EMPLOYMENT TRIBUNALS

Claimant: Mr H Ali

Respondent: Links Recruitment Group Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Midlands West Employment Tribunal (by CVP)

On: 31 March 2023

Before: Employment Judge Kelly (sitting alone)

Appearances
For the claimant: No attendance
For the respondent: Mr Tidy, a solicitor

JUDGMENT

The Judgment of the Employment Tribunal is as follows:

1) The claimant's application for a preparation time order is dismissed for the reasons set out below.

2) The claimant did not attend the hearing. We were surprised at this as the claimant had been emailing the Tribunal about the hearing as late as 23 March 2023, and gave every indication of his intention to participate.

3) From 10.00 am, the Tribunal emailed the claimant and called him on two phone numbers which he had provided but was unable to reach him. The hearing was due to start at 10.00am. We began the hearing at 10.20 by when the claimant had still not attended.

4) Mindful of rule 47 of the Employment Tribunal Rules of Procedure 2013, we considered whether we should dismiss the claim or proceed in the absence of the claimant. We also considered if we should adjourn the Hearing.

5) We decided to continue with the hearing because, having given preliminary consideration to the claimant's application we were of the view that it had little

reasonable prospect of success and it would not be proportionate to arrange a further hearing to consider the application. We then decided to dismiss the application for the following reasons.

6) The claimant sought a preparation time order further to judgment in default of response having been entered under rule 21 and the respondent meeting the judgment. By letter of 8 Aug 22, C relied in his application on the following which we summarise:

   a) The respondent had a disregard for ACAS efforts at resolution when the claim had no reasonable defence. This was unreasonable. Therefore, the claimant had to bring claim. The claim should never have got to the ACAS stage.

7) The law on judgments in default is set out in Rule 21 of the Employment Tribunal Rules of Procedure 2013 (Rules). The circumstances in which a preparation time order may be made are set out in Rule 76. There is no requirement of the rules that any party participate in ACAS early conciliation.

8) Although not expressly relied on by the claimant, we have also considered whether a respondent who does not enter a response should be liable for a preparation time order, as well as one who fails to participate in early conciliation.

9) Rule 76 sets out the following circumstances in which a preparation time order may be made:

   (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.

   (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.

10) Looking at the claimant's argument that there should be a preparation time order because the respondent failed to engage in the ACAS early conciliation process, the circumstances in which such order may be made under Rule 76 are limited to a party's conduct in proceedings. ACAS early conciliation does not form part of proceedings and there is no obligation on a party to participate in it. Therefore, a

failure to participate in it cannot be a factor indicating that a preparation time order should be made. The claimant's application cannot succeed on this basis.

11) Turning now to the question of whether such an order should be made because the respondent did not serve a response. We consider the case of *Sutton v The Ranch [2006] ICR 1170 EAT* to provide useful guidance (even though it deals with an earlier version of the rules and, in particular, 38(4) of the 2004 Rules which allowed a tribunal to make a costs order against a respondent who had not had "a response accepted in the proceedings". This particular rule is not repeated in the Rules.)

12) In *Sutton*, the EAT made the following comments:

a) *If a respondent does not put in a response … The effect is that the claimant does not have to face a contested hearing. The respondent cannot take a part in the proceedings of any nature other than under one of the exceptions to rule 9; as a result the costs of the claimant are likely to be less than if the claimant had to prepare for an opposed and, perhaps, hard-fought hearing on the merits or as to remedies or both before the tribunal.*

b) *The tribunal's jurisdiction is not a cost free jurisdiction; but, as has often been said, an award of costs is the exception rather than the rule and can only be made in a disputed case in restricted circumstances as set out in rule 40(3). Normally, the costs of a fully opposed hearing, in which one party loses and the other wins, are not recoverable. There is a plain saving in costs to a claimant in the normal run if the respondent does not seek to oppose his or her claim.*

13) We also note the comments of the EAT in *Thorpe v Eaton Electrical Limited UKEAT/0497/04/DM*:

a) *We do think that it is important for litigants to appreciate that, however late they come to the conclusion, or are advised, that their case has no realistic prospect of success, they should still abandon it.*

14) Although this comment was aimed at a claimant, we consider that it also applies to respondents. We consider that failing to file a response is the equivalent of abandoning a defence.

15) We do not consider that the respondent has acted vexatiously, abusively, disruptively or otherwise unreasonably in failing to file a response.

16) The result of the respondent's failure to present a response is that, as per *Sutton*, the preparation time of the claimant was less than if the claimant had to prepare for an opposed and, perhaps, hard-fought hearing on the merits or as to remedies or both before the Tribunal. There was a plain saving in preparation time to the claimant because the respondent did not seek to oppose his claim. As per Thorpe, the respondent abandoned its case at the earliest possible stage, rather than unreasonably pursuing a defence which presumably (although we do not know that) had no merits.

17) Indeed, the claimant has been saved time because of the respondent's actions and the Tribunal has avoided the requirement to hold a merits hearing.

18) Nor had the response no reasonable prospect of success because there was no response.

19) For these reasons, the claimant's application is dismissed.

Employment Judge Kelly
31 March 2023