



# **EMPLOYMENT TRIBUNALS**

**BETWEEN Claimant**

**Respondent**

Mr Yates

Retirement Security Ltd

**AND**

## **JUDGMENT OF THE EMPLOYMENT TRIBUNAL ON AN APPLICATION FOR COSTS**

**HELD AT** Birmingham

**ON**

11 June 2021

**EMPLOYMENT JUDGE** Harding

### **JUDGMENT**

The claimant's application for costs is refused.

### **REASONS**

On the application of the parties this costs application was decided on the papers.

#### Background

1 In November 2019 the claimant requested voluntary disclosure from the respondent of: all HR notes about the case made by the respondent, Peninsula

and any other HR consultants engaged on the matter, HR and other emails/notes/memos made by or between the various individuals involved in the case working for the respondent, Peninsula and any other HR consultants engaged on the matter, and transcripts or digital recordings of any calls between the same. The respondent refused to disclose this material asserting that the claimant's request was too broad and the documents were covered by litigation privilege.

2 On 30 April 2020 the claimant made an application to the Tribunal for an order against the respondent for specific disclosure of all HR CRM notes and HR and other emails/notes/memos made by or between the various individuals involved in the case up to date. The claimant requested that the application be dealt with in writing so as to avoid the need for the parties to attend a hearing and incur costs.

3 On 2 June the respondent wrote to the tribunal and the claimant objecting to the application for specific disclosure on the basis that it was disproportionate, a fishing expedition and the documents were covered by legal privilege.

4 On 17 June the tribunal wrote to the parties informing them that; "the claimant's application for an order for disclosure will be discussed at the preliminary hearing". There was, by this point, a case management preliminary hearing by telephone listed to take place on 8 July 2020. This had been listed because a 10 day full hearing, due to start 6 July 2020, had been postponed because of the pandemic and the case management hearing was put in the list in order to re-list the full hearing.

5 The case management preliminary hearing went ahead. The full hearing was duly re-listed and a 1 day open preliminary hearing was listed to determine the claimant's application for specific disclosure.

6 Following the 1 day open preliminary hearing the claimant made a written application for costs in respect of the case management hearing on 8 July under Rule 76(2). The respondent objected to this application by way of letter dated 20 December 2020. Both parties requested that the application be dealt with on the papers.

7 Unfortunately, it was not possible for listing to list the matter for a two hour determination on the papers before me until 11 June 2021. I apologise for the delay.

The Law

8 Rule 76(2) of the Employment Tribunals (Constitution and Rules of Procedure) 2013 states that:

A tribunal may also make such an [costs] order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

### Submissions

9 Mr Barnett, for the claimant, submitted that three weeks before the case management hearing the tribunal had written to the parties stating that the claimant's application for specific disclosure would be discussed at the preliminary hearing on 8 July. He submitted that at the hearing, when the claimant raised his application, the respondent's representative said that he did not know the application was going to be made and had not prepared for it and he asked if it could be postponed. Mr Barnett submitted that the tribunal therefore had jurisdiction to make a costs award as the hearing was postponed on the application of the respondent. He submitted that the respondent was fully on notice of the application and had simply failed to get its act together.

10 Mr Morris, for the respondent, submitted that both parties had been informed by the tribunal prior to the telephone preliminary hearings that the application for specific disclosure would be discussed not that it would be determined. He disputed that the respondent had made an application to postpone the hearing. He submitted that in the absence of directions or orders it was not unreasonable for the respondent to prepare only for discussion of the specific disclosure application and that all of the relevant documents would have had to have been gathered in advance of the hearing on 8 July in order for the application to be dealt with, which was not done.

### Conclusions

11 I decline to make a costs order for the following reasons.

12 An order for costs may only be made under Rule 76(2) when "a hearing" has been postponed or adjourned on the application of a party.

13 The respondent did not make an application to postpone or adjourn the case management preliminary hearing, and accordingly the hearing went ahead on 8 July 2020 and it did so on precisely the basis on which it had been listed; (i) To deal with case management, and

(ii) To discuss (note not "to determine") the claimant's disclosure application. Accordingly, the gateway condition for the making of such an order has not been met.

14 Neither, for the avoidance of doubt, is it accurate to assert that one of *the issues* which was listed to be dealt with at the case management hearing was postponed on the respondent's application to be dealt with on another day because;

(i) Whilst the respondent indicated at the case management hearing that it was not ready to deal with determination of the disclosure request:

(ii) The claimant had made no application before the hearing for the disclosure issue to be dealt with at the case management hearing. The claimant's position (up until the hearing itself) was that the disclosure application should be dealt with on the papers.

(iii) A skeleton argument in support of the disclosure application was sent through by the claimant to the tribunal and the respondent under cover of email on the evening of 6 July 2020, but no application was made in the covering email for the disclosure application to be dealt with at the case management hearing. In any event, the email and attachment was sent so close to the hearing that this correspondence was not referred to a judge before the hearing.

(iv) There had been no order from the tribunal that the disclosure application would be determined at this hearing.

(v) The fact that the claimant prepared a skeleton argument addressing the disclosure issue, and requested at the case management hearing that the application be dealt with, does not change the basis on which the hearing had been listed.

#### Exercise of Discretion to award costs

15 In any event, even had the gateway condition been met, I would not have exercised my discretion to award costs for the following reasons. Whilst Mr Barnett, for the claimant, had prepared a skeleton argument for the case management hearing, the reality was that neither party had completed the preparation necessary to enable the tribunal to deal with the application.

16 The respondent had, I was told, prepared a bundle for the case management preliminary hearing, but I was also told that it contained none of the disputed documents (the bundle was not sent to me by the administration before the preliminary hearing and accordingly I had not had an opportunity to look at it).

17 In order to establish the dominant purpose of the documents it would almost certainly have been necessary for the disputed documents to be before the tribunal in order that they could be examined.

18 The claimant had not requested that the respondent produce these documents for the case management preliminary hearing and the respondent had not done so of its own volition. As a result it would not have been possible for the application to be determined on the day of the CPH.

19 Moreover, there was in any event insufficient time to deal with the application at the CPH. Whilst the administrative records are now not entirely clear, it appears that the case management preliminary hearing was listed for either 2 or 3 hours. Both the claimant's skeleton argument and the bundle prepared by the respondent had, unfortunately, not been sent through to me before the hearing started (this was not the fault of the parties), and accordingly there would have been some delay whilst these were obtained. And the disclosure application was not something that could be dealt with in a couple of hours. Indeed, with the agreement of the parties, the open preliminary hearing to deal with the disclosure application was listed for 1 day. I understand that this hearing finished around 3.40PM.

Case No:1301021.19  
Employment Judge Harding  
Dated: 11 June 2021

JUDGMENT SENT TO PARTIES ON

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FOR THE TRIBUNAL OFFICE