EMPLOYMENT TRIBUNALS

Claimant: **Ms Z Davies**

Respondent: **Argos Ltd**

TIME PREPARATION ORDER JUDGMENT

I issued this decision on 10 February 2020 by way of an order. In the course of dealing with a reconsideration request I realised that the decision should have been in the form of a Judgment. I have therefore reissued it below. The content remains identical.

1. Following the remedy hearing on 13 November 2019, on 3 December 2019 the claimant applied for a time preparation order. The respondent sent in a written response on 11 December 2019. On 12 December 2019 the claimant provided further submissions.

The relevant legal principles

2. Under Rule 75(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 in working on the case, except for time spent at any final hearing.

3. Rule 76 says:

> "(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; or
>
> (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 party…

4. Rule sets out the overriding objective and states:

"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable –

(a) ensuring that the parties are on an equal footing;
(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
(c) avoiding unnecessary formality and seeking flexibility in the proceedings;
(d) avoiding delay, so far as compatible with proper consideration of the issues; and
(d) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

The parties' submissions

5. The claimant's application said:

> "The Respondents decided not to contest the Claimants ET1 claims, at such a late stage, conceding prior to the additional Preliminary Hearing of 13 November 2019, which altered to a Remedy Hearing at the request of the Respondents.
>
> In doing so, the Defendants also avoided requested specific document disclosure and a Full hearing that I was preparing a compiling various documents for."

6. The claimant's application therefore appears to be based on an argument that the respondent conceded liability at a late stage and which meant the claimant had been put to unnecessary preparation work.

7. The respondent states in their letter of 11 December 2019 that the decision not to contest the claim was a commercial one as set out in their letter of 21 August 2019. They state that once the claimant had provided a properly formatted schedule of loss and disclosed information about her new employment, it was the respondent's understanding that she had suffered no financial loss and it make no commercial sense for the respondent to incur further costs contesting liability. The respondent states they only received the information from the

claimant about her new employment on 30 July 2019 (which in fact this should have been provided by the claimant by 10 April 2019). They state there was no deliberate attempt on their part to avoid disclosure of documents and that this came down to timing. They state following receipt of the information from the claimant they considered the financial implications, and took instructions from their client before writing the letter of 21 August 2019. They state they did not want to make a rushed decision.

8. The claimant provided a further response in which she says:

   (a) that the respondent allowed the bullying issues to go on which led to her resignation and then the Tribunal proceedings. She says that if the respondents had properly dealt with the matters at the outside, applying their policies and procedures, the proceedings should never have been necessary;

   (b) the claimant exhausted all reasonable avenues to resolve her situation with the respondent to no avail and meant unnecessary costs were incurred;

   (c) if the claimant's disclosure request during the liability stage of the proceedings had been complied with then documents would have unearthed the respondent's multiple wrongdoings;

   (d) it is disputed that the respondent conceded liability for commercial reasons. The claimant considers it was a deliberate ploy to suppress the disclosure request made on 19 August 2019.

Discussion and Decision

9. These proceedings commenced on 18 January 2019. On service of the claim form on 2 February 2019 case management orders were automatically sent out including that the claimant should by 2 March 2019 set out in writing what remedy she was seeking and include evidence and documentation supporting the calculation as well as including information about earnings and benefits received from new employment. Disclosure of documents was to be undertaken by 16 March 2019. On 1 March 2019 the claimant provided a document called "remedy" but it was a list of things that she thought she should receive damages for rather than a financial calculation of loss with supporting documents.

10. The response was filed on 10 April 2019 and the respondent asked for a preliminary hearing about whether a protected conversation could be relied upon by the claimant. The listed hearing for 2 July 2019 was therefore vacated and a telephone case management hearing was listed. The telephone case management hearing took place on 15 July 2019. Directions made then included an amended response, if so advised, by 29 July 2019, exchange of list of documents by 12 August 2019, a request for documents from the other party's list by 19 August and provision of copy documents by 28 August 2019. A preliminary hearing was listed for 13 November to decide the contested issue of whether an alleged protected conversation could be relied upon.

11. There was no fresh direction made that I can see for a Schedule of Loss but it is clear there was some discussion about it because on 20 July 2019 the respondent's solicitors emailed the claimant saying "I understand that the judge at the preliminary hearing reiterated the need for you to provide a schedule of loss, in line with the original order. I look forward to receiving the same. In the meantime I note that you are now in full time employment. Please confirm by return the date when this full time employment started and your current salary and benefits package". On 29 July 2019 the claimant provided a schedule of loss. On 30 July 2019 the claimant replied to the respondent's solicitor by email in which she set out a timeline of events in relation to her employment status.

12. On 14 August the respondent's solicitor sent the claimant their list of documents. The claimant provided hers to the respondent's solicitor too. On 19 August the claimant sent to the respondent's solicitor a numbered list of documents she was requesting and asking whether there were any additional attendance notes, Skype call notes or text messages.

13. On 21 August 2019 the respondent's solicitors wrote to the Tribunal stating that on a commercial basis they no longer intended to contest liability. They referred to receiving the schedule of loss and mitigation information received on 30 July 2019. The letter said that they considered the claimant to have suffered no financial loss as a result of her resignation/ constructive dismissal or wrongful dismissal. The letter said that the respondent had had to deal with an extensive disclosure exercise and that there was the drafting of witness statements, and preliminary hearing, and then final hearing to come. The letter stated:

> "Therefore for purely commercial reasons in order to save significant costs and management time, given the Claimant has no financial loss whatsoever, the Respondent has chosen not to contest liability in respect of unfair dismissal."

A request was made to convert the preliminary hearing into a remedy hearing.

14. The claimant objected on 23 August 2019. Part of the claimant's objection was that she said the respondent had emailed her on 21 August 2019 immediately after the letter was sent to the Tribunal saying that as liability was no longer being contested there was no need to produce the requested documents or provide contact details of witnesses as it would no longer be required by the Tribunal. On 4 September 2019 I directed that judgment would be entered for the claimant in the unfair dismissal claim on the question of liability and issued fresh remedy directions for disclosure of documents and witness statements. The claim then came before me for a remedy hearing on 13 November 2019.

15. It is important to bear in mind that costs awards in employment tribunal cases are very much the exception rather than the rule and that their purpose is compensatory not punitive. A party is at liberty in a case to concede an issue for commercial reasons/ cost effectiveness reasons. To do so is not an affront to justice but is in accordance with the overriding objective and, in particular, proportionality, saving expense and avoiding delay. A party is not forced to defend a claim should they not wish to do so. The respondent conceded liability some 3 weeks after they received the claimant's mitigation information. They needed that information in order to be able to evaluate the financial value of the claimant's claim. I accept that the

respondent conceded liability on the basis of an analysis of the value of the claim as against the cost of defending it once the claimant had set out her mitigation information. I do not find that 3 week period was unreasonable in terms of considering the options, providing advice to their client and obtaining instructions. I also do not consider it was unreasonable for the respondent to have defended the claim at the outset and then conceded liability once the claimant's mitigation position was known. I do not find I have sufficient evidence before me to conclude that the respondent was deliberately seeking to bury documents for some alleged improper motive or that there was an abuse of the Tribunal process. The respondent's solicitor is an officer of the court and has a duty to this Tribunal to facilitate the administration of justice which includes not misleading this Tribunal in terms of correspondence sent. The fact that the respondent conceded liability for commercial reasons also accords with the wider timeline of events.

16. I therefore do not find that the respondent or their representatives have acted vexatiously, abusively, disruptively or otherwise unreasonably by the way that the proceedings have been conducted. For completeness nor do I conclude that the respondent had no reasonable prospect of success or that the respondent has been in breach of any order or practice direction.

17. The claimant also seeks costs in respect of the respondent's conduct prior to the claim being brought and in not settling the dispute with her by other means. That is, however, not a matter that can be subject to an application for a time preparation order as the conduct complained about must relate to the party's conduct within these particular proceedings. The respondent was only a party to these proceedings once their response form was filed and I have already found that their conduct from then on was not vexatious, abusive, disruptive or otherwise unreasonable.

18. The application for a preparation time order is therefore declined and is unsuccessful.

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Employment Judge Harfield
Dated: 31 July 2020

ORDER SENT TO THE PARTIES ON

……1 August 2020……..

…… ……..
FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS