EMPLOYMENT TRIBUNALS

Claimant: X

Respondent: Revive Dental Care Limited

HELD AT: Manchester **ON:** 12 July 2018

BEFORE: Employment Judge Porter
Mr Q Colborn
Mr WK Partington

REPRESENTATION:

Claimant: Written representations

Respondent: Written representations

RESERVED JUDGMENT

The unanimous decision of the tribunal is that the claimant's application for a Preparation Time Order is refused.

REASONS

Issues to be determined

1. This hearing has been fixed, with the agreement of the parties, to determine the claimant's application for a Preparation Time Order ("PTO") on the papers, without hearing any further evidence.

2. A hearing was held on 21 May 2018 to consider the claimant's applications for reconsideration and a preparation time order.

3. After the application for reconsideration had been dealt with the tribunal proceeded to consider the claimant's application for a PTO. The claimant confirmed that she had made her application in writing and had no further submissions to make. The tribunal started to hear submissions from the respondent's representative. However:

   3.1 The respondent asserted that the Notice of hearing had omitted to confirm that the application for a Preparation Time Order would be heard that day. The respondent's right to a fair hearing was therefore prejudiced as the representative had not had sufficient time to prepare the response to the application for a PTO;

   3.2 the claimant indicated that she was unwell and unable to make any submissions in response;

   3.3 both parties expressed a preference that the tribunal consider the application on the papers at a later stage;

   3.4 The claimant requested that she not be required to attend the tribunal again, or give evidence, because it caused her too much anxiety.

4. The tribunal decided that it was in the interests of justice to adjourn the hearing of the application for a PTO and to deal with the application on the papers, bearing in mind, in particular, the request from the claimant to make an adjustment to the hearing because of her medical condition.

5. Orders were made for the submission and exchange of written submissions as set out in the Order sent to the parties 6 June 2018.

Submissions

6. The claimant relied upon the written application sent to the tribunal in February 2018, re-sent to the tribunal in May 2018 with slight amendment, together with her written submissions and attached documents, which the tribunal has considered with care but does not repeat here.

7. Consultant for the respondent made a number of written submissions which the tribunal has considered with care but does not rehearse in full here. In addition, the consultant made a number of submissions orally at the hearing on 21 May 2018 which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted at the hearing on 21 May 2018 that:-

7.1 The claimant relies on the conduct of the respondent which led to the award of aggravated damages. The application for a preparation time order merely repeated the claimant's assertions that she had suffered increased anxiety and distress by reason of that conduct. The claimant has failed to identify any additional preparation arising from the respondent's conduct;

7.2 the respondent was reasonable in requesting from the claimant evidence relating to her disability;

7.3 the parties were in disagreement as to the contents of the bundle. The fault did not lie solely at the respondent's feet. Further enquiry would be needed in relation to the conduct of both parties in relation to this matter;

7.4 the claimant has claimed a disproportionate number of hours of preparation.

Evidence

8. Evidence was received and considered by the tribunal before:

8.1 making its Judgment on the substantive merits of the claim at a hearing in chambers on 16 and 17 November 2016. A reserved judgment with reasons was sent to the parties on 5 January 2017 ("Reserved Judgment");

8.2 making its judgment on remedy at a hearing on 4 and 5 December 2017. The Judgment on Remedy with reasons was announced orally at the hearing on 5 December 2017. The judgment on remedy was sent to the parties on 11 December 2017. Written reasons were requested and reasons were sent to the parties on 31 January 2018 ("Written reasons on Remedy").

9. No additional evidence was heard. Both parties relied upon the evidence heard, and the documents presented, at the earlier hearings. In addition, the claimant relied on documents attached to her written submissions supplied pursuant to the Order of the tribunal made on 21 May 2018.

10. The tribunal has considered the Case Management Orders and correspondence on the tribunal files between the parties and the tribunal.

Additional findings of Fact

11. The tribunal has considered its findings of fact as set out in its Reserved Judgment on the substantive merits of the claim ("Reserved Judgment") sent to the parties on 5 January 2017 and the Written reasons on Remedy sent to the parties on 31 January 2018 ("Written reasons on Remedy").

12. Having considered all the evidence the tribunal has made the following additional findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.

13. The Judgment on Remedy with reasons was announced orally at the hearing on 5 December 2017.

14. At the remedy hearing on 4 and 5 December 2017 the claimant indicated that she intended to make an application for costs or a preparation time order.

15. The Judgment on remedy was sent to the parties on 11 December 2017. Written reasons were requested and the Written reasons on Remedy were sent to the parties on 31 January 2018

16. By email dated 9 December 2017 the claimant confirmed to the tribunal that she wished to make an application for a PTO but did not set out the grounds of that application.

17. By letter dated 22 December 2017 the tribunal informed the claimant of the need to provide the grounds of her application.

18. By email dated 1 February 2018 the claimant set out what she stated to be the grounds of her application

19. By letter dated 16 February 2018 the claimant was advised by the tribunal that:

> Your emails dated 1 …. February 2018, together with enclosures, have been referred to EJ Porter who directs me to reply as follows.
>
> You have failed to satisfactorily set out the grounds upon which you make application for a preparation time order. It is not for the tribunal to elicit the grounds of the application from your correspondence, which largely sets out the law to be applied in considering any such application.

It is understood that you state that the respondent failed to comply with orders. If you pursue the application for a preparation time order you must set out:

1 Each of the Orders with which the respondent failed to comply, identifying each Order by the date it was made and the judge who made the order;

2. Each of the Orders in relation to which there was a delay in complying, the date of the order, the date upon which the respondent complied with the order;

3. How the failure to comply with Orders, either at all or in the time ordered, affected your preparation of the case.

4. In relation to each alleged breach you should set out the type and amount of work you say you were obliged to undertake as a result of the respondent's failure to comply.

5. You should provide a calculation of the number of hours spent by you in preparation of the case by reason of the respondent's failure to comply.

20. By email dated 19 February 2018 the claimant provided the grounds of her application for a PTO against this respondent, in an attached document dated 16 February 2018.

21. The claimant was legally represented from March 2017 to the start of the Remedies hearing on 4 December 2017.

The Law

22. Under rule 76 (1) Employment Tribunals Rules of Procedure 2013 a tribunal may award a costs order or preparation time order where a party has in either bringing the proceedings or in the conduct of the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably; or the claim or response had no reasonable prospect of success.

23. Under rule 76(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.

24. Rule 76 imposes a two stage test. The tribunal must ask itself whether a party's conduct falls within rule 76 if so, it must then ask itself whether it is appropriate to exercise its discretion to make the award.

25. The tribunal, in deciding whether to exercise its discretionary power under rule 76 should consider all relevant factors including the following;-

- costs in the employment tribunal are still the exception rather than the rule;
- the extent to which a party acts under legal advice;
- the nature of the claim and the evidence;
- the conduct of the parties

26. ″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 the final hearing' — rule 75(2).

27. A PTO is defined by rule 75(2) as 'an order that a party… make a payment to another party… in respect of [that other] party's preparation time while not legally represented'.

28. Rule 79 requires a tribunal to decide the number of hours in respect of which a PTO should be made. This assessment must be based upon:

- information provided by the receiving party in respect of his or her preparation time — rule 79(1)(a), and

- its own assessment of what is a reasonable and proportionate amount of time for the party to have spent on preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and the documentation required — rule 79(1)(b).

29. Rule 77 of the Tribunal Rules 2013 provides that a party may apply for a costs or preparation time order at any stage, but no later than 28 days after the date on which the judgment finally determining the proceedings was sent to the parties.

30. In **McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA,** Lord Justice Mummery stated that the Tribunal Rules do not impose any requirement that the costs must be caused by, or at least be proportionate to, the particular conduct that has been identified as unreasonable. In his view, it is not punitive and impermissible for a tribunal to order costs without confining them to those attributable to that conduct. He observed that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that was not the same as requiring the costs-seeking party to prove that specific unreasonable conduct by the other party caused particular costs to be incurred..

31. In **D'Silva v NATFHE (now known as University and College Union) EAT 0126/09** the EAT brought clarity to the situation by confirming that it was not, in the light of McPherson, necessary to

establish a direct causal link between particular examples of unreasonable conduct and the costs incurred. Once a finding of unreasonable conduct is made, the question of costs is then very much within the discretion of the tribunal. Similarly, in **Salinas v Bear Stearns International Holdings Inc and anor 2005 ICR 1117, EAT,** the EAT held that there was no requirement to identify with any particularity a causal link between the unreasonable conduct and the amount of costs ordered.

32. In **Yerrakalva v Barnsley Metropolitan Borough Council** 2012 ICR 420 CA Mummery LJ clarified that the main thrust of his judgment In **McPherson** had been to reject the erroneous submission that, in deciding whether to make a costs order, the employment tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. It was never his intention to suggest that causation was irrelevant when deciding the amount of costs. Nor was he setting down a requirement that tribunals should dissect a case in detail and compartmentalise the relevant conduct under separate headings, such as 'nature', 'gravity' and 'effect'. His Lordship emphasised that the tribunal has a broad discretion and should avoid adopting an over-analytical approach. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had.

33. The Court of Appeal in **Sud v Ealing London Borough Council 2013 ICR D39, CA,** held that when making a decision as to costs, an employment tribunal needed to consider whether the party's conduct of the proceedings was unreasonable and, if so, it was necessary to identify the particular unreasonable conduct, along with its effect. This process did not entail a detailed or minute assessment. Instead the tribunal should adopt a broad brush approach, against the background of all the relevant circumstances.

34. The tribunal has considered and where appropriate applied the authorities referred to in submissions.

Determination of the Issues
(including, where appropriate, any additional findings of fact not expressly contained within the findings above but made in the same manner after considering all the evidence)

35. The respondent asserts that the application was made out of time. The tribunal has considered all the circumstances and notes in particular as follows:

35.1 Judgment on Remedy with reasons was announced orally at the hearing on 5 December 2017;

35.2 The Judgment on remedy was sent to the parties on 11 December 2017. Written reasons were requested and reasons were sent to the parties on 31 January 2018 ("Written reasons on Remedy");

35.3 At the remedy hearing on 4 and 5 December 2017 the claimant indicated that she intended to make an application for costs or a preparation time order;

35.4 By email dated 9 December 2017 the claimant confirmed to the tribunal that she wished to make an application for a PTO but did not set out the grounds of that application.

36. In all the circumstances the tribunal finds that the application for a PTO was made on 9 December 2017, within 28 days of the final judgment being announced. The fact that the claimant, a litigant in person, failed to set out the grounds of the application does not nullify the application.

37. The application for a PTO was made in time.

38. Further, and in any event, if the tribunal is wrong on that, under rule 5 Tribunal Rules 2013 the tribunal may extend any time limit under the rules. In deciding whether to exercise its discretion to extend time the tribunal has considered all the circumstances including in particular the following:

38.1 The matters listed at paragraph 34 above;

38.2 By letter dated 22 December 2017 the tribunal informed the claimant of the need to provide the grounds of her application.

38.3 By email dated 1 February 2018 the claimant set out what she stated to be the grounds of her application;

38.4 By letter dated 16 February 2018 (see paragraph 19 above) the claimant was advised by the tribunal of the further information needed to progress her application;

38.5 By email dated 19 February 2018 the claimant provided the grounds of her application for a PTO against this respondent, in an attached document dated 16 February 2018.

In all the circumstances, it is in the interest of justice to extend time to enable the application to proceed. The respondent is not prejudiced by the short delay in making the application together with the grounds of that application. The respondent was put on notice at the Remedy hearing of the potential application and the email dated 9 December 2017 made it clear that the application would be made.

39. The tribunal has jurisdiction to consider the application for a PTO.

40. The tribunal has considered the application for a PTO and has applied the two stage test. The tribunal has considered, firstly, whether the respondent's conduct falls within rule 76 and, secondly, whether it is appropriate to exercise its discretion to make the award. The tribunal has also considered the nature, gravity and effect of the respondent's conduct on the claimant's preparation for the hearing. The tribunal notes in particular that:

40.1 costs in the employment tribunal are still the exception rather than the rule;

40.2 in the normal course each party will make its own preparations for any hearing and bear the costs of those preparations;

40.3 the key question in this case is whether or not the conduct of the respondent has increased the normal preparation time for any hearing and whether it is appropriate that the respondent pay to the claimant the cost of the increased preparation time.

41. We note the findings in the Written Reasons on Remedy in relation to the respondent's conduct which led to an award of aggravated damages (paragraphs 53 - 56). The respondent did act unreasonably in this regard. It failed to comply with orders on time, failed to comply with some Orders at all. The remedy hearing was delayed to enable the respondent to obtain its own medical evidence; medical evidence it never got.

42. The claimant has failed to provide satisfactory evidence to support her assertion that additional preparation time was required because of the respondent's unreasonable conduct in this regard. The failure to comply with orders, the delay arising from that failure, and the postponement of the Remedy hearing (see paragraphs 15 – 23 of the

Written reasons on Remedy) arose when the claimant was legally represented. The claimant was legally represented from March 2017 to the start of the Remedies hearing. There is no satisfactory evidence that the claimant spent any more time in the preparation for the case than she would have spent if the remedy hearing had taken its normal course, had the respondent complied with the Orders, had the hearing not been postponed. The claimant makes a number of assertions as to the stress and anxiety which the unreasonable conduct and/or delay caused her. That is not relevant to the application for a PTO. The claimant was compensated for the increased stress and anxiety in the award of compensation and, in particular, in the award for aggravated damages.

43. In exercising its discretion the tribunal finds that it is not appropriate, it is not in the interest of justice, to award a PTO in relation to the respondent's unreasonable conduct as referred to at paragraph 40 above.

44. It is clear that the respondent also failed to comply, either at all or in time, with a number of Orders throughout the conduct of these proceedings. We refer to our findings on the substantive merits of the claim and, in particular, to paragraphs 3 – 12 of the Reserved Judgment.

45. The claimant has failed to provide satisfactory evidence to support her assertion that additional preparation time was required because of the respondent's failure to comply with orders either at all or in a timely manner. We refer in particular to the respondent 's failure to comply with the orders for provision of a bundle and witness statements for the hearing on the substantive merits of the claim in November 2016. There was no additional preparation time arising from those matters. The tribunal dealt with the respondent's failures on the day of the hearing. No additional preparation was required from the claimant.

46. The claimant has spent considerable time and effort in the preparation of the bundles, obtaining evidence and preparing for the hearings. It is clear that there was disagreement between the parties as to the contents of the agreed bundle and this led to a delay in the preparation of the bundles, the claimant preparing her own bundle of documents, with consequent delay in the preparation and service of witness statements. However, there is no satisfactory evidence before the tribunal to support a finding that the respondent was wholly or mainly responsible for the disagreement as to the contents of the bundle, for the consequent delay and any additional preparation arising therefrom. To the contrary, the evidence before the tribunal is consistent with our finding that both parties made their own contribution to the

disagreement relating to the bundle, consequent delays and any additional preparation. Further, and in any even, the claimant has not provided a satisfactory explanation of the effect of any breach and/or delay by the respondent, has not provided a satisfactory explanation of any additional time spent in preparation arising from the respondent's failures. In all the circumstances, in exercising its discretion the tribunal is not satisfied that it is in the interest of justice to depart from the normal principle that each party pay their own costs. It is not in the interest of justice to make a PTO against the respondent in relation to the conduct identified at paragraph 44 above.

47. The respondent did not act unreasonably in requesting medical evidence from the claimant to support her assertion that she was a disabled person within the meaning of the Act. The burden is on the claimant to prove that she was a disabled person at the relevant time. The respondent did not employ the claimant at the relevant time. The respondent was reasonable in seeking evidence from the claimant before conceding that the claimant was a disabled person.

48. The claimant now seeks a PTO in relation to the hours she has spent preparing this application. The respondent was entitled to defend the application. It has not acted unreasonably in doing so. It is not appropriate to make any PTO in relation to preparation for this application.

49. Viewed overall, it is not in the interest of justice to grant the requested PTO. It is appropriate that both parties pay their own costs.

Employment Judge Porter

Date:13 July 2018

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

18 July 2018
FOR THE TRIBUNAL OFFICE