Case Number: 2602403/2019

EMPLOYMENT TRIBUNALS

Mr G WILLIAMS

Claimant

and

ROYAL MAIL GROUP LIMITED

Respondent

Heard at: **Bristol by VHS** **On: 14 March 2023**

Before: **Regional Employment Judge Pirani**

Appearances
For the claimant: in person, assisted by his father Mr Williams
For the Respondent: Mr J Gregson, solicitor

REASONS

JUDGMENT having been sent to the parties on 15 March and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

The applications

1. This is an application for a preparation time order and a wasted costs order by the claimant. By a claim form, received at the Midlands East Tribunal on 28 August 2019, the claimant brought a claim against the respondent for outstanding holiday pay. Within the body of the claim form the claimant alleged that his holiday was not being calculated correctly and should include pay which

was an average of the 12 weeks prior to the holiday week including overtime. The claimant explained that he calculated a running average which appeared to be a shortfall of £220.

Documents

2. A bundle was jointly produced which ran to 373 pages. Both parties produced written arguments. In addition, the claimant provided GW55 which was an email response, dated 12 January 2022, to the points made by the respondent in their written argument.

Chronology of the litigation

3. Because so many similar claims were received at various Employment Tribunals in England and Wales the President of Employment Tribunal issued a National Case Management Order on 16 September 2019. Among other things, the said Order provided:

    a. all such claims be transferred to the Employment Tribunal at Bristol
    b. such claims are to be combined and case managed in accordance with the directions of the Regional Employment Judge at Bristol
    c. such claims shall be stayed until 1 January 2020 in the light of ongoing national discussions with a view to reaching an agreement in respect of the claims

4. Accordingly, this claim became subject to the national multiple and was initially stayed. There followed a series of case management hearings, the first of which took place on 27 March 2020. At that hearing it was noted that the claimants in the multiple alleged that the respondent's method of calculating holiday pay does not meet the requirements of regulation 13 of the Working Time Regulations 1998 and Article 7 of directive 2003/88/EEC (the Working Time Directive). The claimants therefore maintained that there has been a series of unlawful deductions from their pay contrary to section 13 of the Employment Rights Act 1996.

5. The underlying factual issues concerned the overtime that the claimants worked and whether it was regular. Employees of the respondent, like Mr Williams, usually work in a relatively small number of specified roles (delivery workers, mail centre workers, drivers et cetera) and the different types of overtime worked is therefore well-known in most cases. Although there had been

ongoing discussions, the CWU and the respondent had not at the time of the first case management hearing reached an agreement as to what overtime is regular and what is not.

6. At that initial stage there were some 4,538 live claims in the multiple. The stay was extended to 1 March 2020 and the initial hearings were reserved for the union and Thompsons backed claims in anticipation that lead or test cases would be listed to help determine the issues. Because Mr Williams was representing himself, his case was excluded from that initial case management.

7. The first tranche of lead cases were then listed for 10 days commencing 21 June 2021. By 2 June 2021 the number of live claims had increased to 5,890. An amended response, dealing with the lead cases only, was provided on 15 March 2021. In the event, the 10 day hearing was vacated because the respondent had agreed an overall settlement with the union backed claimants. Further directions were provided to allow the Union solicitors to take instructions from their clients about the proposal. The results of those instructions were to be communicated by 3 September 2021. A further case management hearing was then listed on 1 October 2021.

8. By that time, the number of unrepresented claimants continuing with claims had reduced to 68. I then listed a selection of a further 10 cases to be heard for 5 days commencing 4 April 2022. By 17 February 2022 there had been some 5,581 withdrawals with 63 cases continuing. The substantive hearing was later vacated because the further test cases had settled.

9. A further 15 claims were then selected to be heard for 5 days from 10 October 2022. Mr Williams was selected by the respondent as one of the claimants in that batch. The respondent was the ordered to provide responses to these individual claims by 21 July 2022. The selected claimants were to provide schedules of loss by no later than 18 July 2022.

10. The respondent wrote to Mr Williams on 4 July 2022 indicating that he had been selected as one of the next 15 claims. In order to evaluate his claim, they requested both the total value of his holiday claim and a breakdown of the figures. In particular, they requested dates, figures and pay details used in the calculation of the figure he was claiming. As ordered, a revised response form to these claims was then submitted on 21 July 2022.

11. In advance of the October 2022 5 day hearing a further telephone case management hearing took place on 28 July 2022. Of the 15 test cases

identified, only 4 claimants attended the preliminary hearing on 28 July; the claimant being one of them. A discussion took place at that hearing about disclosure and the provision of evidence for the substantive hearing.

12. The case management order of 28 July 2022 provided that the respondent provide a copy of their bundle of documents to the claimant on 31 August 2022.

13. On 16 August 2022 the claimant emailed the tribunal asking, among other things, about applications for costs. The claimant also asked about documents to be included in the trial bundle. The respondent wrote in response on 22 August 2022 saying it was noted during a discussion relating to disclosure that the relevant period to consider was 2 years prior to presentation of the claim. It seems that the claimant's pay information was sent to him by the respondent on 30 August 2022. This is what the claimant has described as "false data" in that it did not marry up with his payslips. It was then agreed that the claimant could add his own time sheets to the bundle in order to highlight any discrepancy.

14. On 11 September 2022, the claimant provided a revised schedule of loss which set out that his claim was for £480.16. The claim for any future period was removed as result of earlier correspondence. The earlier schedule submitted by the claimant on 12 August 2022 was for £883.26. In the event, the respondent conceded unlawful deductions in the sum of £480.16 which resulted in a judgment dated 16 September 2022 and sent to the parties on 23 September 2022. The respondent had written to the tribunal on 14 September 2022 saying as of that date they were in receipt of the claimant's disclosure together with the revised schedule of loss. Accordingly, the respondent was content to make the relevant concessions and agreed to a judgment in the sum claimed.

The application for the preparation time order/wasted costs

15. The application for a preparation time order and wasted costs was made by the claimant on 7 October 2022. The sum claimed is £10,143. The claimant points out that the judgment was made only 17 days before the final hearing when his preparations were almost complete. In particular, bundles had been prepared and exchanged and his witness statement was drafted and ready to be exchanged. However, he had made no hotel or travel bookings.

16. The application is made on the following grounds:

17. The respondent behaved unreasonably in that:
    a. He had previously brought two similar claims against the respondent which had been settled and the response had no reasonable prospects of success
    b. The respondent did not conclude early conciliation with him;
    c. The respondent used ‘false data’ as part of the preparation of the claim;
    d. The respondent wished to include ‘onerous gagging clauses’ in its COT3 agreements

18. The respondent behaved vexatiously in the following ways:
    a. The respondent abandoned conciliation;
    b. The claimant was forced to make multiple claims;
    c. The respondent used ‘false data’ as part of the preparation of the claim;
    d. The respondent did not learn from previous mistakes;
    e. The respondent is still contesting further claims

19. It was also originally alleged that the respondent breached case management orders/directions. The claimant says that the respondent was instructed to include copies of timesheets within the bundle. The claimant says they failed to do this. However, it was clarified during the hearing that the order referred to was dated 28 July 2022. No breach of the written orders is alleged.

20. Reference is made by the claimant in his written submission and the bundle to transcripts from the ACAS early conciliation process as well as without prejudice offers. The general rule of the law of evidence is that all evidence relevant to an issue in proceedings and necessary for the fair trial of the matter is admissible and may be ordered to be disclosed. The “without prejudice” privilege rule is itself part of the law of evidence but is an exception to that general rule which prevents either party to negotiations genuinely aimed at resolving a dispute between them from giving evidence of those negotiations.

21. As set out on the ACAS website:

> Any communications with Acas during the early conciliation process are treated as 'without prejudice', which means that they cannot be used as evidence if the dispute subsequently does proceed to an employment tribunal hearing.

22. The claimant also makes an application for wasted costs, to be paid by the respondent’s solicitors, on the basis that they are said to have relied on “false

data" to contest the case. He argues that the solicitors should have been immediately alerted to the fact that such data was incorrect and a brief overview would have established that the response had no reasonable prospects of success.

Response to the applications

23. The respondent says, among other things:

    a. The respondent has not waived without prejudice privilege in respect of those negotiations.
    b. The respondent presented its ET3 defence on 21 July 2022. That outlined potential issues in respect of jurisdiction and limitation in relation to the claimant's claim.
    c. Each of the previous claims was presented following each period of annual leave that was taken. It was not possible to compromise future claims; given the claimant remaining in employment and the nature of such holiday pay claims meaning that there is inability to understand the timing and potential value of any such claims. Therefore, any claims have had to be considered if and when they are presented. The previous claims were settled at an early stage. No response was presented to them and the issues of jurisdiction or limitation was not pleaded.
    d. Due to the large number of claims it was not possible to engage with each one individually.
    e. The issue of the disclosure of documents was discussed at the case management preliminary hearing on 28 July 2022. It was explained by the respondent's representative that each claimant would be provided with their own 'pay information' and that in a similar format of the disclosure to each of the previous test cases. That would be a spreadsheet of the pay records downloaded from the respondent's pay system showing hours worked for each week of the period of the claim.
    f. Upon receipt of the claimant's disclosure on 14 September the respondent was able to cross check the value of his claim against the data now available and on 15 September the respondent wrote to the tribunal to concede that it had unlawfully deducted the wages that it had allegedly unlawfully withheld.
    g. The respondent did not breach of the case management order made by the Tribunal.

Outline of Relevant Law

24. A tribunal can make a costs order only if the case falls within one of the specific provisions for such orders in the Rules. If the receiving party was not represented at all the order must be a preparation time order (PTO). The relevant rules are at 74-80. Wasted costs are dealt with by rule 80.

25. The grounds for making a costs order under rule 75(1)(a) of the Tribunal Rules and a preparation time order (PTO) under rule 75(2) are the same. Preparation time means 'time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at the final hearing' — rule 75(2).

26. Rule 76 deals with when a costs or PTO may or shall be made. It provides:

> 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; [or (c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins].(a) (2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party. (3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if— (a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and (b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment. (4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party. (5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question,

or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing

27. Rule 77 of the Tribunal Rules provides that a party may apply for either type of order at any stage, although no later than 28 days after the date on which the judgment finally determining the proceedings was sent to the parties.

28. The grounds are discretionary — i.e., the tribunal may make a costs (or preparation time) order if the ground is made out but is not obliged to do so. However, the tribunal is under a duty to consider making an order when they are made out — rule 76(1).

29. As the Court of Appeal reiterated in **Yerrakalva v Barnsley Metropolitan Borough Council and nor 2012 ICR 420, CA**, costs in the employment tribunal are still 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, where the general rule is that costs follow the event. This reflects the policy that tribunals should be accessible, and the assumption that many tribunal cases will be dealt with satisfactorily without the involvement on either side of lawyers.

30. **Breach of order or practice direction**: In such cases the tribunal has a discretion to make a costs order or a preparation time order. There is no specific requirement that the paying party should have been at fault.

31. **Unreasonable (etc) conduct:** A tribunal has a discretion to make a costs order or a preparation time order where the tribunal considers that a party (or his representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either bringing the proceedings (or part of them) or the way that the proceedings (or part of them) have been conducted. The phrase “vexatiously, abusively, disruptively or otherwise unreasonably” applies to the conduct of the party (or his representative) in the litigation. Vexatiousness implies the doing of something over and above that which is necessary for the conduct of the litigation, and suggests the existence of some spite or desire to harass the other side to the litigation, or the existence of some other improper motive.

32. **Claim or response had no reasonable prospect of success:** A tribunal has a discretion to make a costs order or a preparation time order where it considers that any claim or response had no reasonable prospect of success.

33. **Discretion:** If a tribunal considers that the case falls within one of the situations described in the Rules it may make a costs preparation time order. There is a discretion, which must be exercised judicially. An example of a factor which the tribunal may take into account is an offer to settle the case "without prejudice save as to costs."

34. **Wasted costs:** Rule 81 provides that a wasted costs order may require the representative to pay the whole or part of any wasted costs of the relevant party. Wasted costs orders can only be made against a 'representative', which will include solicitors.

35. The Court of Appeal in **Ridehalgh v Horsefield & Another [1994] Ch205** provided the three stage test to be considered when a wasted costs application is made:

    1. Did the representative act improperly, unreasonably or negligently?

    2. If so, did that conduct result in the party incurring unnecessary costs?

    3. If so, is it just to order the representative to compensate the party for the whole or part of those costs?

Conclusions

36. I have excluded all without prejudice correspondence and offers in reference to the ACAS early conciliation procedures and otherwise from my deliberations. Nothing has been put before me which suggests that one of the relevant exceptions applies to the without prejudice principle in this case. It was suggested that because offers were "derisory" or very low that they were not made in good faith. This however is not an example of unambiguous impropriety.

37. Therefore, any offers made by the respondent to settle this claim and/or their responses to early conciliation have been excluded.

38. Understandably, because of the limited value of the claim the claimant believes that it should have been resolved at the early conciliation stage and should never have proceeded to the Employment Tribunal. In his email to the tribunal of 7 October 2022, he said the respondent had wasted time and money defending his claim.

39. In addition to having to wait so long for his claim to be conceded, the claimant is aggrieved because this is his third claim brought against his employer relating to the incorrect calculation of holiday pay. The other two claims resulted in Cot3 settlements also and did not proceed to hearing.

40. He is also concerned that the respondent used what he described as "false data" to evaluate the basis of his claim. The claimant suggests that had the respondent undertaken a diligent process of assessing his claim that would have established a clear pattern of around 30% overtime on his part.

41. The claimant says that the reliance on the wrong or false evidence meant the respondent had no reasonable prospect of defending the claim. Frustratingly, for the claimant, he says the respondent did not learn from its past mistakes in relation to this evidence.

42. However, the claimant did not bring his claim in a vacuum. The respondent was faced with large scale litigation which involved consideration of many legal and factual matters for claimants based all around the country, some of whom were not represented. Although the law might seem straightforward, the factual and legal definition of regular overtime is something which has caused problems for many employers and employees. Added to that are issues of limitation and whether the holiday period fell within the Working Time Regulations days rather than simply contractual holiday.

43. The progression of the claims was dictated by the tribunal, not by the respondent. This is what caused the substantial delay. In fact, the respondent requested represented and non-represented claimants be dealt with at the same time. It was the tribunal that determined that all the represented claims should be dealt with first. Therefore, although the claim in this case was issued in August 2019, in light of the 5,000 or so claims that had been received it was

not until March 2022 that the majority of these claims had been resolved and the unrepresented claimants were then able to be considered.

44. Once the respondent received the claimant's further disclosure on 14 September 2022 it made an informed decision and conceded both liability and the precise amount claimed on 15 September 2022. They acted both quickly and reasonably.

45. The initial claim was for some £220. The claim settled for £480.16 which is what the claimant had eventually claimed. The defence to the claim, like that of many others, was that the claimant had worked an irregular and unsettled overtime pattern. In order to establish the basis of his claim, as is unusual, the claimant provided further and better particulars as well as a schedule of loss. Eventually, he provided documents which appeared to contradict the information provided to the respondent's solicitors.

46. The claimant is obviously aggrieved that the information he provided which enabled the ultimate concession would also have been available to the respondent, as they were his employer.

47. The previous claims were settled at an early stage. However, they have no bearing on this claim and were not part of a national multiple.

48. Any wording proposed in the settlement agreement by the respondent is subject to the without prejudice principle. In any event, what seems to be objected to is a confidentiality clause which is not unreasonable behaviour on the part of the respondent. In any event, the claim was conceded in full by the respondent.

49. Although the claimant says the respondent has not learned from previous mistakes, the respondent settled or conceded all three claims brought by him. None went to trial.

50. It does not seem now to be disputed that the claimant worked regular overtime during the 12 week period before his holiday. The response could therefore be said to have no reasonable prospects of success, once the facts were established in conjunction with the correct documentation. However, once information was provided to the respondent to establish this fact the claim was

conceded for the amount claimed, which had altered (it was £883.26 on the previous schedule and was £220 in the claim form). In an ideal world it could have been conceded earlier. However, on the face of 5,000 or so claims it was not unreasonable for the respondent to have acted as it did. Had it fought the claim at trial then discretion could well have been exercised in favour of making a PTO. However, the claim was conceded very quickly once the facts and the amount claimed were established. The value of the claim had also altered from that originally pleaded.

51. Fundamental to the claimant's application is the allegation that the respondent used 'false data' as part of the preparation of the claim. The chronology of the data provided is in fact extremely truncated. The respondent provided information it had on its systems relating to overtime to the claimant on 30 August 2022. On the respondent's own admission, sometimes there may be a discrepancy with the payslips provided to the claimant. The claimant was able to establish this discrepancy with payslips provided to the respondent on 14 September 2022. Once this was done, the respondent agreed to the amount claimed on 15 September 2022.

52. A discussion took place earlier during the 28 July 2022 hearing about the provision of 'pay information' relating to each test claimant. It was explained by the respondent's representative that each claimant would be provided with their own 'pay information' in a similar format to the disclosure to each of the previous test cases. That would be by way of a spreadsheet of the pay records downloaded from the respondent's pay system showing hours worked for each week of the period of the claim.

53. In this instance, the claimant provided his disclosure to support the calculation of his claim and, once it was established that the claimant was actively pursuing his claim, the respondent was able to consider its position and conceded he was owed the wages claim.

54. The claim settled late because the respondent was engaged with other claims within the multiple of thousands of claims. The representative for the respondent did not act improperly, unreasonably or negligently. The respondent in no way behaved vexatiously. The respondent did not behave unreasonably in the way in which it conducted the litigation. Once it was established that the response had little reasonable prospect of success and the amount claimed by

the claimant for was reduced, the respondent conceded the claim in its entirety very quickly. Therefore, the claimant's applications do not succeed.

Regional Employment Judge Pirani
24 March 2023

Sent to the parties on:

24 March 2023

For the Tribunal: