



EMPLOYMENT TRIBUNALS

Claimant: Mr F E Obiang Mbasogo
Respondent: Ms Z Nicholson (trading as “Hestia Cleaning Services”)
On: 15 May 2023 (in chambers)
Before: Employment Judge S Jenkins

JUDGMENT

The Claimant’s application for a preparation time order is refused.

REASONS

Background

1. The Claimant brought claims of unfair dismissal and breach of contract which succeeded against the Respondent. He had, in fact, brought his claims against a different respondent, but the Respondent had been added by the Tribunal on the basis that it was contended by the other respondent that the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”) applied, such as to transfer any liability to the Respondent.
2. In the event, having considered the evidence, I was of the view that the TUPE Regulations did apply, and that the Claimant’s employment should have transferred to the Respondent. As that had not happened, he had been unfairly and wrongfully dismissed (i.e. dismissed without notice in breach of contract) by the Respondent.
3. The hearing took place on 26 & 27 January 2023, and my reserved judgment was sent to the parties on 6 February 2023.
4. The Claimant then made an application for a preparation time order, pursuant to Rule 75 of the Employment Tribunals Rules of Procedure (“Rules”), by email dated 8 February 2023. The application was made, pursuant to Rule 76(1)(b), on the basis that the Respondent’s response had had no reasonable prospect of success.

Law

5. Rule 76 provides as follows:

“(1) A Tribunal may make a ... preparation time order..., and shall consider whether to do so, where it considers that-

...

(b) any claim or part had no reasonable prospect of success.”

6. Rule 77 provides that a party “*may apply for 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*”.

7. Rule 79 then contains provisions dealing with the amount of a preparation time order, and Rule 84 notes that a Tribunal may have regard to the paying party’s ability to pay.

8. The Court of Appeal reiterated, in Yerrakalva v Barnsley Metropolitan Borough Council and anor 2012 ICR 420, that ¹costs in the employment tribunal are still the exception rather than the rule. It commented that the tribunal’s 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 and the unsuccessful litigant normally has to foot the legal bill for the litigation. In most cases the employment tribunal does not make any order for costs. If it does, it must act within rules that expressly confine the tribunals power to specified circumstances, notably unreasonableness in the bringing or conduct of the proceedings.

9. I was conscious that I was required to apply a two-stage test in relation to the question of whether or not to make a preparation time order. First, I had to consider whether the Respondent’s response had had no reasonable prospect of success, and, if it did, the application went no further. However, if I was satisfied that the Respondent’s response had indeed had no reasonable prospect of success, I then had to go on to consider whether it would be appropriate to exercise my discretion in favour of making a preparation time order, and, if so, how much I should award.

10. The test for whether a claim or a response has no reasonable prospects of success is an objective one. However, I was mindful of the guidance provided by the EAT in AQ Limited v Holden [2012] IRLR 648, that I should not judge the Respondent, as a litigant in person, by the standards of a professional representative, and, in particular, that lay people are likely to lack the objectivity and knowledge of law and practice brought to bear by a professional legal adviser.

¹ That case dealt with a costs application, but an application for a preparation time order is subject to the same principles.

The application and the response to it

11. The basis of the Claimant's application, as set out in his email of 8 February 2023, was that his dismissal had been clear and the amount of his redundancy was so small that he should not have had to raise the case to an employment tribunal. I observe with regard to that, that, as I had decided the Claimant's unfair dismissal claim in his favour and awarded a basic award, I did not then consider his claim for a redundancy payment further, as no additional payment to him could have arisen. I did however record in my Judgment, in passing, that the Respondent, "*now provides additional services in terms of the hours worked, and therefore there would have been no reason for the Claimant to have been dismissed*", which suggested that his redundancy payment claim would not have been resolved in his favour had I needed to do so.
12. The Claimant did not send his application to the Respondent, so, applying Rule 77, I directed the Respondent to provide her representations to the application in writing by 8 May 2023. She did that by an email dated 7 May 2023.
13. In that, she noted that the Claimant had originally not pursued his claim against her, and that she was added as a respondent by the Tribunal's own motion. She also made reference to a comment I made at paragraph 84 of the Judgment, which was:

"I stress that I did not consider that the ²Third Respondent purposely sought to avoid the application of TUPE and to take on the employment of the Claimant. Whilst she did maintain that position in correspondence in January 2022, that was some two months after the transfer had, as I have decided, taken effect, and, bearing in mind her status as a litigant-in-person, it was not unreasonable for her to continue to maintain that position in what is a very technically legal area."

Conclusions

14. As I have noted above, my initial focus was on whether I considered that the Respondent's response had had no reasonable prospect of success. In view of my quoted comment at paragraph 84 of the Judgment, I readily concluded that that had not been the case. The fact that a case is decided in one party's favour rather than another's does not mean that the losing party's case had no reasonable prospect of succeeding.
15. In this case, whilst I concluded that the Claimant's employment had transferred to the Respondent pursuant to the TUPE Regulations, that was only after a consideration of all the evidence. There were elements of the evidence which could potentially have led to a different conclusion, but I was ultimately of the view that, assessed overall, the activities carried out by the Respondent were fundamentally the same as those carried out previously.

² At the merits hearing the Respondent was the third of three respondents, although, as I dismissed the claims against the other two respondents, she now remains the only respondent for the purposes of this application.

16. Overall however, I saw nothing to suggest that the Respondent's defence of the Claimant's claims was misconceived or totally lacked prospects; it was an arguable line of defence. I therefore considered that the Claimant's application for a preparation time order should be refused.

Employment Judge S Jenkins
Date: 15 May 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON 16 May 2023

FOR THE TRIBUNAL OFFICE Mr N Roche