# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
|---|---|---|
| **Mr S Hewitt** | **v** | **Department for Work and Pensions** |

**Held at**: London Central **On**: 22 December 2020

**Before:** Employment Judge P Klimov (in Chambers)

## JUDGMENT

1. The Claimant's application for a preparation time order succeeds in part. The Respondent is ordered to pay the Claimant **£640**.

## REASONS

**Background**

2. The relevant background to this claim, the issues I needed to decide, and my findings and conclusions are set out in the written Reasons sent to the Parties on 19 February 2021. I will not repeat them here, except where directly relevant for the determination of the Claimant's application.

3. On 14 December 2020, the Claimant applied for a preparation time order pursuant to Rule 76 (1) (a) and Rule 76 (1) (b) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 (the Rules) in the total sum of £1,280.

4. On 21 December 2020, the Respondent provided its response asking the Tribunal to dismiss the application.

5. Regrettably, due to London Central Tribunal's closure on 18 December 2020 for Covid safety reasons and resulting restrictions on the staff and judiciary accessing the paper files and the tribunal's case management IT system, the application was passed to me only on 11 February 2021 and the Respondent's

response on 19 February 2021. I apologise for the delay in dealing with the application.

6. The Claimant seeks a preparation time order on the following grounds:

   *(i) "As the Respondent's attempt to change its expenses policy retroactively was unlawful, its defence had no reasonable prospect of success as defined by Rule 76(1)(b).*

   *(ii) Additionally, the Respondent acted unreasonably as per Rule 76(1)(a) by*

      *a. Refusing to engage with ACAS.*

      *b. Applying on 16th October 2020 that the Final Hearing be converted to a Preliminary Hearing; to consider striking out the claim on the grounds that the Claimant had no reasonable prospects of success.*

      *c. Writing on 3rd December 2020 "without prejudice 'save as to costs'" to threaten the pursuit of costs in the sum of £15,000 because it considered the Claimant's case to have no prospect of success when it knew that the Tribunal had previously struck down the application mentioned in 5(b) which had been made for the same reason.*

      *d. On 7th December, the Respondent declined my offer of settlement (made via ACAS) of £784.08 rather than the £1080.10 ultimately awarded."*

7. The Respondent opposes the application. It says that with respect to the first ground of the application, the Respondent's defence did have reasonable process of success, because:

   (i) in my judgement for the Claimant, I acknowledged that the interpretation of the relevant terms in the Respondent's expenses policy, as argued by the Respondent, was possible, however I preferred the interpretation of the Claimant, largely to reconcile the policy terms with the Respondent's duty under section 6 of the Human Rights Act 1998; and

   (ii) its defence on the issue of whether there was "an overpayment with respect of expenses" failed on my findings that the payment was not wrongfully made because it was a legitimate business expense claim duly authorised for payment by the Respondent, and the Respondent had reasonable factual grounds to dispute that and therefore had prospect of success which were more than fanciful.

8. With respect to the Claimant's alternative ground under Rule 76(1)(a), the Respondent denies that it acted unreasonably. It submits that:

(a) *"The Claimant has failed to particularise in what way the Respondent refused to engage with ACAS. In so far as the Claimant is alleging that the Respondent's failure to settle the claim on more favourable terms amounts to unreasonable conduct, the same is denied. The Respondent is a public authority with a duty to manage public money responsibly. As per Paragraph 6 of the witness statement of Darren Rowley (enclosed) this includes ensuring expenses incurred by its employees and paid from the public purse are legitimately incurred and claimed promptly. In circumstances where the Respondent held a reasonable belief that expenses had been paid outwith its policy and where its defence had reasonable prospects of success, it cannot be unreasonable for the Respondent to have pursued such a defence in full;*

(b) *The Respondent denies that its application constituted unreasonable behaviour. The application was based on the Respondent's reliance on section 14(1)(b) ERA and its reasonable belief that the expenses claim, being made outwith its policy, amounted to an overpayment of expenses which it was entitled to deduct from the Claimant's wages. The Respondent held a reasonable belief that converting the hearing to a preliminary hearing would serve to save expense. It is notable that prior to the issue of these proceedings, the Claimant's main point of contention with the new policy was that it was, in his view, incompatible with the Limitation Act 1980 (an argument not actively pursued at the final hearing). In any event, it is noted that the Claimant does not appear to make a claim for preparation time relating to the Respondent's application;*

(c) *For the reasons already set out, the Respondent denies that issuing a costs warning letter was in any way unreasonable conduct on its part;*

(d) *The Respondent repeats its aversions at Paragraph a, above. In addition, the Respondent avers that it is not unreasonable behaviour to reject an offer simply because the Tribunal's decision is more favourable to the party making the offer: Kopel v Safeway Stores plc [2003] IRLR 753. Whilst the Tribunal can take such offers into account, costs do not automatically follow."*

9. The Respondent further invites the Tribunal to take into account the following additional matters:

(i) *"The Claimant's claim succeeded on a ground not raised by the Claimant in his ET1;*

(ii) *The single issue pursed by the Claimant at the final hearing was as to the correct interpretation of the policy – the Claimant's focus on this aspect of the case is supported by the Claimant's mischaracterisation of the reason for the Judge's decision. The Judge said that both interpretations were possible;*

(iii) *Judge Klimov did not make any observations as to the merits of the Respondent's defence in circumstances where it would have been open to the Judge to have done so;*

(iv) *Likewise, Judge Burns considered the Respondent's application and concluded on 4th November 2020 that it would be rejected "as it appears that the question*

*of whether the expenses were overpaid will be an evidential dispute between the parties". The Respondent avers that this comment would likely have applied equally had the Claimant made a similar application*."

10. The Respondent requests that in the event that the Tribunal is not minded to dismiss the application on the papers, to list this matter for a hearing.

11. Finally, it contends that the time claimed by the Claimant is unreasonable and disproportionate to the issues between the parties. In particular, the time spent researching is excessive in circumstances where the law is relatively straight forward and neither party sought to rely upon any case law.

**The Law**

12. Rule 76 provides:

*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 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.*

13. The following key propositions relevant to costs orders may be derived from the case law:

14. There is a two-stage exercise to making a costs order. The first question is whether a paying party has acted unreasonably or has in some other way invoked the jurisdiction to make a costs order. The second question is whether the discretion should be exercised to make an order (Oni v Unison ICR D17).

15. While the threshold tests for making a costs order are the same whether or not a party is represented, in the application of the tests it is appropriate to take account of whether a litigant is professionally represented or not. Litigants in person should not be judged by the standards of a professional representative (AQ Ltd v Holden [2012] IRLR 648).

16. A refusal of a settlement offer did not by itself inevitably mean that an order for costs should be made against the refusing party. However, such an offer is a factor which a tribunal could take into account when considering whether there was unreasonable conduct by that party (Kopel v Safeway Stores plc [2003] IRLR 753).

17. For term "vexation" shall have the meaning given by by Lord Bingham LCJ in AG v Barker [2000] 1 FLR 759:

"*[T]he 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 defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, 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.*" (emphasis added)
>
> (Scott v Russell 2013 EWCA Civ 1432, CA)

18. '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).

19. In determining whether to make a costs order for 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)

20. While a precise causal link between unreasonable conduct and specific costs is not required, it is not the case that causation is irrelevant. In Yerrakalva v Barnley MBC [2012] ICR 420 Mummery LJ said:

> "*41. 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. The main thrust of the passages cited above from my judgment in McPherson's case was to reject as erroneous the submission to the court 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. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances*".

21. Under Rule 79 of the Rules a tribunal must decide the number of hours in respect of which a preparation time order should be made. This assessment must be based upon:

(a) information provided by the receiving party in respect of his or her preparation time, and

(b) the tribunal's 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.

22. The current hourly rate is £40 (Rule 79(2)).

23. The amount of preparation time order shall be the product of the number of hours assessed under Rule 79(1) and the current hourly rate (Rule 79(3)).

24. Rule 77 of the Rules provides that: "*No [preparation time order] order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.*" (my emphasis)

*25.* In interpreting, or exercising any power given to a tribunal under the Rules, it must seek to give effect to the overriding objectives set out in Rule 2 of the Rules, which requires the tribunal to deal with a case fairly and justly, "*including 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*
   (e) *saving expense*." (my emphasis)

**Conclusions**

26. Having considered the matter, I am satisfied that I can deal with it fairly and justly on the papers. Ordering a hearing to determine the application will be disproportionate to the complexity and importance and will result in further unnecessary delay and costs.

27. The Respondent had been given a reasonable opportunity to make representations, and it submitted detailed written representations on the matter.

28. The Respondent in its submissions relies on the witness statement of Mr D Rowley. However, it is his witness statement used at the final hearing, and he was cross-examined on those evidence by the Claimant. The Respondent does not seek to introduce any further evidence in relation to the Claimant's application.

Did the Respondent's defence have no reasonable prospect of success?

29. I do not find that the Respondent's defence had no reasonable prospect of success. It failed on my findings of fact that the Claimant's expense claim had been duly authorised for payment by the Respondent, and on my interpretation of section the Respondent's expenses policy terms and section 14(1)(b) of the Employment Rights Act 1996.

30. However, as I stated in my judgment, the policy wording was ambiguous, and the interpretation applied by the Respondent was possible. However, I found that such interpretation was not consistent with the Respondent's duty under section 6 of the Human Rights Act 1998, and that was the reason why I preferred the Claimant's interpretation.

31. With respect to the meaning of "overpayment" under section 14(1)(b) of ERA 1996, the Respondent relied on the fact that the expense claim was automatically authorised for payment, and the Claimant submitted it knowing that under the updated terms of the policy it was liable to be rejected. Although, I found against the Respondent on this issue, I accept that it cannot be said that it did not have a proper basis to argue the point and that it was not doomed to fail.

32. Therefore, the Claimant's application under Rule 76(1)(b) fails.

Has the Respondent acted unreasonably?

33. Turning to his alternative ground, under Rule 76(1)(a). I accept that the Respondent's refusal to engage in ACAS conciliation, its strike out application and request to convert the final hearing into a preliminary hearing to consider it, are not sufficient reasons for me to find that the Respondent's conduct, up until the strike out application was refused by Employment Judge E. Burns on 4 November 2020, was unreasonable.

34. I am satisfied that until that time, the Respondent held a genuine, albeit erroneous, view that the Claimant's claim had no reasonable prospect of success, in particular because of the Claimant's apparent reliance on the Limitation Act 1980 in his ET1, which was not a relevant matter for his claims. However, the claimant is a litigant in person, and him not fully understanding jurisdiction limitations of employment tribunals, cannot be taken against him as a reason why his application must fail.

35. In any event, and more importantly, on 4 November 2020 the Respondent's strike out application was refused. The reason given for that by Employment Judge E. Burns was as follows: "*as it appears that the question of whether the expenses were overpaid will be an evidential dispute between the parties*".

36. Following that decision, in my judgment, the Respondent could no longer hold a reasonable view that the Claimant's claim had no reasonable prospect of success.

37. There was nothing in the Claimant's conduct of the proceedings that could have reasonably given the Respondent any further reasons to consider that it had or would have a legitimate ground to make a costs order application under Rule 76(1)(a).

38. On 3 December 2020, the Respondent, wrote to the Claimant on a "without prejudice, save as to costs" basis to warn him that it would pursuit him for costs in the sum of £15,000 because it considered the Claimant's case had no reasonable prospect of success.

39. I did not see that letter. For obvious reasons it was not in the hearing bundle. A copy of it was not provided by either party for the purposes of this the application.

40. However, in its response to the application, the Respondent does not deny that it sent the letter. It says that issuing a cost warning letter was not "*in any way unreasonable conduct*". It does not dispute that the sum in the letter was

£15,000. Therefore, I conclude that on 3 December 2020 the Respondent did send the letter to the Claimant, and it contained a costs warning stating the sum of £15,000, as a sum of money, which the Respondent would be asking the tribunal to award against the Claimant by way of a costs order.

41. It does not appear that anything material occurred between 4 November and 3 December 2020 to give the Respondent any reasonable grounds to renew its strike out application, and it did not seek to do so at the hearing.

42. Therefore, I conclude that the letter was sent for the primary purpose of threatening the Claimant that he could end up losing a great deal more than what he could possibly gain by continuing with his claim. That was done in the circumstances when the Respondent knew full well (being legally represented throughout) that it had no reasonable grounds for making such a "warning".

43. I find that such conduct was unreasonable. The Claimant in his application is not asserting that the Respondent's conduct was vexatious. If it had sought a preparation time order on that ground too, I would have held that the conduct in question was also vexatious.

44. Even if, as I suspect, the letter contained a settlement offer, it was unreasonable for the Respondent to threaten the Claimant with disproportionate costs consequences if he did not accept the offer.

45. It appears that on 7 December 2020, the Respondent declined the Claimant's offer of £784.08. Therefore, the sum of £15,000 would most likely be at least 30 times more than whatever offer the Respondent was making in its 3 December 2020 letter.

46. In any event, it was an "all or nothing" case, and there was no dispute as to the value of the deductions made. Therefore, the Respondent could not have reasonably thought that if the Claimant prevailed on liability, he could still end up recovering less than what it had been offered by a way of settlement.

47. In defending this application, the Respondent says "*that it is not unreasonable behaviour to reject an offer simply because the Tribunal's decision is more favourable to the party making the offer".*

48. I agree. However, that is something that was or, at any rate, should have been known to the Respondent at the time it threatened the Claimant with £15,000 of costs, and the more so with the Claimant being a litigant in person, and the tribunal having to take that into account in deciding on any costs application against him.

49. This further supports my conclusion, that at the time of making the costs warning the Respondent did not have any reasonable grounds to believe that costs could be awarded against the Claimant.

50. Having decided that the Respondent's conduct engaged Rule 76(1)(b), I now need to consider whether I should exercise my discretion and order the Respondent to make a payment in respect of the Claimant's preparation time.

51. I find that the nature, gravity and effect of the Respondent's conduct was such that it would be appropriate for me to make an order. It was a threat of a serious financial consequence for the Claimant, in the circumstances when the Respondent knew or should have known that it had no proper basis to make it. It was designed to deter the Claimant from continuing with his legitimate claim.

52. I shall now consider the amount I shall award. The Claimant says he has spent 32 hours on his case in total and gives the following breakdown:

    *(a) "Researching legislative and comparable cases - 12 hours*
    *(b) Completing the ET1 claim form – 2 hours*
    *(c) Conversations & emails with ACAS – 1 hour*
    *(d) Correspondence with Respondent's legal representatives – 2 hours*
    *(e) Preparation of Witness Statement – 3 hours*
    *(f) Reading of evidence bundle – 3 hours*
    *(g) Research to rebut Respondent's evidence – 3 hours*
    *(h) Preparation of questions for witness / self-examination – 2 hours*
    *(i) Research of legislation regarding Preparation Time – 2 hours*
    (j) *Drafting of application for Preparation Time Order – 2 hours"*

53. The Respondent contends that the time claimed by the Claimant is unreasonable and disproportionate to the issues between the parties. In particular, the time spent researching is excessive in circumstances where the law is relatively straight forward and neither party sought to rely upon any case law.

54. I do not accept the Respondent's contention that the Claimant has spent excessive time in preparing for the case. He is a litigant in person and is not expected to know what the Respondent says the "relatively straight forward" law. Furthermore, the law on unlawful deduction from wages is not straight forward, and the Respondent itself has got it wrong.

55. With respect to the disproportionality argument. The Claimant's total preparation time costs were slightly less than the value of his claim. It is not uncommon that in low value cases, costs become greater than the value of the claim, and often by a substantial amount.

56. If, however, £15,000 was a true estimate of the Respondent's costs, I do find that to be disproportionate. That sum would be in addition to legal costs incurred and significant management time spent on dealing with the "recovery action" (see paragraphs 24 to 39 of Mr D. Rowley's witness statement). The Respondent contends that as a public authority it has *"a duty to manage public money responsibly".* It appears that in dealing with this matter it might have lost sight of that.

57. Although it cannot be reasonably concluded that all 32 hours of the Claimant's preparation time was caused by the Respondent's unreasonable conduct, I find that it certainly caused the Claimant to have to spend more time dealing with this case, including in researching the law, corresponding with the Respondent's representatives, dealing with documents and witness statements, and preparing this application.

58. Looking at the Claimant's time breakdown and all the circumstances of the case, I find that an award for 50% of the time claimed is appropriate.

59. Therefore, I order the Respondent to pay the Claimant a sum of £640 in respect of his preparation time.

_____

**Employment Judge P Klimov**
**22 February 2021**

Sent to the parties on:

22 February 2021

For the Tribunals Office

**Public access to employment tribunal decisions**

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant (s) and respondent(s) in a case.