



EMPLOYMENT TRIBUNALS

Claimants: Ms Vidgen
Mrs H Hudson
Ms L Payne

Respondent: K2 Smiles Limited

Heard at: London South by CVP

On: 12 August 2021

Before: Employment Judge N Walker (sitting alone)

Representation

Claimants: Mr A Wrigley, Friend

Respondent: Ms A Beattie, Litigation Manager

RESERVED JUDGMENT ON COSTS

The Respondent is ordered to pay £5,576 pounds to each of the Claimants by way of a preparation time order, that is £11,152 in total.

REASONS

- 1 The Claimants sought a preparation time order and also a wasted costs order in relation to this matter.
- 2 Rule 76 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 provide 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) 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 response had no reasonable prospect of success.
- 3 Rule 77 provides that a party may apply for costs order or preparation time order at any stage up to 28 days after the date on which the judgement finally determined the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing as the Tribunal may order) in response to the application.
- 4 Rule 79 provides that the Tribunal should decide the number of hours in respect of which a preparation time order should be made on the basis of –
- (a) information provided by the receiving party on time spent falling within rule 75 (2) and
 - (b) the Tribunal's own assessment of what it considers to 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 the documentation required.
- 5 The hourly rate is currently £41.00.
- 6 Rule 75 provides that a preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party (including by any employees or advisers) in working on the case except for time spent at any final hearing.
- 7 The first issue is therefore whether this is a case where the Respondent has acted in a manner falling within Rule 76. Mr Wrigley for the Claimants has drawn my attention to a number of matters which he suggests amount to unreasonable conduct of the proceedings. This was a complex case with a large number of documents and emotions were heated. I am not satisfied I have enough of an understanding of what happened to consider the Respondent's conduct merits the criticism suggested by Mr Wrigley, but I do not discount it. It is not necessary for me to reach a conclusion because I am satisfied that the response to the first two Claimants' claims had no reasonable prospect of success from the outset.
- 8 I set out at some length in the liability judgement the fact that the disciplinary matters put to the first two Claimants were wholly spurious and known by

the dismissing officer, Mrs Patel, to be such from the outset. The fact that the Respondent relied on outside consultants who failed to understand that there had been no breach by the first two Claimants of any obligations they might have had to the Respondent employer and the fact that they attempted to follow a form of procedure makes no difference to that fact. Mrs Patel reached the decision to dismiss knowing from the correspondence she had had with the General Dental Council that there was no obligation whatsoever on the Claimants to supply historic training records. In the circumstances it is clear to me there was no reasonable prospect of the Respondent succeeding in defending the claims. Accordingly, I must consider making a costs order as required by Rule 76.

- 9 I make this order in respect of the first two Claimants and not the third. The reason that I do so is that the first two cases related to an actual dismissal and for the reasons I have given, the Respondent was aware that the reasons given for the disciplinary action which led to their summary dismissal were simply unsustainable. The third Claimant claimed constructive dismissal and while I concluded that she had been constructively dismissed, I cannot say that situation was so clear that I could conclude that the response had no reasonable prospect of success. In the circumstances, the order is not made in relation to the third Claimant whose circumstances overlapped with the first two Claimants at the beginning, but then were separate and distinct in relation to the actual events which caused her dismissal.
- 10 Although I believe one of the Claimants took some legal advice, I do not have an invoice for that and do not know precisely what it pertained to. The majority of the time the Claimants were assisted by Mr Wrigley who, as a former dentist and their former employer, acted as an advisor and friend to them and thus a preparation time is the appropriate order. In all the circumstances I have to consider whether to make a preparation time order.
- 11 I have considered the Respondent's evidence and representations made orally at this hearing. I am satisfied that this is a case where an order should be made.
- 12 In accordance with rule 84, I have taken evidence from Mrs Patel for the Respondent on the paying party's ability to pay and I am satisfied from that that although the company has various liabilities, I was told that the Respondent has about £68,000 in the bank and I conclude that it has the ability to pay a costs order.
- 13 In order to determine the amount of the order I have to consider the number of hours for which the order should be made and multiply it by the hourly rate which is now £41.
- 14 Mr Wrigley submitted that he had spent 290 hours on each of the Claimant's claims and that they in turn had spent about 967 hours each on their claims. He did not give me a breakdown showing how that time was spent. While I appreciate that Mr Wrigley probably spent a great deal of time, I do not

know all the details of what the Claimants did for themselves. At the liability and remedy hearings the Claimants very much relied upon Mr Wrigley to speak for them, but I have no doubt they spent a considerable time preparing for the witness statements and reviewing the documentation. However, I also know that Mr Wrigley wrote very long emails, and often unnecessary ones, and the basic approach to costs orders is that a paying party should not have to pay for time which was not necessary time. The rules provide for preparation time to be time spent on the “case” and do not provide for time spent on the dispute between the parties over the disciplinary action that led to the case.

- 15 I bear in mind Mr Wrigley’s calculation of the time spent and I have also assessed from my own experience what I consider to be a reasonable and proportionate amount of time to spend on such preparatory work. I bear in mind that these were two Claimants whose situations were very much aligned although not completely, which is why the cases were consolidated.
- 16 I bear all that in mind, and my own assessment of what time was spent on the first two Claimants’ claims which was reasonable and proportionate. I recognise that I am not wholly familiar with the number of times the Claimants attended tribunal hearings prior to the full merits hearing nor am I wholly familiar with the detail of the dealings between the parties. Nevertheless, I have done my best to assess the position. Taking everything into account, I order the Respondent to pay a sum representing time spent by Mr Wrigley and each of the first two Claimants of 136 hours between them on the preparation time of each Claimant’s claims, which at £41 per hour is £5,576 each.
- 17 Mr Wrigley also applied for a wasted costs order against the Respondent’s representative. He gave some examples of situations which he considered lead to this being an appropriate order. The events that he describes are matters of which I have insufficient detail to reach that sort of conclusion. Moreover, in assessing the preparation time, I have endeavoured to assess what I consider to be reasonable time for all the stages that would be involved in a normal tribunal hearing. In the circumstances the application for a wasted costs order is declined.

Employment Judge N Walker

Dated this 7 day of September 2021