



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111775/2019

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Held via telephone conference call on 23 March 2022

Employment Judge - A Strain

10 **Mr A Todd**

**Claimant
Not present and
Not represented**

15 **Oyster Enterprises Limited**

**Respondent
Represented by:
Mr R Furman -
Director**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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

REASONS

Application and background

- 25 1. By email received at the tribunal on 26 November 2021, and copied to the claimant, the respondent made an application for strike out and a Preparation Time Order ("**PTO**") on the grounds that the claim was scandalous and vexatious. This was because it was presented without basis or supporting evidence and was an act of retaliation. The
- 30 respondent further asserted that the claim had no reasonable prospect of success as the claimant had not engaged reasonably with the process and was no longer providing instruction to his legal representatives. The respondent asserted that the claimant had acted vexatiously, disruptively and unreasonably throughout the proceedings and the respondent

sought 8 full days preparation (8 hours per day) at £33 per hour totalling £2,112.

2. The application was copied to the claimant on 3 December 2021 and he was asked to provide any comments by 17 December 2021. No response was received. The tribunal wrote to the claimant on 29 December 2021 requesting comments by 12 January 2022 failing which a strike out warning for failing to actively pursue the claim would be issued. No response was received so the tribunal issued a strike out warning letter on 19 January 2022 informing the claimant that if he did not respond by 3 February 2022 his claim may be struck out. No response was received.
3. The claim was struck out on 8 February 2022.
4. On 11 February 2022 the tribunal wrote to the claimant asking for his comments on the PTO application by 21 February 2022. No response was received. The tribunal wrote to the parties informing them that an OPH would take place on 23 March 2022 at 10am by conference call for the purposes of considering the PTO application.
5. The case called on 23 March 2022 for consideration of the PTO application. The respondent was represented by its director Mr R Furman. There was no appearance or representation by the claimant. The tribunal delayed the start of proceedings to see if the claimant would participate but he didn't. The tribunal considered that it was in accordance with the overriding objective to proceed without the claimant.

Outline of legal principles

6. An employment tribunal has a discretionary power to make a costs order under rule 76(1)(a) of the Tribunal Rules 2013 where it considers that a party 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.
7. The power to make a PTO is contained in rule 76 (coupled with rule 75(2)). 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). Preparation time means 'time spent by the receiving party in working on the case, except for time spent at the final hearing' — rule 75(2). A PTO is defined by rule 75(2) as 'an order that a party... make a payment to another party... in respect of [that other] party's preparation time while not legally represented'. The hourly rate of a lay representative is capped (as at 6 April 2021) at £41 for the purpose of assessing costs under a costs order. This is the same hourly rate that applies for the purpose of assessing preparation time.

- 5 8. 'Unreasonable' has its ordinary English meaning. In determining whether to make an order under this ground, an employment tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct'. 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.
- 15 9. Under rule 76(2) of the Tribunal Rules an employment tribunal has the discretionary power to make a costs order or preparation time order against a party who has breached an order or Practice Direction.
- 20 10. 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 respondent/claimant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant/respondent, 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.
- 25 11. If a tribunal considers that the case falls within one of the situations described in the Rules, it may make a costs preparation time order. In deciding whether to make a costs or preparation time order, or the
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amount of it, a Tribunal may have regard to the paying party's ability to pay.

12. Rule 76(1) therefore imposes a two-stage test: first, a tribunal must ask itself whether a party's conduct falls within rule 76(1)(a) of rule 75(2); if so, it must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party. Factors relevant to the discretion may include the fact that costs in the employment tribunal are still the exception rather than the rule. The fact that a party is unrepresented can also be a relevant consideration in deciding whether to award costs against him or her. An employment tribunal cannot and should not judge a litigant in person by the standards of a professional representative.
13. Once an employment tribunal has decided to make a costs order, it must then go on to decide how much to award. The purpose of an award of costs is to compensate the party in whose favour the order is made, and not to punish the paying party. Given that costs are compensatory, it is necessary to examine what loss has been caused to the receiving party. Costs should be limited to those 'reasonably and necessarily incurred'. The amount awarded for a PTO must also exclude time spent at the final hearing.

Relevant Background facts

14. By a claim form received at the tribunal on 18 October 2019 the claimant brought a claim against the respondent for unfair dismissal, redundancy payment and unlawful deductions. The claimant asserted it was not a genuine redundancy and the payments received were incorrect. He asserted the respondent continued to trade.
15. The claim was served on the respondent on 22 October 2019. A response was received at the tribunal on 25 January 2020. The response had been delayed due to the claim having been sent to a previous address for the respondent. The respondent's Mr Furman explained that the company had ceased to trade from that address and he had moved to England.

The respondent sought an extension of time to lodge the response and the application was copied to the claimant. The claimant was given until 6 February 2020 to respond. No response was received so the tribunal accepted the response.

- 5 16. Case management orders were sent to the parties on 14 February 2020. By email of the same date the respondent sought postponement of the hearing that had been fixed for 24 February 2020 due to child care commitments and the fact he now resided in England.
- 10 17. By email of 17 February 2020 the claimant's solicitors contacted the tribunal and advised they were now instructed and did not oppose the postponement.
18. The tribunal granted the postponement and issued date listing letters which the parties completed and returned.
- 15 19. Notice of hearing was then sent to the parties on 9 March 2020 for an in person hearing on 21 April 2020. Due to the pandemic the tribunal proposed to convert the hearing to by telephone.
20. By email of 2 April 2020 the respondent objected to this and sought postponement until the matter could be heard in person. The postponement request was refused and parties advised on 6 April 2020.
- 20 21. By email of 15 April 2020 the respondent once again sought postponement of the hearing. The tribunal confirmed that the hearing had been converted to a case management preliminary hearing (PH) by telephone call.
- 25 22. The case called for PH on 21 April 2020 at which the claimant was represented by his solicitor and the respondent was represented by Mr Furman. A final hearing was allocated for 20 May 2020 by CVP. The claimant was ordered to produce a schedule of loss by 5 May 2020 and the parties were to agree and lodge a joint bundle (which the claimant's solicitor offered to put together) and exchange witness statements by 14
- 30 May 2020. The claimant did not produce the schedule of loss by 5 May

2020 and the tribunal wrote on 7 May 2020 requiring the claimant to produce it immediately. The claimant produced the schedule of loss on 11 May 2020.

23. By email of 14 May 2020 the respondent complained about the conduct of the claimant's solicitor for the delay in lodging the schedule of loss, exchanging documents and witness statements. The claimant's solicitor lodged the bundle and exchanged statements on 14 May 2020.
24. The tribunal extended the deadline for lodging the joint bundle due to formatting issues. The respondent lodged the joint bundle updated by email of 19 May 2020.
25. The hearing fixed for 20 May 2020 did not proceed due to the claimant being unable to join other than by telephone call. At the hearing the claimant's solicitor undertook to make suitable equipment available at his offices for the claimant to participate.
26. A new hearing date was set for 10 September 2020 by CVP. Notice of hearing was issued to parties on 2 July 2020. The hearing date was amended by the tribunal to 28 August 2020 and notified by email of 9 July 2020. The respondent applied for postponement as the hearing date did not suit. The tribunal issued amended hearing notification on 11 August 2020 informing the parties that the hearing would now be on 10 September 2020.
27. By email of 9 September 2020 the claimant's solicitor sought postponement of the hearing fixed for 10 September 2020 on the basis that due to the pandemic the claimant could not be accommodated in the office and permitted to use facilities due to health and safety concerns. The postponement request was granted reluctantly by the tribunal in light of the late notification on 9 September. The tribunal asked the claimant to confirm whether arrangement could be made for an early CVP Hearing or whether an in person hearing was required. A response was requested by 16 September 2020. No response was received so the tribunal wrote

again on 29 September 2020 to the claimant's solicitor and asked for a response by 6 October 2020.

28. The claimant's solicitor responded by email of 5 October 2020 requesting an in person hearing.
- 5 29. Date listing letters were issued by the tribunal and parties' comments sought with regard to a CVP Hearing. The respondent responded by email of 21 April 2021 seeking a CVP Hearing and the claimant's solicitor responded by email of the same date seeking an in person hearing. The tribunal wrote to the claimant's solicitor enquiring whether or not the firm's
10 IT could be made available to the claimant on 28 April 2021. The claimant's solicitor responded by email of 17 May 2021 advising this was not possible due to ongoing restrictions in the office.
30. The tribunal enquired about a hybrid hearing but this was rejected by the respondent on 3 June 2021.
- 15 31. A case management PH was fixed for 11 August 2021 but did not proceed.
32. Notice of Hearing was issued to the parties on 2 July 2021 listing the case for hearing on 27 and 30 August 2021 in person. By email of 2 July 2021 the respondent sought postponement on the basis that the dates
20 coincided with the school holidays and he had caring commitments. The tribunal granted the postponement request and issued date listing letter.
33. The claimant's solicitor wrote to the tribunal on 25 November 2021 advising that they had withdrawn from acting for the claimant.
34. Events thereafter are narrated in the Application and Background section
25 above.

Decision and Reasons

35. Undoubtedly this case has a lengthy and unfortunate history against the background of the pandemic. The tribunal carefully examined the

progress of the case and the reasons for any delay The claim had been struck out and had not reached a merits hearing.

36. The tribunal asked whether there had been vexatious, abusive, disruptive or unreasonable conduct by the claimant in bringing or conducting the case and, in doing so, identify the conduct, what was vexatious, abusive, disruptive or unreasonable about it, and what effect it had.
37. Both parties had been engaged in preparations for the case proceeding to a hearing. The claimant was late (by a few days) in complying with the case management order to lodge of a schedule of loss. The claimant's solicitor had undertaken to produce a joint bundle, however, it appears that the respondent prepared this in the end of the day. Normal practice before the tribunal is that the respondent will produce the joint bundle. The claimant's solicitor appears to have volunteered to do so, presumably as a matter of professional courtesy. Accordingly the tribunal does not find this conduct vexatious, abusive, disruptive or unreasonable.
38. The hearings on 20 May 2020 and 10 September 2020 did not proceed. The hearing on 20 May 2020 didn't proceed due to the claimant experiencing technical difficulties (this is confirmed in the Note that followed). Whilst the tribunal has some sympathy for the respondent's position that this should have come to light in the tests before hand there is no evidence this was due to fault on the part of the claimant. The tribunal cannot conclude this conduct was vexatious, abusive, disruptive or unreasonable.
39. In so far as the 10 September 2020 hearing is concerned the tribunal cannot understand why the issue of the claimant not being able to attend his solicitor's office had not been identified at a much earlier stage. The claimant's solicitor had volunteered his office's services to assist the claimant. The tribunal does not know what (if any) explanation for not having checked beforehand there was. Further, it could possibly have been the claimant's solicitor rather than the claimant himself that was at fault for the postponement. Accordingly, the tribunal cannot conclude that

the claimant's conduct was vexatious, abusive, disruptive or unreasonable in the circumstances.

40. The procedural history thereafter is the attempts by the tribunal and the parties to get another hearing date fixed. While clearly this takes time the
5 conduct of the claimant (and his solicitor) in trying to assist with fixing hearing dates is not vexatious, abusive, disruptive or unreasonable.

41. The claimant's solicitor then withdraws from acting and the respondent seeks strike out on 26 November 2021. The claimant does not respond and the claim is struck out for failing to actively pursue it. Other than
10 issuing the letter seeking strike out the matter is dealt with by the tribunal with little involvement from the respondent.

42. Accordingly, while the respondent has clearly expended considerable time and expense in the defence of this claim the tribunal cannot say that
15 this has been caused by the vexatious, abusive, disruptive or unreasonable conduct of the claimant. Preparation of bundles, witness statements and correspondence with the tribunal, attendance at hearings would all have been incurred in the normal course of events.

43. The tribunal declines to make a PTO in the circumstances of the case.

20 Employment Judge: Alan Strain
Date of Judgment: 12 April 2022
Entered in register: 13 April 2022
and copied to parties