



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss Evie P Skentelbury

**Respondent:** Fresh Perspective Resourcing Limited

**Heard at:** Manchester (In Chambers)

**On:** 21 February 2022

**Before:** Employment Judge Wheat (sitting alone)

## Representation

Claimant:

Respondent:

**UPON APPLICATION** made by the claimant via her lay representative by emailed letter dated 1 December 2022 to reconsider the judgment dated 14 November 2022 under rule 71 of the Employment Tribunals Rules of Procedure 2013 ('the Rules'):

## JUDGMENT

1. The claimant's application to reconsider the 'commission' element of the original claim was refused under rule 72 of the Rules.
2. The claimant's application to reconsider the application for a Preparation Time Order was granted, the original decision is confirmed, and no order is made.
3. The respondent's application for a Preparation Time Order arising out of the claimant's reconsideration application is refused.

## REASONS

### Background and Chronology

1. The claimant's claims were heard at a final hearing on 4 and 17 October 2022.

2. At the conclusion of the final hearing, both parties made an application for a Preparation Time Order. The Tribunal did not make any awards.
3. At the claimant's lay representative's request, judgment was accompanied by written reasons (dated 14 November 2022).

Commission

4. By email dated 1 December 2022, the claimant's lay representative requested reconsideration of the 'commission' element of the original claim, which was dismissed at the final hearing on 17 October 2022.
5. In relation to the application to reconsider the 'commission' element, I was satisfied that there was no real prospect of the original decision being varied or revoked and refused the application under rule 72 of the Rules. This was on the basis that the application sought to revisit the evidence heard, upon which findings of fact were properly reached. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation and a reconsideration should not be used to attempt 'another bite at the cherry' (as set out in the case of **Liddington v 2Gether NHS Foundation Trust EAT/0002/16**). It was not in the interests of justice to allow the application.

Claimant's original Preparation Time Order application

6. In the same email from her lay representative, the claimant also requested reconsideration of the decision not to award 'costs' (in fact, a Preparation Time Order) at the conclusion of the final hearing on 17 October 2022.
7. The claimant's representative did not send a copy of the application to reconsider to the respondent or their representative, as is required in rule 71.
8. The parties were informed by letter dated 22 December 2022 that I proposed to deal with the application to reconsider the decision on the 'costs' element on the papers without a hearing in accordance with rule 72(2). Parties were directed to make written representations no later than 19 January 2023.
9. The parties were also informed that it was my provisional view that the grounds for making an award had arisen under rule 76(1)(b)), therefore, the focus for reconsideration was likely to be on the second and third 'Haydar' stages. (As set out at paragraph 51 of the Judgment and Reasons dated 14 November 2022)
10. The respondent's representative submitted written representations at 23.59 on 19 January 2023.
11. The claimant's representative submitted documentation on 20 January 2023, at 08.15, which included an undated statement from the claimant entitled 'Costs Claim Statement'. He later resubmitted the part of the email

dated 1 December 2022 which related to the application to reconsider the 'costs' element.

12. The respondent's representative submitted further representations via emails on 23 January 2023, including a document entitled 'Costs Counter Claim' in which an application for 'costs' (a Preparation Time Order) arising from the claimant's application for reconsideration was made.
13. This was an application made on behalf of the claimant by her lay representative to reconsider the decision not to award a Preparation Time Order, in relation to the part of her original claim that concerned an alleged unlawful deduction of wages in the form of a final salary payment of £1269.23. This part of her claim was dismissed upon withdrawal at the final hearing on 4 October 2022, the amount having been paid by the respondent after a preliminary case management hearing which took place on 6 June 2022.
14. In summary, the application is for reconsideration of the Tribunal's conclusion that '*no claim or response was without reasonable prospect of success*', which led to no award being made. The application is brought on the basis that rule 76(1)b was triggered (i.e., that the response had no reasonable prospect of success) by the 'preliminary findings' detailed in a Case Management Order dated 6 June 2022 in which Employment Judge Doyle recorded: '*The respondent accepts that it has no legal basis for withholding wages, commission or holiday pay (so far as properly payable) as a negotiation position regarding the LinkedIn account dispute.*'
15. In addition, the application for reconsideration states that the respondent 'had professional representation who confirmed there was no lawful right to withhold the claimant's wages.'
16. Although the application refers to rule 76(1)a being triggered, I have taken this to be a typographical error and that it should have referred to rule 76(1)b, given that it clearly states there is no challenge to the findings relating to the conduct of the parties.
17. The respondent's HR representative has submitted written responses on behalf of the respondent. In summary, the first written response, sent 19 January 2023, asserts that the claimant's application is unclear as to how it aligns with the quoted paragraph 59 of the Judgment; that no orders or findings were made at the preliminary hearing on 6 June 2022. The response rejects the contention that a professional representative confirmed the respondent had no lawful right to withhold wages. The response also highlights that the reconsideration application was not sent to the respondent or their representative in accordance with rule 71, and it doesn't set out why it would be in the interests of justice to reconsider the decision. A further response dated 23 January 2023 pointed out that the claimant had made their further written submissions out of time, which, it stated, was grossly unfair, not in line with the overriding objective and not

in the interests of justice. In addition, that no claim was ever made for the 'withholding of wages' and no evidence was heard on that issue.

### **Evidence and Documents Considered**

18. I had regard to the written applications of the claimant and respondent, and the written submissions of the parties with accompanying documentation.
19. I referred back to the Judgment and Reasons dated 14 November 2022.
20. I had regard to the parties' original submissions and documentation on the issue of Preparation Time Orders.
21. No evidence was heard as the matter was dealt with on the papers.

### **The Law**

22. Rule 2 sets out the overriding objective: to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable— (a) ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense. A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.
23. An application for reconsideration is an exception to the general principle that (subject to appeal on a point of law) a decision of an Employment Tribunal is final.
24. Rules 70 to 73 govern the principles, application and process for reconsideration. The test is whether it is necessary in the interests of justice to reconsider the judgment (rule 70).
25. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again (rule 70).
26. Rule 72 provides that the notice to parties may set out the Judge's preliminary view on the application.
27. The rules in relation to Preparation Time Orders are set out at rules 74 to 79.
28. The procedure and considerations relevant to this application are dealt with at paragraphs 47 to 54 of the Judgment and Reasons dated 14 November 2022.

29. It follows from the Rules that the Tribunal must go through a three-stage procedure (see paragraph 25 of *Haydar v Pennine Acute NHS Trust* UKEAT 0141/17/BA). The first stage is to decide whether the power to award costs/preparation time has arisen, whether by way of unreasonable conduct or otherwise under rule 76; if so, the second stage is to decide whether to make an award, and if so the third stage is to decide how much to award. Ability to pay may be taken into account at the second and/or third stage.
30. The case law on the awarding of costs/preparation time orders (and their predecessors in the 2004 Rules of Procedure) includes confirmation that the award of costs/preparation time orders is the exception rather than the rule in Employment Tribunal proceedings; that was acknowledged in **Gee v Shell UK Limited [2003] IRLR 82. 8.**
31. I again had regard to the case of **Kopel v Safeway Stores plc 2003 IRLR 753 EAT**, that a claimant's refusal of an offer of settlement was a factor that a tribunal could take into account in deciding whether to award costs.

## Conclusion

### Application for Reconsideration

32. I considered the first preliminary point raised by the respondent in their written submissions, namely that the claimant did not send a copy of their application for reconsideration to the respondent in accordance with the Rules. Bearing in mind the overriding objective set out above, with emphasis on dealing with cases in a proportionate way and avoiding delay, I considered that the respondent has had adequate time, once notified by the Tribunal of the application, to provide written submissions, and has indeed done so.
33. The second preliminary point made by the respondent concerns the claimant providing their written submissions out of time, on 20 January 2023, at 08.15am, when the Tribunal had set the deadline as 19 January 2023. The Tribunal did not direct that one party must make their submissions before the other. I note the respondent's own submissions were sent at 23.59 on 19 January 2023, which, whilst in accordance with rule 4, meant that there was only an 8-hour difference in the submissions from both parties being received. In addition, both parties have sent in further submissions and documentation beyond the date fixed by the Tribunal. In these circumstances, I do not find that the respondent had been placed at any material disadvantage or that to proceed would not be in the interests of justice.
34. I am satisfied that it is in the interests of justice to reconsider my decision regarding an award, to the claimant, of a Preparation Time Order. I have already notified the parties, in writing, in accordance with rule 72, of my provisional view as follows: *'The parties should note that it is my provisional view that the grounds for making an award on this point have arisen (under Rule 76(1)b)), therefore, the focus for reconsideration is likely to be on the*

*second and third 'Haydar' stages, as set out in para 51 of my decision."*

35. I maintain that view. The original decision did not properly consider the factors which were pertinent to rule 76(1) b. The claimant's original application for a Preparation Time Order was limited to the part of the original claim for an unauthorised deduction from wages of the claimant's final salary payment and further limited to the date of the preliminary hearing, as the agreed final salary payment amount was subsequently paid by the respondent to the claimant. The original claim was properly detailed in the claimant's ET1.

36. I agree with the respondent that Employment Judge Doyle did not make any findings, orders or directions regarding that final salary payment at the preliminary hearing on 6 June 2022. However, he recorded the discussion which took place between himself and the parties and said:

*'...the Tribunal has no jurisdiction to resolve the dispute about the LinkedIn account (which may be a dispute about the property rights in its contents).'*

*'The respondent accepts that it has no legal basis for withholding wages, commission or holiday pay (so far as properly payable) **as a negotiation position regarding the LinkedIn account dispute.**'*

37. In the written representations for this application, the respondent submitted that *'it was never in dispute that the claimant was owed the withheld wages, but there was a breach of contract dispute ongoing.'*

38. After the discussion at the preliminary hearing, the agreed amount of final salary payment was made to the claimant by the respondent.

39. I agree with Employment Judge Doyle's analysis and find that I did not take proper account of the circumstances in considering whether to make an award on the basis that the response had no reasonable prospect of success. The grounds in rule 76(1)b had arisen in this case, the response to the claim for the final salary payment had no reasonable prospect of success. My original finding that the grounds under rule 76(1)b did not arise, was incorrect.

40. Having determined that the grounds under rule 76(1)b have arisen for the making of an award, (the first stage) I must next consider whether to exercise my discretion under rule 76 (the second stage).

41. I bore in mind the principle that an award is the exception rather than the rule in employment tribunal proceedings.

42. I took into account the number of offers made by the respondent to settle the case between 12 and 30 May 2021 before the claim was presented (see paragraph 58 of my Judgment and Reasons), as referenced in the respondent's written submissions dated 23 January 2023:

*'The Respondent tried on many occasions to offer settlement, and*

*amounts that went way beyond what would have been awarded if she had won – it was her choice not to accept settlement and proceed to a full hearing and take the risks associated with the process.'*

43. I concluded that it would not be proportionate, appropriate, or fair to award the claimant a Preparation Time Order when the respondent's repeated offers to settle in amounts up to £2200.00, prior to the claim being presented would have covered the totality of the claimant's claims, including her final salary payment, which amounted to £1269.23.
44. Therefore, the original decision not to award a Preparation Time Order is confirmed.

Respondent's Preparation Time Order application

45. There is also a counter 'costs' application in the sum of £205.00 (an application for a Preparation Time Order), made on behalf of the respondent by their HR representative. The 'costs' application is made on the basis that the grounds for making such an award have arisen under rule 76(1)a; that the claimant's/claimant's representative's behaviour in applying for the reconsideration of the original decision on 'costs' is vexatious, abusive, and unreasonable and a continuation of the way they have behaved throughout the proceedings. Also, that rule 76(1)b is engaged, in that the reconsideration application has no reasonable prospect of success because the part of the claim to which it refers was withdrawn by the Claimant in 'June/July'.
46. It would appear the application has been made on an anticipatory basis, in advance of the judgment on reconsideration being sent to the parties, which is a requirement of rule 77. It arises from the claimant's application for reconsideration and was received by the Tribunal on 23 January 2023 by email. The claimant's representative was also copied into the email.
47. Neither the claimant nor her representative have submitted written representations regarding the request to award a Preparation Time Order by the respondent.
48. With the overriding objective in mind, particularly in seeking to avoid further delay, and to deal with the issues in a proportionate way, I have considered the respondent's application for the award of a Preparation Time Order, despite it being made prior to judgment being sent and in the absence of any representations from the claimant.
49. I have found, as set out above, that it was in the interests of justice to reconsider the application to award a Preparation Time Order made by the claimant in the original proceedings, and further, I determined that the grounds under rule 76(1)b arose for the making of such an award. I did not then go on to exercise my discretion to make an award after taking into account the full circumstances and history of the case.

50. Given my findings on the claimant's application for reconsideration, I do not find that the claimant or their representative's behaviour in applying for a reconsideration fell into the category of behaviour that was vexatious, abusive or unreasonable. Equally, having found that grounds arose for the making of an award for a Preparation Time Order, it could not be said that it was an application that had no reasonable prospect of success.
51. As the grounds for the making of an award in favour of the respondent have therefore not arisen under rule 76(1) a or b, I was not required to move to the next stage of the procedure.
52. I do not make an award in favour of the respondent for a Preparation Time Order.

Employment Judge Wheat  
Date: 24 February 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON  
7 March 2023

FOR THE TRIBUNAL OFFICE

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