Case No: 2301303/2019

EMPLOYMENT TRIBUNALS

Claimant: Mr Javier Sanchez Ortiz

Respondent: Mitie Limited

Heard at: London South Employment Tribunal

Before: Employment Judge Abbott, Mrs G Mitchell and Mr J Bendall

JUDGMENT ON COSTS

The unanimous decision of the Tribunal is that the Claimant's application for a preparation time order under Rule 76 of the Employment Tribunals Rules of Procedure 2013 succeeds. The Respondent is ordered to pay the sum of £567.

REASONS

1. By its Judgment sent to the parties on 22 February 2022 (reasons having been delivered orally on 27 January 2022) the Tribunal found in favour of the Claimant in respect of all of his complaints.

2. The Claimant applied for a preparation time order. He contended that the Respondent acted unreasonably in the way that the proceedings were conducted, and/or that key parts of its response had no reasonable prospects of success. In particular, once the Respondent knew that its dismissing officer Mr Royall was not available as a witness, it ought to have known that it could not meet its burden of proof in respect of key claims, and therefore the failure to withdraw/seek to settle those claims was unreasonable. The Respondent resisted the application.

3. It was common ground between the parties that the application was capable of being determined on paper, and the Tribunal has done so based on the written submissions of the parties.

<u>The law</u>

4. As set out in *Hossaini v EDS Recruitment Ltd* [2020] ICR 491 (at para 64) the Tribunal should adopt a three-stage test when determining whether to make a preparation time order: (1) the Tribunal needs to determine whether or not its

jurisdiction to make a costs award is engaged – here, whether the circumstances provided by Rule 76(1) exist; if so, (2) it must consider the discretion afforded to it by the use of the word "may" at the start of that rule and determine whether or not it considers it appropriate to make an award of costs in that case; only then would it turn to question (3), that is to determine how much it should award.

5. Rule 76(1) provides (insofar as relevant):

> 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 prospect of success […]

Discussion

Stage 1

6. In the view of the Tribunal, the critical question is at what stage the Respondent should reasonably be expected to have known that Mr Royall would not be a testifying witness. It is apparent from the Respondent's submissions that it accepts its defence was fundamentally flawed from that point.

7. The Respondent's position is that it was not until the morning of day 2 of the Final Hearing that the moment came. The Claimant's position is that the Respondent should have known all along that Mr Royall would not testify (and therefore claims preparation time going all the way back to the phases of disclosure and evidence).

8. The Tribunal is not satisfied that either of these extremes is correct.

9. Mr Royall signed a witness statement on 20 January 2021, shortly before the second-listed date for the final hearing (21 February 2021) which, like the first, had to be adjourned through no fault of the parties. The Tribunal considers it more likely than not that Mr Royall would have attended to testify had the final hearing proceeded in February 2021.

10. In respect of the January 2022 final hearing, the Respondent's submissions are carefully worded. They say that the Respondent "believed [Mr Royall] was attending and had no reason to think otherwise" and that "had been notified of the new final hearing date". There is no express statement that Mr Royall had told the Respondent he would be attending.

11. In the Tribunal's judgement, it is reasonable to expect the Respondent to have sought to confirm Mr Royall's attendance several weeks in advance of the January 2022 final hearing. Had it done so, and been unable to get that confirmation, a reasonable Respondent in that position would have moved to concede liability. Rule 76(1)(a) is therefore engaged from the point that the Respondent should have reached out to Mr Royall.

12. Rule 76(1)(b) does not apply. The Tribunal finds that the response, as filed,

had reasonable prospects of success provided that Mr Royall would testify – as stated above, we find that, at that stage, this was more likely than not.

Stage 2

13. The Tribunal considered whether to exercise its discretion to make a preparation time order. We consider it appropriate to do so in the circumstances. Had the non-attendance of Mr Royall been known earlier, the final hearing (and the Claimant's preparations for it) would have been very different.

Stage 3

14. The Claimant sought the following preparation time:

    1. Disclosure: 10 hours;
    2. Witness statement preparation: 15 hours;
    3. Schedule of loss: 2 hours;
    4. Skeleton argument preparation (May 2020): 15 hours;
    5. Cross-examination preparation (May 2020): 25 hours;
    6. Skeleton argument preparation (February 2021): 1 hour;
    7. Cross-examination preparation (February 2021): 15 hours;
    8. Chronology preparation (February 2021): 2 hours;
    9. Skeleton argument preparation (January 2022): 1 hour;
    10. Cross-examination preparation (January 2022): 15 hours.

    Total: 101 hours.

15. On the Tribunal's findings above, it is only points 9 and 10 for which a preparation time order may be awarded, because only these come after the point that the Respondent should have reached out to Mr Royall in advance of the January 2022 final hearing.

16. The Tribunal accepts that 1 hour is appropriate for skeleton argument preparation. The bulk of the work had been done in May 2020, but it is necessary for an advocate to revisit and refresh.

17. The Tribunal is not satisfied that 15 hours is justified for cross-examination preparation. It is fair to expect an advocate to have to revisit and refresh cross-examination preparation in advance of the final hearing, and that this will be more time-consuming than work on a skeleton argument. However, the Claimant's own submissions state "the Claimant's trade union representatives had to prepare for cross-examination three separate times, though he accepts that preparation on each occasion was slightly less time-consuming than the last", whereas in fact the same time is claimed under point 10 as under point 7. In the Tribunal's judgement, a reasonable and proportionate award is for 12.5 hours under this point.

18. The prescribed rate for a preparation time order under Rule 79(2) is £42 per hour (as of 6 April 2022). The amount awarded is therefore 13.5 x £42 = £567.

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Employment Judge Abbott

Date: 25 April 2022