EMPLOYMENT TRIBUNALS

Claimant: Mr A Thompson

Respondent: Wheeldon Brothers Limited

Heard at: Manchester (by CVP) **On:** 2 September 2021 (in Chambers)

Before: Employment Judge McDonald
Ms S Khan
Mr J Ostrowski

REPRESENTATION:

Claimant: Not in attendance
Respondent: Not in attendance

JUDGMENT ON A COSTS APPLICATION

The judgment of the Tribunal is that the respondent's application for a preparation time order is refused.

REASONS

Background

1. By a judgment given on 22 January 2020 the Tribunal found that the respondent had subjected the claimant to race related harassment and that he had been unfairly dismissed. The harassment claim succeeded in relation to seven of the incidents relied on by the claimant but failed in relation to six other incidents. The claimant's claims of direct race discrimination, victimisation and unlawful deduction from wages failed and were dismissed.

2. In a Judgment on Remedy sent to the parties on 2 December 2020 the respondent was ordered to pay the claimant the sum of £105,904.75 by way of compensation.

3. The claimant, by his wife (who has represented him throughout the proceedings) made an application for a preparation time order. That was initially made on 5 January 2021. The Tribunal ordered that the claimant provide further grounds for making the application by 9 March 2021, which the claimant did.

4. The respondent set out its objection to the application by email on 6 April 2021.

5. On 26 May 2021 the Tribunal wrote to the parties to say that the application for a preparation time order would be dealt with in chambers. The Tribunal gave the parties until 7 June 2021 to object to that proposal. No such objection was received and so the Tribunal considered the application in the absence of the parties on 2 September 2021.

The Relevant Law

6. The power to make a preparation time order is contained in the 2013 Rules of Procedure. The definitions of a preparation time order and preparation time appear in rule 75(2). A preparation time order is an order that a party makes a payment to another party "in respect of the receiving party's preparation time while not legally represented". Preparation time is "time spent by the receiving party in working on the case, except for time spent at any final hearing".

7. The circumstances in which a preparation time order may be made are set out in rule 76. The relevant provisions here were rules 76(1) and (2) which provide as follows:

> **"(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….**
>
> **(2) A Tribunal may also make such an 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"**

8. The procedure by which the application should be considered is set out in rule 77 and the amount which the Tribunal may award is governed by rule 79. In summary rule 79 empowers a Tribunal to make an order on the basis of its assessment of the reasonable and proportionate amount of time spent in preparation multiplied I by the hourly rate specified in rule 79(2).

9. Rule 84 concerns ability to pay and reads as follows:

> **"In deciding whether to make a costs, preparation time or wasted costs order and if so in what amount, the Tribunal may have regard to the paying party's (or where a wasted costs order is made the representative's) ability to pay."**

10. It follows from these rules that the Tribunal must go through a three stage procedure (see paragraph 25 of **Haydar v Pennine Acute NHS Trust UKEAT 0141/17/BA**). The first stage is to decide whether the power to make a preparation

time order has arisen, whether by way of unreasonable conduct or otherwise under rule 76; if so, the second stage is to decide whether to make an award, and if so the third stage is to decide how much to award. Ability to pay may be taken into account at the second and/or third stage.

11. The case law on the costs powers (and their predecessors in the 2004 Rules of Procedure) include confirmation that the award of costs (and the making of a preparation time order) is the exception rather than the rule in Employment Tribunal proceedings; that was acknowledged in **Gee v Shell UK Limited [2003] IRLR 82**.

12. In determining whether to make an order in respect of unreasonable conduct the Tribunal should look at the totality of the circumstances of the case, taking into account the nature, gravity and effect of a party's unreasonable conduct (**McPherson v BNP Paribas (London Branch) [2004] ICR 1398 Court of Appeal**).

13. In **McPherson** the Court of Appeal confirmed that the Tribunal Rules do not impose a requirement that the costs must be caused by or be proportionate to the unreasonable conduct – it is not necessary to establish a direct causal link. The Tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of its discretion.

Discussion and conclusions

14. The claimant's application was based on three grounds:

(1) that the respondent had conducted proceedings unreasonably (rule 76(1)(a));

(2) that some or all of the response had no reasonable prospects of success (rule 76(1)(b)); and

(3) that the respondent had breached an order made by the Tribunal (rule 76(2)).

15. The claimant's written submission of 9 March 2021 set out 8 numbered examples of what were said to be specific acts of unreasonable conduct. We have referred to those below using "SA1" using the numbering in that submission.

<u>Conducting the proceedings unreasonably</u>

16. When it comes to the first ground, we do not as an overall point accept that the respondent acted unreasonably in defending the claim. As the respondent pointed out in its submissions, a number of the claimant's claims were unsuccessful. This included the claims of direct race discrimination and victimisation as well as around half of the incidents relied on as race related harassment. The outcome of the successful claims of harassment and unfair dismissal case turned on the Tribunal's view of the evidence and could therefore only be decided at the final hearing, having heard from witnesses and considered the documentary evidence.

17. It follows from our findings above that it was not, therefore, unreasonable conduct of proceedings for the respondent to refuse settlement or judicial mediation in this case and instead choose to defend the claim at the Tribunal (SA2).

18. Having considered the eight specific examples of alleged unreasonable conduct of proceedings set out by the claimant, we find that some (SA1 and SA7) do not relate to the conduct of proceedings but to the respondent's behaviour in relation to the incidents giving rise to the proceedings. They are therefore not relevant to the issue we are deciding.

19. In relation to SA 3 (withholding CCTV footage), it is correct that the respondent initially objected to disclosure of the CCTV footage on the basis that it would amount to a breach of data protection because it included images of others than the parties to the claim. However, it included the CCTV footage in the documents disclosed in accordance with the disclosure timescale set out in the Case Management Order made by Employment Judge Howard. We do not find that initial reluctance to disclose the CCTV footage to amount to unreasonable conduct within the meaning of r.76(1). The respondent gave a reason for that initial reluctance to disclose and did then voluntarily include it within the disclosure process within the timescale set out by the Tribunal without the need for the Tribunal to make an order as to specific disclosure.

20. In our Liability Judgment, we preferred the claimant's evidence to that of the respondent's witnesses on a number of matters but not all. The claimant's submission suggested that it was unreasonable conduct of the proceedings for the respondent to "base their defence on things that were untrue" and to maintain things to be the case which the Tribunal found were not (SA 4, 5, and 6). Although we did prefer the claimant's evidence to that of the respondent's witnesses in a number of respects, we do not accept that this in itself gives grounds for finding that the case was conducted unreasonably. In relation to SA5 we do not accept that it is accurate to say (as the claimant does in the submission on this act) that we found that the respondent wrote "his own version of events and try to pass them off as unsigned witness statements". We think that overstates our findings at paras 103 or 141 of our liability judgement. We did find inadequacies in the witness statements but did not find that there was fabrication, which is what SA5 seems to suggest. We do not find that SA4, 5, or 6 provide a ground for a finding of unreasonable conduct within the meaning of r.76(1)

21. The final specific example given (SA8) was that it was unreasonable for the respondent to change the course of the defence to include reliance on the reasonable steps defence in section 109 of the 2010 Act. That clarification was given by the respondent's representative in response to a question from the Tribunal. It does not seem to us that that amounted to unreasonable conduct of proceedings.

<u>No reasonable prospects of success</u>

22. The claimant's second ground for seeking a preparation time order was that the response "had no reasonable prospects of success". It is not entirely clear from the claimant's application whether this ground relates to the respondent's response as a whole or only in relation to the "reasonable steps defence". For the avoidance of doubt, we have dealt with both.

23. First, in relation to the response as a whole, we do not accept that it had no reasonable prospects of success. That is, to some extent, borne out by the fact that not all the claimant's claims succeeded. More to the point, as the case law makes clear, it is rare that a discrimination claim (or a response to such a claim) will have no

reasonable prospects of success where the outcome depends on findings of fact. That was very much the case here. We do not, therefore, think that the response as a whole had no reasonable prospects of success.

24. When it comes to the reasonable steps defence having no reasonable prospects of success, that again is not a submission we accept. It was necessary for the Tribunal to hear evidence to decide whether or not that defence could be sustained. The claimant quotes our finding at para 153 of our Liability Judgment that the respondent "presented very little evidence" about the reasonable steps it took. As that sentence makes clear, the respondent did present some evidence to substantiate its reasonable steps defence, and therefore we find that it could not be said to have no reasonable prospects of success. It was another matter that had to be dealt with by the Tribunal making findings of fact at the final hearing.

25. The claimant quoted a number of paragraphs from our Judgment where we referred to aspects of the respondent's behaviour as being unreasonable, for example in relation to steps taken as part of the respondent's investigation of the incident which led to the claimant's dismissal. Those findings are not the same as a finding that the response (or part of it) had no reasonable prospects of success. The application based on this ground therefore fails.

Failure to comply with an order

26. The claimant said that the respondent was in breach of an order of the Tribunal because it failed to pay the claimant his full compensation within 14 days of the Remedy Judgment. It does not seem to us that that provides a basis for a costs award. Rule 76(2) refers to "orders" rather than "judgments". It seems to us intended to apply to case management orders made during the course of proceedings rather than to judgments. Enforcement of Tribunal awards is not something which the Tribunal itself has powers to deal with. It appears to us that a failure relating to payment of the remedy amount in a judgment does not fall within rule 76(2) such as to give rise to the power to make an order for a preparation time order.

Conclusion

27. For the reasons set out above, we find that the conditions for making a preparation time order have not been satisfied so the claimant's application is refused.

Employment Judge McDonald
Date: 2 September 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
3 September 2021

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.