



EMPLOYMENT TRIBUNALS

Claimant: Mr Aaron Sunter

Respondent: Buildakit (UK) Ltd

Heard at: Manchester (in chambers) **On:** 20 February 2023

Before: Employment Judge Poynton

JUDGMENT RESPONDENT'S APPLICATION FOR A PREPARATION TIME ORDER

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

REASONS

Introduction

1. The Claimant brought a claim of unfair (constructive) dismissal and unlawful deductions from wages following his resignation from the respondent on 31 October 2021. The Claimant relied on the Respondent purportedly breaching the implied term of mutual trust and confidence in the contract of employment, with acts that were individually or cumulatively sufficient for him to treat the contract of employment as broken entitling him to resign.
2. The Claimant relied on four events as breaches of the contract of employment:
 - a. In early April 2020, the Claimant shared some concerns that other colleagues had brought to his attention via a WhatsApp group. The Claimant spoke with Mr Richardson on behalf of the Respondent and felt that his concerns were not listened to and were not addressed. The Claimant received a letter from Mrs Richardson on behalf of the Respondent in relation to this incident and felt that he was not given opportunity to discuss this further.

- b. On 1 July 2020, the Claimant installed a sign during the course of his employment. It transpired that the sign had been installed incorrectly or in the wrong location. The Claimant believed that he had installed the sign according to the instructions given to him by Mr Richardson. The Claimant and Mr Richardson had an exchange when the Claimant arrived at work on 2 July 2020. The Claimant understood that Mr Richardson was requesting that he move the sign at the weekend. The Claimant considered this to be an unreasonable request and felt that the exchange was intimidating. He left the premises following the exchange.
 - c. On 6 September 2021, the Claimant was injured at work. The Claimant attended hospital. The Claimant felt pressured to return to work and returned on 7 September 2021. The Claimant was absent from work on 8 September 2021 and returned to work on 9 September 2021. The Claimant felt that he was being pressured to return to work and carry out tasks that were not appropriate given the injuries he had sustained.
 - d. On 24 September 2021, the Claimant had an operation and was off work from this date onwards. The Claimant's position is that there was an agreement between him and the Respondent that he would be paid 2 weeks' contractual pay during this period of absence. The Claimant was paid Statutory Sick Pay for the entire period of his absence.
3. The Respondent defended the claim on the basis that its treatment did not amount to a fundamental breach of the implied term of trust and confidence, or in the alternative, that any breach was waived by the Claimant. The Respondent also stated that the Claimant was planning to resign in any event and that the Respondent's conduct was not the reason for the Claimant's resignation.
 4. The final hearing of Claimant's claims was heard on 6-7 October 2022. All evidence and submissions were heard at that hearing. I gave a reserved judgment following the hearing dismissing the Claimant's claim for constructive dismissal and unlawful deductions from wages. The reserved judgment was sent to the parties on 30 November 2022.

Respondent's application

5. In a letter dated 19 December 2022, the Respondent made an application for costs or a preparation time order in the sum of £5,606.74. The application was made under Rule 76 of the Employment Tribunal Rules of Procedure 2013 on the basis that (1) the Claimant's claims had no reasonable prospects of success (Rule 76(1)(b)) and (2) that the Claimant acted vexatiously in bringing the claim in an attempt to intimidate the Respondent into withdrawing a separate claim made against the Claimant for recovery of training fees (Rule 76(1)(a)). The Respondent was not legally represented in the claim. Whilst the Respondent's application refers to both costs and a preparation time order, the premise of the application is for a preparation time order as the Respondent was not legally

represented and the application is for time spent in preparing for the final hearing.

Claimant's response to the application

6. The Claimant, having been supplied with the Respondent's application, responded to the Tribunal in an email dated 1 February 2023. He stated that he believes that he has conducted himself with honesty and integrity and that he has always followed the instructions of the Tribunal. He also stated that he sought advice from ACAS and that at no point was he advised that his claim had little or no chance of success.

Determination on paper

7. 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. Having considered the correspondence from both parties and taking into account the overriding objective, it is proportionate and in the interests of justice to provide my decision without the need for a hearing.

The Law

8. Unlike the general procedure in Civil Courts, costs do not "follow the event" in Employment Tribunals. Traditionally, Employment Tribunals have allowed employees to challenge the fairness of dismissals, or other matters within the jurisdiction of the Employment Tribunals, without a threat of costs in the event that a claim is unsuccessful and also for employers to respond to claims, without a threat of costs in the event that a claimant is successful. As the Court of Appeal reiterated in **Yerrakalva v Barnsley MBC [2012] IRLR 78**, costs in the Employment 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.
9. The Tribunal Rules provide Tribunals with the power to award costs or a preparation time order in the circumstances set out in those Rules.
10. 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 preparation time under Rules 74-79. They cannot claim for time spent at any final hearing (Rule 75(2)).
11. The Rules which are relevant to the Respondent's application state as follows:

When a costs order or a preparation time order may or shall be made

76. – (1) 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.....*

Procedure

77. A party may apply for a costs order or a preparation time order 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.

The amount of a preparation time order

79. – (1) The Tribunal shall decide the number of hours in respect of which a preparation time order should be made on the basis of –

- a. *information provided by the receiving party on time spent falling within rule 75(2) above; and*
- b. *the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required.*

(2) The hourly rate is £33 and increases on 6 April each year by £1.

(3) The amount of a preparation time order shall be the product of the number of hours assessed under paragraph (1) and the rate under paragraph (2).

Ability to pay

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 (or where a wasted costs order is made, the representative's) ability to pay.

12. It is important to note 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. 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 the Tribunal's 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**).

Conclusion

14. Rule 76 obliges a Tribunal to apply a two-stage test to consider: (1) whether there has been conduct as set out in Rule 76(1)(a) or if the claim had no reasonable prospects of success as set out in Rule 76(1)(b). If either of those two tests is met, it is then necessary to decide if it is appropriate to make an order. In relation to an application under Rule 76(1)(b) (no reasonable prospect of success), this test should be considered on the basis of the information that was known or reasonably available at the start of proceedings (**Radia v Jefferies International Limited UKEAT/007/18/JOJ**). Whilst I found against the Claimant, that finding was made on the basis of me having heard and considered the evidence before me. The judgment in **Radia** makes clear that the no reasonable prospects test must be applied as things would have looked at the start of the case, not with the benefit of hindsight when all findings of fact have been made.
15. Dealing with the first stage, the Respondent relies on the Claimant's claim having no reasonable prospects of success and that the Claimant acted vexatiously in bringing the claim in an attempt to intimidate the Respondent into withdrawing a separate claim made against the Claimant for recovery of training fees. Meanwhile, the Claimant does not accept that he has behaved in a manner prescribed by the Rules. He relies on his own beliefs at the time, as well as advice from ACAS.
16. I have considered both parties' submissions in relation to the Claimant's conduct. The Claimant believed that the Respondent's conduct amounted to either individual or collective breaches of the implied term of trust and confidence and that he was entitled to treat himself as constructively dismissed. In relation to the unlawful deduction of wages, the Claimant believed that the Respondent had agreed to pay him his contractual rate of pay for a period of absence due to illness. I conclude that the Claimant did not act vexatiously in bringing his claims.
17. In the factual findings at the final hearing, the Claimant's contentions, as described at paragraph 2, were not found to satisfy the legal test to amount to a repudiatory breach of the contract, either individually or cumulatively, as required in **Malik v BCCI [1997] IRLR 462** and **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978**. The Claimant's claim for constructive dismissal therefore failed.
18. Nevertheless, I accepted the Claimant's evidence and that he, subjectively at least, felt aggrieved by the incidents on which he relied. It follows that whilst the Claimant's case did not pass the threshold to amount, objectively, to sufficient cause to destroy or seriously damage the implied term of trust and confidence, there were issues upon which the Tribunal understood the Claimant's sense of grievance about the claim for constructive dismissal and the claim for unlawful deduction of wages. The Claimant considered that his claims had reasonable prospects of success and was entitled to pursue his claims. His claims failed because the findings of fact went against him. In conclusion, I am satisfied that

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it cannot be said that the Claimant had no reasonable prospects of success in bringing his claims.

19. As the threshold in Rule 76(1)(a) and/or (b) has not been met, I do not need to go on to consider whether a preparation time order should be made.

Employment Judge Poynton

Date 20 February 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

24 February 2023

FOR THE TRIBUNAL OFFICE