Employment Judge Bloom, Employment Judge Bloom caused a member of the tribunal administration to write to the parties saying that the hearing listed for 3 May 2018 would be converted to a preliminary hearing to determine whether or not the claimant's claims had been presented in time and to determine the claimant's employment status. The question of time limits, certainly as applied to the complaint of unfair dismissal, was not a good point because considering the date claimed to be the effective date of termination, namely 10 July 2017, the period of early conciliation between 20 September 2017 and 5 October 2017, and the date when the claim had been presented on 27 October 2017, the claim was evidently in time. It is not clear to me why Employment Judge Bloom may have believed to the contrary but different considerations may have arisen in respect of the claimant's claim in respect of unpaid sums.

7. In an e-mail to the Employment Tribunal on 13 December 2017, Mr Parkins said that the respondent was insolvent. That e-mail does not appear to have been copied to the claimant but in evidence before me, the claimant said that by December 2017, or January 2018, he appreciated that the respondent was insolvent. On 18 December 2017, Mr Parkins again wrote to the Employment Tribunal, again he does not appear to have copied Mr Hayes into his correspondence. He said that Mr Hayes had not complied with the order to disclose documents and did not anticipate complying until 21 January 2018.

8. On 17 February 2018, a member of tribunal staff was caused by Employment Judge Sigsworth to write to the parties, granting an extension of time for disclosure to 21 January 2018 for production of a bundle of documents to 5 March 2018 and for exchange of witness statements to 19 March 2018. Although Employment Judge Sigsworth's direction in respect of disclosure pre-dated the date of the letter sent by the Tribunal (i.e., that date had already passed when the letter was sent), since the obligation to disclose documents was an ongoing one, this acted as no legal impediment to Mr Hayes' obligation to disclose documents relevant to the issues in the claim. On 12 March 2018 in an e-mail, this time copied to the claimant, Mr Parkins wrote to the Employment Tribunal saying that the claimant had again, without notice or explanation to him, failed to comply with even the tribunal's first case management direction in respect of disclosure. It was this e-mail which caused a letter to be written at Employment Judge Foxwell's direction dated 13 April 2018 notifying Mr Hayes that Employment Judge Foxwell was considering striking out the claim because the claimant had not complied with the Employment Tribunal Order of 1 November 2017 and on the grounds that the claim appeared not to be actively being pursued.

9. In response by e-mail dated 17 April 2018, Mr Hayes wrote to the tribunal copying in Mr Parkins saying that there was parallel litigation on foot between Mr Parkins and Mr Hayes, that more recently Mr Hayes had obtained professional legal advice and that a civil case lay against the company, broadly in respect of contracts of service and *quantum meruit*. And so, it did not appear to him proportionate to litigate two County Court cases as well as Employment Tribunal claim and accordingly he had, he said, already notified Marckita, the respondent, that he would withdraw his Employment Tribunal claim. By an e-mail of 17 April 2018, he formally withdrew the Employment Tribunal claim. That claim was subsequently dismissed by a judgment of Employment Judge Henry dated 27 April 2018, sent to the parties on 30 May 2018.

10. On 14 May 2018, the respondent made an application for a preparation time order in these proceedings. The claimant provided a written response to that application dated 13 July 2018 following an extension of time. The hearing of this application was originally listed by letter dated 9 August 2018 for 26 November 2018, but as a result of a lack of judicial resources on that day shortly beforehand, the hearing was postponed and by notice of hearing dated 12 January 2019, the hearing was relisted for today, 15 March 2019. On 27 February 2019, Mr Hayes applied for a postponement of this hearing on the grounds that he was involved in other civil proceedings, part heard in the County Court in central London and by a decision of 14 March 2019, I refused that request for a postponement for the reasons that were sent to the parties.

11. In deciding the application today, in addition to the tribunal file I had a bundle of documents from the claimant and a separate single sheet showing Mr Hayes' income by way of State Pension. Mr Hayes was tendered for cross examination and questioned by Mr Parkins. Mr Parkins did not give evidence and I heard oral submissions from Mr Parkins for the respondent and Mr Sims for the claimant as well as taking into account their respective written application and response. Mr Sims also provided to me a

bundle of authorities which I was taken to in part and which I took account of in full. A substantial part of Mr Parkins's cross examination of Mr Hayes concerned the question whether Mr Hayes had been or might arguably have been an employee of the respondent. This hearing had been listed for two hours and the question of Mr Hayes's status, viz a viz the respondent is not an issue that has been determined. It is a matter that is put in issue by Mr Hayes in civil proceedings between Mr Hayes and Mr Parkins and I was told that there is an as yet undecided application by Mr Hayes to join the respondent to these proceedings to the civil proceedings between Mr and Mrs Hayes and Mr Parkins. While it is open to an Employment Tribunal in considering an application for costs to consider the question whether a claim or any part of it had no reason prospect of success, it would have been impossible for me, within the compass of a two hour hearing, to consider proportionately and justly the question whether Mr Hayes had been an employee of the respondent or whether there was no reasonable prospect of him establishing that proposition and I considered that firstly I could not fairly and justly decide that issue as between the parties in the time available and with the materials available, and secondly that I doubted the propriety of that where there are subsisting civil proceedings concerning that issue on foot.

12. I therefore make no findings as to whether or not Mr Hayes was, at any time, an employee of the respondent. Further, I feel unable to conclude that Mr Hayes had no reasonable prospect of succeeding in that contention. The absence of a written contract of employment is never decisive as to employment status. Nor is the tax arrangements by which a person does work, although the absence of appropriate arrangements as to taxation may affect the legality of the contract, but for those tax arrangements, the relationship would be one of employment. But I have not been satisfied that Mr Hayes had no reasonable prospect of succeeding in his contention that he had been an employee of the respondent.

13. As to the intentions of Mr Hayes in relation to these proceedings, there are several matters which give rise to a reasonable suspicion that Mr Hayes's pursuit of these proceedings was not in good faith. In particular, his failure to actively pursue them from December 2017 but the standard of proof which I must apply is the civil standard, whether something is more likely than not. The burden of proof is on the party asserting a state of factual affairs and I have not been satisfied to the civil standard that in pursuing his Employment Tribunal claim Mr Hayes was acting vexatiously.

Applicable Law

14. Rule 75 of the Employment Tribunal Rules of Procedure provides:

> "(1) A cost order is an order that a party ("the paying party") make a payment to –
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> a) Another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;
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> b) The receiving party in respect of a Tribunal fee paid by the receiving party; or

c) Another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.

(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 an 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."

15. Rule 76 provides:

"**When a costs order or a preparation time order may or shall be made**

(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;]

c) 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.

(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if-

a) The claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and

b) The postponement or adjournment of that hearing has been caused by the respondent's failure, with a special reason to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

(4) A tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.

(5) A tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative where a witness has attended or has been ordered to attend to give oral evidence at a hearing".

16. Rule 74 defines 'legally represented' for the purposes of the rules as having the assistance of a person who, amongst other things, is a solicitor but given that the respondent's application is solely for a preparation time order I do not need to decide how that rule is to be interpreted where a party received assistance from somebody who is not the record.

17. Rule 79 (1) provides that the tribunal should decide the number of hours in respect of which a preparation time order should be made on the basis of information provided by the receiving party on time spent and the tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses, and documentation required.

18. Rule 79 (2) provides that the hourly rate is £33 and increases on 6 April each year by £1. Mr Sims argued that that meant that the applicable rate was £37 but in my judgment by 6 April 2018, before the claimant withdrew his claim and at the time of this hearing the applicable rate is £38 and rule 79 (3) provides that the amount of the preparation time order shall be the product of the number of hours assessed under paragraph 1 and the applicable rate.

19. Mr Sims, by reference to the Employment Appeal Tribunal's decision in AQ Limited v Holden [2012] IRLR 678 SAID that a tribunal is entitled to take into account that a party is a litigant in person and that while the threshold tests under the Employment Tribunal Rules are the same whether a party is in person or professionally represented, the application of those tests must take into account whether a litigant is professionally represented. A tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals and since legal aid is not available, they will not usually recover costs if they are successful. And so, since it is inevitable that many lay people will represent themselves, justice requires that tribunals do not apply professional standard to such people who may be involved in legal proceedings for the only time in their life. They are likely to lack objectivity and knowledge of law and practice brought by a professional legal adviser. Further, even if the threshold tests for an order of costs are met the tribunal has discretion whether to make an order and this discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice. Pausing there, I do not have details of the periods of time during which Mr Hayes had access to specialist help and advice but I was told that there had been periods of time during which he

had legal advice and representation, certainly in parallel proceedings which overlap in factual substance with these proceedings.

20. Mr Sims drew my attention to an unreported decision of the Employment Appeal Tribunal, Mr D Rogers v Dorothy Barley School, in which an employee brought Employment Tribunal proceedings as a result of the school causing a water bill for the home in which he lived to be sent to him directly. The school, when Mr Rogers was unsuccessful before the Employment Tribunal and Employment Appeal Tribunal, made an application for its costs and, in rejecting that application Mr Recorder Luba QC took into account that the school had caused a water bill to be sent to Mr Rogers and had in Mr Recorder Luba's judgment singularly failed to achieve a satisfactory solution with Mr Rogers that gave Mr Rogers the confidence that he would not face a future liability to pay for water. In those circumstances the judge found that there was at least an element to which the employer had brought Mr Rogers' Employment Tribunal proceedings on itself. Mr Sims relied on this decision as authority for the proposition that the question whether an employer has brought Employment Tribunal proceedings on itself is relevant to at least the exercise of the discretion as to whether costs should or should not be awarded but other than in that respect, I derived no assistance from that authority.

21. Mr Sims drew my attention to the decision of the Employment Appeal Tribunal and Telephone Information Services Limited v Wilkinson which provides that it is reasonable for an employee to wish to obtain a declaration that he has been unfairly dismissed, whatever the position in respect of compensation and lastly by reference to an excerpt from Harvey, Mr Sims drew my attention to the fact that according to the authors of Harvey, the operation of rule 76 (2), provides that tribunals have a discretion to award costs or preparation time on a broadly compensatory basis where there has been a breach of an order or practice direction where it may not be possible to calculate the costs attributable to the breach with precision.

22. The first basis on which the respondent sought its costs was that the claimant's claim had no reasonable prospect of success having regard to time limits. In my judgment as Mr Parkins frankly conceded during submissions that argument could not succeed because the claim had in fact, certainly the unfair dismissal complaint, been presented in time.

23. So far as the basis of application that the claimant's claim to be an employee had no reasonable prospect of success as concerned, I have already concluded that I am not satisfied that the claimant's claim had no reasonable prospect of success.

24. The second basis for the application is that there had been a breach of an Employment Tribunal Order. It is conceded by the claimant that there had been such a breach, the claimant did not, even after the enlarged orders made by Employment Judge Sigsworth, disclose documents co-operate in the production of a bundle or produce a witness statement by respectively 21 January, 5 March or 19 March 2018. Mr Sims says that the respondent should have done more, including making an application for an Unless Order. I disagree. In my judgment, Mr Parkins was reasonably entitled to

communicate with the Employment Tribunal, as he did, including on 12 March 2018 and Mr Parkins was reasonably entitled to continue preparing to defend the proceedings as he did. Mr Sims says that Mr Parkins could not have produced a witness statement without a bundle being agreed. Again, I disagree, it is commonplace in proceedings in these tribunals for preparation of witness statements to be carried out alongside agreement of a hearing bundle and indeed, sometimes witness statements are finalised before a hearing bundle is agreed. Neither of those observations about Mr Parkins's conduct of the proceedings excuses Mr Hayes's failure to comply with the tribunal orders. Mr Hayes did not seek an extension of time and he did not explain why it was that he was failing to comply with tribunal orders of which he had had knowledge since November 2017.

25. It is said on behalf of Mr Hayes that the claimant can only be criticised for not withdrawing the claim earlier once it was clear that the respondent was insolvent, however, in any event, it is said that the claimant had a right to a declaration against the respondent, even if there was no likelihood of financial remedy.

26. By 19 February 2018, that is two days after the date of Employment Judge Segworth's letter extending time, I am satisfied that the claimant appreciated the new timetable by which case management orders had to be complied with. Nonetheless, he continued to fail in his duty to disclose documents and he took no subsequent steps in the proceedings. If he had withdrawn his claim promptly at around this time, in my judgment there could be limited criticism of him. If he had complied with the case management orders, on time or nearly on time even, there could be limited criticism of him. But in my judgment, doing neither of those things was objectively unreasonable and in any event by failing to comply with the Employment Tribunal's orders, he brought himself within the circumstances of rule 76 (2). It was, in my judgment, reasonable for the respondent unless and until Mr Hayes had withdrawn his claim, to continue to prepare to defend the claim and as I have already observed, the respondent wrote to the Employment Tribunal in pursuit of effective case management on 12 March 2018. It was only, thereafter, in response to Employment Judge Foxwell's order requiring the claimant to explain himself that the claimant withdrew his claim.

27. I must consider—given that there is no dispute that there was a breach of the Employment Tribunal Orders—what effects that breach had and what (if any) order for costs should be made as a result of it, bearing in mind that I have a discretion in relation to whether to award costs at all, even if the gateway to a costs award is open, and that I must take into account, at least, that the claimant did not have lawyers on the record and I must also take into account evidence about the claimant's means.

28. I am satisfied that the effect of the claimant's failure either to comply or to withdraw his claim is that the respondent, in vain, continued to prepare quite properly for the 3 May 2018 hearing. Mr Sims says that those are costs that the respondent would have incurred if the litigation had proceeded. That of course is true but in fact they were costs which were thrown away because those proceedings did not continue and Mr Hayes had not engaged with them. Mr Parkins, in his written application for costs, identified, after costs

relating to disclosure, eight hours of time spent dealing with ancillary matters and communications, and preparing for the hearing. Having regard as I must to rule 79, I conclude that those eight hours were a reasonable and proportionate amount of time for Mr Parkins to spend on preparatory work after the substantial amount of time that had been spent on the initial defense of the claim and disclosure of documents.

29. In my judgment it is appropriate to consider a preparation time order in relation to Mr Hayes in light of the combination of his failure to comply with Employment Tribunal Case Management Orders and his failure to notify the respondent that he was no longer intending to pursue his claim. By January 2018, Mr Hayes knew that the respondent was insolvent, it was reasonable for him to consider with knowledge of that fact whether or not he wished to continue his tribunal claim but neither complying with Employment Tribunal Case Management Orders, nor communicating with the respondent was conduct, in my judgment, which, having regard to rule 76 (1)(a) and (2), means that I should make a preparation time order. The gateway to a preparation time order open (in other words, I may make such an order), and I exercise my discretion to do so, because I am satisfied that Mr Hayes's default was serious enough to merit such an order, and that the respondent suffered loss as a result. In doing so, I have taken into account the fact that Mr Hayes was at least formally a litigant in person and I treat him as if he was in every respect a litigant person.

30. I consider that the eight hours that Mr Parkins spent preparing is reasonable, and I take that as my starting point for a preparation time order.

31. The applicable rate, I hold, is £38 per hour. The product of eight hours at £38 per hour, is £304. I have limited information about Mr Hayes' means. I have details that Mr Hayes' weekly income is £186.65. Mr Hayes has had an opportunity to put in evidence other information about his means. Mr Sims' submission was that the respondent had had an opportunity to cross examine Mr Hayes about his means but, in my judgment, there is some onus on Mr Hayes, if he seeks to rely on his means, to produce information about them in a witness statement signed with a statement of truth. My judgment is that is not proper for a claimant simply to tender themselves for cross examination, and leave it for the respondent to interrogate them about their means when the information is inherently in their knowledge and control.

32. I accept that Mr Hayes is somebody of limited means. He has limited income. It was not suggested to me that Mr Hayes is the owner of any substantial amount of property. Considering my starting point of £304, and taking into account Mr Hayes' means, I have decided that a just and proportionate sum for Mr Hayes to pay to the respondent by way of a preparation time order is £280. That is 1.5 weeks of income for Mr Hayes and for the avoidance of doubt if I am wrong about the applicable hourly rate, and if the applicable hourly rate were £37, I would still have concluded that £280 was an appropriate amount to pay, because the applicable sum in those circumstances would have been £296 and the decisive factor for me in arriving at the payable amount has been Mr Hayes' means rather than the applicable multiplicand.

33. I therefore order Mr Hayes to pay to the respondent the sum of £280 by way of a preparation time order in consequence of his breach of tribunal case management orders and because of his unreasonable conduct in failing to progress or withdraw those proceedings.

Employment Judge Brown

19 July 2019

Judgment sent to the parties on

.....08.08.19.....

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For the Tribunal office