



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A. Beech

**Respondent:** Capital Recruitment Investments Ltd

**Heard at:** Midlands West (on papers)

**On:** 12 June 2023

**Before:** Employment Judge Power

## Representation

Claimant: Not required to attend

Respondent: Not required to attend, no representations received

# COSTS JUDGMENT

1. The Claimant is awarded a preparation time order of £215.
2. The Respondent is ordered to pay the award by 27 June 2023.

# REASONS

## Background

1. The Claimant's claim was heard on 6 February 2023. Judgment was given orally, upholding the Claimant's claim for unlawful deduction of wages in the sum of £213. Judgment was sent to the parties on 7 February 2023.
2. The Claimant made an application for a preparation time order on 5 March 2023.
3. The Tribunal indicated to the parties that it was minded to consider the application on the papers. The Tribunal gave the parties an opportunity to object and received no objections. The Respondent was directed to provide any written representations by 25 April 2023. There was no response.
4. By Case Management Order of 16 September 2022, the parties were ordered to prepare witness statements and documents by 11 November 2022. There was no evidence that this happened, although a schedule of

loss was provided by the Claimant dated 14 October 2022. Before the hearing commenced, the Tribunal was provided with a bundle from the Claimant of 45 pages including his witness statement and an updated schedule of loss. The Respondent provided a bundle of 18 pages, with no witness statement.

5. The Tribunal will not set out in full the conclusions on liability given in its oral judgment, written reasons not having been requested. The Tribunal does need to refer to them however to the extent necessary to decide the application, in summary as follows:
6. Although the Claimant undertook work for a third-party client of the Respondent, his time, pay and jobs were administered by the Respondent. The Tribunal accepted the Claimant's evidence that he had agreed to work at a rate of £14 per hour. The Tribunal also accepted the Claimant's evidence that he undertook work for 71 hours which were underpaid by the Respondent at £11 per hour, rather than the agreed rate of £14 per hour. The Tribunal therefore found that the Claimant was owed a shortfall by the Respondent of £3 per hour for 71 hours, totalling £213.
7. The Tribunal found that the Respondent knew that this sum was due and had attempted to pay the money due to the Claimant. The Respondent's response said as much. A letter dated 14 October 2022 from the Respondent to the Claimant admitted that the Respondent had underpaid the Claimant by £213 and stated that the Claimant would be paid £243.86, being the sum owed plus interest of £5.86 and a discretionary payment of £25, on 14 October 2022. However, this was never received by the Claimant. There was no explanation as to why the Respondent had not followed this up and why, knowing that the money was due and that the Claimant was asking to be paid, the Respondent did not ensure that the Claimant received the money.
8. Although not pleaded on the ET1 claim form, in the Claimant's witness statement and in his schedule of loss he made a claim that 13 of the 71 hours related to Sunday working, in respect of which he alleged it had been agreed that he would be paid £20 per hour, rather than the £14 originally claimed. Having heard evidence from both the Claimant and the Respondent, the Tribunal did not find that there was any agreement to pay the Claimant £20 in respect of 13 hours worked on a Sunday. The Tribunal found that those 13 hours should have been paid at the rate of £14 per hour, which had already been accepted by the Respondent.

## **Submissions**

9. On 5 March 2023, the Claimant applied to the Tribunal for a preparation time order in the amount of £1,518, broken down as follows:
  - *“3 days of work paid at £15 per hour for a minimum of 8 hours per day. Total amount £360. This is for loss of earnings due to seeking legal advice and guidance. This was days off from work offered to me by HGV driving agency.*
  - *Tribunal hearing dated 6 February 2023. This is paid at national minimum wage of £9.50 per hour for a minimum of 8 hours. Total amount £76. This is the amount due to having a day off from the new company I work for.*

- 26 hours spent working on my schedule of losses, paid at £14 per hour, total amount £364. This includes research, gaining advice from legal, how and what needs to be included in my claim and also writing up my schedule of losses.
- 42 hours spent working on my statement of truth, paid at £14 per hour, total amount £588. This includes research, legal advice, how it needed to be presented and what needed to be included. Also writing up my statement of truth and amendments.
- £18 for printing.
- 8 hours paid at £14 per hour, total amount £112. This is for the research and weighting up this preparation time order.
- The total amount I am claiming is for £1,518.”

10. The Claimant did not cite any specific grounds in that application.

11. The Respondent made no representations, despite being given reasonable opportunity to do so.

### Law

12. Case law provides regular reminders that costs remain the exception not the rule in Employment Tribunal litigation. The relevant rules are Rules 74 to 79 of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. These provide Tribunals with the power to award a preparation time order in the circumstances set out in those Rules.

13. In respect of this application, the relevant rules are:

Rule 75(2):

*A preparation time order is an order that a party (“the paying party”) make a payment to another party (“the receiving party”) in respect of the receiving party’s preparation time while not legally represented.*

*“Preparation time” means time spent by the receiving party (including by any employees or advisers) in working on the case, except for any time spent at any final hearing.*

Rule 76:

*“(1) A Tribunal may make 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...”*

Rule 77:

*“A party may apply for a costs order or 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”.*

14. Rule 79 provides that the Tribunal shall determine the number of hours in respect of which a preparation time order should be made on the basis of the information provided by the receiving party on time spent falling within Rule 75(2) and 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. The current hourly rate is £43.
15. Rule 84 provides that the Tribunal may have regard to the paying party’s ability to pay in deciding whether to make a preparation time order.
16. Even if one (or more) of the grounds for awarding a preparation time order is made, the Tribunal is not obliged to make an order. Rather, it has a discretion whether or not to do so.

## **Conclusion**

17. The Claimant made an application for a preparation time order by email dated 5 March 2023. This was within the time limit provided in the Rules (Rule 77). The Tribunal finds that it is entitled to consider the Claimant’s claim for a preparation time order.
18. The starting point is whether any of the grounds set out in Rule 76 (1) or (2) are made out. If either limb of Rule 76(1) is satisfied, the second step is to consider whether to make a costs order; it is not mandatory to do so, and tribunals have a wide discretion in that regard. If it is decided that a costs order should be made, the third step is to consider the amount of the costs to be paid pursuant to the order, and in doing so the Tribunal may take the Respondent’s financial means into account.
19. The Claimant’s claim was about unlawful deduction from wages in respect of 71 hours in respect of which the Claimant said he was paid the incorrect hourly rate. The Respondent admitted in a letter to the Claimant dated 14 October 2022 that it had paid the Claimant £3 per hour short in respect of 71 hours of work and stated that it had arranged for the Claimant to be paid that money on 14 October 2022. Having seen the Claimant’s witness statement and documents (including bank statements) before the hearing, the Respondent accepted that the payment of £213 was still owing to the Claimant. It did not accept that it owed the Claimant a higher sum claimed (in the Claimant’s witness statement and schedule of loss) of £9 per hour in respect of 13 of the hours worked on a Sunday.
20. Dealing with the grounds in Rule 76(1)(a), the Respondent’s position was that it had not been sure that the whole claim made was in respect of the £213 as the Claimant’s schedule of loss was significantly higher (claiming injury compensation and in respect of additional payments for Sunday working). When the Respondent received the Claimant’s witness statement and documents, which included bank statements, it was able to see that the £213 payment had not been received by the Claimant. There were clearly errors in the Claimant’s schedule of loss as to how he valued his claim. The Tribunal is unable to conclude therefore that the Respondent acted vexatiously, abusively, disruptively or otherwise

- unreasonably in the way in which the proceedings (or part) have been conducted.
21. Dealing with the grounds in Rule 76(1)(b), whether a party acted unreasonably in pursuing a defence from the outset must be judged by what the evidence before the Tribunal shows that they knew, or ought reasonably to have known at the outset, not with the benefit of hindsight (**Radia v Jeffries International Limited UKEAT/0007/18**). The Respondent's response to the claim reads "*we settled the outstanding money owed to him on the 14/10/22*". It was clear that the Respondent accepted that the sum was owed to the Claimant. The Respondent did not however take steps to ensure that the Claimant then received that payment. It was evident that the Respondent's defence to the claim in respect of £213 had no reasonable prospect of success pursuant to Rule 76(1)(b). The Tribunal therefore finds that the criteria to make a preparation time order is satisfied.
  22. Whilst there was no evidence that either party had complied with the Tribunal order to produce documents and witness statements by 11 November 2022, the hearing was able to take place despite the late submission of documents by both parties and a statement from the Claimant. The Respondent had not produced a witness statement but was permitted by the Tribunal to answer questions in relation to the Sunday rate of pay claimed by the Claimant (noting that this had not been pleaded in the ET1 claim form). With this adjustment to the process, the hearing was able to take place. The grounds at 76(2) are not therefore made out.
  23. The Tribunal must next consider whether to exercise its discretion to make an award. This discretion is broad and unfettered. The Tribunal concludes that in circumstances where the Respondent maintained an unsustainable defence to the claim, which has caused the Claimant to have to bring and prepare such a claim at Tribunal, it is appropriate to make a preparation time order.
  24. On the basis that the grounds at 76(1) are made out, the Tribunal determines the amount to award by considering the time spent by the Claimant in preparing the case, taking account of proportionality. There is no evidence before the Tribunal that the Respondent is not able to pay. The hourly rate is fixed at £43 (Rule 79). The Claimant's work rate per hour is not relevant.
  25. The Tribunal takes into account that the Claimant is a litigant in person and that some legal research would have been required and preparing a bundle and witness statement is likely to be unfamiliar to the Claimant. The bundle of documents produced by the Claimant was relatively short – 45 pages, including a witness statement of just over 3 pages. The schedule of loss was two pages long. It incorrectly included claims for various losses (basic and compensatory award, tribunal preparation and *Vento* compensation) which the Tribunal has no power to award in a claim for unlawful deduction from wages. The Claimant's application for a preparation time order states that he spent 26 hours preparing the two-page schedule of loss document, including "*research, legal advice, how it needed to be presented and what needed to be included*". The Claimant also states that he spent 3 days "*seeking legal advice and guidance*" and 42 hours on his witness statement including "*legal advice*". There appears to be some duplication and exaggeration here. Had legal advice been taken by the Claimant, it is likely that it would have been brought to his attention that he could not claim these heads of loss.

26. The Tribunal concludes that a proportionate amount of time to prepare the case for hearing is 5 hours. Rule 75(2) is clear that the order is in respect of time spent by the Claimant working on the case. It does not include costs such as printing costs and does not include time spent at any final hearing.

27. The Claimant is therefore awarded £215 (5 x £43).

Employment Judge Power  
12 June 2023