EMPLOYMENT TRIBUNALS

Claimant: **Ms E Williams**

Respondent: **Rabiannah Care Ltd**

Heard at: **Cardiff (on the papers)** **On: 22 March 2021**

Before: **Employment Judge Harfield**

JUDGMENT

1. The claimant's application for a costs order is granted;

2. The respondent is ordered to pay the claimant the sum of £744.00 (inclusive of VAT).

REASONS

Introduction and background

3. Employment Judge Brace entered Judgment for the claimant under Rule 21 in the sum of £840.58 unpaid wages and £165.60 holiday pay on 25 September 2020. On 9 October 2020 the respondent's representatives made an application under Rule 20 for an extension of time for presenting a response and an application for reconsideration of the Rule 21 Judgment (so that it could be set aside and they would have permission to defend the proceedings).

4. That application came before me on 18 March 2021. I heard from both parties' representatives. I refused the respondent's application and the Rule 21 Judgment therefore stands. I gave oral reasons at the time. There has been no request for written reasons. The claimant's representative at that hearing intimidated that they wished to make an application for costs. There was not sufficient time available on the day to

deal with the application and I therefore directed that any application be made in writing.

5. On 22 March 2021 the claimant's representative made an application for costs, copying it to the respondent's representative. On 13 April 2021 the parties were written to at my direction requesting the respondent's comments on the application within 7 days. No comments have been received. The parties were also asked to confirm whether they wished there to be a video hearing to determine the costs application or whether they agreed for it to be dealt with on the papers. The claimant's representatives confirmed they were content for it to be dealt with on the papers. There has again been no response from the respondent's representative. I have therefore proceeded with a paper based decision.

The grounds of the costs application

6. The application is made under Rule 76(2). It is said the respondent acted unreasonably in the conduct of the proceedings. In particular it is alleged:

   (a) The respondent failed to engage with the claimant's claim in refusing to respond to the emails of the claimant's union representative, in not responding to the ET1, nor in making any real effort to chase the ET or the claimant for a copy of the ET1. It is said the respondent provided no evidence in advance of the reconsideration hearing and no individual from the respondent company attended the hearing, giving no explanation for this;

   (b) The respondent made a last-minute application for a postponement on the afternoon of 17 March 2021 and then at the hearing itself said they were no longer seeking a postponement. It is said that this led to wasted preparation time and costs on behalf of the claimant's representative and wasted time at the hearing when there were deliberations about whether the respondent was pursuing a postponement or not;

   (c) It is said that a number of credibility issues arose during the hearing on 18 March 2021. The respondent accepted it was wrong to state in their application of 9 October 2020 that the claimant worked in a church. The respondent said it received the Rule 21 Judgment on 25 September 2020 and then changed this to 27 September 2020 when, based on the records on the Tribunal file, neither could have been possible as it was not posted by the Tribunal until 27 September 2020;

   (d) The application also says a further credibility issue arises out of the fact that the respondent said they could not provide a draft ET3 because they did not receive the claim form and did not know what the

claim was about. The claimant points to the fact that the respondent accepted that they had been notified of Acas early conciliation and that the individual at the respondent whom their representatives take instructions from (Mr Adebayo) had received an email from the claimant's union representative, pre-litigation, setting out the claimant's claim for a shortfall in pay from 14 January 2020 to 13 February 2020. The Rule 21 Judgment itself also makes clear that the Judgment relates to holiday pay and unpaid wages. The respondent was also aware that the claimant had only worked for them for a limited time between 1 January 2020 and 21 February 2020;

(e) The respondent's application of 9 October 2020 said that their premises had only recently opened and had then come across details of a claim that they had no opportunity to defend. The claimant points to the fact that at the hearing the respondent's representative accepted that the respondent had checked post periodically/on an adhoc basis after March 2020;

(f) It is also alleged that the respondent failed to provide any evidence that its defence had any merit or that its excuse for not receiving the notice of claim was justifiable. No documentary or witness evidence was provided such as payslips. It is said as a represented party the respondent should have known that it would be expected to provided documentary and witness evidence to support its proposed defence and its reasons for not receiving the original proceedings.

(g) The claimant seeks the sum of £250 plus VAT as counsel's brief fee for the hearing on 18 March 2021 together with 1 hour preparation for the hearing of a solicitor at £229 plus VAT and another hour of £141 plus VAT said to be for assisting preparation for the hearing.

The legal principles

7. The relevant Employment Tribunal Regulation is 74-76. Rule 76(1)(a) provides that: "A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—a party (or that party's representative) has acted vexatious, 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 any claim or response had no reasonable prospect of success. Fees for this purpose means fees, charges, disbursements or expenses incurred – rule 74(1) Tribunal Rules 2013.

8. Rule 76 of the Tribunal Rules 2013 imposes a two-stage exercise for a Tribunal in determining whether to award costs. First, the Tribunal must decide whether the paying party has acted unreasonably, such that it has

jurisdiction to make a costs order. If satisfied that there has been unreasonable conduct, the Tribunal is required to consider making a costs order but has discretion whether or not ultimately to make one. Rule 84 provides that in deciding whether to make a costs order, and if so in what amount, the Tribunal may have regard to the paying party's ability to pay.

9. In Employment Tribunal proceedings costs do not ordinarily follow the event, unlike County Court and High Court actions. In the case of Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78 (CA) it was held that 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 was unreasonable conduct by the paying party in bringing and/or conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. In Dyer v Secretary of State for Employment UKEAT/183/83 it was held that 'unreasonableness' should be given its ordinary meaning and does not have to be an equivalent standard to vexatious.

Decision

10. I have born in mind that an award of costs is not something that is routinely imposed in Employment Tribunal proceedings and that the discretion given to an Employment Judge under the relevant Rules is focused upon whether the behaviour of the parties and representatives in the proceedings falls below the standard that one would reasonably expect in litigation of this nature.

11. I do consider that, when looking at the whole picture of what happened in this case, there has been unreasonable conduct of the proceedings by the respondent. I accept, and have weighed into account, that the Tribunal should have responded to the respondent's representatives request to be sent a copy of the ET1 as originally served. However, as a represented party, I do consider that the respondent's representatives should have done more (and acted unreasonably in not doing so) prior to the hearing on 18 March 2021 to chase up a copy of the ET1 whether from the Tribunal or from the claimant's solicitors. As a represented party they knew or reasonably should have known that a key question for whether the Rule 21 Judgment should be set aside was the merits of the purported response. If they needed the ET1 to make submissions about that/provide a draft ET3 then they needed reasonably to chase that up.

12. I do also consider that the respondent should reasonably have been better prepared so that the hearing on 18 March 2021 was an effective one from their perspective. I accept, and have weighed into account, that the Tribunal made no express directions as to the provision of evidence for

the reconsideration hearing. However, as a represented party the respondent would or should reasonably have known that the Tribunal would expect to have some evidence before it as to what the respondent said they did or not did not receive from the Tribunal and when, and their postal arrangements in place during lockdown. The respondent's representative said that she had originally arranged for Mr Adebayo to attend the hearing, which demonstrates the respondent's representative understood this point. The respondent's representative was then unable to contact Mr Adebayo in the immediate advance of the hearing, hence the application the day before the hearing for a postponement (but which was withdrawn at the hearing itself). The respondent should reasonably have ensured that Mr Adebayo or another individual able to speak on behalf of the respondent on the key issues, was in attendance.

13. The respondent should also reasonably have appreciated, and have been in a position, to put forward some evidence on the merits of their purported defence to the claim, even if they were not in receipt of the ET1. Mr Adebayo knew from the emails he received from the claimant's union representative, pre-litigation, that there was a claim for outstanding wages/mileage. The email also foreshadowed the possibility the claimant may be owed holiday pay. The respondent then knew from the Rule 21 Judgment itself that the award was for holiday pay and an unauthorised deduction from wages. The claimant only worked for the respondent for a short period of time. The respondent should sensibly have therefore known in broad terms what the claim was about. They should have been in a position to put forward some evidence to substantiate their purported defence, by setting out, for example, the wages they said where payable and paid to the claimant, and holiday entitlement and holiday pay records. The respondent's representative told me that her instructions were that the respondent did not owe anything to the claimant. If so, then they should have been able to put forward some prima facie evidence of that in some way to support the merits of their purported defence.

14. On this basis I am satisfied there was unreasonable conduct on the part of the respondent and the threshold for awarding costs under Rule 76 is met. I am also satisfied that it is appropriate to exercise my discretion to make an award of costs under the second stage of the relevant test. Ultimately the respondent caused the claimant wasted time and costs in bringing the claimant along to the reconsideration hearing on 18 March 2021 in circumstances in which the respondent was not properly prepared for the hearing such that their reconsideration application failed.

15. It is appropriate to award counsel's fees for attending the hearing which in the sum of £250 plus VAT is a reasonable sum sought. I also accept that 2 hours preparation of a solicitor and a more junior fee earner in terms of preparing for the hearing (including instructing counsel and preparing a

bundle and other associated correspondence and paperwork submitted) is reasonable. I therefore award the sum claimed in full at £744.00 including VAT.

Employment Judge R Harfield

Dated: 26 August 2021

JUDGMENT SENT TO THE PARTIES ON 27 August 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche