



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case Number: 4110531/2021**

**Hearing held in chambers in Glasgow on 1 March 2023**

5

**Employment Judge D Hoey**

**Members: F Paton and S Keir**

**Mr L Ramos**

**Claimant  
In Person**

10

**Lady Coco Ltd t/a Shamela's Fresh Hot and  
Cold Food**

**Respondent  
Represented by:  
Ms Yeo -  
Director**

15

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The claimant's application for a preparation time order against the respondent pursuant to email dated 15 September 2022 is refused, the requirements of Rule 86 not having been established in this case and it not being just to make the order sought.

20

### **REASONS**

1. This case has a lengthy procedural history. Following an oral judgment having been issued dismissing the claims and with a preparation time order having been made in the respondent's favour, the claimant sought a preparation time order against the respondent. The respondent was given the opportunity to make submissions and the matter was to be determined in chambers.

25

2. At the hearing the Tribunal had unanimously found that the claimant had raised the claim of sex discrimination against the respondent to seek money from them, following an unlawful advertisement that had been posted by the respondent which the claimant saw online. The Tribunal found that while the advertisement was unlawful the claimant had no genuine desire to apply for

30

the role. While he had claimed not to know the law, his submissions had made it clear that he fully understood the law. The claimant was intelligent and articulate and had shown an understanding of the law during the hearing.

### The application

5 3. Within an email sent to the Tribunal (on pages 7 and 8 of the attachment) during the hearing the claimant sought a preparation time order against the respondent.

4. In his original application he stated:

10 *“I would like to make a request that Judge Hoey changes his mind and not strike out my claim and award to me and not to the Respondent a preparation time order*

9. *I would like that Judge Hoey changes his mind and not strike out my claim and award to me and not to the Respondent a preparation time order*

15 9.1 *Judge Hoey in his oral examination has not put forward any evidence why I have acted unreasonably so that to award a preparation time order to the Respondent because we do not know what I have done wrong because to issue a claim because of a discriminatory advert is not bad conduct because*  
20 *it was up to the Respondent not to post it*

9.2 *However, we know what the Respondent has done wrong i.e. the five acts of bad conduct explained above*

25 9.3 *The only problem is that I do not live in Scotland and I would not have applied for the position but we have to take into account the difference in costs of living between London and Glasgow, that the position was near a “beautiful area” and that I was deterred from applying because the discriminatory contents of the advert as confirmed by an example in the “Explanatory Notes” of the Equality Act 2010*

5 9.4 *According to the Equality Act 2010 there is only one “shifting of the burden of proof” because the victim of discrimination has to prove that an advert requiring a female exists and then the burden of proof is shifted to the employer to prove that it has an “occupational requirement”*

10 9.5 *It is not fair that on addition of being a victim the victim has to go through the ordeal of proving also that it was interested in the position which is something which is difficult to prove with certainty because it is subjective. Hence, the “default position” is that it is up to the Respondent to prove its accusation because this issue is not regulated by the Equality Act 2010 because it does not make any reference to it*

15 9.6 *There is also the issue of fairness because it is not fair that not only the Respondent gets away with discrimination by having posted several discriminatory adverts and having committed four other acts of bad conduct and is also awarded a preparation time order”.*

5. On 10 November 2022 the claimant provided further information in support of his claim. He stated:

20 *“I request that a preparation time order of £286 is issued against the Respondent in my favour because the respondent misconducted by failing to comply with the two Disclosure Orders: this of Judge MacLean dated 09 August 2022 and this of Judge Hoey dated the 29 August 2022*

25 a) *For the Reason that this failure force me to do additional work because I have to send seven emails on the 09 August 2022, on the 15 August 2022, on the 25 August 2022, on the 29 August 2022, on the 31 August 2022 and two emails on the 06 September 2022 informing the tribunal that the Respondent has not complied with these two Disclosure Orders and requesting that the tribunal issued an Unless Order to force the Respondent to comply with them*

30

b) *I access to one hour work for each of these seven emails so I access the value of the additional work that I have to do to seven hours multiplied by £41 i.e. to £287 (7 x £41)*

5 c) *We notice that contrary to the Respondent who did not provide a breakdown of the work that it did when it requested that a preparation time order is issued on its favour , I provide a breakdown of the work that I have done concerning my request for a £287 preparation time order in my favour*

10 15. *It is in the interest of justice to revoke the order rejecting my claim and the £697 preparation time order imposed on me because these two orders were wrongly issued and because this will save the need to make a costly and lengthily appeal to the Employment Appeal Tribunal (EAT)*

15 16. *it is also in the interest of justice to accept my request for a £287 preparation time order in my favour concerning the fact that the Respondent did not comply with the two Disclosure Orders of the 09 August 2022 and of the 29 August 2022 so that the Respondent is deterred from not complying with the orders of the tribunal...”.*

### **The factual matrix**

20 6. On 9 August 2022 Employment Judge Maclean in correspondence directed to the parties stated that the respondent should send the claimant a copy of the advertisement relied upon by the claimant in support of his claim.

7. On 29 August 2022 the respondent was asked to confirm whether or not a copy of the advert had been issued to the claimant and if not why not.

25 8. The respondent's position was that they did not retain a copy of the advertisement and in any event at the case management preliminary hearing the respondent accepted that the terms of the advert as set out by the claimant were accurate. As the terms of the advert were accepted there was no prejudice to the claimant in the advert not being produced by the respondent (even if they had it). As the terms of the advert were agreed, the focus was in

relation to the claimant's position with regard to the role and the hearing was able to progress expeditiously.

### Law

- 5 9. In terms of rule 75 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 a preparation time order is an order where the paying party pays the receiving party for the preparation time when they were not legally represented (but not for the time spent at the final hearing). Rule 76 states that an order can be made if (a) the party acted vexatiously, abusively or otherwise unreasonably in the bringing of the
- 10 proceedings or in the way the proceedings were conducted or (b) where the claim had no reasonable prospects of success. Rule 77 states that the paying party must have a reasonable opportunity to make representations before an order is made.
- 15 10. The amount of a preparation time order is set out in rule 79 and is determined by the Tribunal assessing the number of hours spent preparing for the case when not represented and what the Tribunal considers is reasonable and proportionate with reference to the complexity of the proceedings and the documents required.
- 20 11. Rule 84 allows the Tribunal to have regard to the paying party's ability to pay.
12. Any sum awarded should be proportionate and not punitive. The amount should be no more than is proportionate to the loss caused by the unreasonable conduct.
- 25 13. In **Hossaine v EDS** 202 ICR 491 at paragraph 64 the court confirmed that a 3 stage process should be followed: is the threshold met for considering the making of an order, is it appropriate to make the order (applying discretion judicially) and finally how much should be awarded.
- 30 14. With regard to whether or not the claimant acted "otherwise unreasonably", the key question is whether the claimant acted unreasonably. It is not whether the Tribunal would have acted differently but whether the decision taken by the claimant was unreasonable in all the circumstances, which is a wide

objective test (See **Boden** EAT/246/18). A party litigant should be given greater latitude.

15. In **Daleside v Matthew** 2009 All ER (D) 99 it was noted that a claimant who has lied may be found to have acted unreasonably but that is not automatically the position. Similarly in **Kapoo** 2014 All ER D 261 the court noted that giving false evidence does not automatically mean the claimant acted unreasonably. The Tribunal should look at the whole picture and consider what happened in the case.
16. It is a question of fact whether conduct is unreasonable (**Arrowsmith v Nottingham** 2011 EWCA Civ 797).
17. Vexatious conduct is rare and the threshold to be vexatious is extremely high. To be unreasonable the claimant need not be aware of the nature of the conduct (since an objective assessment of the conduct and its effect should be considered within the full context). Vexation requires a degree of knowledge and so a claimant who pursues a claim knowing it is false or that it has no reasonable prospects or who acts with malice may be vexatious, but not necessarily so. A careful assessment of the full factual matrix should be carried out.
18. Whether or not a claim has reasonable prospects of success is looked at from the claimant's perspective at the time the claim is raised.

### Decision

19. The Tribunal firstly considered whether or not the jurisdiction to make the order had been engaged. The Tribunal was not satisfied any of the grounds that allow a preparation time order had been engaged.
20. The orders relied upon by the claimant which support his application relate to the requirement upon the respondent to produce the advertisement upon which the claimant's claim was based. The respondent's position was that they did not have a copy of the advert. In any event it was accepted that the advert relied upon by the claimant, in the terms set out by the claimant, was the advert upon which the claim was based and upon which the hearing

progressed. The claimant's assertions as to the what the advert said were accepted by the respondent. The respondent did not retain a copy of the advert and were in any event unable to produce it.

21. The Tribunal carefully considered the conduct of the respondent during the  
5 course of the proceedings, together with the orders issued and the approach taken. The Tribunal is satisfied that the respondent did not act unreasonably or in any way as to engage the terms of Rule 76. The respondent did not retain a copy of the advert that had been sought but the respondent did agree to the terms alleged by the claimant.

10 22. Rule 76 states that an order can be made if (a) the party acted vexatiously, abusively or otherwise unreasonably in the bringing of the proceedings or in the way the proceedings were conducted or (b) where the claim had no reasonable prospects of success. The Tribunal is satisfied that the respondent did not act in such a way so as to engage Rule 76 on the facts.

15 23. Even if the Tribunal had been satisfied that the respondent's conduct did engage Rule 76, it would not have been proportionate or just to have issued the order sought by the claimant. The respondent engaged with the claim the claimant raised. The respondent accepted the terms of the advert were those  
20 relied upon by the claimant and sought to assist the claimant and the Tribunal in progressing matters to allow the Hearing to be expedited. As the claimant had already set out the terms of the advert, the failure by the respondent to provide the actual advert did not prejudice the claimant.

24. The issues in this case were sharply focused given the respondent's acceptance of the wording relied upon by the claimant. The issue was whether  
25 or not the claimant had a genuine desire to apply for the role. That was the position arrived at in light of the concessions made by the respondent in this case (to the claimant's benefit). If the claimant established that he genuinely wished to apply for the role, the claim would have been successful. He had not done so.

25. The jurisdiction pertaining to the making of a preparation time order was not engaged in this regard. The respondent's actions in their conduct of the case and in their failure to comply with the orders issued was not unreasonable.

26. Further it would not have been appropriate to make a preparation time order even if the respondent had acted unreasonable. The Tribunal considered the full facts in reaching its conclusion. The Tribunal was satisfied that the respondent's actions were not so unreasonable as to make it just to issue the order sought. The respondent did not retain a copy of the advertisement and their concession as to its terms resulted in no prejudice whatsoever to the claimant. The respondent's conduct in no way detrimentally affected the claimant with regard to this claim or his pursuit of it. The respondent's action in conceding what the advertisement said allowed the claimant to focus instead on the key issue in this claim, whether or not he had a genuine desire to apply for the role. That ensured the claim was focused and the key issue could be determined without further delay.

27. The claimant's application for a preparation time order against the respondent is therefore refused.

20

**Employment Judge: D Hoey**  
**Date of Judgment: 02 March 2023**  
**Entered in register: 03 March 2023**  
**and copied to parties**

25