EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
	v	
Ms J Talbot		Kession Capital Limited

Heard at: Watford Employment Tribunal **On**: 28 and 29 March 2022
Before: Employment Judge (sitting alone)

Appearances
For the Claimant: In person
For the Respondent: Ms A Fadipe (Counsel)

COSTS JUDGMENT

1. The Claimant's application for preparation time costs is well founded and is upheld.

2. For the reasons given below, the Respondent is ordered to pay to the Claimant £820 by way of preparation time costs.

REASONS

Introduction

3. By an application dated 29 April 2022, the Claimant applied for a preparation time order ("PTO") under rules 74-79 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules") for preparation time costs ("PT costs") totalling 278 hours and certain expenses totalling £403.00.

4. On 16 May 2022, the Respondent wrote to the Tribunal opposing the application.

5. Neither party requested an oral hearing to determine the matter and both parties have made submissions in writing thereby discharging the obligation under Rule 77 that they be given a reasonable opportunity to make representations.

6. The Claimant's application is predicated on various bases, including:

(1) That the Respondent acted vexatiously and abusively in unlawfully accessing and processing private messages and attempts to use those messages in the litigation thereafter (paragraphs 1-10);
(2) The Respondent's approach to disclosure (paragraph 11);
(3) The Respondent's application to postpone orders to a later date and breaching orders in reliance on those applications (paragraph 12-13);
(4) The Respondent's solicitor originally agreed to place disputed documents in a separate section of the bundle then reneged on that agreement and included documents in the bundle disclosed by the Claimant whilst only disclosing a similar type document itself (an internal witness statement) at a later date and misleading the Claimant that the document was signed / approved when only part of it had been (paragraphs 14-17);
(5) The manner in which WhatsApp messages were presented in the Respondent's statements (which the Claimant says was erroneously presented as corroborating the Respondent's case) (paragraph 18);
(6) The Respondent had no reasonable prospects of success in defending the claim of unfair dismissal (paragraph 22); and
(7) The Claimant attempted to settle the matter but the Respondent did not reciprocate (paragraph 22).

Relevant law

7. Where a party has no legal costs because they are not legally represented, but they (or lay advisors) have spent time working on the case, the party can claim PT costs under Rules 74-79. They cannot claim for time spent at any final hearing (see R.75(2)).

8. Under Rule 76, an employment tribunal has a discretion to make a PTO where it considers that a party has acted unreasonably, or a claim or response had no reasonable prospect of success.

9. Rule 76 obliges a tribunal to apply a two-stage test to consider: (1) whether the ground / basis for PT costs is made out; and (2) if so, whether to exercise the discretion to award PT costs. This two-stage test is well-established in respect of applications under rule 76(1)(a) of the Rules (**Monaghan v Close Thornton Solicitors EAT 0003/01***)* but applies equally to applications under rule 76(1)(b).

10. Rule 76(1)(b) differs slightly from the wording of its predecessor (under the 2004 Regulations) which instead of using the phrase "no reasonable prospects of success" referred to a claim or response being "misconceived". However, given that "misconceived" was itself defined under the 2004 rules as including "having no reasonable prospect of success", many of the older cases decided under the 2004 rules will still be instructive.

11. In **Opalkova v Acquire Care Ltd EAT [2021] 8 WLUK 265** the EAT considered the test for determining whether an employer's response has no reasonable prospects of success. The EAT stated that there were three key questions: (1) did the response have no reasonable prospect of success when submitted, or did it reach a stage where it had no reasonable

prospect?; (2) at the stage when the response had no reasonable prospect of success, did the respondent know that was the case?; (3) if not, should the respondent have known? In considering the third question, the EAT stated that a tribunal is likely to assess a legally represented respondent more rigorously. It also stated that the tribunal must assess separate claims / responses separately to determine whether they can be said to have had no reasonable prospects of success.

12. It is important to recall that even if one (or more) of the grounds for awarding costs or a preparation time order is made out, the tribunal is not *obliged* to make an order. Rather, it has a discretion whether or not to do so.

13. As the Court of Appeal reiterated in **Yerrakalva v Barnsley MBC 2012 IRLR 78**, costs in the tribunal are the exception rather than the rule. It commented that the tribunals' 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).

14. The purpose of costs is of course to compensate the receiving party and not to punish the paying party. Questions of punishment are irrelevant both to the exercise of a tribunals' discretion as to whether to make an award and to the nature of the order that is made (**Lodwick v Southwark LBC 2004 ICR 884**).

15. There are very many factors which a tribunal is permitted to take into account when deciding whether to award costs or not. This includes:
    (a) Whether the paying party was legally represented;
    (b) The nature of the conduct giving rise to the application;
    (c) The effect of such conduct;
    (d) The merits (or lack thereof) of a claim / response;
    (e) Whether the paying party knew or ought to have known of the defects in their case;
    (f) Whether the receiving party had applied for strike out or a deposit order and pursued / secured it;
    (g) Whether there had been a costs warning, either by the other side, or the tribunal (**Rogers v Dorothy Barley School UKEAT/0013/12**).
    (h) Whether the receiving party has conducted its case appropriately. (See **Yerrakalva**, in which the judge criticised the respondents for going "over the top in defending the case", and it was considered that the tribunal should have factored such criticisms into the exercise of the discretion.)
    (i) The paying party's ability to pay (Rule 84).

16. In any given case, different factors may be relevant, but these are some which have been considered relevant to the discretionary exercise.

17. Where the case falls into a category in which costs may be awarded, case law has emphasised that the tribunal has a wide and unfettered discretion and the EAT will not use "legal microscopes and forensic toothpicks" to "tinker" with it (per **Yerrakalva**).

18. Given that costs are compensatory, it is necessary to examine what loss has been caused to the receiving party. In this regard the Court of Appeal in **Yerrakalva** held that costs should be limited to those "reasonably and necessarily incurred". At paragraph 41 it was stated that:

> "The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had."

19. As noted by the EAT in **Howman v Queen Elizabeth Hospital Kings Lynn EAT 0509/12** when having regard to a party's ability to pay, a tribunal needs to balance that factor against the need to compensate the other party who has unreasonably been put to expense.

20. Rule 84 does not oblige a tribunal to consider a party's ability to pay, it merely permits the tribunal to do so. However, in **Jilley v Birmingham and Solihull Mental Health NHS Trust and ors EAT 0584/06** it was held that if a tribunal decides not to take into account a party's ability to pay after having been asked to do so, it should say why. If it does decide to take into account ability to pay, it should set out its findings on the matter, say what impact these have had on its decision whether to award costs or on the amount of costs, and explain why.

21. Under Rule 79, a preparation time order is calculated in two stages: (1) The tribunal assesses the number of hours in respect of which a payment should be made. It will take into account any information provided by the receiving party on the time they spent that falls within rule 75(2) along with 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 matters such as the complexity of proceedings, the number of witnesses and documentation required; (2) The tribunal then applies an hourly rate to that figure. The rate was set at £33 in July 2013, and increases by £1.00 on 6 April each year thereafter.

Application of law to facts

22. In the present case, the Respondent sought to defend the unfair dismissal claim in the knowledge that it had failed to follow any dismissal process whatsoever prior to taking the decision to dismiss the Claimant. As found in the liability judgment, this was not a case in which there were any exceptional circumstances that might have rendered such a process futile as considered in the case of **Polkey v AE Dayton Services Ltd [1987] IRLR 503.** Indeed, in the Respondent's closing submissions, there was very little reference to the complete lack of any process prior to the decision to dismiss, nor any real argument or evidence from which a tribunal could conclude that the Respondent reasonably believed that such a process would have been futile.

23. The Respondent's written submission merely stated at paragraph 50: "Given the context, an investigation is likely to have been of *limited* utility."

The Respondent's oral submissions were to the same effect. This is no criticism of Ms Fadipe for how she put her client's case, rather it is a stark reality that there was no evidence from which she could put the case any higher than that.

24. The Respondent also knew or ought to have known that the appeal process it offered could not reasonably have been considered to have rectified the errors in the process which preceded it. As stated in the liability judgment, Mr Price did not engage in the matter effectively or at all and failed to give any reasoned basis for his rejection of the appeal.

25. Accordingly, for the reasons given in the liability judgment, I did not and do not find that a disciplinary process would have been futile, nor that the appeal rectified the failures. I shall not repeat my reasons herein, but I rely on them when determining whether the Respondent's response had no reasonable prospects of success.

26. In all the circumstances, the Respondent knew of its lack of process at the date of presenting its response and throughout. It was also aware (or ought to have been aware) that it had no evidential basis to argue that a disciplinary process would have been futile. Accordingly, I find that the Respondent's defence of the unfair dismissal claim had no reasonable prospects of success at the date it was filed and at all times thereafter. The Respondent was professionally represented and was or ought to have been aware of this.

27. Similarly in respect of the wrongful dismissal claim, the Respondent ought to have been aware that there was little or no evidence from which a tribunal could conclude that the Claimant had committed a repudiatory breach which it accepted.

28. In respect of the holiday pay claim, the Respondent never actively contested that it had some liability to the Claimant in respect of this. It merely argued over the amount. Therefore, it ought to have conceded such part of the holiday pay claim that it considered to be due and paid it rather than contesting it. Its defence to the entirety of the claim had no reasonable prospects of success at the outset and throughout.

29. Therefore, I find that the first stage for awarding PT costs is made out under Rule 76(1)(b). It is not necessary for me to consider the other bases on which the application was advanced because having found that the response was misconceived from the outset, all time spent (or expenses incurred) by the Claimant in pursuing it were because of the response.

30. I therefore go on to consider whether to exercise my discretion to award costs – the second stage of the test, which is discretionary.

31. I note that despite replying in writing, the Respondent has not advanced any arguments or evidence as to its means, nor asked me to take its means into account. The Respondent is professionally represented by both solicitors

and a barrister and therefore I consider it has had (and decided not to take up) the opportunity to argue that its ability to pay would or should limit any order for PT costs I might make.

32. I also note that the Respondent was legally represented throughout proceedings.

33. I have considered the fact that the Respondent made a without prejudice (save as to costs) offer to settle the claim for £5,000 back in July 2021 and then on 16 March 2022, it offered to pay her to the end of her notice. Had the Respondent offered her full notice, plus holiday and a sum referable to the basic award at any time, I would have held that her pursuit of the claim in the face of such an offer after that date was itself unreasonable. However, no such offer was ever made. Perhaps if the Claimant had engaged in settlement discussions following the offer made on 16 March 2022, a settlement might have been achieved. I have not been provided with any evidence to suggest she did so engage.

34. The Claimant did indicate to the Respondent at least twice that she would apply for preparation time costs.
    (a) On 13.08.21, she stated: "...To do so would inevitable increase my and my advisers 'preparation' time, already estimated to be approaching 65 hours."
    (b) On 29.08.21, she stated: "please be advised that my preparation costs at present are: 68 hours @ £41 per hour = £3088. It is my intention to apply to have these added to the schedule together with any further hours up to the hearing."

35. On balance, taking all matters into account, I consider it is just and appropriate to award some preparation time costs to the Claimant, notwithstanding that she only received marginally more following judgment than she was offered by way of settlement.

36. I have considered my obligation under the Overriding Objective in so doing, including my duty to act fairly and justly and in a way that is proportionate.

37. In assessing the level of the award, I consider the Claimant's assessment of the time taken to prepare for the full merits hearing to be overstated. I consider that preparation time costs in the region of 20 hours' work is reasonable and proportionate, and just and fair. I therefore award the Claimant preparation time costs in that amount, which, at a rate of £41 per hour, equates to £820.00.

Employment Judge Dobbie

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Date: 29 June 2022

REASONS SENT TO THE PARTIES ON

26 July 2022

FOR THE TRIBUNAL OFFICE

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Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.