EMPLOYMENT TRIBUNALS

Claimant: **Mr T. Sheikh**

Respondent: **Stonewall Consulting Ltd**

Heard at: **East London Hearing Centre**

On: **26 March 2021**

Before: **Employment Judge Massarella**

Representation
Claimant: Did not appear and was not represented
Respondent: Mr B. Jamil (HR Manager)

JUDGMENT

The judgment of the Tribunal is that: -

1. **the Claimant acted unreasonably in not complying with the Tribunal's case management orders in the period leading up to the hearing on 30 July 2020;**

2. **the Respondent is entitled to a preparation time order in relation to the sending of the emails of 26 and 30 April 2020, and time spent by Mr Jamil preparing for the hearing;**

3. **the Claimant is ordered to pay to the Respondent £132.**

REASONS

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was V (CVP). A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.

1. The Respondent, which is not professionally represented, seeks a preparation time order against the Claimant on the basis that he conducted the proceedings unreasonably, pursuant to Rule 76(1)(a), Sch. 1 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 ('the Rules'), by failing to comply with the Tribunal's orders in the period leading up to the hearing on 20 July 2020.

2. Rule 75(2) provides that 'preparation time' means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

3. At this point the Respondent pursues only two aspects of its original application, relating to:

    3.1. reminders to the Claimant to comply with case management orders, by emails sent to him on 26 and 30 April 2020, for which it seeks an order in respect of three hours; and

    3.2. time spent by Mr Jamil preparing for the hearing on 30 July 2020, for which it seeks an order in respect of a further three hours.

4. For the avoidance of doubt, the Respondent reserves the right to pursue a preparation time order in respect of the other matters originally raised by it, but not pursued today.

The Respondent's submissions

5. Directions were given on 5 March 2020 that the Claimant must set out in writing what remedy he was seeking, disclose relevant documents to the Respondent, and prepare a witness statement and send it to the Respondent. He did not comply with any of those directions. As a result, at the beginning of the hearing, which was listed as a final hearing and which he attended, there was no schedule of loss and no statement from him.

6. The Respondent submitted its application for a preparation time order on several occasions in August and September 2020, and again in the lead up-to this hearing, by email dated 19 March 2021. The Claimant did not reply to the application, and did not attend today's hearing, of which he had been given notice.

7. Accordingly, I had regard to the explanation which he had given at the hearing on 30 July 2020, which was that:

> 'he has had little time to prepare because of the pandemic, which prevented him from accessing and sending the documents he needed. He stated that he had not had time to comply with the directions […] The Claimant was extremely apologetic [and] said that he understood the Respondent's position.'

8. In deciding whether to strike out the Claimant's claim at that hearing, I considered the extent of the non-compliance, and whose responsibility it was. My view in that context was that the Claimant's explanation was 'unpersuasive and implausible'.

The law to be applied

9. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provide as follows (as relevant):

> **(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;**
> >
> > **…**

10. Orders for costs in employment Tribunals are the exception, not the rule (*Gee v Shell UK Ltd* [2003] IRLR 82 CA *per* Sedley LJ at [35]). However, the facts of a case need not be exceptional for a costs order to be made. The question is whether the relevant test is satisfied (*Vaughan v London Borough of Lewisham and others* [2013] IRLR 713).

11. The EAT in *Haydar v Pennine Acute NHS Trust* UKEAT/0141/17 held that the determination of a costs application is essentially a three-stage process (*per* Simler J at [25]):

> **'The words of the Rules are clear and require no gloss as the Court of Appeal has emphasised. They make clear (as is common ground) that there is, in effect, a three-stage process to awarding costs. The first stage - stage one - is to ask whether the trigger for making a costs order has been established either because a party or his representative has behaved unreasonably, abusively, disruptively or vexatiously in bringing or conducting the proceedings or part of them, or because the claim had no reasonable prospects of success. The trigger, if it is satisfied, is a necessary but not sufficient condition for an award of costs. Simply because the costs jurisdiction is engaged, does not mean that costs will automatically follow. This is because, at the second stage - stage two - the Tribunal must consider whether to exercise its discretion to make an award of costs. The discretion is broad and unfettered. The third stage - stage three - only arises if the Tribunal decides to exercise its discretion to make an award of costs, and involves assessing the amount of costs to be ordered in accordance with Rule 78'.**

12. 'Unreasonable' has its ordinary meaning. It is not equivalent to 'vexatious' (*Dyer v Secretary of State for Employment* UKEAT/183/83).

13. Costs awards are intended to be compensatory, not punitive. The costs awarded should be no more than is proportionate to the loss caused to the receiving party by the unreasonable conduct (*Barnsley Metropolitan Council v Yerrakalva* [2012] IRLR 78). However, unlike the wasted costs jurisdiction, in exercising its discretion to order costs, the Employment Tribunal does not have to find a precise causal link between any relevant conduct and any specific costs claimed. Mummery LJ gave the following guidance at [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 was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET 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.'**

Conclusions

14. The Claimant has had ample opportunity to explain why a preparation time order should not be made, and he has not done so. I am satisfied that he acted unreasonably in failing to take any steps to advance his claim in the period leading up to the July 2020 hearing, notwithstanding clear directions from the Tribunal, and reminders from the Respondent about the need to do so. He has given no plausible or persuasive explanation as to why he was unable to do so, beyond a generalised reference to difficulties caused by the pandemic. I am not satisfied that he did not have time, as he maintained, to comply with the orders, for that reason or for any other reason.

15. Consequently, I am satisfied that the trigger for making a costs order has been established because the Claimant has acted unreasonably. That is a necessary but not sufficient condition for a preparation time award. I went on to consider whether to exercise my discretion to make such an award, and decided that it is just in all the circumstances to do so.

16. I am satisfied that the effect of his failure to comply with the orders was that the Respondent spent time attempting to secure his compliance, and prepared for a hearing which, in the event, could not go ahead because of his non-compliance.

17. I consider that the Respondent's claim for three hours in respect of preparation for the hearing is realistic and proportionate: I have no doubt that it took that long for Mr Jamil to read the documents and to marshal his thoughts in advance of the hearing. I award three hours at the current fixed rate of £33 per hour (£99).

18. By the email of 26 April 2020, the Respondent scanned and resent docs it had previously sent by post on 14 April 2020. Mr Jamil's evidence was that it took him two hours to scan the documents. I think that is unlikely. I also had regard to the fact that the Respondent had not been ordered at that stage to scan the documents, nor had the Claimant asked him to do so. On the other hand, I accept that Mr Jamil was attempting to be helpful by scanning the documents, and was only chasing documents from the Claimant because the Claimant had not complied with the Tribunal's orders. In the circumstances I think an award in respect of one hour is proportionate: £33.

19. As for the email of 30 April 2020, in which Mr Jamil again chased the Claimant's documents, it is four lines along and cannot have taken more than two minutes to draft. I make no order in respect of the time spent drafting that email.

20. I did not take into account the Claimant's means because he did not provide me with any evidence of them.

Employment Judge Massarella

31 March 2021