# EMPLOYMENT TRIBUNALS

**Claimant:** **Ms S Cooke**

**Respondent:** **Poundland Limited**

**Heard at:** **In chambers** **On:** **7 May 2021**

**Before:** **Employment Judge S Moore**

# JUDGMENT

1. The Claimant's application for a costs order and preparation time order succeeds.

2. The Respondent is ordered to pay the Claimant preparation time of £2652.00 and;

3. The Respondent is ordered to pay the Claimant the sum of £187.89 in respect of expenses incurred.

# REASONS

Background and introduction

1. The judgment on remedy was sent to the parties on 18 September 2019. Written reasons were provided on 18 December 2019. On 14 October 2019 the Claimant's representative made an application for costs. This was not referred to a Judge until 28 August 2020. The Respondent had not entered a response nor taken part in the proceedings until M/s Clarkslegal LLP went on record on 20 September 2019. The Claimant's application was sent to them for comment and the parties were advised and have not objected to the costs application being determined without a hearing.

2. The Claimant had been represented by a family friend who is not a legal representative. The Claimant has learning difficulties and stress related anxiety and depression. The application, whilst not specified as such must therefore be for a preparation time order pursuant to Rule 75 (2) of the Employment Tribunal Rules of Procedure 2013. It was made under Rule 76 (1) (a) on the basis the Respondent has acted vexatiously, abusively, disruptively or otherwise in the way the proceedings have been conducted.

3. The grounds relied upon were as follows:

a) The Respondent deliberately ignored every part of the proceedings including the involvement of ACAS and all of the case management requirements including the requirement to file a response.

b) The Claimant contends this was a deliberate ploy of the Respondent knowing she was unable to represent herself due to her medical condition and that she was very unlikely to be able to afford representation.

c) In allowing the proceedings to continue the Claimant contends the Respondent has acted unreasonably.

4. When the Respondent's representatives went on record on 20 September 2019 they advised the Tribunal that the Respondent was not aware of this claim prior to the receipt of the judgement on remedy which was sent to the parties on 18 September 2019. They requested and were duly sent copies of the ET1 and all relevant hearing notifications and case management orders. The Respondent did not make any further applications for example to set aside the judgement or to seek permission to file a response out of time. Accordingly the judgement on liability remedy stood. Following the referral of the Claimant's costs application to a judge it was directed that this be sent to the Respondent for comment. This was duly sent on 20 September 2022 to the email address that had been provided to the tribunal when the Respondent's representative went on record the previous year.

5. The Respondent's representative did not reply to the application for costs and was chased for a response on 5 December 2020 by the tribunal staff.

6. No reply was received until 13 January 2021 where another fee earner from the Respondent's representatives wrote to the Tribunal advising that the fee earner who had gone on record the previous year had been on maternity leave and her emails had not been checked during her maternity leave. They set out their objections to the application for a preparation time order. These were as follows:

a) There is no obligation on a prospective Respondent to participate in ACAS early conciliation.

b) Successful parties in the Employment Tribunal do not generally receive awards for preparation time. The Claimant would have had to spend many hours on her claim in the event that the Respondent had defended these proceedings. The Claimant had not put forward any evidence that more time was spent as a result of the Respondent not defending the claim.

c) The Respondent was not aware of the proceedings until they received notification of judgement against it. This is the reason the Respondent did not submit a response and cannot be characterised as conduct.

d) In any event the consequence of not submitting response was that the Respondent was quite correctly not permitted to defend the claim. Rather

than being prejudicial to the Claimant this allowed to bring a claim effectively unopposed. Any costs that the Claimant incurred were as a result of complying with the tribunal orders.

The Law

7. The ability to award costs in the Tribunal is set out in the Employment Tribunal Rules of Procedure 2013.

8. Rule 76 (1) provides that the Tribunal may make a costs order or a preparation time order and shall consider whether to do so when (a) a party or parties representative has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) all the way that the proceedings (or parts) have been conducted; or (b) any claim or response had no reasonable prospects of success.

9. Accordingly the Tribunal should consider first of all whether the conduct falls within Rule 76 (1) (a) or (b) (has the party conducted the proceedings unreasonably etc) and if so whether to exercise the discretion to make such an order.

10. When exercising the discretion to order costs the Tribunal must 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 MBC [2012] IRLR 78).** The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion **(McPherson v BNP Paribas SA (London Branch), 2004 ICR 1398).**

11. Where the Tribunal is considering a costs application at the end of, or after, a trial, it has to decide whether the claims "had" no reasonable prospect of success, judged on the basis of the information that was known or reasonably available at the start, and considering how, at that earlier point, the prospects of success in a trial that was yet to take place would have looked. But the Tribunal is making that decision at a later point in time, when it has much more information and evidence available to it, following the trial having in fact taken place. As long as it maintains its focus on the question of how things would have looked at the time when the claim began, it may, and should, take account of any information it has gained, and evidence it has seen, by virtue of having heard the case, that may properly cast light back on that question. But it should not have regard to information or evidence which would not have been available at that earlier time. The Tribunal may draw on the evidence that it has read and heard at the full hearing, provided that it does so to inform its view of the prospects at the earlier time, based on what was known, or could reasonably have been known, back then **(Radia v Jefferies International Ltd UKEAT/0007/18/JOJ).**

## Conclusions

12. The Claimant's application is made under 76 (1) (a). I consider I may also make a PTO order in respect of 76 (1) (b) if I consider the response had no reasonable prospect of success, even though the Respondent did not enter a response. It cannot follow that if a Respondent fails to enter a response that they can escape liability for costs provided of course that the requirements are satisfied. Further, although the Claimant (who is a litigant in person) has not applied specifically under Rule 76 (1) (b), the Rules provide the Tribunal may make such an order.

13. There was no basis for me to conclude that the Respondent deliberately ignored the proceedings or that there was a deliberate ploy to behave in a certain way knowing the Claimant's learning and financial difficulties. I do however find there has been a blatant disregard for a fair procedure when dismissing the Claimant under S98 ERA 1996 and the Claimant's welfare in the events leading up to her dismissal as well as the Tribunal procedure for the reasons set out in the written reasons.

14. The Respondent's representative has maintained in their objection and correspondence that the Respondent only became aware of the claim upon receiving the remedy judgment. I am unable to accept this submission and have no evidence before me to support it. The Respondent was sent numerous correspondence from the Tribunal including the service of claim, liability Judgment, notice of remedy hearing. The HR department were also sent a list of documents by the Claimant on 22 July 2019 which they acknowledged by email as well as a number of other documents sent by tracked and signed for recorded delivery. I have received no explanation as to why therefore the Respondent maintains they only became aware of the claim upon receipt of the Judgment on remedy.

15. In my judgment the Respondent has acted unreasonably in the way it has conducted the proceedings. The Respondent has, with no reasonable or adequate explanation completely ignored the whole process. It failed to enter a response or comply with any of the Tribunal's orders even thought the HR department were aware and acknowledged the Claimant's list of documents sent in compliance with the orders.

16. The Respondent suggests that in not defending the application there has been no prejudice to the Claimant and that it allowed her to bring the application unopposed. There could be some merit in the contention that the Claimant has only incurred the costs of preparing the hearing that she would have incurred even if there had been a defence to the claim, as the Claimant had to comply with case management orders anyway. However I reject this contention for two reasons.

17. Firstly, this cannot be a reason to defeat a claim for costs as this would be the case for all claims subject to tribunal orders.

18. Secondly, and this overlaps with 76 (1) (b), I have considered whether, had the Respondent engaged and complied with the procedure, the costs would still have been incurred and my conclusion is they would or should

not have been as if the Respondent had entered a response and continued to defend the case this would have also been unreasonable conduct as the defence had no reasonable prospect of success.

19. I set out in my written reasons at paragraph 20 that a 25% uplift should be applied due to the serious failings of the ACAS Code on Disciplinary Procedures.

20. The Respondent themselves recognised the original dismissal was wholly unfair and reinstated the Claimant on appeal but then failed to pay her the back pay promised or make arrangements for the Claimant to return to work (see paragraphs 7, 8, 9, 10, 11 and 12 which set out the findings of fact). They knew, and acknowledged in writing and in action at the point of reinstatement in March 2019 that there had been an unfair dismissal. I have no hesitation in concluding the claim for unfair dismissal had no reasonable prospect of success at the earliest point, even before proceedings were issued.

21. Accordingly the dismissal was substantively and procedure unfair and had no reasonable prospect of success.

22. The Claimant had to obtain pay records from the HMRC such were the failings of the Respondent's online platform which is supposed to provide the itemised pay statements or holiday pay. This took time and effort on the part of the Claimant to obtain information that should lawfully have been available to her by the Respondent. The HMRC records also recorded that despite working an average of 16 hours per week the Claimant was only ever paid holiday pay based on 8 hours per week.

23. The Claimant was put in the position of having to bring the claim as she had been unfairly dismissed and had not been provided with itemised pay statements. She incurred costs in having to conduct the claim right through to a remedy hearing as the Respondent unreasonably failed to enter a response or comply with orders. I consider it appropriate to exercise my discretion and award the Claimant a preparation time order as well as the expenses she incurred in bringing the claim under both 76 (1) (a ) and (b).

24. The Claimant has claimed a total of 68 hours preparation. Whilst I have no doubt the case took time to prepare and research and I also take into account that the Claimant's representative was not legally qualified. This included preparation of the claim and compliance with the orders, preparation (bundle and 4 additional witness statements as well as the Claimant's statement) as well as attendance at the Tribunal Hearing. Taking a broad brush approach I consider this to be a reasonable and proportionate amount of time.

Employment Judge S Moore

Date: 7 May 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON
12 May 2021
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FOR THE TRIBUNAL OFFICE Mr N Roche