EMPLOYMENT TRIBUNALS

Claimant: Mrs AL Campbell

Respondent: Quirky Tea Rooms Limited

Heard at: Manchester **On:** 16 May 2022

Before: Employment Judge Dunlop
Ms C Titherington
Mr A Egerton

JUDGMENT

The claimant's application for a preparation time order is refused.

REASONS

Introduction

1. By a judgment promulgated on 13 December 2021, supported by written reasons promulgated on 18 February 2022, the claimant succeeded in various claims against the respondent. By email dated 4 January 2022 the claimant made an application for a preparation time order. The parties were invited to comment as to whether the application should be determined at a hearing or on the papers, and both agreed to it being determined on paper. The respondent duly submitted a written response to the application on 22 April 2022, along with some supporting documents. (There was a delay due to correspondence around a potential appeal of the Judgment).

2. This hearing was therefore convened as an in-chambers meeting involving the Tribunal panel members only. We carefully considered the written material put forward by both parties as well as reviewing our earlier Judgment and the case management orders made by Employment Judge Benson and Employment Judge Johnson earlier in the proceedings.

Legal Principles

3. The rules relating to costs and preparation time orders are set out Rules 74-84 Employment Tribunal Rules of Procedure 2013. Costs orders are available to legally represented parties, preparation time orders are available to self-represented parties. Mrs Campbell (correctly) applied for a preparation time order, and we use that wording below, even although many of the principles to be applied come from cases involving applications for costs orders.

4. Rule 76 sets out when a preparation time order may be made. Under that rule, the Tribunal "shall" consider whether to make an order in the following circumstances:
    4.1 when a party (or their representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in the way the proceedings have been conducted; or
    4.2 when any response to a claim had no reasonable prospect of success.

5. In addition, the Tribunal may make a preparation time order where a party has been in breach of an order or practice direction. (The Tribunal is not obliged to consider making an order in these circumstances, but it is permitted to do so.)

6. Other rules set out provisions related to the amount to be awarded when a preparation time order is made. As we ultimately declined to make any order, we did not consider those rules and I have not set them out here.

7. Neither party referred to any specific case law. The general principles surrounding the award of preparation time costs in the Tribunal are well known, and we do not consider it necessary to lengthen this Judgment with a detailed recitation of them. We do, however, record, that we noted the recent decision of the EAT (HHJ Taylor) in **Opalkova v Acquire Care Ltd UKEAT/2020/000345** and the confirmation contained in that decision that where a claimant has brought multiple complaints within one claim with mixed success, the Tribunal considering a preparation time application against the respondent must consider each complaint as a separate claim and determine whether the defence of each of those separate claims had reasonable prospects of success.

Discussion and conclusion

8. We set the context for this discussion by observing that Mrs Campbell and her husband have been rigorous and assiduous in their preparation and conduct of this case. We have no doubt that the many hours of preparation spoken of in the application are not exaggerated. We also note that that thorough preparation and pursuit of the claims resulted in findings in favour of the claimant in respect of several of her claims and a substantial award of compensation. It is axiomatic that costs do not follow the event in ET litigation and that the fact that a claimant has found it necessary to engage in many hours of preparation does not, of itself, have any bearing on whether a preparation time order is appropriate.

9. It was not straightforward to determine from the claimant's application exactly what the separate complaints were and which part of Rule 76 was

being relied upon. Most of the matters complained of appeared to the Tribunal to be well within what might be described as the usual "cut and thrust" of contested litigation. It is inevitable, in almost every case, that each party will believe the other party has acted badly in some way or another (generally in many different ways). Litigation is, by its nature, a stressful and antagonistic process. That being the case, we have not sought to deal separately with each and every complaint raised by the claimant, but have instead identified some broad themes and, in particular, to address the areas where it appears that the claimant has come closer to showing conduct of the sort which might justify a preparation time order.

Delays to the litigation

10. There were delays in the course of this litigation. The final hearing had been scheduled for December 2020 as an in-person hearing. The respondent applied to postpone this hearing due to a holiday planned by Ms Woods. The Tribunal seemingly failed to deal with that application in a timely way with the result that Ms Woods cancelled her holiday and forfeited her deposit. Having done so, the respondent made a last-minute successful application to postpone the December hearing. This arose from circumstances related to Covid-19 and, separately, from a personal issue relating to counsel instructed by the respondent (Not Mr Flood who ultimately represented the respondent). The Tribunal was provided at the time with an email from counsel's chambers confirming that specific issue. In view of that, postponement was inevitable, although it is also noted that the Covid-19 position was both severe and rapidly-changing at the time the hearing was due to take place and it is likely that the application would have succeeded on that basis even aside from the issue involving counsel.

11. The final hearing was re-listed for three days in June 2021. As recorded in our substantive judgment, there were difficulties with the CVP platform during that hearing which, combined with time taken out of the hearing allocation for the Tribunal meeting, meant that the case was adjourned part-heard. It reconvened in December 2021, taking a further two days to complete.

12. Given the relative simplicity of this claim, Mrs Campbell has been unlucky in the length of time the case has taken to progress through the Tribunal system, and in the total number of hearing days it has required. We accept that work associated with those delays (including responding to postponement applications) has caused the claimant to spend more time preparing the case than might otherwise have been the case. However, blame for that cannot reasonably be placed at the door of the respondent. We are satisfied that each postponement application was genuinely made for circumstances beyond the respondent's control. Difficulties with the Tribunal (for example in not dealing earlier with the first postponement application, and with the technological issues with the in-room connection to the CVP system during the June 2021 hearing) cannot be laid at the respondent's door.

13. Whilst the situation overall is far from ideal, we are satisfied that that is not the result of any unreasonable conduct by the respondent, and that the Rule 76 threshold test is not met.

Disclosure of documents

14. There are often difficulties with disclosure of documents in the run up to Tribunal hearings. The claimant's preparation time order includes complaints about disclosure, but lacks specifics in setting out what defaults are relied on, and giving any precise chronology. There is nothing in the case management orders of Employment Judges Benson or Johnson to indicate that the difficulties faced by the parties in this case went outside the parameters of the usual "cut and thrust" of litigation. There were no outstanding disclosure applications at the start of the substantive hearing.

15. We have to take care to distinguish between the respondent's conduct of the litigation and its conduct beforehand, which gave rise to the litigation. There were serious defects in the respondent's accurate and timely production of payslips, a P45 and other documentation during and immediately after the claimant's employment. These defects contributed significantly to the course of conduct which we found to have amounted to discrimination on grounds of pregnancy. We recognise that the respondent cannot disclose documents which it never had, and to the extent that the disclosure complaint relates to the respondent's failure to produce a proper paper-trail of payments made to the claimant the fault, as we see it, is largely in its pre-litigation conduct where it failed to properly generate these documents, rather than in any failure to disclose them during litigation.

16. In the course of our judgment, we found one key document was not disclosed as part of the proceedings and no explanation had been given for this. This was the email Ms Woods had purportedly received from her accountant advising that Ms Campbell's holiday pay could not be carried over from the previous year. We considered whether the respondent's conduct in relation this email, in isolation, amounted to unreasonable conduct in the way the proceedings had been conducted and found it did not. We have regard to the fact that we made no finding as to whether this email had actually existed, or whether (as Mrs Campbell) suspected Ms Woods had lied about receiving advice. Ms Woods' representations to Mrs Campbell at this key juncture were the foundation for her successful claim of discriminatory dismissal and our findings about this relied on the lack of documentary evidence of the purported email from the accountant. Again, we consider the core complaint here is about the respondent's conduct at that time, rather than a complaint about the conduct of the litigation. We did not find the threshold had been met.

17. Finally, we note that the claimant complains that the respondent was 7 days late in complying with a particular order about disclosing payslips. We appreciate that such delays are concerning for litigants in person and can cause anxiety. As a panel, however, we recognise that they are common-place in litigation for various reasons. We do not consider this short delay would have had any material impact on the parties ability to prepare and do not consider that it gives rise to any proper grounds for claimant preparation time, either under Rule 76(1) or (2).

Failure to settle

18. In her application, Mrs Campbell repeatedly asserts that the claim should have been settled. She did not refer to any specific offer that was refused by the respondent, and the thrust of the argument seems to be that the respondent should have done more to engage with settlement negotiations.

19. Alongside its written submissions, the respondent put forward some email evidence of settlement negotiations. Although these were not marked as being "without prejudice save as to costs" we considered it appropriate to have regard to them as the claimant herself had raised the concern relating to settlement, and had not objected to the material being provided to the Tribunal. The documents indicate that whilst both parties evinced a willingness to settle, they were very far apart in their assessment of the value of the claim. The respondent suggested sums between £200-£300, which seem to be based on the value of the holiday pay claim only. The claimant was apparently reluctant to propose a specific sum, although she mentions the fact that she is looking for "middle band" **Vento** damages for injury to feelings (which is in line with what was ultimately awarded).There is an indication via ACAS on 20 November 2020 that she would be prepared to accept £20,000. From the correspondence disclosed, there appears to have been no real movement to close this gap.

20. So, the claimant offered to settle for £20,000 and ultimately did better than this (although not by much, given the amount of the final award attributable to interest accruing after November 2020). However, the mere fact that the claimant made an offer and then beat it does not mean that she is entitled to recover costs, any more than the fact that the claimant was successful in her claim means that she is entitled to recover costs.

21. The value of the claim in this case hinged on the discrimination complaints. It was not clear on the pleadings or on the papers whether or not those claims were likely to succeed. As a Panel, the discrimination element of this case was not one we found to be easy or straight-forward, and the outcome could have been different, including if the oral evidence in the case had gone differently. This was far from a case which the respondent was 'always going to lose' and in those circumstances, whilst it might have been a better approach for them to make more realistic settlement offers, we cannot conclude that they were acting unreasonably in failing to do so. To reach such a conclusion would be to import the 'Calderbank' regime from the civil courts, and it has been often reiterated that that approach is simply not the correct one in the Employment Tribunal.

Pursuing a response that had no reasonable prospect of success

22. As noted above, **Opalkova** confirms that we must look at each cause of action separately. In respect of two causes of action, the claimant failed. We have considered the successful causes of action below:
    22.1 Notice pay – this claim was only permitted to proceed due to a successful amendment application at the final hearing, the respondent therefore cannot be criticised for defending it (indeed, the respondent did not defend the claim after the amendment application had been accepted).
    22.2 Holiday pay – we return to this below.

22.3 Unauthorised deductions relation to national insurance – this was a very small claim, the respondent conceded around £13 was owed, and was ordered to pay £17.35. It took some time for the parties' respective positions to become clear on this claim; a lack of focus on it is unsurprising given the very low value in the context of the wider claim. The issue was not straightforward and we do not consider that the respondent acted unreasonably in defending the claim.

22.4 Discrimination on grounds of pregnancy and maternity (including dismissal). This claim was partially successful, as described in the Judgment and reasons. Further, even if we exclude the unsuccessful elements and look only at the successful ones, we do not consider that it was a claim where the respondent had no reasonable prospect of success. We repeat the comments at paragraph 22 above.

23. Turning to consider the holiday pay claim in more detail, the claimant had been asking for unpaid accrued holiday from the time of her termination. She had set out her position in detail and has maintained it consistently through the proceedings. We infer from the settlement offers made by the respondent and produced as part of its response to this application that the respondent acknowledged that it was highly likely to lose the holiday pay claim, as the proposed settlement amounts appear to reflect the value of that claim. Ultimately, the claim was conceded as a matter of principle and the small discrepancy in the sums put forward by the parties was resolved by consent (in favour of the sum put forward by the respondent).

24. We find, in respect of the holiday pay claim, that the respondent *did* pursue a response which had no reasonable prospect of success. In contrast to the unauthorised deductions claim, it was clear from the outset what this claim was about and how it arose. We consider that a reasonable litigant would have conceded the claim and paid the amount owed at a much earlier stage.

25. The threshold test is therefore passed in relation to the holiday pay claim only. We then proceeded to consider whether we should exercise our discretion to award costs in those circumstances. We considered that it was not appropriate to do so on the following grounds:

25.1 The holiday pay claim was only one very minor element in the broader litigation. It would most likely be impossible to allocate specific amounts of time that the claimant had spent preparing for that claim in isolation. Even if that could be done, we are confident that the amounts would be very small.

25.2 Related to this, we do not consider that an early concession on the holiday pay claim would have made a material difference to the length of the final hearing, or to the prospects of the parties achieving a global settlement. It is not unusual, in cases such as this one, that parties focus their attention on the high-value parts of the claim and that ancillary claims are to some extent left to "come out in the wash". Whilst that might not be best practice, it is a natural tendency in litigation and that militates against a preparation time award being an appropriate response.

25.3 As noted above, the claimant has already been compensated for the respondent's poor conduct in dealing with the calculation of payments owed to her during her maternity leave and on termination.

In the circumstances of this case, we consider there would be an element of double-recovery in making a further award for preparation time on this basis.

25.4 Finally, we bear in mind that this is a small respondent (although professionally represented) which has already paid a relatively heavy price for the (undoubtedly grave) errors that the Tribunal found it made.

Conclusion

26. For those reasons the claimant's application is rejected.

Employment Judge Dunlop
Date: 16 May 2022

SENT TO THE PARTIES ON
17 May 2022

FOR THE TRIBUNAL OFFICE