Case No: 1807221/2022

EMPLOYMENT TRIBUNALS

Claimant: **Mr R Allan**
Respondent: **United Education Projects Limited**

AT A COSTS HEARING

Heard at: **Leeds in chambers and on the papers** **On: 12th May 2023**
Before: **Employment Judge Lancaster**

Representation
Claimant: Not required to attend
Respondent: No appearance entered, and did not make any representations

JUDGMENT

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

REASONS

Introduction

1. The Claimant is and always has been a litigant in person, not legally represented.

2. The claim was presented on 21st December 2022. At box 8.1 of the claim form (ET1) it was stated to be for "other payments" still owing to the Claimant from the Respondent after the end of his employment.

3. In particulars of the complaint it was identified that this was in respect of "about £230 remaining owed to me", which in context appears to be in respect of both petrol expenses and pay but which which is not broken down.

4. The ET1 also sought to claim for additional compensation to cover "stress and financial instability".

5. The Response (ET3) was due by 3rd February 2023, but none has ever been received.

6. On 20th February 2023 the parties were therefore informed by the Tribunal that a judgment in default of a Response might be issued, and that the Respondent would now only be permitted to participate in the final hearing listed on 17th March 2023 to the extent that this was allowed by the Employment Judge.

7. Also on 20th February 2023 the Claimant was, however, required to provide additional information about the sum claimed and how it had been calculated before any judgment under rule 21 of the Employment Tribunal Rules of Procedure 2013 could in fact be given.

8. This information was duly and promptly sent by the Claimant on 25th February 2023, within the 7 days which tribunal had given him to reply.

9. The claim for "missing wages" was now quantified at £379.63. This was as a result of a detailed reconciliation of the sums calculated to be owed by way of hours worked, petrol expenses and other expenses as against the amounts actually received, some of which had been specified as holiday pay.

10. The further information also sought to claim for 28 hours spent on the claim (at the same hourly rate as in employment, £9.80) as well as for interest, compensation for hardship, loss of earnings and negative mental impact, and for failure to provide a P45.

11. On 14th March 2023 after considering this further information, Employment Judge Rogerson directed that judgment could only be given in the claimed sum of £379.63, not for "interest, future loss and injury to feelings", and that any application for a preparation time order under rule 77 would have to be made separately after judgment had been issued.

12. On 16th March 2023 the Claimant expressly agreed to judgement only in these terms, and accordingly I issued the rule 21 judgment on the same date, 16th March 2023, and cancelled the hearing listed for the following day.

13. On 30th March 2023 the Claimant did then apply for a preparation time order, calculated at 100.05 hours at £41 per hour, namely £4,102.50

14. I then caused the Claimant to be written to on 3rd April 2023, requiring him to specify the precise grounds of his application under rule 76, and informing him that a claim for costs in these proceedings would not cover time spent before the institution of the Tribunal claim itself and that any substantial time claimed after 14th March 2023 was unlikely to be reasonable or proportionate.

15. The Claimant replied immediately, on 4th April 2023, asserting that "neglecting to respond to any contact during the employment tribunal process is unreasonable behaviour by the respondent".

16. The application for a preparation time order was now limited to a claim for 29 hours from 21st December 2022 up to the preparation o the response to the Tribunal's letter of 20th February 2023. That is now quantified at £1,189.00.

17. The Respondent was given until 24th April 2023 to reply to this amended application but has not done so.

The law

18. Under rule 76 of the Employment Tribunal Rules of Procedure 2013:

"(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;"

19. So, whilst if there has in fact been unreasonable conduct of proceedings the Tribunal must consider making a costs (or preparation time) order, it is always a matter of discretion.

20. Costs in the Employment Tribunal do not "follow the event". That is to say that a successful party is not automatically entitled to recover their costs. It is frequently stated that costs are the exception, not the rule.

21. Under rule 79 a preparation time order, if made, is to be assessed as follows:

"(1) The Tribunal shall decide the number of hours in respect of which a preparation time order should be made, on the basis of—
(a) information provided by the receiving party on time spent falling within rule 75(2) above; and
(b) the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required.
(2) The hourly rate is [£42 since 15th May 2022]
(3) The amount of a preparation time order shall be the product of the number of hours assessed under paragraph (1) and the rate under paragraph (2)."

22. It has been held, applying the previous 2014 Employment Tribunal Rules (not all of which – particularly not rule 38 (4) with which this decision was specifically concerned – are however replicated in the present Rules of Procedure), that a failure to submit a response is not of itself unreasonable conduct of proceedings, and that costs can only attach to any actual unreasonable conduct where the Respondent is then in fact permitted to participate in proceedings: Ms C Sutton v The Ranch Ltd. UKEAT/0072/06/ZT; [2006] ICR 1170

23. In particular His Honour Judge J Burke QC said in thar case:

"37. I start by respectfully acknowledging and accepting the importance of what the Employment Appeal Tribunal said in Kwik Save, in the passage which I have cited above. However, Miss Jolly accepted, when I put the point to her, that this is not a case of a Respondent seeking leave to put in a response out of time, as in Kwik Save. The Rules which were relevant at the time were different from the current Rules. Now the Rules require a Response, if one is to be presented, to be presented in time, that is to say within 28 days of the date on which the Claim Form was sent; see [now rule 16]. An employer may seek an extension of time under the…. Rules, pursuant to [now rule 20]; but he has to do so within the same 28 day period and if he does not do so, ……..he will be at risk of a default judgment under [now rule 21]. He can then seek to set aside the default judgment under [now rule 20].

38. There is, however, no requirement in the rules that a Respondent should provide a Response. [Now rule 16] sets out how and when a Respondent must present a Response if he wishes to do so. The context of the present case is materially different to that of Kwik Save. If a Respondent does not put in a Response, as I have said, [now rule 21] applies, …. 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 ……[now rule 21(3)] 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.

42. It follows, in my judgment, that the Chairman reached the right result when he revoked the order for costs which had been earlier made at the remedies hearing. I do not accept that a costs order can be made against a Respondent who has not put in a Response or not had a Response accepted, on the basis that, other than in relation to [now rule 21 (3)] that Respondent has either by some act or omission acted in a way such as is described by Miss Jolly in this case i.e. by receiving a claim form, by thinking about what should go into a Response or by drafting a response, if that Response is not received and never has any effect.

43. It surely is the case that, in some respects, an omission to do something required by the Rules or required by an Order of the Tribunal can attract an order for costs. The obvious example of a party's refusal or neglect to obey a specific Order will occur to anybody who considers the situation which I am addressing; but that does not mean that an omission such as an omission to put in a Response can give rise to an order for costs against a Respondent who makes that omission …….

44. Finally, I do not take the view that the acts or omissions consisting of failing to put in a Response or in seeking or conducting negotiations through ACAS could properly be regarded as taking part in the proceedings."

Conclusions

24. I also take the view that failing to put in a Response at all cannot properly be regarded as a way of conducting the proceedings, so that rule 76 (1) (a) might have any application.

25. In reality the Respondent has not done anything at all in these proceedings. at all, so the way it has conducted itself in the course of proceedings cannot therefore be said to have been unreasonable

26. If there had been a Response it would have been perfectly legitimate both for the claim for stress to have been contested for lack of jurisdiction to hear it, and for further details of the monetary claim to have been requested.

27. Alternatively, even had the Respondent submitted a Response but indicated that the claim for outstanding wages was not contested, the Claimant would still have had to clarify how his claim was quantified and confirm that he agreed the limitation upon the power to award compensation, before the judgment could be issued. In actual fact the increase in the total from "about £230" to £379.63, and the inclusion of expenses other than petrol is in effect an amendment to the claim which he has been allowed to make without challenge.

28. The Claimant has, therefore, when engaging in the necessary clarifications of his claim, incurred no additional cost by reason of there having been no Response at all. He has done no more than was necessary in order actually to establish that he was indeed owed monies.

29. Whilst I appreciate how stressful this has been for the Claimant and how it has evidently consumed so much of his time and effort, I must also observe that the number of hours he has devoted to pursuing this complaint is much more than I would consider reasonable, even if the calculations are potentially complex.

30. Applying the principles in the case of Sutton I therefore conclude that, although I have every sympathy for the Claimant who has been made to fight for what is lawfully his, the preconditions for making a preparation time order are not satisfied.

31. In any event the fact that the Claimant has now, inevitably, succeeded in his claim without having to go to a hearing would not of itself justify the exercising of my discretion to award costs to compensate him for time spent merely in the necessary and proper formulation of that complaint.

EMPLOYMENT JUDGE LANCASTER

DATE 12th May 2023