



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss C Thompson

**Respondent:** LBS Worldwide Limited

**Heard at:** Manchester by CVP

**On:** 8 March 2022

**Before:** Employment Judge Humble

## REPRESENTATION:

**Claimant:** Mr Porter, Lay Person

**Respondent:** Mr Haines, Consultant

# RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The respondent acted unreasonably in its conduct of the proceedings.
2. The respondent is ordered to pay the claimant for preparation time in the sum of £1300.00.

# REASONS

## The Hearing

1. This was a hearing to determine the claimant's application for a preparation time order under Rule 76. The judgment in this case was handed down on 25 November 2020 following a final hearing which took place on 16 October 2020. The claimant's application for costs was made in writing on 20 December 2020. A case management order of 9 February 2021 gave the parties the option of a determination of the matter based on the papers but the claimant requested an in person hearing and it took some considerable time to list the case for a costs hearing.
2. The parties had prepared a bundle of documents which extended to 40 pages and there was a further bundle of documents provided by the respondent of 20

pages. Oral submissions were taken from Mr Porter on behalf of the claimant and from Mr Haines on behalf of the respondent. The basis upon which the respondent contested the application was also set out in a letter of 15 March 2021. The oral submissions were relatively brief but there was a further hearing listed to follow this one and, with some time needed for further consideration of the papers and deliberations, judgment was reserved.

### The Law and Issues

3. Rule 76 of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 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; or*
- (b) any claim or response had no reasonable prospects 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.”*

Rule 75 (2) provides that any time spent at a final hearing is excluded from a preparation time order. Rule 76 (2) provides that such an order may be made where a party has been in breach of any order or where a hearing has been postponed on the application of a party. The amount payable under a preparation time order is provided for under Rule 79.

4. Rule 84 provides: *“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 parties...ability to pay.”* During the hearing, the tribunal enquired of the respondent’s means and was informed by Mr Haines that it did not need to be taken into account since the respondent’s representative, Corner Group Limited, would be covering the cost of any order that might be made.

5. The basis of the claimant’s application, as set out in the letter of 20 December 2020 and confirmed by Mr Porter, at the outset of the hearing can be summarised as follows:

- (1) The respondent acted unreasonably in its conduct of proceedings by failing to comply with orders at various times during the course of the proceedings and causing hearings to be adjourned. In addition, there was unreasonable behaviour at the final hearing when Mr Greaves interfered with the witness evidence of Mr Jowett whose evidence, as a consequence of Mr Greaves actions, was disregarded (pages 27-28 of the bundle).
- (2) The preliminary hearing of 25 April 2019 to determine whether the claimant had the requisite period of service to bring an unfair dismissal claim was unnecessary since, the claimant submitted, it was evident from documentation that the claimant had two years continuous service and in any event the matter could have been determined at the substantive hearing.
- (3) The final hearing of 13 September was adjourned as a direct consequence of the respondent’s failure to properly prepare that hearing. In particular,

documents and witness statements were only provided the day before the hearing took place.

- (4) The final hearing listed for 19 December was adjourned on the morning of the hearing because of the non-attendance of the respondent, its witnesses and its representative.
  - (5) The respondent had no reasonable prospect of success since the respondent acknowledged that a fair procedure had not been followed in respect of the dismissal.
6. The claimant's representative abandoned his reliance on point (5) at the outset of the costs hearing and it was not pursued in submissions.

### Findings

The Employment Tribunal made the following findings of fact on the balance of probabilities (the tribunal made findings of fact only on those matters which were material to the issues to be determined and not upon all the evidence placed before it):

7. The Tribunal held that the respondent acted unreasonably in its conduct of the proceedings in the following respects: it disclosed documents and witness statements late, and in breach of tribunal orders, which caused the hearing of 13 September 2019 to be adjourned; it failed to attend the hearing of 19 December 2019 which caused that further hearing to be adjourned; and, at the final hearing of 16<sup>th</sup> October 2021, Mr Greaves (a director of the respondent) interfered with the evidence of Mr Jowett while Mr Jowett was in the witness stand giving oral evidence.
8. In respect of the preliminary hearing of 25 April 2019, the basis upon which the claimant contended that this preliminary hearing was unnecessary was not clear to the tribunal. There was a reference in Mr Porter's letter of 20 December 2020 to two contracts of employment been available which purportedly showed that the claimant had the requisite period of continuous service but these were not before the tribunal at the hearing and nothing was made of the point in submissions. No reasons were provided with the judgment from the preliminary hearing and there was no other documentation before the tribunal which related to the point. The tribunal was not therefore persuaded that the respondent's request for a preliminary hearing to determine whether the claimant had the requisite service to bring an unfair dismissal claim was unreasonable conduct, and it was not in a position to assess whether the arguments advanced by the respondent at that hearing had no reasonable prospect of success. That part of the costs order was rejected.
9. The tribunal was satisfied that the adjournment of the hearing of 13 September 2019, which took place on the morning of that hearing, was the fault of the respondent. The reasons for this are set out in the Order of Employment Judge Franey from that hearing, at paragraphs 1.1 to 1.13 of that Order (pages 5 to 6). We do not recite them in full here save to quote the concluding summary at paragraphs 1.11 and 1.12, which states as follows:

*"I record, however, that the adjournment of today's hearing is in my view the responsibility of the respondent rather than the claimant. The claimant had been protesting about the lack of compliance with case management orders during August. The respondent is professionally represented; the claimant is not.*

*Without seeking to apportion responsibility between the respondent itself, its former representatives and its current representatives, it is clear to me that this hearing was not effective because of failure on the respondent's side to prepare the case in a timely fashion.*

*Accordingly, in principle a preparation time order in respect of hours spent by Mr Porter preparing for this hearing is appropriate. Any preparation which is still of use for the final hearing should be discounted."*

10. The tribunal also find that the adjournment of the final hearing on the morning of 19 December 2019 was due to the actions of the respondent, or more specifically its representative. At 6:41am on the morning of 19 December 2019 Mr Haines emailed the tribunal requesting that the hearing be adjourned since he was unable to attend due to being ill with "*some form of vomiting and diarrhoea bug*". Mr Haines informed the respondent and its witnesses shortly thereafter of his predicament and, in terms, advised them not to attend the hearing. A text message to Mr Jowett, at 6:48am, to that effect was produced (page 6 to 7 of the respondent's bundle) in which Mr Haines also suggested that Ms Foster, who was a witness for the respondent, should attend work so as not to lose a days holiday. Mr Porter and the claimant attended the hearing, not having received the email or a later text message until after they had set off to the hearing. At 9:54am on 19 December 2019 a clerk sent an email to Mr Haines asking, on behalf of the Judge, whether another representative could attend the hearing. Oddly, an automatic email response was received from Mr Haines to the effect that he was on annual leave that week (Mr Haines explained this by saying that he had booked holidays either side of the hearing date and did not wish to over-complicate his out of office response or give clients any expectation that he would respond to messages when he was in a hearing). Mr Haines then replied by email in person at 10:01am to inform the tribunal that no-one else was available to provide representation.
11. The absence of a representative at the hearing was not fatal to the case proceeding on 19 December. However, Mr Haines was in possession of the bundles of documents relating to the case which meant that the tribunal had no documents before it, and he had also advised the respondent and its witnesses not to attend. As a consequence Employment Judge Ainscough adjourned the hearing, "*in circumstances where there was no attendance on behalf of the respondent or its witness*" (page 11). Ms Foster was the subject to a witness order and was therefore obliged, by the Regional Employment Judge, to provide a reason for her non-compliance with that Order.
12. Mr Haines was not in any position to advise the respondent and its witnesses to refrain from attending the hearing of 19 December 2019 and was wrong to do so. The case had not been adjourned and it was not for Mr Haines to assume that it would be adjourned in his absence. Ms Foster was compelled to attend the hearing by a witness order which is not a matter to be taken lightly, particularly given that a failure to comply with a witness order is a criminal offence. By advising Ms Foster not to attend the hearing Mr Haines was causing Ms Foster to commit such an offence although on this occasion nothing came of it. In his submissions, Mr Haines appeared to acknowledge that he was remiss, which he put down to "*inexperience*" saying that he was "*new to litigation at that time.*" His main submission was that there should be no preparation time order since his illness was "*one of those unfortunate things*"

and the case would not have gone ahead anyway, even with the respondent and its witnesses present, since the tribunal would not have had the bundles which were in his possession and which he had intended to take to the hearing that morning. That failed to account for the fact that it was incumbent upon the respondent to ensure the bundles were before the tribunal. On Mr Haines own account he was feeling ill the evening before the tribunal and therefore, even if he was unable to secure alternative representation for his client, he could have put the respondent and Mr Porter on notice of his predicament and made contingency plans in consultation with them to ensure the bundles were placed before the tribunal. Even early on the morning of the hearing, reasonable efforts should have been taken to ensure the witnesses of the respondent attended the hearing to take copies of the bundle with them. It was a sit alone case so, assuming the claimant had a copy, only a couple of further copies were required and so it was not a very onerous task. This would have given the tribunal the option of proceeding with the final hearing.

13. In respect of the final hearing which did go ahead, on 16 October 2020, the tribunal find that the respondent failed to act reasonably at that hearing. The reason for this finding is summarised at paragraphs 7 to 10 of the Judgment (pages 27-28) as follows:

*“7. During the course of the evidence of Mr Jowett, following a line of questioning by the claimant’s representative, the Judge asked of Mr Jowett: “Was this company a competitor?” Mr Jowett paused to consider the question and the Tribunal heard a voice, quite distinctly, say “Yes it is.” The Judge picked up on this interjection and asked where the voice had come from. Mr Haines, on behalf of the respondent, suggested that it may have emanated from Ms Foster, but she was in a different location to Mr Jowett and she denied saying anything. The Judge asked Mr Jowett where the voice had come from and he said that Mr Peter Greaves had made the remark. It transpired that Mr Greaves, a director of the respondent, was sat in the same room as the claimant out of view of the Tribunal. The Tribunal ordered Mr Greaves to leave the room with immediate effect. Mr Greaves appeared from behind the camera, where he had been sat opposite the witness, and left the room.*

*8. The Tribunal sought an explanation from Mr Haines as to why Mr Greaves was present in the room and interfering with the witness’s evidence. Mr Haines said that he had advised that Mr Greaves could be in the room with the witness provided that he remained quiet. The Tribunal indicated that it would proceed with the remainder of the evidence but would take submissions upon how to deal with the matter in due course. Following a recess for lunch, at which point the respondent’s evidence was concluded, the Tribunal indicated that it would hear the claimant’s evidence and then take submissions from both parties, which would include submissions upon the involvement of Mr Greaves involvement in the hearing. The Tribunal said that it would consider appropriate sanctions for the behaviour of the respondent, which could include a consideration of a strike out of the response for scandalous and unreasonable behaviour under rule 37(1)(b) of the Rules of Procedure, or alternatively might result in it disregarding Mr Jowett’s evidence.*

9. *During submissions, Mr Haines apologised on behalf of Mr Greaves for the interjection. He said that he took responsibility for Mr Greaves being present in the room with the witness without the knowledge of the Tribunal, and that he believed this was acceptable practice. It was not explained how Mr Haines had come to this view. The Judge had advised the witnesses at the outside of the hearing that they should be alone and without distractions when giving evidence and that the formal rules of procedure applied. Further, an email had been sent to the parties representatives the evening before the hearing which stated: "Please ensure you endeavour to minimise distractions – we understand the difficulties in this regarding the accommodations required by the current situation however this is still a formal tribunal."*
10. *For his part, Mr Porter submitted that Mr Jowett's evidence should be disregarded but did not seek any other sanction. The Tribunal took the view that Mr Jowett's evidence was unsafe. Mr Greaves was present when he was giving the majority of the evidence, was facing the claimant, had not disclose his presence, and had interjected on at least one occasion by instructing the witness to answer a question in a specific way. Given that he was out of camera shot it could not be determined whether Mr Greaves did anything else to influence the witness but it was at least a strong possibility. The Tribunal held that Mr Jowett's evidence was unsafe and that the respondent acted unreasonably, his evidence could not be relied upon and it was to be disregarded in its entirety. The Tribunal stopped short of a strike out in this case since, although it took the view that the respondent acted unreasonably, in the circumstances of the case the disregarding of Mr Jowett's evidence was sufficient."*
13. In conclusion, the tribunal find that the adjournments of the final hearings on the mornings of 13 September 2019 and 19 December 2019 were entirely due to the conduct of the respondent or its representative and this gives rise to a costs consideration for the purposes of Rule 76(1)(c). Further, it finds that the conduct of the respondent in causing those adjournments, and the behaviour of the respondent at the final hearing, was unreasonable for the purposes of Rule 76(1)(a). The tribunal is satisfied that a preparation time should be made in favour of the claimant who was put to additional time and inconvenience as a consequence of the respondent's actions and there was no convincing mitigation put before the tribunal in respect of the respondent's behaviour.
14. The tribunal agreed with the assessment of Employment Judge Franey that the claimant should be compensated for the time it took to prepare for the hearing of 13 September 2019 but to discount any preparation that could be put to use at the subsequent final hearing. Mr Porter was not able to provide any accurate breakdown of his preparation time but rather provided a list of the various tasks which he carried out prior to each hearing with a rough estimate of the time taken in total. He assessed this at 100 to 110 hours preparation in advance of the first date for the final hearing, and an additional 25 to 30 hours for each subsequent date for the final hearing. This appeared to be excessive and the tribunal reminded itself, firstly, that no award was to be made for attendance at the hearings themselves, and secondly that it was empowered to make its 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 documentation*

*required.*” The tribunal took the view that any work carried out in advance of the first preliminary hearing of 26 April 2019 should not be included since it was not convinced that this hearing was unnecessary or that there was any unreasonable behaviour on the part of the respondent before that date. Thereafter the tribunal estimate that approximately 40 hours represented a proportionate amount of time for a reasonable competent lay person to have prepared for the hearing listed for 13 September 2019. The tribunal discounted 25 hours of that time which included the work carried out in preparing the witness evidence and preparing the documentation which remained of use for the subsequent final hearing, meaning that 15 hours was claimable.

15. Given the further adjournment of 19 December, the tribunal take the view that the claimant should be compensated for the preparation time in dealing with further disclosure, an updated statement of loss and associated correspondence, and some re-reading of the evidence and refreshing of memory prior to that hearing. The tribunal estimate a reasonable time for that additional work would be 8 hours. Further, the tribunal award a further 4 hours of time for the claimant in reviewing documentation and refreshing prior to the final hearing which took place on 16 October 2020.
16. Having regard to the fact that the unreasonably conduct of the respondent occasioned the costs application, the tribunal took the view that it would be proportionate to award the claimant for the additional preparation time associated with preparing for the costs hearing. This was estimated at 6 hours. Accordingly, the tribunal assess preparation time as follows:
  - a) 26 April 2019 to December 2019: 23 hours
  - b) January 2020 to October 2020: 4 hours (of which the tribunal estimate all relevant additional preparation would have taken place after 6 April 2020).
  - c) November 2020 to March 2022: 6 hours (of which the tribunal estimates three hours of the additional preparation would have taken place before 6 April 2021 and three hours after it).
17. The dates are significant since the amount of the preparation time claimable increases on 6 April each year. The breakdown for the purposes of this case is as follows:
  - a) 26 April 2019 to 5 April 2020: 23 hours at £39 = £897.00
  - b) 6 April 2020 to 5 April 2021: 7 hours at £40 = £280.00
  - c) 6 April 2021 to date: 3 hours at £41 = £123.00
18. Accordingly, the respondent is ordered to pay the claimant for her preparation time in the sum of £1300.00.

Employment Judge Humble

11<sup>th</sup> March 2022

RESERVED JUDGMENT AND REASONS  
SENT TO THE PARTIES ON

17 MARCH 2022

FOR THE TRIBUNAL OFFICE

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