



EMPLOYMENT TRIBUNALS

Claimant: Mr B Cunningham
Respondent: Sainsbury's Supermarkets Limited

JUDGMENT ON COSTS

The judgment of the Tribunal is that:

The Claimant's application for a Time Preparation Order is refused.

REASONS

Introduction

1. The claimant claimed unauthorised deduction of wages and breach of contract for failure to pay him for overtime worked between 1 November 2019 and 7 February 2021. The Full Merits Hearing (FMH) took place on 25 April 2022.
2. By a reserved Judgment sent to the parties on 16 May 2022 the tribunal decided that the respondent made unauthorised deductions contrary to s.13 of the Employment Rights Act 1996 and ordered the respondent to pay to the claimant the sum of £1870.08.
3. The claimant applies for a Time Preparation Order (TPO) under Rule 77 of the Employment Tribunal Procedure Rules. The parties have been informed that a determination will be made based on written representations under rule 60 of the Employment Tribunal Procedure Rules.

Procedure

4. The claimant was directed to prepare
 - 4.1 a breakdown of time spent in bringing the proceedings up to the date of the hearing;
 - 4.2 written representations setting out why he alleges the respondent's conduct entitles him to a TPO and/or the response had no reasonable prospect of success;
- 5 The respondent was directed to respond within 28 days of receiving the

claimant's written representations with written representations setting out why the respondent does not agree that a TPO should be granted.

- 6 The tribunal has received the claimant's representations consisting of 4 pages (undated), the objections of the respondent dated 8 June 2022, the claimant's response to the objections dated 13 June 2022 and a further response from the respondent also dated 13 June 2022. The claimant's representations dated 13 June 2022 attached copies of without prejudice correspondence dated from September 2021 to February 2022.
- 7 I have also considered the claimant's letter dated 29 November 2021 when the claimant notified the respondent that he would be applying for a TPO. It states, 'The time will be particularly related to research into the Respondent's policies and IT systems, my rights as the claimant and the Employment Tribunal Procedures. The preparation time will also include detailed data analysis of the Respondent's timecard and pay systems, correspondence with the Respondent, preparation of case notes, witness statement, cross examination notes and preparation of the bundles.'

Law

- 8 Rule 76 (1) provides as follows:

"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...."

- 9 Rule 76(1) (a) refers to conduct 'in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted'. In *Health Development Agency v Parish 2004 IRLR 550, EAT*, it was held that conduct prior to the issue of proceedings cannot be considered. The tribunal has no power to make an award of costs incurred prior to the commencement of proceedings.

- 10 Rule 75(2) provides that the award of a TPO is for time spent working on the case prior to the final hearing.

"A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "*Preparation time*" means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing."

- 11 The ground that a response did not have reasonable prospects of success is to be subjected to analysis as set out in *Opalkova v Acquire Care Ltd EAT 0056/21*:

'First, objectively analysed when the response was submitted did it have no

reasonable prospects of success; or alternatively at some later stage as more evidence became available was a stage reached at which the response ceased to have reasonable prospects of success? Second, at the stage that the response had no reasonable prospects of success did the respondent know that was the case? Third, if not, should the respondent have known that the response had no reasonable prospect of success? ‘

- 12 The consideration of whether to award a TPO is a two-stage process. First it is necessary to decide if there has been conduct as set out in Rule 76 (1)(a) or if the claim had no reasonable prospect of success as set out under Rule 76(1)(b). If either of those two tests are met it is then necessary to decide if it is appropriate to make an order.

Claimant’s submissions

- 13 These are detailed in a 4-page document. They relate to the conduct of the respondent before the issue of the claim, the failure of the respondent to bring specific witnesses to the FMH and the assertion of the respondent that the claim was outside the time limit.

Respondent’s submissions

- 14 The respondent submits that the conduct of the respondent before proceedings are issued is not relevant to the application for a TPO and the failure to call witnesses is a matter of evidence. It is further argued that the conduct of the claimant was not reasonable as an offer to settle was rejected. In respect of rule 76(1) (b) it is submitted that the test for no reasonable prospects of success has not been satisfied.

Conclusion

- 15 I divide my conclusion into 1) conduct and 2) no reasonable prospects of success, accepting the claimant’s assertion in his letter dated 13 June 2022 that the matters raised can be relevant to both.

Conduct

- 16 Considering the wording in rule 76 (1) (a) which refers to ‘the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted’ I find that most of the conduct claimed does not relate to the proceedings for the purposes of the rule. Therefore, I do not take it into account in deciding whether to grant a TPO. Section 5 to 8 of the claimant’s submissions relate to the conduct of the respondent prior to the bringing of proceedings. The claimant’s letter of 29 November 2021 refers to research into the respondent’s policies and IT systems and detailed data analysis of the respondent’s timecard and pay systems, which would have been carried out for the purposes of the grievance procedure.
- 17 The conduct alleged since the bringing of proceedings consists of the respondent’s assertion that the claim was outside the 3 month time limit and the failure to call certain witnesses to give evidence to the tribunal. I find that the claim that the ET1 was issued late was not the main element of the response as alleged by the claimant (4 page document). It was not referred to in the without prejudice letter of 18 November 2021. Nevertheless, the fact

that it was not conceded until the morning of the hearing is worthy of consideration under both conduct and reasonable prospects of success. The failure to call witnesses to the hearing relates to the conduct of proceedings. I need to consider whether the respondent acted vexatiously, abusively, or disruptively in these respects.

- 18 I find that the respondent did not act vexatiously. There is no evidence of spite, some other improper motive or harassment in respect of either the time or the witness issue. The respondent was entitled to take the point on time as discussed below and made an offer to settle without reference to the point. The respondent was entitled to decide what witnesses to call to argue its case. It was for the respondent to present its response as it saw fit. It was open to the claimant to apply for a witness order if the claimant thought other witnesses were relevant to his case. The respondent did not act abusively or disruptively in the conduct of proceedings. The respondent complied with the directions of the tribunal, and, although I found that they were mistaken about whether the overtime had been authorised, I did not find that there had been lies and false evidence. I find that the respondent's representatives conducted the proceedings professionally and in a timely manner. They made an offer to settle of an amount which was slightly more than the claimant recovered.

No reasonable prospect of success

- 19 In considering whether the response had no reasonable prospect of success I have considered the prospects of success of the response objectively. I have further considered if the respondent maintained a response that it knew was unmeritorious or untrue. I find that this was not the case at any stage in the proceedings. This was a factual dispute and the respondent, having conducted their own investigation, believed its own managers and the Kronos system rather than the claimant. This was not an unreasonable belief when viewed objectively. The defence that the claim was issued outside the 3 month period was not unreasonable. It turned on whether time ran from the date the pay was earned rather than the date on the claimant's pay slip.
- 20 As I do not find that Rule 76(1) (a) or (b) is satisfied I do not need to go on to consider exercising my discretion. The claimant's claim for a TPO is refused.

Employment Judge S. Matthews

7 July 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON
31 July 2022

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FOR THE TRIBUNAL OFFICE