EMPLOYMENT TRIBUNALS

Claimant: Mr D Scantlebury-Watson

Respondent: Protect My Property Services Ltd

Before: (1) Employment Judge A.M.S. Green
(2) Mrs D Winter
(3) Ms S Mee

RESERVED JUDGMENT ON COSTS

The unanimous decision of the Tribunal is that the claimant's application dated 10 December 2021 for a Preparation Time Order is dismissed.

REASONS

Introduction

1. For ease of reading we refer to the claimant as Mr Scantlebury-Watson and the respondent as Protect My Property.

2. On 16 November 2021, the Tribunal issued a judgment upholding Mr Scantlebury-Watson's claim for discrimination arising from disability pursuant to the Equality Act 2010, section 15 ("EQA") and ordered Protect My Property to pay him compensation amounting to £44,432.13. The Tribunal dismissed Mr Scantlebury-Watson's claim for failure to make reasonable adjustments under EQA, section 20. The Tribunal did not have jurisdiction to hear Mr Scantlebury-Watson's claim for harassment related to disability pursuant to EQA, section 26 as it was presented out of time.

3. On the 10 December 2021, Mr Scantlebury-Watson applied for a Preparation Time Order ("PTO") under Rule 76. The sum claimed is £4,633 based on 113 hours of work at a rate of £41 per hour. The basis upon which he proceeds is

that he believes that Protect My Property acted vexatiously, abusively, disruptively, or otherwise unreasonably. He also states in his application that he had previously informed Protect My Property in writing that he intended to apply for a PTO should his claim be successful.

4. In his application, Mr Scantlebury-Watson sets out his reasons for the making of a PTO on the following grounds. He says Protect My Property:

    a. did not engage in any dialogue intended to agree a realistic settlement proposal. He states that ACAS was engaged by Protect My Property only to forward two Claim for Costs/Drop Hands proposal emails to him in the months leading up to the final hearing;

    b. made excessive requests for further information or written answers;

    c. was persistently late in complying with Tribunal orders;

    d. persistently failed to provide documents or information requested by Mr Scantlebury-Watson; and

    e. ran a misconceived defence.

5. By an email dated 20 December 2021, Ms Deborah Henning, in-house solicitor acting for Protect My Property, opposed Mr Scantlebury-Watson's application. We note that Mr Wynn, the in-house solicitor who represented Protect My Property at the final hearing, had left the organisation. Ms Henning wrote that she had only recently taken up the file had not been involved with the litigation.

6. In summary, Protect My Property opposes the application for the following reasons:

    a. By way of general observation, it noted Mr Scantlebury-Watson's belief that that his 113 hours of preparation time (excluding the final hearing) was reasonable. Placing this in context, this equated to a sum of £28,815 of a Grade A solicitor's cost at local allowed rates. This would be before the costs of a solicitor or counsel attending the final hearing. The total amount that the Tribunal can award on a summary assessment is £20,000.

    b. Protect My Property accepted the judgment and paid Mr Scantlebury-Watson his compensation plus a small amount of interest as payment could not be affected within the first 14 days. Ms Henning states her belief that there was nothing in the reserved judgment to suggest that the conduct of the proceedings was unreasonable in any way. She adds that Protect My Property did not seek to avoid liability by running a statutory defence. She also refers to the Tribunal's finding that Ms Gallagher of HR acted fairly when she was involved. Ms Henning refers to the fact that the Tribunal allowed only one of the original eight claims. She goes on to say that the successful claim related to the conduct of two employees before proceedings commenced. This is not a finding that would entitle Mr Scantlebury-Watson to a PTO. Were that to be the case, every successful claimant would be entitled to the costs.

c. The Tribunal is not a costs forum. The key question is how a party has behaved once proceedings have commenced. In his application for aggravated compensation Mr Scantlebury-Watson said that Protect My Property acted inappropriately in the defence of the claims by adopting "a stance of obstructive notes, denial and obfuscation that is contrary to the overriding objective and a spike compelling evidence of his disability." Ms Henning submits that the Tribunal did not award compensation for this but for the behaviour of Mr Foot and Mr Siddle during the course of Mr Scantlebury-Watson's employment and awarded £500. Consequently, it is submitted that the Tribunal had already thought about this issue and did not agree with Mr Scantlebury-Watson and the application is misconceived. Furthermore, the harassment claims were out of time and could not form the basis of any costs application. References are made to the fact that much of Mr Scantlebury-Watson's work related to claims which were unsuccessful.

d. Ms Henning submits that looking at the time detailed and claimed, there is much time that was wasted by Mr Scantlebury-Watson pursuing fruitless claims. She cites the example that he is claiming in excess of 50 hours in bundle related time which she finds incredible.

e. Ms Henning then responds to the specific grounds relied upon by Mr Scantlebury-Watson in his application as follows:

    i. Negotiations as to settlement through ACAS were conducted on a without prejudice basis and could not be referred to in any costs application as examples of conduct.

    ii. Protect My Property and the Tribunal needed to understand the case brought including its legal basis. If Mr Scantlebury-Watson thought that the requests were excessive, it was open to him to refuse and for the Tribunal to refuse to order that they be provided. If they were provided on a voluntary basis, then Mr Scantlebury-Watson has no legitimate complaint.

    iii. Both sides missed deadlines for compliance with some orders, but all orders were ultimately complied with. Ms Henning acknowledges that lateness is regrettable and apologises wholeheartedly for that on behalf of Protect My Property. She states that it is a fact of litigation life that represented parties will often agree to extend deadlines for numerous reasons as long as the overall case is not delayed, and such behaviour is in accordance with the overriding objective. By contrast, a rigid and inflexible approach on a representative's behalf would not be in accordance with the overriding objective. There was no delay in the case or the hearing and she submits that it is far from the realms of vexatious, abusive, disruptive, or otherwise unreasonable conduct and refers to the decision in **Denton v TH White [2014] EWCA Civ 906.** The same rationale is applied to Mr Scantlebury-Watson's third ground of complaint.

    iv. The defence was not misconceived because there were many issues of fact and law that required to be decided and there is

no finding by the Tribunal that the defence was misconceived. Originally, there were eight claims which were reduced to three. Mr Scantlebury-Watson only succeeded with one claim. A substantial proportion of his time must have been utilised dealing with those matters, most of which had no reasonable prospects of success.

v. Ms Henning reminds Mr Scantlebury-Watson that though he has won the substantive case, a misconceived and unreasonable costs application which has to be defended if successful, would entitle Protect My Property to claim costs at £255 per hour, including for any final hearing. Ms Henning submits that it seems clear that were the satellite costs litigation be allowed to continue, it would become as costly and timely as the original claim. She concludes that Mr Scantlebury-Watson has been compensated appropriately and has been paid.

7. By letter dated 4 January 2022, Mr Scantlebury-Watson rebutted Protect My Property's points in opposition to his application. In particular, we note the following:

    a. He states that he is a litigant in person and any attempt to compare the time and cost spent with that of a solicitor is neither reasonable nor helpful.

    b. The Tribunal found that Protect My Property did not follow the ACAS code on discipline and grievance which he believes counters the assertion that there is nothing in the judgment which "suggests the conduct of proceedings was unreasonable in any way." Mr Scantlebury-Watson reiterates his belief that Protect My Property acted vexatiously, abusively, disruptively, or otherwise unreasonably particularly given the paucity of documents that were provided to him first following his Subject Access Request ("SAR") and then under standard disclosure.

    c. It is a contradiction to claim that much of his work would have been in relation to claims which were unsuccessful and then to state, "much of the detail is currently not available for the writer to examine, and it is difficult to identify specifically what time is allocated to which piece of work."

    d. Mr Scantlebury-Watson then addresses the specific points of opposition as follows:

        i. Matters of negotiations as to settlement are not the same as failing to engage in such negotiations.

        ii. Mr Scantlebury-Watson is a litigant in person. What would be a reasonable refusal to respond to request against what would be obstruction contrary to the overriding objective, is a nuance that will be beyond that of most, if not all, litigants in person.

iii. Mr Scantlebury-Watson missed one deadline because of his entire household having been taken ill with Covid 19. Protect My Property missed deadlines by up to 14 days.

iv. Lateness and non-compliance are different issues.

v. That the claims were whittled down were because Mr Scantlebury-Watson was a litigant in person.

8. The Tribunal, having received written representations from both parties, decided that it would not be proportionate to hold a costs hearing. It had sufficient information before it to reach its decision without a hearing. The members of the Tribunal deliberated in private on 1 February 2022.

Applicable law

9. The power to make PTOs is in Rule 76 (coupled with Rule 75 (2)). 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 the final hearing' (Rule 75(2)).

10. The grounds for making a PTO are identical to the grounds for making a general costs order against a party under Rule 75 (1) (a). Rule 75 (1) (a) gives the Tribunal the power to make a costs order against one party to the proceedings (the "paying party") to pay the costs incurred by another other party (the "receiving party") on several different grounds. Rules 76(1) sets out the grounds for making a costs order which includes, amongst others, where:

    a. a party (or that party's representative) has acted vexatiously, abusively, disruptively, or otherwise unreasonably in the bringing or conducting of proceedings (or part thereof).

11. Rule 76(1)(a) imposes a two-stage test. The Tribunal must first ask itself whether a party's conduct falls within rule 75(1)(a). If so, it must ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party. If a party's representative has acted vexatiously, abusively, or disruptively or otherwise unreasonably in the bringing or conducting of the proceedings the Tribunal may make a costs order against the party in question.

12. It is important to recognise that even if one (or more) of the grounds is made out, the Tribunal is not obliged to make a costs order. Rather, it has a discretion whether or not to do so. As the Court of Appeal reiterated in **Yerrakalva v Barnsley Metropolitan Borough Council 2012 ICR 420, CA**, costs in the employment tribunal are still the exception rather than the rule. It commented that the Tribunal's power to order costs is more sparingly exercised and is more circumscribed than that of the ordinary courts, where 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, by contrast, costs orders are the exception rather than the rule. If the Tribunal decides to make a costs order, it must act within rules that expressly confine its power to specified circumstances, notably unreasonableness in bringing or conduct of the proceedings.

13. The term 'vexatious' was defined by the National Industrial Relations Court in **ET Marler Ltd v Robertson 1974 ICR 72, NIRC**. The Court stated that:

> *If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously.*

14. Of course, what applies to an employee bringing a claim applies equally to an employer or other respondent resisting a claim. So, it would appear that for conduct to be vexatious there must be evidence of some spite or desire to harass the other side, or the existence of some other improper motive. Simply being 'misguided' is not sufficient to establish vexatious conduct (**AQ Ltd v Holden 2012 IRLR 648, EAT.**)

15. However, the Court of Appeal in **Scott v Russell 2013 EWCA Civ 1432, CA** (a case concerning costs awarded by an employment tribunal), cited with approval the definition of 'vexatious' given by Lord Bingham in Attorney **General v Barker 2000 1 FLR 759, QBD (DivCt)**. According to His Lordship:

> *the 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.*

This suggests that where the effect of the conduct falls within Lord Bingham's stringent definition, this can amount to vexatious conduct, irrespective of the motive behind it.

16. A Tribunal may also make a costs order or PTO against a party who has acted abusively or disruptively in bringing or conducting proceedings (or his or her representative has done so). For example, in **Garnes v London Borough of Lambeth and anor EAT 1237/97** — a case which concerned a complaint of race discrimination — the tribunal office had made four attempts to fix a hearing but had adjourned on the first three occasions at G's request. In addition, G had failed to attend two interlocutory hearings as he objected to their being held. At the fourth hearing, which was fixed for 15 days, G again said he could not proceed. The tribunal offered to adjourn for five days but G said he would not attend at any time during the 15-day period. The tribunal then adjourned for an hour to allow G to consider his position. The tribunal warned G that if he did not attend after the hour the case might be struck out and costs awarded against him. When G did not attend the tribunal struck out the case and awarded the respondent the costs of attending the tribunal hearing. The tribunal held that G had conducted the proceedings 'unreasonably, vexatiously and disruptively' and this was upheld by the EAT on appeal.

17. 'Unreasonable' has its ordinary English meaning and is not to be interpreted as if it means something similar to 'vexatious' (**Dyer v Secretary of State for Employment EAT 183/83**). It will often be the case, however, that a tribunal will find a party's conduct to be both vexatious and unreasonable.

18. In determining whether to make an order under this ground, the Tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct — **McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA**. However, the Tribunal should not misunderstand this to mean that the circumstances of a case have to be separated into sections such as 'nature,' 'gravity' and 'effect,' with each section being analysed separately (**Yerrakalva**). The Court of Appeal in **Yerrakalva** commented that it was important not to lose sight of the totality of the circumstances. The vital point in exercising the discretion to order a PTO is to look at the whole picture. The Tribunal has to ask whether there has been unreasonable conduct by the paying party in bringing, defending, or conducting the case and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had.

19. Reasonableness is a matter of fact for Tribunal, and it will be difficult to argue that it has made an error of law unless it can be shown that it has neglected relevant considerations or taken into account irrelevant ones. In **Khan v Heywood and Middleton Primary Care Trust 2006 ICR 543, EAT**, for example, the Employment Appeal Tribunal stated that whether conduct could be characterised as unreasonable required an exercise of judgment about which there could be reasonable scope for disagreement among tribunals, properly directing themselves. It went on to uphold an employment tribunal's decision to award costs against K. While accepting that not all employment tribunals would characterise K's conduct as unreasonable, the EAT noted that there had been nothing wrong with the way in which the tribunal had exercised its discretion to order costs.

20. The Tribunal must be careful not to penalise parties unnecessarily by labelling conduct 'unreasonable' when it may, in fact, be perfectly legitimate in the circumstances.

21. Persistent failure to provide information may be held to be unreasonable. In **Kaur v John L Brierley Ltd EAT 783/00**, for example, K and her advisers persistently failed to identify the unlawful deduction they were alleging had been made from her wages. This was despite repeated and reasonable requests from the employer's solicitors. Although she was not able to provide any explanation for this failure, K pursued the proceedings, causing the employer to incur additional and wholly unnecessary costs. When the final hearing was imminent, K withdrew. The employment tribunal hearing the employer's application for costs ordered K to pay costs to be assessed in the county court. This decision was upheld by the EAT.

22. It may be that a party's conduct, taken as a whole, amounts to unreasonable conduct. In **Sahota v Dudley Metropolitan Borough Council EAT 0821/03**, for example, S lied in his evidence, introduced new matters at a whim and, when faced with a cause or a point which was lost, would not concede it, meaning that the length of the hearing was unnecessarily prolonged. An employment tribunal concluded he had behaved unreasonably and made a costs order of £9,000 against him. This decision was upheld by the EAT, which also ordered him to pay an additional £1,000 towards the cost of the appeal.

Discussion and conclusions

23. Mr Scantlebury-Watson has not made out that that Protect My Property's conduct falls within Rule 75(1)(a) for the following reasons.

24. We have not seen any evidence of the vexatious behaviour on the part of Protect My Property in the conduct of the proceedings. We do not believe that there was any spiteful or harassing or improper motivation in their behaviour. They were entitled to defend the proceedings which were factually sensitive and could only be determined by the Tribunal on hearing the evidence. Mr Scantlebury-Watson appears to be conflating conducting a robust defence of a case which is justiciable and meriting a hearing with vexatious behaviour. We have seen no evidence of improper behaviour on the part of Protect My Property.

25. We have not seen any evidence of abuse of process. In this regard, we are persuaded by Ms Henning's submission in paragraph 3 of her email of 20 December 2020. It is, indeed, a fact of litigation life that deadlines are not met. However, whilst it is important is that orders must be complied with, the date for the final hearing should not, unless for good reason, be compromised.

26. It is often the case in litigation that documents are not disclosed, or information provided by a party is insufficient. In the case of information, it is commonplace for claimant litigants in person to articulate their claims in insufficient detail to enable a respondent to answer the allegations that are being made against it. For example may claim that they have suffered disability discrimination without specifying what type of unlawful discrimination is alleged to have happened (e.g. direct discrimination, harassment and victimisation). It is entirely proper under such circumstances for a respondent to request further information and, indeed, the Tribunal may order such information and often does this so that the respondent can properly defend itself. In this regard, we note that on 29 September 2020, Employment Judge Garnon issued lengthy case management notes and orders to address the issue of lack of information provided by Mr Scantlebury Watson about his claims and he made and ordered that he should redraft his claim or provide a statement of claims that he intended to pursue to trial. Looking at the notes, it is clear that Mr Scantlebury Watson had not adequately identified which types of unlawful act or behaviours he was relying upon under EQA. He had not separated out the heads of claims. Employment Judge Garnon provided extensive guidance to assist in this regard as set out in the case management summary. I note that Employment Judge Garnon acknowledged that he was a litigant in person, but he went on to say:

> *however, he must try to say what claims he intends to make over and above dismissal, if any, and what types of discrimination he alleges his dismissal to be.*

We also note at paragraph 32 the following:

> *The response asks for further and better particulars of many alleged events such as what discriminatory act happened, who committed the act. Such a request is reasonable.*

27. On the premise that Mr Scantlebury-Watson provided the necessary information, Protect My Property were then given an opportunity to amend their response to meet the specific claims being pursued.

28. There was a private preliminary hearing on 16 November 2020 before Employment Judge Garnon. We note the following:

Mr Wynn said he is finding it difficult to work out from the claim form specific allegations such as who did or said what and when which amounts to harassment. I can see how that may be so, what he needs then to do is ask the claimant to provide specific information. A blanket request for further information will only produce more confusion for everyone. The claimant said he would try to answer such questions and was confident he could.

…

If a case is inadequately pleaded, it runs the risk of being struck out.

29. An SAR is separate to proceedings in the Tribunal and is subject to its own rules and protocols. The fact that there may have been difficulties in respect of the SAR referred to by Mr Scantlebury-Watson in support of his application does not necessarily lead to the inevitable conclusion of vexatious, abusive disruptive or unreasonable behaviour on the part of the respondent in the conduct of the litigation. We were not persuaded that this was the case here.

30. We also note that on 28 June 2021, Mr Wynn applied for a preliminary hearing for case management purposes. He referred to a case management order that was issued at the earlier hearing on 16 November 2020 relating to disclosure of documents. He went on to say:

The Respondent has received in excess of 175 separate documents with over 370 pages with the vast majority of the documentation irrelevant to the case. The Respondent believes that the claimant has "carpet bombed" the Respondent by disclosure causing unreasonable and unnecessary costs. Furthermore the documents disclosed are incorrectly referenced against the supplied List of Documents causing further costs for the Respondent. The Claimant has refused to remove the documents identified as irrelevant.

…

The Respondent respectfully requests the Employment Tribunal apply a refinement of documents to be disclosed.

…

The Claimant has requested the Respondent disclosed documents to him which are also irrelevant to the case. The Claimant made a DSAR in April 2020 which was supplied with all documentation, emails and other records held by the Respondent.

31. Employment Judge Shore conducted a private preliminary hearing on 13 August 2021 to discuss the application. We note the following that he wrote in his case management summary:

12. I discussed the respondent's application for an order that edited the claimant's list of documents with the parties. The claimant said that he had spent three weeks pruning all the documents in his possession down to create the list he had sent to the respondent. He said that all the documents and the list would be referenced in his witness statement.

13. I discussed the potential costs implications if the claimant included many irrelevant documents. However, I was unable to undertake a qualitative analysis of the documents in the list and found that the claimant should be permitted to present his case in any way he sees fit. I refused the respondent's application.

14. ***By 4 PM on Friday 20 August 2021****, the claimant shall edit his list of document to remove any unnecessary documents and shall also revise the document references in the list and send a copy of the new list to the respondent.*

32. We do not consider the respondent's response to be misconceived. Of the eight claims original made, only three proceeded to the final hearing. Protect My Property contested the claims in their response. These were factually sensitive claims and could only be resolved by hearing the evidence. Furthermore, we are mindful of the fact that the Tribunal dismissed Mr Scantlebury-Watson's claim for failure to make reasonable adjustments under EQA, section 20. It had not merit. Finally, the Tribunal did not have jurisdiction to hear Mr Scantlebury-Watson's claim for harassment related to disability pursuant to EQA, section 26 as it was presented out of time. The respondent identified this in paragraph 44 of the response. It was right to do so.

33. The Tribunal cannot consider without prejudice communications between parties either on a bipartisan basis or through the auspices of ACAS in determining whether a PTO should be made except in the limited circumstances of a "Calderbank" offer (i.e. on the basis of an offer to settle without prejudice save as to costs) which does not appear to be the case here. Considering such communication, if it was made, would only be relevant if Mr Scantlebury-Watson had been awarded compensation by the Tribunal equal to or less than any sum tendered in the Calderbank offer. That does not appear to be the case here and would be relevant to considering whether a costs order should be made against him and not against the respondent. Furthermore, Mr Scantlebury-Watson, in referring to our finding that Protect My Property failed to follow the ACAS code on discipline and grievance, has confused himself. That is something that refers to pre-litigation conduct which has been adjudicated on, but which cannot form the subject matter of an application for a PTO. It has nothing to do with the conduct of the litigation by Protect My Property, it predates the litigation.

34. Looking at the case in the round, we have seen no evidence of unreasonable conduct. The case was robustly defended, as is the right of a respondent in circumstances where the allegations are factually complicated and can only be resolved through a proper and fulsome testing of oral and documentary evidence at a final hearing.

Employment Judge Green

Date 3 February 2022