EMPLOYMENT TRIBUNALS

Claimant: **Ms DL Baldwin**

Respondent: **UK School of English Srls**

JUDGMENT

Rule 75 and 76 Employment Tribunal Rules 2013

The Respondent is Ordered to pay the Claimant the sum of £1,209 (31 hours work at £39 per hour) in respect of her preparation time.

REASONS

Application and background

1. By email received at the tribunal on 25 January 2020, and copied to the respondent, the claimant made an application for a Preparation Time Order ("PTO") on the grounds that the respondent has been unreasonable and vexatious.

2. The grounds on which the application was made are:
    a. The respondent did not include the address of the registered office on the employment contract as required by law.
    b. Despite never having a registered office in the UK, the respondent gave the claimant a UK contract
    c. The respondent did not comply with case management orders. These were dated 23 March 2018 and were to provide requested documents including a witness statement and the preparation of a bundle.
    d. The respondent lied about an office move which resulted in a further reconsideration hearing. The respondent failed to attend the hearing and gave no explanation for its non-attendance.

e. After the reconsideration on paper the respondent submitted new documentation which required further analysis and preparation.
f. The respondent insulted the claimant by casting doubt on the state of her mental health and threatened to sue for defamation.
g. The respondent repeatedly hacked the claimant's computer and tampered with documents related to her case.

3. The claimant has not been legally represented. The application is for 38 hours of preparation time at £39 per hour, totaling £1,482.

4. Within the application the claimant requested that it be dealt with on paper to avoid further travel from Italy to the UK.

5. I caused a letter to be sent to the parties on 4 February 2020 seeking responses to, among other things, the following questions:
   i. The respondent is to set out its response to the costs application. That response is to include any information it wishes to rely on in relation to ability to pay.
   ii. The claimant is set to out, in broad terms, what the 38 hours claimed was made up of.
   iii. The respondent is to set out its position on having the costs application dealt with on paper as opposed to at a hearing.

6. Nothing was received from the respondent in response to this request.

7. The claimant replied on 8 February 2020, copying in the respondent, explaining that the actual time she spent preparing for her case far exceeds the number of hours claimed. She provided a breakdown of time spent which comes to some 38 hours. She broke this down into 7 periods of activity with a description of the activities for each period claimed.

Outline of legal principles

8. An employment tribunal has a discretionary power to make a costs order under rule 76(1)(a) of the Tribunal Rules 2013 where it considers that a party 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.

9. The power to make a PTO is contained in rule 76 (coupled with rule 75(2)). The grounds for making a PTO are identical to the grounds for making a general costs order against a party under rule 75(1)(a). Preparation time means 'time spent by the receiving party in working on the case, except for time spent at the final hearing' — rule 75(2). 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'. The hourly rate of a lay representative is capped (as at 6 April 2018) at £38 (increasing by £1 each year on 6 April for the purpose of assessing costs under a costs order). This is the same hourly rate that applies for the purpose of assessing preparation time.

10. 'Unreasonable' has its ordinary English meaning. In determining whether to make an order under this ground, an employment tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct'. The tribunal has to ask whether

there has been unreasonable conduct by the paying party in bringing, defending or conducting the case and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had.

11. Under rule 76(2) of the Tribunal Rules an employment tribunal has the discretionary power to make a costs order or preparation time order against a party who has breached an order or Practice Direction.

12. The hallmark of a vexatious proceeding is that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the respondent/claimant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant/respondent, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.

13. If a tribunal considers that the case falls within one of the situations described in the Rules, it may make a costs preparation time order. In deciding whether to make a costs or preparation time order, or the amount of it, a Tribunal may have regard to the paying party's ability to pay.

14. Rule 76(1) therefore imposes a two-stage test: first, a tribunal must ask itself whether a party's conduct falls within rule 76(1)(a) of rule 75(2); if so, it must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party. Factors relevant to the discretion may include the fact that costs in the employment tribunal are still the exception rather than the rule. The fact that a party is unrepresented can also be a relevant consideration in deciding whether to award costs against him or her. An employment tribunal cannot and should not judge a litigant in person by the standards of a professional representative.

15. Once an employment tribunal has decided to make a costs order, it must then go on to decide how much to award. The purpose of an award of costs is to compensate the party in whose favour the order is made, and not to punish the paying party. Given that costs are compensatory, it is necessary to examine what loss has been caused to the receiving party. Costs should be limited to those 'reasonably and necessarily incurred'. The amount awarded for a PTO must also exclude time spent at the final hearing.

Relevant Background facts

16. By a claim form received at the tribunal on 2 September 2017 the claimant brought a claim against the respondent for unfair dismissal.

17. The claimant says she was dismissed for asserting statutory rights in relation to, among other things, being paid the minimum wage and holiday pay. Notice of claim was then sent to the respondent on 4 October 2017 with a hearing date of 31 January 2018. Included in the notice were a series of case management orders. The claim was served on UK English International.

18. Because the claim was re-served the original hearing date of 31 January 2018 was vacated. After further investigation the claim was re-served again on a different address on 26 February 2018. This time a response was required by 26 March 2018. A response was eventually received at the tribunal on 23 March 2018.

19. Notice of hearing was then sent to the parties on 23 March 2018 for a hearing on 13 and 14 September 2018. Again, case management orders were included in the notice. These included that by 9 May 2018 the claimant and the respondent shall send each other a list of any documents they wish to refer to at the hearing or which are relevant to the case. The bundle was to be prepared by 23 May 2018.

20. On 9 June 2018 the claimant emailed the tribunal, copying in the respondent to the email address which had been provided, saying she had not received a list or copy of documents from the respondent which was in breach of case management orders. This prompted an email from Employment Judge Harper requesting that the respondent provide comments on the correspondence by 16 July 2018. Because no reply was received the tribunal wrote again by email to the respondent and the claimant on 27 July 2018 requesting a reply by return. Still no reply was received from the Respondent.

21. Employment Judge Harper then caused a letter to be written to the respondent on 11 August 2018 saying on the tribunal's own initiative he was considering striking out the response because it was not being actively pursued. The respondent was given an opportunity to object to this proposal by 20 August 2018. In the event, and after no further response or comment from the respondent, Employment Judge Harper struck the response out on 11 September 2018 because the response was not being actively pursued. The strike out judgment was sent to the parties on 11 September 2018.

22. Judgment was then provided pursuant to rule 21 of the Employment Tribunal Rules 2013 in the sum on £1,800 gross on 14 November 2018, which was sent to the parties on 28 November 2018.

23. On 11 December 2018 the respondent emailed the tribunal with an application to reconsider the judgment sent to the parties on 28 November 2018. The respondent used a different email address and explained that the one it had previously provided, and was used by the tribunal and the claimant, was out of service.

24. The respondent also wrote on 16 January 2019 explaining that it was not aware of the 20 August 2018 deadline because emails were not received. The server was said to be down from 10 August 2018 until 20 September 2018 which occurred after a relocation of offices on 10 August 2018.

25. Both parties were given the opportunity of having a hearing in person or over the phone. In the event, both agreed that I should deal with the initial reconsideration application matter on paper.

26. For reasons set out in the reconsideration judgment, I determined that the interests of justice favoured (i) extending the time to apply for reconsideration and set aside, and (ii) set aside of the strike out of the response and revocation of the judgment. The interests of justice favoured the merits of the case being considered.

27. The judgment was dated 28 February and sent to the parties on 1 March 2019.

28. The claimant wrote again on 14 March 2019 applying for a further reconsideration of this reconsideration judgment. In essence, the claimant explained she was able to provide documented proof that the respondent did not move office. According to the claimant, this shows that the alleged problems with the server were a fabrication. She went on to make other comments about the substantive case in the same application.

29. I then caused an email to be sent to the parties on 22 March 2019 saying, among other things, that it had been agreed with the parties that the reconsideration would be dealt with on paper. I pointed out that it was not feasible or practical to engage in ping-pong correspondence or applications. Therefore, the parties were informed that the claimant's further request for reconsideration would be dealt with at the commencement of the substantive hearing listed on 16 and 17 January 2020 in Southampton.

30. Both parties were reminded that they must come prepared to deal with the substance of the underlying case if the further request for reconsideration did not succeed.

31. A notice of hearing was sent to the parties on 4 March 2019.

32. The claimant attended Southampton Tribunal on 16 January 2020 and provided a witness statement and bundle relating to her reconsideration application.

33. The respondent failed to attend without explanation. The tribunal had previously emailed the respondent and asked them to confirm whether they were intending to attend. No response was received from the respondent to this request.

34. In the event, for reasons set out in the judgment sent to the parties on 22 January 2020 and provided orally on 16 January 2020, the strike out of the response was reinstated. I also determined that the Claimant was automatically unfairly dismissed by the respondent pursuant to section 104 Employment Rights Act 1996.

Conclusions

35. Prior to the hearing on 16 January 2020 the claimant inquired about the potential to attend via video or skype hearing. The parties were informed by email on 9 January 2020 that the Tribunal did not have video hearing facilities in Southampton where the case was listed. The Tribunal offered relocation of the hearing to Bristol. An email was also sent by the Tribunal to the Respondent on 14 January 2020 asking it to confirm in writing, by return, whether or not it would be attending on either or both days of the hearing. As set out above, no response was received to this correspondence.

36. The gravity and effect of the respondent's conduct was exacerbated by the fact that the claimant was required to travel to Southampton from Italy, where she now lives

37. The respondent failed to address the allegation relating to what was said to be a fabricated move to Via Antonio Salandra in its written responses to the claimant's

allegations. This is what led to the reinstatement of the strike out of the response. I determined that the move had been fabricated.

38. In my judgment, the respondent behaved unreasonably by fabricating the move of premises in an attempt to overturn the strike out of the response. The respondent therefore had no excuse for its failure to comply with case management orders during this period. This unreasonable behaviour was further compounded by failing to respond to emails from the tribunal about whether or not it would be attending the hearing listed for 16 and 17 January 2020. This same conduct was also vexatious in that it caused the claimant inconvenience and expense and involved an abuse of the tribunal process.

39. However, there is insufficient evidence before me to determine whether the respondent behaved unreasonably in relation to the other allegations. In particular, there is no sufficient evidence of email hacking. Not including the address of the registered office or not having a registered office in the UK are not instances of conduct pertaining to the proceedings. Comments about the claimant's mental well-being and threats to sue for defamation emanate from, among other things, allegations that the claimant made about nanotechnical poisoning and attacks with microwave weapons. Because the claimant provided no sufficient evidence of this, I do not find that this element of the correspondence was unreasonable or vexatious. Also, the provision of new documentation is not in itself unreasonable conduct.

40. Thus, the conduct of the respondent falls within rule 76(1)(a). There is no reason not to exercise my discretion in favour of awarding costs against the respondent. Nothing has been put before me in relation to ability to pay. The respondent has failed to respond to further correspondence about the claimant's application for a PTO. The fact that the respondent was unrepresented does not explain or excuse its behavior.

41. Moving on to how much to award the claimant. I remind myself that the purpose of an award of costs is to compensate the party in whose favour the order is made, and not to punish the paying party. Costs should be limited to those 'reasonably and necessarily incurred'. Also, the amount awarded for a PTO must also exclude time spent at the final hearing.

42. The claimant has provided a breakdown of the time she spent. She has also explained that this is an underrepresentation of the actual time spent on her case. The substantive case was relatively simple. She says she was dismissed by reason of the assertion of a statuary right. A complicating factor was that the respondent denied that she was an employee. Further, the claimant was required to undertake additional work in light of the respondent's reconsideration application. This additional preparation required some detective work on her part which would have taken some considerable time.

43. Seven hours are claimed for the initial preparation of the claim including for contact with ACAS. Time is also claimed for making travel and accommodation arrangements for the 31 January 2018 hearing. This hearing did not take place because the claim was reserved on 11 December 2017. The tribunal had previously written to the claimant on 23 November 2017 explaining the then named respondent appeared to be a trading name only.

44. This initial delay and vacation of the hearing were not caused or related to any unreasonable conduct on the part of the respondent.

45. However, thereafter the time claimed relates to work done in substantial part occasioned by the unreasonable conduct of the respondent.

46. The additional 31 hours of preparation time is, in my judgment, reasonably and proportionately incurred. The factors thrown up by the defence and factual matters taken by the respondent were reasonably complex and, as set out above, required some detective work on the part of the claimant.

47. The amount per hour has now gone up to £39. Therefore, the amount awarded is 31 hours at £39 per hour, which comes to £1,209.

Regional Employment Judge Pirani

Date: 28 February 2020

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