EMPLOYMENT TRIBUNALS

BETWEEN

Dr Adil Razoq **(Claimant)**	**and**	**1. General Medical Council** **2. Sarah Gibson** **3. Willie Paxton** **4. Kristan Matuszcsak** **(Respondents)**

Held at: **Birmingham, with a determination made on the papers**

On: **26 April 2021**

Before: **Employment Judge T Coghlin QC**

JUDGMENT

The claimant's application for a preparation time order is refused.

REASONS

Introduction

1. By way of an emailed application sent on 2 January 2021 the claimant seeks a preparation time order (PTO) in respect of the respondents' application for a strike out or deposit orders in relation to the claimant's case. I gave my decision on the respondents' application by a reserved judgment and reasons dated 30 October 2020 and sent to the parties on 2 November 2020.

2. In circumstances where the tribunal's administrative systems have been under great strain, there was a regrettable delay in the application being referred to me.

3. The parties have made further submissions in writing: the respondents on 26 and 31 March and 1 April 2021, and the claimant on 28 and 31 March 2021.

4. The parties have confirmed that they are content for the application to be determined on the papers and I am satisfied that this approach is appropriate and in accordance with the overriding objective.

The nature and scope of the application

5. There are two points to make about the nature and scope of the application. First, although the claimant describes his application as one for costs, it is clear that what he seeks is in fact a PTO. Second, the claimant's application is for an order against the "defendant", which I assume is intended to be a reference to the first respondent, the General Medical Council (GMC). It is not clear whether his application is also intended to be made against the three other individual respondents. I shall assume that it is, but nothing turns on that.

The claimant's application

6. The claimant's application in his email of 2 January 2021 did not identify any recognisable ground for an award of costs or a PTO. However in his email of 28 March 2021 he elaborated upon his application. It may be summarised as follows (I have corrected some of the references he has given to the ET Rules 2013):

    a. the application had no reasonable prospect of success (rule 76(1)(b));

    b. the respondents acted unreasonably (rule 76(1)(a)) in making their application 2½ years into the life of the claim, after the claim had already been the subject of multiple hearings at which it had not been struck out;

c. the respondents acted unreasonably (rule 76(1)(a)) by making an application on an unreasonably wide front, seeking a strike out or deposit order in respect of each and every one of the 40 or so allegations made by the claimant rather than narrowing their application so that it was properly focussed on the weakest parts of the claimant's case.

7. The respondents' response is that they had to wait until the consolidation of three separate ET3s submitted by the claimant before they could seek to apply to strike out, and they had given ample notice that this was their intention from an early stage in the proceedings. They say that the large volume of documents is a product of the fact that the claimant had sought to challenge significant aspects of his interaction with the respondents.

Time limits

8. Before turning to the merits of the application, I shall address a procedural point taken by the respondents in relation to the timing of the claimant's application.

9. Rule 77 of the Employment Tribunal Rules of Procedure 2013 provides as follows:

> A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties.

10. The tribunal has the power to extend the time for making an application under Rule 5:

> The Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in these Rules or in any decision, whether or not (in the case of an extension) it has expired.

11. The claimant's application was made on 2 January 2021. The respondents' position is that the application was made out of time, and it should have been brought by no later than 30 November 2020, which is to say within 28 days of the judgment being sent to the parties. Their submission is as follows:

> Under Rule 77 of the 2013 Rules, an application for a preparation time order must be made within 28 days of the date on which the judgment finally determining (in this case, the relevant part of) the proceedings was sent to the parties.

12. I do not accept that the application is made out of time.

13. In my judgment on strike out, I struck out four limited parts of the claimant's claim: Allegation 10.2, and parts of Allegations 4.3, 18 and 21. Those parts of the claimant's claim were finally determined by that judgment. The remainder of his allegations, which are far greater in number, were not, and those parts of the claim remain on foot.

14. I am not persuaded that it is appropriate to consider that the time limit runs from the date when "the relevant part" of the proceedings against a party is finally determined. That is to put a gloss on the plain wording of rule 77, which speaks of the proceedings against the paying party being "finally" determined, and I would be reluctant to find an implied limitation in a provision relating to time limits which may act as a trap for the unwary. But that is a point I do not need to determine, because even if I were to assume that time runs from the date when the "relevant part" of the proceedings was finally determined, that would not assist the respondents, because it makes no sense to regard the four points on which the claimant *lost* as being "the relevant part" of the proceedings for the purpose of his application for a PTO, an application which is based squarely on his success in defending the respondents' strike out application in relation to the other parts of his claim, on which he *won*. These all remain live and have not been determined. The relevant part of the proceedings have not been finally determined, and the application is brought in time. I do not therefore need to consider whether to extend time under rule 5.

The threshold criteria

15. Costs and PTOs do not automatically "follow the event" in employment tribunal claims. In order for such an order to be made, I must first be satisfied that one or more of the threshold criteria set out in rule 76(1) is or are met.

16. Rule 76(1) provides:

> 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.

17. The claimant does not put his application for a PTO on the basis that the respondents' *response* had no reasonable prospect of success, rather that their *applications* did. Strictly speaking, therefore, rule 76(1)(b), which is limited to the consideration of the merits of a claim or response, is not in play. However, a party which pursues an application which has no reasonable prospect of success is likely thereby to act unreasonably in its conduct of that part of the proceedings and, if so, the rule 76(1)(a) threshold for making a PTO order would be passed; and I approach the claimant's application on that basis.

18. There were two kinds of applications pursued by the respondents: for strike out (rule 37) and for deposit orders (rule 39). These two kinds of applications are commonly pursued as alternatives, since usually in practical terms the tests overlap: a party which narrowly fails to clear the hurdle for a strike out may nevertheless succeed in obtaining a deposit order in respect of the same part of the claim.

19. I heard argument on the respondents' applications over two days. The respondents made a number of arguable points. Some were overarching in nature, applying to all or most of the claimant's allegations, and I addressed these at paragraphs 23 to 51 of my judgment on strike-out. Others related to specific allegations, and I addressed these at paragraphs 52 to 76 of that judgment. Some of those overarching and specific points were stronger than others, but all were properly arguable. On some points the respondents succeeded, and four allegations were struck out in whole or in part. I was not ultimately persuaded to made either strike out or deposit applications in relation to the remaining parts of the claims, but having heard detailed argument I did not consider, and do not consider, that the application was in whole or in part so lacking in merit that it could properly be

described as having no reasonable prospect of success. That is a high threshold. Nor, in my judgment, did the respondents act unreasonably in pursuing those applications.

20. The claimant says that the timing of the respondents' application evidences and exemplifies the unreasonableness of the respondents' application. I do not agree. There is no set stage in litigation beyond which an application for strike-out or a deposit order may be made: indeed rule 37(1) makes clear that a strike out application may be made "at any stage of proceedings".

21. In any event, this litigation was still in fact at an early stage: it had gone through a complex and prolonged interlocutory history which had taken some time, but there had as yet been no disclosure or exchange of witness statements. The respondents were dealing with three separate ET1s, which were consolidated and had to be clarified and further particularised. At a preliminary hearing on 29 November 2019 before EJ Harding, at which efforts were made to clarify the claimant's claims as they now stood, it was directed that further particulars would be provided of the claimant's claims and that the respondents would then have permission to file an amended ET3. At that point the respondents made clear that they were considering an application to strike out. It was agreed, as noted at paragraph 28 of EJ Harding's case management summary, that "any strike out/deposit application could not properly be pursued until an amended ET 3 was presented given that the application would proceed on the basis of both parties pleaded cases," and a preliminary hearing was listed for 14 September 2020 to consider any strike out application (this was the hearing which took place before me). The respondent's consolidated grounds of resistance dated 1 May 2020 confirmed that a strike out application was being pursued. Overall I see nothing unreasonable in the respondents taking stock once the claimant's claims had been put in order through consolidation, clarification and particularisation and deciding at that stage to pursue an application for strike out.

22. As for the breadth of the respondents' applications, and the amount of documentation which those applications required to be considered, I again am not satisfied that the respondents acted unreasonably. The respondents did not simply seek to pick off the claimant's allegations piecemeal: they raised a series of

overarching points each of which applied to all, or many, of the claimant's allegations. The respondents' arguments were largely unsuccessful, but it does not follow that they were either hopeless or fanciful or legally misconceived. They were not. Moreover, in my judgment they were not unreasonably pursued. Given the existence of their arguable (if ultimately unsuccessful) overarching arguments it is unsurprising that the respondents cast their net widely, all the more so since success for the respondents might have resulted in a saving of significant time, cost and resources (to all parties, to witnesses and to other tribunal users).

23. It is true that there was a large amount of documentation produced, and ultimately this is a matter which I found counted against the making of a strike out or deposit order. But I am not persuaded that this amounted to unreasonable conduct of part of the proceedings by the respondents. The size of the bundles before me was in large part simply a reflection of the simple fact that the claimant's claims, spread as they were across three ET1s and spanning dozens of allegations and a number of years, were so wide-reaching.

24. Accordingly the claimant's application for costs is dismissed.

Employment Judge Coghlin QC
27 April 2021