EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Ms I Opalkova	**v**	**Acquire Care Ltd**

Heard at:	Reading	**On: 3 February 2020 (in chambers)**
Before:	Employment Judge Hawksworth Mrs AE Brown	

Upon the claimant's application dated 30 July 2019 for a preparation time order and the respondent's application dated 27 September 2019 for a costs order being considered without a hearing:

JUDGMENT ON PREPARATION TIME AND COSTS

The unanimous judgment of the tribunal is:

1. The claimant's application for a preparation time order is refused.

2. The respondent's application for a costs order is refused.

REASONS

Background

1. The claimant's employment with the respondent as a carer began on 14 April 2017. By a claim form presented on 20 October 2017, the claimant brought complaints of unauthorised deduction from wages and breach of the Working Time Regulations 1998. The claimant's employment with the respondent terminated on 16 January 2018.

2. The hearing was held on 18 and 19 July 2019 before a tribunal comprising Employment Judge Hawksworth and Mrs A E Brown, the parties having given written consent to a tribunal of two. Judgment was reserved.

3. The judgment dated 11 August 2019 was sent to the parties on 2 September 2019. Three of the claimant's complaints succeeded, these were:

3.1. her complaint that she had not been paid the national minimum wage because she was not paid for actual travelling time between assignments;

3.2. her complaint that the respondent had refused to permit her the right to daily rest of 11 hours as required under Regulation 10 of the Working Time Regulations; and

3.3. her complaint that the respondent had refused to permit her the right to a rest break as required under Regulation 12 of the Working Time Regulations.

4. Three of the claimant's complaints failed and were dismissed, these were:

4.1. her complaint for one week's pay for five days training in April 2017;

4.2. her complaint that she was not paid increases in pay due under her contract of employment after the completion of 12 weeks probation and after six months employment;

4.3. her complaint that the respondent unlawfully deducted tax and national insurance payments from insurance, road tax and car repair allowances.

5. The claimant was awarded the total sum of £3,304.39. This has been varied following reconsideration under rule 72 because of an error in the calculation of the additional remuneration due in respect of the national minimum wage shortfall. The total award to the claimant after the variation was £3,363.67. In her remedy statement of 21 November 2017, the claimant had set out her losses as £5,849.90, plus an unquantified loss of pay for a week's training.

6. The parties have both made applications for costs/preparation time orders. The respondent requested that the two applications be considered without a hearing. The claimant said that she was agreeable to the applications being dealt with without a hearing. The tribunal wrote to the parties on 8 December 2019 to say that the judge had decided that, in the light of the views expressed by the parties and the overriding objective (in particular saving expense), the two applications would be considered without a hearing. The parties were given the opportunity to make further written representations; neither did.

7. The tribunal which originally heard the case met in chambers on 3 February 2020 to consider these two applications. Both applications were refused, for the reasons set out below. In these reasons we have not dealt with every point made in the detailed applications, however in reaching our decisions we have considered each of the grounds contained in the parties' applications.

The claimant's application

8. On 30 July 2019 the claimant made a written application for a preparation time order. This was an amended version of an application previously made on 5 July 2019 which had not yet been determined. The claimant relies on rule 76(1)(a) and 76(1)(b) and rule 76(2) of the Employment Tribunal Rules of Procedure.

9. In summary, the main points made by the claimant are:

   9.1. The respondent's response had no reasonable prospect of success;

   9.2. The respondent's representative made false statements in the Grounds of Resistance and made an application for a deposit order knowing that the respondent's case was hopeless;

   9.3. The respondent failed to provide disclosure requested by the claimant;

   9.4. The respondent fabricated a 'Company Car Scheme' document;

   9.5. The respondent's representative decided not to include most of the claimant's documents in the hearing bundle in an attempt to mislead the employment tribunal;

   9.6. The respondent required the claimant to prepare a supplemental bundle of documents which were not included in the main bundle;

   9.7. The respondent delayed exchange of witness statements.

10. The respondent replied to the claimant's application for a preparation time order in a letter dated 30 September 2019. The claimant made further written submissions in support of her application in letters dated 7 October 2019 and 11 November 2019.

The respondent's application

11. On 27 September 2019 the respondent made a written application for costs. The respondent relies on rule 76(1)(a).

12. In summary, the main point made by the respondent is that the claimant's rejection of two settlement offers amounted to unreasonable conduct. The offers which the respondent made were:

   12.1. on 5 November 2018, a settlement offer of £6,000 on a without prejudice save as to costs basis. This was the amount the claimant had included in her statement of remedy (not including the pay for the week's training); and

12.2. on 12 July 2019, a settlement offer of £6,178.30 on both an open and without prejudice basis. This was the amount the claimant had included in her statement of remedy, together with the pay for the week's training.

13. The claimant replied to the respondent's application for costs in a letter dated 8 November 2019.

The Law

14. The power to award costs and to make preparation time orders is set out in the Employment Tribunal Rules of Procedure 2013. Unlike in civil litigation where the successful party can expect to recover some or all of their costs from the unsuccessful party, in the employment tribunal jurisdiction the general position is that parties bear their own costs, unless one of the grounds for making a costs or preparation time order is made out and the tribunal decides to exercise its discretion to make an award of costs.

15. Under rule 76(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 .... the way that the proceedings (or part) have been conducted; or*
>
> *(b) any ..... response had no reasonable prospect of success."*

16. Rule 76(2) provides:

> "*A tribunal may also make such an order where a party has been in breach of an order…"*

17. There is a two-stage test to be applied by tribunals in considering applications for costs or preparation time orders. The first stage is for the tribunal to consider whether the ground or grounds put forward by the party making the application are made out. If they are, the second stage is for the tribunal to consider whether to exercise its discretion to make an award of costs, and if so, how much. The consideration required at this second stage is mandatory where the ground which applies is under rule 76(1), but not under rule 76(2).

18. In determining whether to make an order on the basis of unreasonable conduct, a tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct (McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA). However, it is important not to lose sight of the totality of the circumstances (Yerrakalva v Barnsley Metropolitan Borough Council 2012 ICR 420, CA).

19. The relevance of settlement offers to applications for costs has been considered by the EAT in a number of cases. In Kopel v Safeway Stores plc 2003 IRLR 753, EAT, the EAT held that the rule in Calderbank (a rule which applies in civil litigation in the courts when a claimant obtains an award of damages which is less than or no greater than an earlier settlement offer) does not apply in employment tribunal jurisdiction, although a settlement offer is a factor which can be taken into account when considering whether there has been unreasonable conduct. This was followed in Anderson v Cheltenham and Gloucester plc EAT 0221/13 where the EAT held that the employment tribunal had been wrong to award costs against the claimant who recovered less than a settlement offer, where she had considered her losses to be much higher. In the EAT's view, the tribunal had failed to consider other factors that might have contributed to the claimant's refusal of the settlement offer. The EAT held that a failure to recover compensation in excess of a settlement offer did not of itself justify an order for costs.

20. When considering whether rejecting an offer of settlement amounts to unreasonable conduct, the tribunal should consider the position of the party whose conduct is said to be unreasonable, and then apply the 'range of reasonable responses' test, since there may be more than one reasonable course to take. It is not permissible for the tribunal to substitute its own view of what is reasonable: "*the true task of the ET [is] to examine why [the party] took the decision to refuse the offer and whether that decision was within the parameters of reasonableness*." (Solomon v University of Hertfordshire and anor EAT 0258/18) EAT).

21. Finally, the conduct of a litigant in person will be judged less harshly than that of a litigant who is professionally represented. An employment tribunal cannot, and should not, judge a litigant in person by the standards of a professional representative (AQ Ltd v Holden 2012 IRLR 648, EAT).

Conclusions: the claimant's application

22. We have first considered the claimant's application for a preparation time order against the respondent.

23. The first stage is to consider whether there are grounds for a preparation time order against the respondent under rule 76. The claimant has applied for an order under rule 76(1)(a) and/or 76(1)(b) on the basis that the respondent acted unreasonably in the conduct of proceedings, and/or its response had no reasonable prospects of success, and under rule 76(2), on the basis that the respondent was in breach of an order.

24. We have considered carefully the points made by the claimant in her application.

25. First, we do not consider that it can be said that the response had no reasonable prospect of success for the purpose of rule 76(1)(b). We base this on the following points in particular:

25.1. The respondent succeeded in defending three of the six complaints brought by the claimant.

25.2. Minimum wage and working time claims are a complex area of the law. The respondent relied on the fact that its mechanism for calculating travel time had been considered to be compliant with the national minimum wage requirements in the context of an HMRC compliance check. It had also taken advice from its accountant.

26. As to whether the conduct of the respondent was unreasonable within rule 76(1)(a), we have considered the points made by the claimant in her application and by the respondent in its response to the application.

27. In relation to each of the key points the claimant has made, our conclusions were as follows:

27.1. We did not find that there were any false statements made in the grounds of resistance, or that the application for a deposit order was made knowing that the respondent's case was hopeless. There may have been statements with which the claimant disagreed, or which set out a recollection which is different to hers, however we did not find that the respondent or its representative had made false statements in its conduct of the proceedings.

27.2. The respondent did not fail to provide voluntary disclosure requested by the claimant, it provided her with documents on 13 April 2018 and 1 May 2018.

27.3. We did not find that the respondent fabricated a 'Company Car Scheme' document, rather we found that it was likely that the document was in existence at the time of the claimant's recruitment.

27.4. There were lengthy discussions between the parties about what documents should be included in the bundle. However, this is not unusual. We accept the respondent's explanation that the volume of documents provided in the claimant's disclosure and the format in which they were provided made it difficult for the respondent to know which documents should be included. The respondent's representative added documents to the draft index when the clamant asked for this. We have not found that there was any attempt to mislead the tribunal in the documents that were put before the tribunal.

27.5. The respondent did not require the claimant to prepare a supplemental bundle of documents, rather the respondent's representative suggested to the claimant that this would be a way of dealing with the documents which the claimant considered were missing from the main bundle. An order providing for the claimant to

prepare a supplemental bundle of documents was made by the tribunal.

27.6. The respondent's representative emailed the claimant to ask if she would agree to delay exchange of witness statements by one day because of a commitment on the part of the respondent's representative on the day exchange was due to take place (6 June 2019). The respondent would have been able to exchange as ordered if the claimant had not agreed. In fact the claimant did not reply to the respondent's representative until 23.39 on 6 June 2019. The respondent's representative then offered to exchange at 11.00am on 7 June 2019. The claimant preferred to exchange at 4.00pm on that day. Divergence from the order was for a very short period only, part of which was at the claimant's request. Witness statements were exchanged almost 6 weeks before the hearing.

28. As well as considering these main points and the other points the claimant made in her application, we also stepped back and considered the circumstances in the round. Having done so, we have concluded that the respondent's conduct of proceedings was not unreasonable and that no ground under rule 76(1) is made out.

29. As explained above, we have not found that the respondent was in breach of a tribunal order within rule 76(2). The short delay in exchange of witness statements arose from discussions between the parties about the practicalities of exchange, and in any event any delay at the respondent's request was 'de minimis', which means that the breach was so minor that it can be overlooked. We do not find that there is any breach of an order by the respondent or the respondent's representatives which would give grounds to consider making a preparation time order.

30. For these reasons, we have concluded that the grounds for a preparation time order to be awarded against the respondent are not made out. This means that the second stage (consideration of whether we should exercise our discretion and make an order) does not arise.

Conclusions: the respondent's application

31. We have next considered the respondent's application for costs against the claimant.

32. The first stage is to consider whether there are grounds for an award of costs under rule 76. The respondent has applied for costs under rule 76(1)(b) on the basis that the claimant's conduct in refusing two offers of settlement was unreasonable.

33. The first part of the task for us is to examine why the claimant took the decision to refuse the offers. The respondent's offer of 5 November 2018 was made in full and final settlement of the claimant's employment tribunal

claim and all and any claims that she had or may have arising out of her employment or its termination.

34. The claimant sent an email dated 12 November 2018 replying to this offer. She said that she would not accept the offer in exchange for her rights to be able to make more claims against the respondent. She listed some other possible claims which she might have, these included breach of contract. A breach of contract claim would still have been in time. We accept that the possibility of bringing a breach of contract claim was a genuine concern of the claimant's; she referred to the possibility of a breach of contract claim in the county court during the hearing before us.

35. The respondent's second offer of 12 July 2018 was also made in full and final settlement of

> *"i) the whole of the claims brought by you against the respondent in the employment tribunal under case number 3328500/2019;*
> *ii) your application for a preparation time order dated 5 July 2019; and*
> *iii) all and any claims that you have or may have against the respondent arising out of your employment or its termination."*

36. The claimant sent an email on 12 July 2019 responding to this offer. She said that the sum offered was not acceptable 'for all your demands, specifically considering sub-paragraphs (ii) and (iii)' of the offer. This was a reference to the fact that acceptance of the offer would mean the claimant giving up the possibility of pursuing any other claim against the respondent, and giving up her application for a preparation time order.

37. We next consider whether it was within the parameters of reasonableness for the claimant to refuse the settlement offers for the reasons we have found. We have concluded that the claimant's decision to refuse the settlement offer of 5 November 2018 did fall within the parameters of reasonableness. We have reached this conclusion for the following reasons.

38. The settlement offers were (in relation to the first offer) very close to and (in relation to the second offer) equal to the amount the claimant had set out in her statement of remedy. It would of course have been reasonable for her to accept them. However, there may be more than one reasonable course of action and we need to consider whether the claimant's actions fell within the parameters of reasonableness.

39. Acceptance of the offers by the claimant was conditional on her giving up other rights. If she had accepted either of the offers, the claimant would not have been able to pursue a breach of contract claim in the county court. Acceptance of the second offer would have meant the claimant also giving up her application for a preparation time order. These are factors which it was reasonable for the claimant to take into account when deciding whether to accept the offers.

40. We also bear in mind that the claimant was a litigant in person. She had taken legal advice on one occasion but otherwise conducted the litigation herself. The question of whether to accept a settlement offer is often a difficult one for claimants, whether they are represented or not. In the claimant's case, her complaints concerned complex areas of law, and were not the kind of complaints where it could be said that the claimant should have known what the outcome would be. We have concluded that, against that background, the claimant's decision to continue with her claim to obtain a tribunal judgment rather than give up other rights to accept the settlement offers was within the parameters of reasonableness.

41. We have therefore concluded that the grounds for a costs order to be made against the claimant are not made out. This means that the second stage (whether we should exercise our discretion to order costs) does not arise.

42. In summary, the claimant's application for a preparation time order against the respondent, and the respondent's application for a costs order against the claimant are both refused. The parties will each bear their own costs.

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Employment Judge Hawksworth

Date: 5 February 2020

Judgment and Reasons

Sent to the parties on: ..21.02.2020.....

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