Case Number: 2300776/2020

EMPLOYMENT TRIBUNALS

Claimant: **Louise Overton**

Respondent: **Hearcentres Limited**

JUDGMENT

1. **The Claimant's application for a preparation time order is refused.**

REASONS

1. The Claimant brought a claim for unauthorised deductions from wages and/or breach of contract arising out of a failure by the Respondent to pay her £3000, which she claimed she was owed as a bonus payment in respect of the financial year 2018/19. At a hearing on 25 January 2021, I found that the Claimant's claim succeeded, and ordered the Respondent to pay the gross sum of £3,000 to the Claimant. Written reasons were requested by the Respondent and sent to the parties on 27 February 2021.

2. The Claimant made an application for a preparation time order on 26 March 2021, which was resisted by the Respondent. I made directions for the parties to set out their opposing contentions in writing, and to comment on whether the application could be dealt with on the papers or required a hearing. The Claimant set out her application in full by means of a letter dated 4 July 2021, in which she confirmed that she was content that the matter should be dealt with on the papers. The Respondent has also provided detailed written representations and although they contained no express comment on whether the matter should be dealt with on the papers, there was no objection.

3. I have considered the representations and the overriding objective, and have concluded that I have sufficient information in the representations to determine the application on the papers, and that it would be proportionate to do so in all the circumstances, including the wishes of the Claimant and the sums involved.

Application and Response

4. The Claimant made her application for a preparation time order on the following bases:

(a) the Respondent had acted vexatiously during the proceedings, in that it had a history of withholding payments and dragging out subsequent proceedings; made unfounded accusations of professional misconduct; withheld part of the sum ordered to be paid by the ET and failed to comply with Tribunal orders in dealing with the proceedings;

(b) the Respondent had behaved unreasonably by refusing to engage in appropriate alternative resolution, including via ACAS;

(c)the Respondent had unreasonably dragged out the proceedings by requesting an extension of time from the original hearing date of 22 May 2020 to 14 July 2020 and lodging an appeal;

(d) the Respondent failed to comply with orders of the Tribunal in relation to the preparation of the bundle and failed to pay the sum ordered by the Tribunal in full.

5. In response, the Respondent made the following representations:

(a) the question of the Respondent's behaviour in other proceedings was irrelevant to the Claimant's application and was in any case denied. The Respondent denied the other allegations of inappropriate conduct and contended that it was required to deduct tax and national insurance from the gross sum ordered. The Respondent denied that any behaviour on its part was vexatious in the sense of being intended to spite or harass the Claimant;

(b) the Respondent had engaged in attempts to mediate by carrying out an internal grievance process, which the Claimant had not wished to pursue formally. ACAS involvement was unsuccessful. Even if unreasonable, not engaging in settlement was not unreasonable conduct of the proceedings;

(c)the Respondent had not requested the adjournment of the 22 May 2020 hearing; this was done by the Tribunal. Lodging an appeal was not unreasonable conduct and payment of the compensation had already been made;

(d) the bundle was prepared by the Respondent within the time stipulated in the directions, as were the witness statements. The Tribunal judgment had been complied with in full.

The Law

6. Rule 76 of the Employment Tribunal Rules of Procedure 2013 provides 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;

(b) any claim or response had no reasonable prospect of success; or

(c)a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

(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.

7. Under rule 75(2), a preparation time order is an order that the paying party make a payment to the receiving party in respect of the latter's preparation time when not legally represented. "Preparation time" in this context means time spent by the receiving party, including by employees or advisers, in working on the case, except for time at any final hearing.

8. Rule 79 provides that the Tribunal shall decide the number of hours in respect of which any preparation time order should be made on the basis of information provided by the receiving party on time spent falling within rule 75(2) and the Tribunal's own assessment of what would be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required. The hourly rate as of May 2020 was £40.

9. Costs and preparation time orders in the Employment Tribunal are the exception rather than the rule; see *Yerrakalva v Barnsley MBC* [2012] ICR 420 at paragraph 7:

"The employment tribunal's power to order costs is more sparingly exercised and is more circumscribed by the employment tribunal's rules than that of the ordinary courts. There the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the employment tribunal costs orders are the exception rather than the rule. In most cases the employment tribunal does not make any order for costs."

10. In *Scott v Russell* [2013] EWCA Civ 1432 (paragraph 30), the Court of Appeal adopted Lord Bingham's description of vexatious proceedings in *AG v Barker:*

"[T]he hallmark of a vexatious proceeding is … that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be , its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process."

11. Tribunals may take into account the fact that parties are unrepresented in considering whether it is appropriate to make a costs or preparation time order; *AQ Ltd v Holden* [2012] IRLR 648 at paragraphs 32 – 33:

32. The threshold tests in rule 40(3) are the same whether a litigant is or is not professionally represented. The application of those tests may, however, must take into account whether a litigant is professionally represented. A tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals; and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent themselves. Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. As Mr Davies submitted, lay people are likely to lack the

objectivity and knowledge of law and practice brought by a professional legal adviser. Tribunals must bear this in mind when assessing the threshold tests in rule 40(3) . Further, even if the threshold tests for an order for costs are met, the Tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice.

33. This is not to say that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity...

Conclusions

12. I deal with each of the bases for the application, as summarised above, below.

(a) Vexatious conduct

13. I do not consider the Respondent's conduct in relation to these proceedings to have been vexatious in the sense explained in *Scott v Russell.* It is not the case that the Respondent's defence in these proceedings had little or no basis in law, and I do not accept that the Respondent had the intention, or that its conduct had the effect, of causing the Claimant harassment, cost and inconvenience out of all proportion to the proceedings. As I explained at paragraph 47 of my Written Reasons, I did not find this case easy to decide, and, importantly, I did not consider that either party had deliberately told an untruth to me during the course of the hearing. My impression was that the Respondent's witnesses' memories of the events had faded over time, rather than that there was any attempt to mislead me.

(b) Unreasonable conduct in failing to engage in alternative dispute resolution

14. I do not find that the Respondent's approach to resolving the proceedings could be regarded as "unreasonable conduct" within the meaning of rule 76(1)(a). There is no obligation on a party to engage in settlement discussions. I accept that the Respondent took the view that the Claimant's position on the factual matters in dispute in this claim was incorrect. As explained in paragraph 47 of my Reasons, I did not consider this to be disingenuous, but accepted that it was the Respondent's genuine understanding at the time of trial, albeit that I reached a different conclusion.

(c)Unreasonable conduct in delaying proceedings

15. Having reviewed the file, I note that a hearing was originally listed for 22 May 2020 in this matter. On 27 March 2020, Mr Jonathan Ormerod wrote to the Employment Tribunal on behalf of the Respondent to request an extension of time to respond to the claim, on the basis that the Respondent was closed owing to Covid-19 and all employees were furloughed. The hearing was postponed by the Tribunal on 14 May 2020, and the Respondent was granted an extension of time to 14 July 2020 to file an ET3 response. It therefore appears that the Respondent did not directly request an adjournment of the hearing on 22 May 2020, but unfortunately, Mr Ormerod's request for an extension of time was not dealt with until 14 May 2020, necessitating the adjournment of the hearing listed. I do not consider the Respondent's conduct in requesting an extension of time in the circumstances explained to have been unreasonable, and the subsequent delay was not the fault of the Respondent.

16. Any conduct relating to the Respondent's appeal to the Employment Appeal Tribunal falls outside the jurisdiction of the Employment Tribunal.

(d)Failure to comply with orders of the Tribunal

17. Although this claim was listed for 25 January 2021 by letter dated 29 September 2020, the Tribunal made no directions in that letter. After both parties contacted the Tribunal in December 2020, the Tribunal wrote to the parties on 5 January 2021 with the following directions made by Employment Judge Andrews:

(a) the parties were to liaise prior to the hearing to agree a paginated bundle of relevant documents to be referred to during the hearing. The Respondent was to send a copy of that bundle to the Tribunal to arrive no later than 22 January;

(b) the parties were to prepare written statements for each of their witnesses and exchange copies with each other no later than 18 January 2021, and supply one copy of each statement to the Tribunal no later than 22 January 2021.

18. Having reviewed the respective submissions and the file, I cannot see that the Respondent failed to comply with the orders of the Tribunal regarding the bundle (or indeed the witness statements, although that is not the subject of the

Claimant's application). EJ Andrews' letter was to the effect that agreement of the bundle was the task of both parties, not just the Respondent, and there is no reason why the Claimant should not have provided an initial index of documents. Although I accept it would have been helpful and convenient for the Respondent to provide a copy of the bundle to the Claimant prior to the date for exchange of witness statements (as it appears from the Respondent's email of 18 January 2021 that the bundle had been prepared by that date), there was no order to that effect. In the event, as noted at paragraphs 6 and 7 of my Reasons, both parties raised concerns about the preparations for trial, and any difficulties were accommodated by permitting the witnesses to give supplemental evidence about new matters in the statements and/or late-disclosed documents. I do not consider either party to have been prejudiced by this arrangement.

19. The Claimant also complains that the Respondent has failed to pay her the full sum awarded by the Employment Tribunal. The Tribunal has no jurisdiction in relation to enforcement of awards.

20. I therefore conclude that the Claimant has not met the threshold test for a preparation time order as set out in rule 76(1) or (2), and the Claimant's application is refused.

Employment Judge A. Beale
Date: 8th September 2021