Case No: 1402361/2019

EMPLOYMENT TRIBUNALS

Claimant: Ms M Rodriguez

Respondent: ABC Hair Company Ltd

Heard at: **Bristol (in chambers)**

Before: Employment Judge Midgley

Representation
Claimant: Mr Osquaye, Lay representative
Respondent: Mr M Brown, Director

RESERVED JUDGMENT

1. The respondent's application for a time preparation order is granted and the claimant is ordered to pay the respondent the sum of £600.00.

REASONS

The application and procedural history

1. On 24 May 2019, the claimant presented a claim for unlawful deduction of wages, notice pay and unpaid annual leave following her summary dismissal on 20 January 2019.

2. In a response presented on 26 June 2019, the respondent applied for the claim to be struck out (alternatively a deposit Order) on the grounds that the claim was vexatious. In particular, the respondent argued that the claim's sole purpose was to extort a settlement from the respondent by alleging (during ACAS early conciliation) that she had been sexually harassed whilst working for the respondent and that she would present a claim for sexual harassment to the Tribunal. The claimant did not include that allegation in her claim and the respondent therefore argues that it was entirely without basis and vexatious, and the claim was itself by extension similarly vexatious.

3. On 17 July 2019, the Tribunal dismissed the respondent's application for strike out or a deposit order and directed the parties to identify the number of

witness that they would call, listing the hearing for 6 December 2019. On 30 July 2019, the respondent suggested it would call two witnesses.

4. The claimant did not comply with the order, despite a further reminder, and a strike out warning was issued on 9 August 2019. The claimant did not respond to that warning and in consequence the claim was struck out on 23 August 2019.

5. On 28 August 2019, the respondent applied for a time preparation order in respect of 60 hours work in preparing for the hearing and defending the claim generally.

6. On 26 September 2019, the claimant objected to the application on the grounds that her representative had not forwarded the orders to her until she notified her that her claim had been struck out.

7. On 22 October 2019, the respondent indicated that it would consent to a Judge determining the application on the papers to avoid further cost. It provide more detail of the time claimed, identifying:-

   7.1. 10 hours liaising with ACAS trying to obtain clarification of the sums claimed and the basis on which they were pursued;

   7.2. Time speaking with employment lawyers

   7.3. Half a day was required to interrogate its pay and annual leave systems to rebut the unclear claim for annual leave.

   7.4. Time interviewing staff as witnesses, preparing the response and communicating with the Tribunal.

8. The respondent submitted a witness statement in support of the application on 10 March 2020. The additional grounds it identified were first that the claim for notice pay was vexatious as there was no contractual basis for the claimant to claim 4 weeks' notice pay, the respondent maintained that she knew her entitlement was 1 week. Secondly, it argued that the holiday pay claim was vexatious as there was no contractual provision permitting the claimant to carry over annual leave, and she had not identified one or the periods in respect of which she said the annual leave was due in the claim.

9. The matter came before me for a hearing on 23 March 2020; the discussion and directions made on that day are contained in the case management summary and will not be set out in full here.

10. With the parties' consent, I have made a decision on the papers which consisted of the following:

    10.1. The claim form (but as indicated in paragraph 18 of the case management decision, taking as my start point that the claimant was fairly summarily dismissed as her claim was stuck out).

    10.2. The response

    10.3. The witness statement of Mr Brown.

10.4. The witness statement of the claimant 12 March 2020, attaching a statement from her representative, Mr Osquaye.

10.5. The claimant's response to the first application.

10.6. The respondent's application of 28 August 2019.

10.7. The schedule of preparatory work and hours claimed, dated 4 April 2020

10.8. The claimant's response to the respondent's clarified application, dated 7 April 2020

11. The essential detail of the work undertaken, the need for it and the time taken detailed in the respondent's amended application of 4 April were as follows:-

11.1. It was necessary to interrogate the respondent's appointment systems to identify when the claimant worked (8 hours)

11.2. It was necessary to reread all the meeting notes with the claimant, to identify reference to her complaints of sexual harassment, and to liaise with ACAS to understanding and clarify the claims (10 hours)

11.3. Speaking to employment lawyers (2 hours)

11.4. Interrogation the respondent's systems to the claimant's annual leave (4 hours)

11.5. Interviewing staff (10.5 hours)

11.6. Reading legislation in relation to the claims (12 hours)

11.7. Seeking details of the claim by liaising with ACAS (8 hours)

11.8. Preparing the response (6 hours)

12. I sincerely apologise for the delay in the promulgation of this Judgment. The incidence of the Pandemic caused the Judiciary to work from home from 23 March, April and May and it appears that this case somehow fell between the cracks.

13. It was not until the claimant sent in a further email with additional evidence (and many pages of SMS printout on 29 August 2020, that the file was located in October and it was noticed that the application had not been referred back to me. Regrettably, pressure of work meant that I was unable to consider this matter until now. I recognize that that the delay will necessarily have caused the parties frustration and anxiety.

The Issues

14. The following issues therefore fall to be decided:

14.1. Did the claimant act unreasonably in issuing the proceedings or in the manner in which she conducted them?

14.2. If so, should the Tribunal exercise it discretion to make a time preparation order?

14.3. If so, what was the nature, gravity and effect of that unreasonable conduct?

14.4. What level of award should be made?

The Law

15. The relevant rules are contained in rules 75, 76 and 79.

16. Rule 75(2) defines preparation time as "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."

17. Rule 76 provides:

(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 has acted … unreasonably in either the bringing of 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.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or wear a hearing has been postponed or adjourned on the application of a party.

18. Rule 77 requires that any such application must be made within 28 days of the date on which judgement is sent to the parties.

19. Finally, Rule 79 provides:

(1) The Tribunal shall decide the number of hours in respect of which a preparation time order should be made, on the basis of

(a) information provided by the receiving party on time spent falling within rule 75 (2) above; and

(b) the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time spent on such preparatory work, with reference to such matters as the complexity of the proceedings, number of witnesses and documentation required.

(2) The hourly rate is £33[1]

20. Rule 76(1) imposes a two-stage test: first, a tribunal must ask itself whether a party's conduct falls within rule 76(1)(a); 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.

[1] Increasing by £1 on 6 April each year. The current rate is £40

21. 'Unreasonable' has its ordinary English meaning and is not to be interpreted as if it means something similar to 'vexatious' — Dyer v Secretary of State for Employment EAT 183/83.

22. In determining whether to make an order under this ground, 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. There must be some causal link between the unreasonable conduct and the costs claimed, in the sense the causation is not irrelevant, but there does not need to be a precise causal link between the unreasonable conduct in question and the specific costs being claimed.

23. 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 (Yerrakalva v Barnsley Metropolitan Borough Council and anor [2012] ICR 420, CA.) 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 (Sud v Ealing London Borough Council 2013 ICR D39, CA).

Discussion and Conclusions

24. I cannot say on the balance of probability that the claimant act unreasonably in issuing a claim as I have not seen any evidence relating to the claims themselves, particularly those of unpaid holiday pay, and unlawful deduction of wages.

25. However, in my judgment the claimant acted unreasonably in intimating that she would bring a claim of sexual harassment through ACAS in circumstances where that allegation was not subsequently pursued. That creates a presumption that the allegation (a) was not one that the claimant genuinely believed in, or, if she did, (b) that she did not believe she had any reasonable prospect of establishing it at a final hearing. That gives force to the respondent's argument that the sole purpose for which it was raised was to pressurize the respondent into settling the claims, given the potential reputational and business impact of such an allegation.

26. Secondly, the claimant acted unreasonably in failing to respond to the Tribunal's orders. The claimant's explanation for that is that her representative failed to notify her of the orders. I reject that explanation. I note that the failure to respond to important and reasonable enquiries is a constant and unvaried theme of the claimant's litigation even prior to the Tribunal's orders: she did not respond to the respondent's requests through ACAS for details of her claim, she did not respond to the Tribunal and she has provided no detail or explanation in relation to the nature of the failure of her representative in response to this application.

27. Each of those failures is significant and serious. The very purposes of early conciliation is negated if one party will not clarify the claims or respond to requests for information or responses, or indeed at all. Similarly, failure to comply with Tribunal Orders cause the Tribunal's limited time and resource to

be wasted, preventing meritorious claims for being dealt with and considered by the Tribunal.

28. In addition, the respondent has necessarily had to continue to prepare for the claim, assuming it is actively pursued, diverting its time and energies from running its business.

29. In my view it is just and equitable in those circumstances to exercise my discretion to make a Time Preparation Order in the respondent's favour. Adopting the broad-brush approach articulated by the authorities above, in my view, all of the categories of claim, with the exception of 11.3 above, are potentially reasonable. The respondent is only entitled to recover its time in preparation, not time in seeking legal advice from legally qualified third parties. The time and costs of lawyers can be pursued under Rule 75, but not under Rule 76. The other categories of claim all flow naturally from the claimant's approach to ACAS and the claim presented to the Tribunal and are properly claimed under Rule 76.

30. Nevertheless, the times claimed are excessive; they are not proportionate to the complexity of the case and the claims themselves.

31. The claimant did not ultimately bring a claim for harassment, and it is only the claim that the claimant presents to the Tribunal that the respondent must defend. The respondent's defence to the notice pay claim rests on the terms of the contract. Very little investigative work was required in respect of it. More work was required in relation to wages and annual leave, but I am satisfied that the bulk of the hours claimed in the respondent's schedule, given the explanations in it, related to the allegation of sexual harassment, which is not a claim ultimately presented to the Tribunal.

32. In my view it would have been reasonable for the respondent to spend 15 hours to interrogate its system to identify whether any annual leave or wages were owed to the claimant, liaise with ACAS and subsequently draft the response and, where necessary, speak to staff.

33. The current hourly rate for is £40 an hour. I therefore make an Order that the claimant should pay the respondent £600.00.

Employment Judge Midgley

Date: 28 November 2020