# EMPLOYMENT TRIBUNALS

**Claimant:** Mr. T Baker

**Respondent:** Manpower UK Ltd

# JUDGMENT on PREPARATION TIME ORDER

Upon consideration of the claimant's application for a Preparation Time Order made on 12 October 2022 and determined without a hearing.

The claimant's application for a Preparation Time Order is refused and accordingly is dismissed.

# REASONS

**Application**

1. By email received at the tribunal on 12 October 2022, and copied to the respondent, the claimant made an application for a Preparation Time Order ("PTO"). No grounds were included in this email.

2. The tribunal wrote to the claimant on 9 December 2022 requesting reasons why the PTO should be granted. The claimant replied by email on 12 December 2022 (and copied to the respondent) indicating the following reasons:
   a. That the respondent's representative would have received payment from the respondent and therefore the claimant should be paid too. In the claimant's own words, "*I would like the same as I was unrepresented and by doing this I mitigated the respondents loss as I would of applied for these fees to be paid*."
   b. The respondent knowingly defended a claim they were always going to lose. By not agreeing settlement outside of tribunal it has resulted in unnecessary proceedings.

3. The claimant has not been legally represented. The application is for 10 hours of preparation time at £42 per hour, totalling £420.00.

4. The respondent by email on 19 October 2022, and copied to the claimant, states there are no grounds for making a PTO and, in any event, no order should be made in circumstances where:
   a. The tribunal found that no holiday pay was in fact due to the claimant and made no award;
   b. The claimant persisted with his claim for some eight and a half months after the holiday pay was paid to him;
   c. The claimant simply seeks to penalise the respondent for a perceived delay in paying the holiday pay; and
   d. The claimant has failed to quantify the preparation time spent.

5. Further by email on 12 December 2022 (and copied to the claimant) the respondent states that the respondent should not be punished for paying the claimant his holiday pay late.

6. The tribunal wrote to the respondent on 6 January 2023 noting the content of the emails in the paragraphs above and asking the respondent whether it wanted to put forward any other reasons why the PTO should not be granted. By email on 13 January 2023 the respondent further states there is zero evidence of the rule 76(1)(a) threshold being crossed (nor do they consider the Claimant alleges any such conduct). This email further states that nor can the respondent's defence of the claim be criticised as having no reasonable prospect of success in circumstances where just three weeks prior to the final hearing the claimant was served an unless order requiring him to give further particulars of his claim.

**Relevant background facts**

7. By a claim form received at the tribunal on 11 January 2022 the claimant brought a claim against the respondent for failure to pay holiday pay stating that he had not been paid for the correct amount of holiday days. The claimant did not indicate how many days' holiday pay he was owed by the respondent in the claim form.

8. The tribunal wrote to the claimant on 22 September 2022 ordering the claimant to provide better particulars of his claim for holiday pay failing which his claim would be struck out (the Unless Order). The claimant confirmed by email (and copied to the Respondent) on 30 September 2022 that he was claiming 21 days' holiday pay. The case came before the tribunal on 12 October 2022 for a 3-hour hearing, via the Video Hearings service.

9. Judgment and reasons were given orally by me on 12 October 2022 and the claimant's claim for unlawful deductions from wages for failure to pay holiday pay was successful, but I made no financial award. In the reasons I made clear that as at the date of presenting the claim the claimant was owed 8 days' holiday pay by the respondent. The judgment also stated that the respondent had subsequently paid the claimant. This payment was made via the respondent's payroll at the beginning of February 2022

after the claim form had been received by the tribunal, but prior to the hearing date. In the reasons I found that this subsequent payment was more than what the claimant was owed and that it was holiday pay. I did not, therefore, award any sum for unlawful deductions from wages to the claimant.

## Relevant law

10. The employment tribunal is a different jurisdiction to the county court or high court. In those jurisdictions the normal principle is that "costs follow the event", or in other words, the loser pays the winner's costs. That is not the position in the employment tribunal.

11. The Employment Tribunals Rules 2013 contain the relevant rules to be applied by employment tribunals, and for present purposes these are as follows:
    a. Rule 76 (1) A tribunal may make a costs order or a preparation time order (PTO) 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) had been conducted; or (b) any claim or response had no reasonable prospect of success.
    b. The power to make a PTO is contained in rule 76 (coupled with rule 75(2)). The grounds for making a PTO are identical to the grounds for making a general costs order against a party under rule 75(1)(a). Preparation time means 'time spent by the receiving party in working on the case, except for time spent at the final hearing' — rule 75(2). A PTO is defined by rule 75(2) as 'an order that a party… make a payment to another party… in respect of [that other] party's preparation time while not legally represented'. The hourly rate of a lay representative is capped (as at 6 April 2018) at £38 (increasing by £1 each year on 6 April for the purpose of assessing costs under a costs order). This is the same hourly rate that applies for the purpose of assessing preparation time.
    c. Under rule 76(2) of the Employment Tribunals Rules a tribunal has the discretionary power to make a costs order or PTO against a party who has breached an order or Practice Direction.
    d. Rule 77 - A party may apply for a costs order or a PTO at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party, was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the tribunal may order) in response to the application.
    e. Rule 84 - In deciding whether to make a costs, preparation time or wasted costs order and if so in what amount, the tribunal may have regard to the paying party's ability to pay.

12. The claimant's application in the present case is not made expressly on any of the grounds in rule 76 above. The claimant's first reason for requesting a PTO does not fall within any of the grounds in Rule 76 above. The claimant's second reason appears to be alleging the grounds under either Rule 76(1)(a) or Rule 76(1)(b) above.

13. Costs orders and PTOs in employment tribunals have long been, and remain, the exception rather than the norm. Lord Justice Sedley in **Gee v Shell UK Limited [2002] IRLR 82** stated as follows:

> *"A very important feature of the employment jurisdiction is that it is designed to be accessible to people without the need of lawyers, and that – in sharp distinction from ordinary litigation in the United Kingdom – losing does not ordinarily mean paying the other side's costs."*

14. That said, the facts of a case need not be exceptional for a costs order or PTO to be made. The question is whether the relevant test is satisfied (**Vaughan v London Borough of Lewisham and others [2013] IRLR 713**).

15. The discretion afforded to a tribunal to make an award of costs or PTO must be exercised judicially (**Doyle v North West London Hospitals NHS Trust UKEAT/0271/11/RN**. The tribunal must take into account all of the relevant matters and circumstances. The tribunal must not treat costs orders and PTOs as merely ancillary and not requiring the same detailed reasons as more substantive issues. Costs and PTOs are intended to be compensatory and not punitive.

16. The EAT in **Haydar v Pennine Acute NHS Trust UKEAT/0141/17** held that the determination of a costs application (which is also relevant to the determination of a PTO application) is essentially a three-stage process (per Simler J at [25]) (emphasis added):

> *"The words of the Rules are clear and require no gloss as the Court of Appeal has emphasised. They make clear (as is common ground) that there is, in effect, a three-stage process to awarding costs. The first stage - **stage one** - is to ask whether the trigger for making a costs order has been established either because a party or his representative has behaved unreasonably, abusively, disruptively or vexatiously in bringing or conducting the proceedings or part of them, or because the claim [or response] had no reasonable prospects of success. The trigger, if it is satisfied, is a necessary but not sufficient condition for an award of costs. Simply because the costs jurisdiction is engaged, does not mean that costs will automatically follow. This is because, at the second stage - **stage two** - the Tribunal must consider whether to exercise its discretion to make an award of costs. The discretion is broad and unfettered. The third stage - **stage three** - only arises if the Tribunal decides to exercise its discretion to make an award of costs, and involves assessing the amount of costs to be ordered in accordance with Rule 78."*

17. For the purposes of rule 76(1)(a) above, "unreasonable" has its ordinary meaning; it is not equivalent to "vexatious" (**Dyer v Secretary of State for Employment UKEAT/183/83**).

18. In **Yerraklava v Barnsley MBC [2012] IRLR 78** Mummery LJ gave the following guidance at [41] including as to the question of causation in the context of unreasonable conduct and related costs or PTO claimed:

> *"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 … and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in McPherson was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances."*

*Stage one of the Haydar process*

19. On the question of a response having no reasonable prospect of success, for the purposes of rule 76(1)(b), under the previous tribunal rules, a "misconceived" response was synonymous with a response having no reasonable prospect of success.

20. In **Scott v Inland Revenue Commissioners [2004] ICR 1410, CA,** Lord Justice Sedley observed that "misconceived" for the purposes of costs (and PTOs) under the Employment Tribunals Rules 2004 included "having no reasonable prospect of success" and clarified that the key question in this regard is not whether a party thought he or she was in the right, but whether he or she had reasonable grounds for doing so.

21. In **Radia v Jefferies International Ltd [2020] IRLR 431** the EAT gave guidance on how tribunals should approach costs and PTO applications under rule 76(1)(b). It emphasised that the test is whether the claim or response had no reasonable prospect of success, judged on the basis of the information that was known or reasonably available at the start. Thus, the tribunal must consider how, at that earlier point, the prospects of success in a trial that was yet to take place would have looked. In doing so, it should take account of any information it has gained, and evidence it has seen, by virtue of having heard the case, that may properly cast light back on that question, but it should not have regard to information or evidence which would not have been available at that earlier time.

22. The EAT went on in **Radia** to clarify that the mere existence of factual disputes in the case, which could only be resolved by hearing evidence

and finding facts, does not necessarily mean that the tribunal cannot properly conclude that the claim or response had no reasonable prospects from the outset, or that the respondent could or should have appreciated this from the outset. That still depends on what the respondent knew, or ought to have known, were the true facts, and what view the respondent could reasonably have taken of the prospects of the response in light of those facts.

23. In **Radia** the EAT also considered the overlap between a claim or response having no reasonable prospect of success and unreasonable conduct and stated as follows at [64]:

> *"This means that, in practice, where costs are sought both through the r 76(1)(a) and the r 76(1)(b) route, and the conduct said to be unreasonable under (a) is the bringing, or continuation, of claims which had no reasonable prospect of success, the key issues for overall consideration by the Tribunal will, in either case, likely be the same (though there may be other considerations, of course, in particular at the second stage). Did the [response], in fact, have no reasonable prospect of success? If so, did the [respondent] in fact know or appreciate that? If not, ought they, reasonably, to have known or appreciated that?*

*Stage two of the Haydar process*

24. In terms of the more general exercise of discretion at the second stage, the fact that a party is unrepresented is a relevant consideration. The threshold tests may be the same whether a party is represented or not, but the application of those tests should take account of whether a litigant has been professionally represented or not (**Omi v Unison UKEAT/0370/14/LA**).

25. The means of a paying party in any costs award may be considered twice – first in considering whether to make an award of costs and secondly if an award is to be made, in deciding how much should be awarded. If means are to be taken into account, the tribunal should set out its findings about ability to pay and say what impact this has had on the decision whether to award costs or an amount of costs (**Jilley v Birmingham & Solihull Mental Health NHS Trust UKEAT/0584/06**).

**Conclusions**

26. Having considered the law above against the claimant's application, I have concluded that the claimant has not overcome the hurdle of establishing, for the purposes of his application for a PTO, that the respondent acted unreasonably or vexatiously in the conduct of the proceedings or that its response had no reasonable prospect of success.

27. I have concluded this because:
    a. When the claimant presented his claim he stated in the claim form that he had not been paid the correct amount of holiday

days, but he did not specify how many days he claimed he was owed by the respondent.

b. It was in response to the Unless Order that the claimant specified the number of holiday days he was claiming.
c. In the claimant's email dated 30 September 2022 he confirmed he was claiming 21 days' holiday pay, at the hearing I concluded that as at the date of presenting his claim form he was owed 8 days' holiday pay.
d. The respondent had paid holiday pay to the claimant subsequent to the claimant presenting his claim at the tribunal. I also concluded at the hearing on 12 October 2022 that this exceeded the amount that was owed to the claimant for the 8 days' holiday pay.
e. No financial award was made to the claimant at the hearing,

28. Consequently, for the reasons given above, I conclude that the threshold required by the rules to demonstrate vexatious or unreasonable behaviour or that the response had no reasonable prospect of success is not reached. Therefore, the claimant's application for a PTO fails at the first stage and there is, strictly, no need for me to consider the second or third stages of the process.

29. I do not need to consider the second stage, but even if the threshold had been reached in the first stage, I would not in any event exercise my broad discretion in the claimant's favour. Costs and PTOs remain the exception rather than the rule, they are intended to be compensatory (not to punish the party) and the fact that the respondent did pay the claimant more holiday pay than what the claimant was owed two to three weeks after the claimant presented his claim form would all mean I would not have exercised my discretion in the claimant's favour.

30. The claimant's application for a PTO is refused and is dismissed accordingly.

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Employment Judge Macey

Date: 24 January 2023