Case No: EA-2020-000345-RN
(previously UKEAT/0056/21/RN)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1 September 2021

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

MS I OPALKOVA	**Appellant**
- and -	
ACQUIRE CARE LTD	**Respondent**

- -
- -

Mr I Browne (instructed by Advocate) for the **Appellant**
Mr N Boers for the **Respondent**

Hearing date: 17 August 2021

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JUDGMENT

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SUMMARY

PRACTICE AND PROCEDURE

The Tribunal found in favour of the claimant in 3 of 6 claims. The claimant sought a preparation time order on the basis that the responses to each of the 3 claims that succeeded had no reasonable prospect of success. The Tribunal erred in law in failing to consider whether the threshold test had been met in respect of the responses to each of the 3 claims before going on to consider whether to exercise the discretion to make an order. The matter was remitted to the same Tribunal to redetermine the application for a preparation time order in respect of the responses to the 3 claims that succeeded.

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HIS HONOUR JUDGE JAMES TAYLER:

1. This is an appeal against the judgment of the employment tribunal sitting at Reading on 3 February 2020, chaired by Employment Judge Hawksworth, dismissing the claimant's application for a preparation time order and the respondent's application for costs.

2. The claimant appealed the refusal of the preparation time order.

3. The Tribunal set out the claims that had succeeded and those that had failed at the liability hearing at paragraphs 3 and 4:

> "3. The judgment dated 11 August 2019 was sent to the parties on 2 September 2019. Three of the claimant's complaints succeeded, these were:
>
> 3.1. her complaint that she had not been paid the national minimum wage because she was not paid for actual travelling time between assignments;
>
> 3.2. her complaint that the respondent had refused to permit her the right to daily rest of 11 hours as required under Regulation 10 of the Working Time Regulations; and
>
> 3.3. her complaint that the respondent had refused to permit her the right to a rest break as required under Regulation 12 of the Working Time Regulations.
>
> 4. Three of the claimant's complaints failed and were dismissed, these were:
>
> 4.1. her complaint for one week's pay for five days training in April 2017;
>
> 4.2. her complaint that she was not paid increases in pay due under her contract of employment after the completion of 12 weeks probation and after six months employment;
>
> 4.3. her complaint that the respondent unlawfully deducted tax and national insurance payments from insurance, road tax and car repair allowances."

4. In respect of the claim at paragraph 3.1, the respondent had agreed at the outset of the liability hearing that the claimant should receive payment for travel time between assignments and had agreed a sum to be paid to the claimant. In respect of the claims at paragraphs 3.2 and 3.3 the respondent had maintained the defence to the claims, which were unsuccessful at the liability hearing.

5. The Tribunal first considered whether the defence mounted by the respondent had reasonable prospects of success. The Tribunal held at paragraph 25:

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> "25. First, we do not consider that it can be said that the response had no reasonable prospect of success for the purpose of rule 76(1)(b). We base this on the following points in particular:
>
> 25.1. The respondent succeeded in defending three of the six complaints brought by the claimant.
>
> 25.2. Minimum wage and working time claims are a complex area of the law. The respondent relied on the fact that its mechanism for calculating travel time had been considered to be compliant with the national minimum wage requirements in the context of an HMRC compliance check. It had also taken advice from its accountant."

6. The Tribunal went on from paragraph 26 to consider whether the conduct of the respondent had been unreasonable. At paragraph 27, the Tribunal dealt with a number of specific aspects of the respondent's conduct that were said to have been unreasonable by the claimant, including allegations that the respondent made false statements, failed to provide voluntary disclosure, fabricated a company car scheme document, caused difficulty with the production of the bundle, required the claimant to produce a supplementary bundle and delayed exchange of witness statements. The Tribunal found that those specific aspects of unreasonable conduct had not been made out. That determination is not subject of appeal.

7. At paragraph 28 the Tribunal stated:

> "28. As well as considering these main points and the other points the claimant made in her application, we also stepped back and considered the circumstances in the round. Having done so, we have concluded that the respondent's conduct of proceedings was not unreasonable and that no ground under rule 76(1) is made out."

8. While referring to considering the circumstances in the round, the Tribunal did not suggest that there were any specific aspects of the respondent's conduct that were taken into account other than those set out at paragraph 27.

9. The Tribunal also concluded that while the delay in exchange of witness statements involved a minor breach of a tribunal order, the breach was so insignificant that it should not result in it making a preparation time order.

10. The appeal was initially considered by HHJ Shanks pursuant to rule 3(7) of the **Employment Appeal Tribunal Rules 1993**, who decided that there were no reasonable grounds for bringing the

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appeal. That determination was challenged pursuant to rule 3(10) of the **EAT Rules**. By an order with seal date 1 April 2021, John Bowers QC, DJHC, allowed limited grounds of appeal to proceed as set out in the reasons for the order:

> "A. The ET erred in failing to provide any or any adequate reasons as to why it refused the Appellant's application for a Preparation Time Order ("PTO") and/or whether the Respondent's conduct of the proceedings was unreasonable in circumstances where the Respondent:
>
> (i) had not conceded the NMW/travel time issue before the full merits hearing;
>
> (ii) maintained its defence to the claims under regulations 10 and 12 of the Working Time Regulations 1998 up to the conclusion of the full merits hearing."

11. The circumstances in which a costs order or preparation time order may be made are provided for by Rule 76 of the **Employment Tribunal Rules 2013 (ET Rules)**, which so far as is relevant to this appeal provides:

> "(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; or …"

12. The claimant contended that a preparation time order should be made on the basis that the defence to 3 of her claims that succeeded had no reasonable prospect of success and that the respondent had acted unreasonably in defending and maintaining the defence to the claims that succeeded, in the first claim to the first day of the hearing, and in the second and third to the conclusion of the hearing.

13. In order to analyse Rule 76 in a little more detail it is necessary to consider what is meant in subsection (b) by the terms "claim" and "response" and the time at which it is to be assessed whether the claim or response "had" no reasonable prospect of success.

14. Rule 1 of the **ET Rules** defines claim and complaint as follows:

> ""claim" means any proceedings before an Employment Tribunal making a complaint; …

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> "complaint" means anything that is referred to as a claim, complaint, reference, application or appeal in any enactment which confers jurisdiction on the Tribunal;
> …"

15. Because a "claim" is defined as being proceedings before the employment tribunal making a complaint, it might be thought that the word "claim" refers to the proceedings commenced by the service of the claim form, so that each claim form includes only one claim. However, because a complaint means anything referred to in an enactment conferring jurisdiction on the employment tribunal as a claim, complaint, reference, application or appeal, I consider that the better interpretation is that each separate statutory cause of action is a complaint. Thus, a claim form may include a number of claims.

16. I consider that in this case the proper analysis is that the claimant brought 6 claims in her claim form. I do not consider that that analysis is undermined by the reference in Rule 37, when dealing with strikeout, to striking out all or "part" of a claim or response. A statutory cause of action that constitutes a claim, or the response to it, might be struck out in part where one component is struck out which does not preclude the claim or response proceeding on other grounds.

17. Accordingly, in rule 76 where reference is made to a response having no reasonable prospect of success, I consider that means the response made to each of the claims brought by the claimant, rather than the entirety of the response set out in the ET3 response form to all of the claims brought by the claimant in the ET1 claim form. There are certain provisions of the rules, such as those that provide for the respondent to respond by way of submitting an ET3, that suggest that in the specific context the "response" means the response to the claim in the ET1 as a whole, but I do not consider that undermines the analysis that the word "response" in Rule 76 means the response to each of the claims brought by the claimant.

18. In this case 6 claims were brought by the claimant. It only makes sense to analyse whether the response to each of those claims had reasonable prospects of success. It does not make sense to consider whether an ET3 as a whole has reasonable prospects of success where it is responding to a number of different statutory causes of action, to some of which there may be a valid defence, whereas

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the defence to others may have no reasonable prospect of success. The assessment in the case of the ET1 and ET3 must be of the prospects of success of each claim and the defence to each claim.

19. My determination that one does not take an overview of the prospects of success of the entire ET1 or ET3 is supported by the approach adopted in **Scott v Commissioner the Inland Revenue** [2004] ICR 1410, at paragraph 47, and **Nicolson Highlandwear Ltd v Nicolson** [2010] IRLR 859, at paragraph 34.

20. It is possible that a claim or response when served had reasonable prospects of success, but that a development, such as new evidence coming to light, meant that the claim or response ceased to have reasonable prospects of success. It is at that time that the claim "had" no reasonable prospects for the purposes of **Rule 76(1)(b) ET Rules**.

21. In deciding whether there has been unreasonable conduct in defending a claim, or in continuing with the defence, I consider that the position has to be considered separately in respect of the response to each of the claims brought in the claim form.

22. Determining that a response did not have a reasonable prospect of success or that a respondent acted unreasonably in defending the claim and/or in maintaining the defence is a threshold that results in the tribunal having a discretion to make a cost or preparation time order. As HHJ Auerbach noted in **Radia v Jefferies International** [2020] IRLR 431:

> "61. It is well-established that the first question for a Tribunal considering a costs application is whether the costs threshold is crossed, in the sense that at least one of r 76(1)(a) or (b) is made out. If so, it does not automatically follow that a costs order will be made. Rather, this means that the Tribunal *may* make a costs order, and *shall consider* whether to do so. That is the second stage, and it involves the exercise by the Tribunal of a judicial discretion. If it decides in principle to make a costs order, the Tribunal must consider the amount in accordance with r 78. …" [Original emphasis]

23. HHJ Auerbach considered the overlap between a claim or response having no reasonable prospect of success and unreasonable conduct:

> "64. This means that, in practice, where costs are sought both through the r 76(1)(a) and the r 76(1)(b) route, and the conduct said to be unreasonable under (a) is the bringing, or continuation, of claims which had no reasonable prospect of success, the key issues for overall consideration by the Tribunal will, in either case, likely

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> be the same (though there may be other considerations, of course, in particular at the second stage). Did the complaints, in fact, have no reasonable prospect of success? If so, did the complainant in fact know or appreciate that? If not, ought they, reasonably, to have known or appreciated that?"

24. Accordingly, there are three key questions. First, objectively analysed when the response was submitted did it have no reasonable prospects of success; or alternatively at some later stage as more evidence became available was a stage reached at which the response ceased to have reasonable prospects of success? Second, at the stage that the response had no reasonable prospects of success did the respondent know that was the case? Third, if not, should the respondent have known that the response had no reasonable prospect of success?

25. These questions are relevant whether the matter is analysed on the basis that the response had no reasonable prospects of success or that the respondent was guilty of unreasonable conduct in defending or maintaining the defence to the claims. The relevance of the questions differ between these two grounds for making a preparation time order. The question of whether a response had reasonable prospects of success is objective and is the threshold for making a preparation time order under **Rule 76(1)(b) ET Rules**, even if the respondent was not aware, and should not reasonably have been aware, that the response had no reasonable prospect of success. However, the lack of understanding of the merits of the response would be relevant, along with other matters, to the discretionary question of whether a preparation time order should be made. The questions of whether the respondent knew that the response had no reasonable prospects of success, or should reasonably have known, are relevant to the threshold question for a preparation time order on the basis that defending, or maintaining the defence, to the claim was unreasonable conduct for the purposes of **Rule 76(1)(a) ET Rules**; after which the discretion to make a preparation time order has to be applied considering all relevant factors. Whichever of the two provisions is applied it is hard to see that the result will be different. However, the matter must be analysed properly.

26. In considering whether the respondent should have known that a response had no reasonable prospects of success, a respondent is likely to be assessed more rigorously if legally represented: see

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for example **Brooks V Nottingham University Hospitals NHS Trust** UKEAT/0246/18/JOJ, at paragraph 3.

27. The Tribunal dealt with the question of whether the response had reasonable prospects of success at paragraph 25. The Tribunal appears to have treated the response as meaning the ET3 as a whole. The first reason that the Tribunal gave for holding that there were reasonable prospects of success in the defence was that the respondent had succeeded in defending 3 of the 6 complaints brought by the claimant. I consider that was an error of law. The Tribunal had to consider separately, in respect of each of the 3 responses to the claims of the claimant that succeeded, whether the response had no reasonable prospects of success. The Tribunal's second reason for holding that the response had reasonable prospect of success was that minimum wage and working time claims are complex, that there had been a compliance check and advice was taken from an accountant. That did not go to the objective test of whether the responses had reasonable prospects of success. Those were the only two grounds given by the Tribunal for determining that there were reasonable prospects of defending the claim. Both involved an incorrect analysis as a matter of law. The factors referred to by the Tribunal could be relevant to the question, if it held that there had been no reasonable prospect of success in the response to any of the 3 claims that were successful, of whether the Tribunal should exercise its discretion to make a preparation time order and/or to the question of whether the respondent acted unreasonably in defending or maintaining the defence to those claims.

28. The Tribunal did not include the question of whether the respondent had acted unreasonably in defending or maintaining the defence to the claims that were successful in the list of the matters that the claimant contended amounted to be unreasonable conduct at paragraph 27. The issue had been raised by the claimant in the application for a preparation time order and required consideration. I do not consider that the statement, at paragraph 28, that the Tribunal stepped back and considered the circumstances in the round is sufficient to suggest that the reasonableness of defending and maintenance of the defence to the claims that were successful had been considered as possible unreasonable conduct.

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29. Accordingly, I consider the appeal must be allowed.

30. The appeal will be remitted to the Tribunal to consider the threshold questions of 1) whether the responses to the 3 claims that were successful had no reasonable prospects of success and/or 2) whether defending and/or maintaining defences to those claims constituted unreasonable conduct; and, if so, 3) whether to exercise its discretion to make a preparation time order. If the threshold for making a preparation time order is made out under either **Rule 76(1)(a) or (b) ET Rules**, in exercising the discretion to make such an order it will be for the Tribunal to consider the matter in the round, taking account of all relevant factors, although it will not be open to the claimant to reopen the acts of alleged unreasonable conduct that were considered and dismissed by the Tribunal at paragraph 27.

31. I consider it is appropriate to remit the matter to the same Tribunal. Neither party suggested the matter should be remitted to a different tribunal. The Tribunal determined liability and has a good understanding of the case. The findings of the Tribunal in respect of the specific unreasonable conduct considered at paragraph 27 were not subject to challenge. There would be disproportionate additional cost, and use of tribunal time, in remitting to a different tribunal. There is no reason to doubt the professionalism of this Tribunal.

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