EMPLOYMENT TRIBUNALS

Claimant: Mr K Lee

Respondent: Needham Laser Technologies Limited

Heard at: **Birmingham West** **On:** 15 September 2022

Before: **Judge L Mensah (paper)**

Representation
Claimant: On the papers
Respondent: On the papers

FINAL JUDGMENT on APPLICATION FOR PREPARATION TIME ORDER

The Tribunal orders are;

1. An extension of time is granted for the Respondent to file a Response to the application for a Preparation Time Order dated 28.05.2020, to the 13.12.2021 under Rule 5. The Respondent did file such a Response on the 13.12.2021.

2. The Claimant's application for a Preparation Time Order dated 28.05.2020 is dismissed.

Findings and Reasons

1. All references to Rules are references to the Employment Tribunals Rules of Procedure 2013. The Claimant has made an application for a Preparation Time Order, by application dated 28.05.2020. A Preparation time orders is a payment in respect of the preparation time of another party ('the receiving party') in respect of the receiving party's preparation time while not legally represented, (Rule 75(2)). It is confined to time spent by the receiving party, including any employees or advisers, in working on the case, except for time spent at a final hearing (Rule 75(2)).

2. The parties were warned they must file any evidence they wish the Tribunal to consider by return on the 14.09.2022. I make this decision based upon the evidence presented. The history to this case is the known to the parties, but effectively is with regard to unpaid holiday pay. The Claimant complained the Respondent failed to pay her holiday pay when her employment terminated [20.09.2019] and during the period immediately following and post termination she suffered some financial loss with regard to a claim for Universal credit. The Claimant sets out her history,

On 20 Aug 2019 I gave my notice. My final day of employment was 20 Sept 2019.

My final payment on 28 Sept should have included my basic salary and 7.5 days outstanding holiday accrued to date.

On 26 Sept, I was sent my pay slip via email by Claire Gater (HR). I noticed the holiday payment was not included so immediately replied to Claire explaining this.

After 5 days I had still not received a response. I emailed again asking for the outstanding payment. Claire replied the following day saying there was no information but had a meeting scheduled to go through the dates.

12 days later, on 14 Oct, I had still received no response. I emailed Claire again for an update. I was told that the records showed I was owed no holidays as I had taken them all. I knew this to be incorrect as I had only taken 8 days holiday in total.

On 22 Oct, Claire said I would be paid 4.5 days holiday. Again, I knew this was incorrect. After going through the calculations and dates, it was eventually agreed that I was owed 7.5 days which I would be paid and was on 28 Oct.

Since I had left the company and would be unemployed, I would be claiming Universal Credit which is based on your income.

My first Universal Credit assessment period was between 14 Oct and 13 Nov. Essentially, anything paid to me between these dates would affect my claim. Since my last pay day from Needham should have been 28 Sept, this should not have been an issue. It would mean 15 clear days to correct any errors. The error was actually spotted on 26 Sept so it turned out to be 17 clear days.

NLT's late processing of my holiday pay interfered with the Universal Credit assessment calculation. What should have been a payment of £317.82 was changed to zero. Universal Credit stated there was no miscalculation on their part and that the decision would stand. They specified that the official figures and dates reported by Needham were what mattered as far as my payment calculation was concerned.

I see no reason that the company records would show that I had zero holidays due in the first place, which initially caused the error. I appreciate that errors do happen but when I pointed out the error, there were still 17 days to rectify it. Despite me highlighting the issue, persistently chasing and waiting for replies, the company's lack of urgency to correct their mistake ultimately led to the loss.

3. The Claimant went through ACAS and the certificate shows the ACAS period ran from the 14.11.2019 through to the 14.12.2019. The Claimant lodged a claim for this outstanding holiday pay with the Tribunal on the 27.12.2019. The Respondent did not file a Response. At the hearing on the 22.05.2020 the Judge dismissed, upon withdrawal, the liability elements of the Claimant's claim for holiday pay and the hearing was vacated. The basis for this is, as I understand it, because the Respondent agreed it owed the Claimant the outstanding sum of £317.82 and did make the payment to the Claimant on the 18.05.2020. Therefore, as of the date of the hearing there was no outstanding claim for holiday pay. This application was lodged on the 28.05.2020, so well within the 28 days required under the procedure Rules (Rule 77). The Claimant says as follows,

> The respondent did not respond at all throughout the claim however has now paid me the amount I initially requested via bank transfer.
>
> I feel that this claim should have been unnecessary and could have been settled back in September without myself and the court having to deal with it.

4. The Respondent say they were not copied into that application and had believed the matter was concluded. The Respondent wrote to the Tribunal in June 2020, after receipt of a notice for a hearing listed for the September 2020, asking why it had been listed. I can see the application filed with the Tribunal, but no evidence it was sent to the Respondent, by the Claimant. Despite various requests by the Respondent, and a long period of inactivity, the Tribunal did send a copy of the application to the Respondent on the 13.11.2021, as the Claimant appears, not to have done so. The Tribunal asked the Respond for their position by no later than the 13.12.2021. The Respondent therefore sought an extension to file a Response and did file a Response on the 13.12.2021.

5. I am satisfied on the evidence before me, the failure to file a Response to the application was caused by the failure of the Claimant to copy the Respondent into the application or send a copy thereafter. I therefore grant the extension to the Respondent to the 13.12.2021, if such a decision was not made, to give effect to the overriding objective and under my powers to extend time (Rule 5).

6. In the Response the Respondent says as follows,

> The Respondent would like to set out the background of this matter to assist the Tribunal.
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> The Claimant's employment was terminated on 21st September 2019 and records indicated that the Claimant had taken his accrued entitlement and no payment was due based on the standard company entitlement of 20 days plus 8 bank holidays, pro-rated. Unfortunately, the Respondent later realised that the Claimant's contract actually stipulated an entitlement of 25 days and 8 bank holidays.
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> The Respondent was contacted by ACAS in November 2019 and the Claimant claimed that he was owed 7.5 days and saw no reason that the company records would show zero holidays due. The Respondent had experienced personnel changes and manual records were being kept which resulted in a discrepancy and took time to resolve. The Respondent agreed internally to make payment of the £317.82.
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> At this point there was an instruction made internally within the Respondent company to make the required payment of £317.82 to the Claimant. Unfortunately, as a result of compulsory homeworking arrangements due to COVID-19, communications internally were not so communicated and as a result of this lack of communication internally this instruction to pay the Claimant the amount that was due was not actioned internally and the Claimant brought a claim for outstanding holiday by way of a claim to the Employment Tribunal.
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> The Respondent is apologetic for this failure to make payment, but like many businesses during this period, including the Tribunal itself, was short-staffed and those that were working were working from home and this caused a breakdown in communications internally.

The Respondent contacted the tribunal again on 6th April 2020 and 13th May 2020 to ascertain if there had been an update on this matter. A response from the Tribunal was received dated 14th May 2020 in which Judge Hughes directed that if the Respondent was willing to pay the Claimant, payment should be made to the Claimant and confirmed to the Tribunal.

Payment was made to the Claimant on 18 May 2020 and as instructed the Respondent confirmed this to the Tribunal by email.

Following the Judgment on 22nd May 2020 in which Judge Broughton confirmed that the liability elements of the Claimant's claims were dismissed upon withdrawal and the hearing date was vacated. The Judgment confirmed that the Claimant should make a formal application for a Preparation Time Order detailing precisely, what is claimed for and why within 14 days. This was the first time the Respondent had seen any mention of a Preparation Time Order.

The Respondent was informed that it would have 14 days to respond to any application following receipt of such application.

The Respondent received numerous pieces of correspondence by email from the Tribunal dated 10th September 2020 which referenced the Claimant's application for a Preparation Time Order requesting the Respondent to respond by 24 September 2020 in writing if it was happy for the application to be dealt with in writing rather than a hearing.

The Respondent understands from the correspondence that it has received from the Tribunal on 10 September 2020 that the Claimant contacted the Tribunal on 28 May 2020 and 01 June 2020 with details of the application, however the Respondent was not copied into the correspondence.

The Respondent received no further correspondence on this case until 03 September 2021 directed by Legal Officer Metcalf asking the Claimant and the Respondent to confirm if this case was settled. The Respondent replied on 10 September 2021 advising that they had not received from the Claimant or from the Tribunal a copy of the Claimant's application for a Preparation Time Order and therefore considered the case to be settled.

The Respondent received correspondence from the Tribunal dated 30 November 2021 along with a copy of the Claimant's Preparation Time Order.

The Respondent understands that costs do not "follow the event" in employment tribunals as they do in civil courts and that costs have traditionally been viewed as "the exception rather than the rule". The Respondent further understands that the Employment Tribunal may make a Preparation Time Order under Rule 75 of the Tribunals (Constitution and Rules of Procedure) Regulations 2013. The Respondent understands that for a Preparation Time Order to be awarded in this case the Respondent must have acted vexatiously, abusively, disruptively or otherwise unreasonably in conducting of the proceedings or had no reasonable prospect of success in any claim made in the proceedings.

Although the Respondent made an error in not actioning payment of the amount outstanding it has not acted in such a way as described above and it has not brought or conducted any proceedings. As soon as the Respondent was made aware by the Tribunal it could simply make payment of the outstanding sum and the claim would be settled it did so. The Respondent considers that the Claimant could have chased the Respondent for payment of the outstanding sum following early conciliation, but at no point did he choose to do so and instead swiftly proceeded to lodge an Employment Tribunal claim instead. The Respondent was dealing with the matter in challenging circumstances as a result of COVID-19 impacting its staffing resources and having an effect on its internal communications as a result of those involved in actioning the payment working from home.

> At no point did the Respondent proceed with a defence that had no prospects of success it simply waited for the Tribunal to confirm it could simply make payment to end the claim and it did so swiftly thereafter.
>
> The Respondent does not consider that its actions have been vexatious, abusive, disruptive or unreasonable and avers that the application of the Claimant for a Preparation Time Order should fail.

7. The fundamental principle remains that costs are the exception rather than the rule, and that costs do not follow the event in Employment tribunals (see *Gee v Shell UK Ltd [2002] EWCA Civ 1479*, *[2003] IRLR 82, at paragraphs 22, 35*; *Lodwick v Southwark London Borough Council [2004] EWCA Civ 306*, *[2004] ICR 884, at paragraphs 23–27*; *McPherson v BNP Paribas (London Branch) [2004] EWCA Civ 569*, *[2004] ICR 1398, at paragraphs 2*; *Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255*, *[2012] IRLR 78, at paragraph 7*).

8. The potential grounds for making costs orders fall into two categories:

   (a) a party (or his 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 (SI 2013/1237 Schedule 1 r 76(1)).

9. I take into account the status of the litigant as a lay representative of the Respondent business, who I accept should not be judged by the professional standards of a legal advisor or other professional, see *AQ Ltd v Holden [2012] IRLR 648, EAT*, paragraphs 32. This does not mean the Respondent are immune from costs if found to have behaved "vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity" (paragraph 33 *Holden).*

10. The Claimant does not identify what ground is being pursued. I agree with the Respondent, they have not sought to challenge the fact they owed the Claimant the holiday pay in any Response and so it cannot be said to fall within (b) above. The reality is the Claimant complains they should have made the payment sooner and this would have meant time was not spent on preparing for the case. There is no evidence or suggestion the Respondent acted vexatiously, abusively or disruptively. Their response to the application explains the administrative errors regarding the failure to make the payment, their lack of understanding as to how to resolve the claim prior to the payment being made and their correspondence with the Tribunal. From the information I have seen the summary by the Respondent of their correspondence with the Tribunal is accurate.

11. The failure of the Respondent to make the payment prior to the claim being lodged, or put another way, that conduct, is not conduct envisaged within (a) above because it is not the conduct of a party in bringing or defending a claim, or continuing to pursue the claim or defence (see *Davidson v John Calder (Publishers) Ltd and Calder Educational Trust Ltd [1985] IRLR*

97, [1985] ICR 143, EAT). It may be relevant to what happened thereafter but it is not conduct that an award can be founded upon.

12. I accept the period from the January 2020 onwards was a difficult and exceptional time caused by the Covid Pandemic. It was the first time business had to address the impact of the spread of, a then much unknown virus, on their workforce and business and led to the national lockdown on the 23 March 2020. The claim was lodged on the 27 December 2019, and so just as the difficulties with this virus were beginning to emerge. The virus is not a complete explanation for any administrative oversight on the part of the Respondent, but it is a partial one for this first period from lodging the claim through to May 2020, when they sought to understand the next step. I have considered what the Respondent has said about his failure to make the payment after the proceedings were issued.

13. As explained in *Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255 at paragraph 40*

    '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 if had'.

14. I am satisfied the Respondent had written to the Tribunal to try and ask for guidance as to how to resolve the claim on two separate occasions on the 06.05.2020 and the 13.05.2020 and after the Tribunal asked if they were willing to make the payment, the Respondent did make the payment. I am being asked to assess this matter on the documentary evidence filed. Neither side has filed any formal witness statements. Standing back and looking at the overall picture, I find the evidence does not show the Respondent acted unreasonably in the way they have conducted themselves during these proceedings. They acknowledge the administrative failings and I accept, absent any evidence to the contrary, they have no prior experience of handling Employment Tribunal claims. They were proactive contacting the Tribunal in May once the initial lockdown period had ended and at no stage post claim, did they seek to suggest they were not willing to make the payment. I can understand the Claimant's sense of frustration from the lack of prompt payment but I take into account this was not an intentional default and the Respondent was seeking to resolve it.

15. On that basis, the application for a Preparation Time Order is dismissed.

Employment Judge **Mensah**
15.09.2022

Notes:
Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

