EMPLOYMENT TRIBUNALS

Claimant: **Andrzej Denis**

Respondent: **County Foods Ltd**

Heard at: **Bristol ET – in chambers** **On:** **22 July 2023**

Before: **Employment Judge G. King**

COSTS JUDGMENT

The Respondent's application for a Preparation Time Order is refused.

REASONS

Background

1. This case was heard in the Bristol Employment Tribunal on 3 March 2023. The Claimant's claim in respect of unpaid holiday was dismissed.

2. Judgement was sent to the parties on 17 March 2023. Written reasons were requested by the Claimant, and these were given on 4 May 2023.

3. The Respondent has subsequently applied for a Costs Order. What the Respondent appears to request is actually a Preparation Time Order. The Respondent's application states:

   "These costs relate to preparation for the Video Hearing and attendance on Friday, 3 March 2023".

4. The total time claimed is 34.75 hours, charged at £84.26 per hour, making a total of £2,928.21.

5. Both parties agreed to this application being determined on the papers without the need for a hearing.

Relevant Law

6. Rule 75 of the Employment Tribunal Rules of Procedure 2013 sets out the definition of a preparation time order: -

   (1) …

   (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 time spent at any final hearing.

   (3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

7. Rule 76 sets out the test to be applied by the Tribunal in considering whether to grant a costs application: -

   (4) 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;

   (b) any claim or response had no reasonable prospect of success;

   [or

   (e) 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.]

(5) 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.
…

8. Rule 77 sets out the procedure for determining such applications: -

> *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.*

9. The principle in the Rules is that "costs" (the Tribunal will use this term as shorthand for both costs and preparation time) do not follow success as they do in other areas of civil litigation. Rather, the Tribunal has power to make awards of costs in the circumstances set out in the Rules. In this case, the relevant provision is Rule 76(1)(a) which gives the Tribunal a discretion to award costs of the conduct of a party meets the threshold test set out in the Rule.

10. The Tribunal's discretion to award costs is not fettered by any requirement to link any unreasonable conduct to the costs incurred (*McPherson v BNP Paribas (London Branch*) [2004] ICR 1398 and *Salinas v Bear Stearns International Holdings Inc* [2005] ICR 1117, EAT). However, that is not to say that any issue of causation is to be ignored and the Tribunal must have regard to the "nature, gravity and effect" of any unreasonable conduct (*Barnsley Metropolitan Borough Council v Yerrakalva* [2012] IRLR 78).

11. The Tribunal takes into account that the "no reasonable prospect of success" provision is not the same as that when assessing whether a claim should be struck out or not. In those cases, the Tribunal as not heard full evidence, and so the test for strike out is a high bar. In assessing whether or not a claim has no reasonable prospect of success when considering an argument for costs the Tribunal has the benefit of having heard all the evidence in relation to the Claimant's claims and the Respondent's response to those claims.

<u>Deliberation</u>

12. The Respondent has applied for a costs order on the grounds that the the claim made by the Claimant was unreasonable and disruptive for the company with regards to the time taken and work involved in defending the claim. The

Respondent further says that the Claimant's claim had no reasonable prospect of success.

13. Disruption to the Respondent company is not a ground on which costs can be awarded.

14. The Tribunal may award costs if the Claimant has behaved unreasonably.

15. The grounds on which the Respondent says the Claimant behaved unreasonably are as follows:

    (6) County Foods fully co-operated with the ACAS early conciliation representative during both August and September 2022, to avoid the claim progressing to a Tribunal Hearing. ACAS confirmed that the issues raised by the Claimant had been satisfied and duly issued an early conciliation certificate (R198059/22/29).

    (7) Upon receipt of the Tribunal Claim (22 September 2022), County Foods arranged for a face-to-face meeting to be held with the Claimant on 12 October 2022 with Sandie Cutler, HR Officer, plus a Company translator, to clarify the basis of the claim lodged by the Claimant with the Employment Tribunal.

    It was also explained at this meeting and confirmed with print outs given to the Claimant from the time management system, that usage of his holiday entitlement had in fact been calculated correctly.

    (8) An additional meeting was held by Sandie Cutler on 20 October 2022 to discuss with the Claimant the Company's position on points raised by him on 12 October 2022. It was explained to the Claimant that the Company had met legal requirements about notification of dates the Company would be closed for the holiday year running from 1 February 2021 to 31 January 2022. A printout from the ACAS website was given to the Claimant at the meeting on 20 October, to confirm the statutory requirements.

16. With regard to the first point raised by the Respondent, I do not see how this confirms unreasonable behaviour on the part of the Claimant. I understand that some claims were dealt with by ACAS and these did not proceed to an Employment Tribunal hearing, but it is clear that the Claimant's claim for unpaid holiday (which related to two different days, and two different arguments as to why he was entitled to claim unpaid holiday) were not resolved through ACAS and proceeded. The Respondent's cooperation with ACAS does not of itself mean that the Claimant acted unreasonably.

17. In the second and third points, the Respondent raises that a meeting was held that the Claimant to try and resolve the claim. The Respondent's case is that the Respondent's position regarding the holiday claim was explained to the Claimant, and he did not agree with the Respondent's view.

18. It is important to note that no offer to settle were put forward by the Respondent. The Respondent maintained the same position that it did at the final hearing of this matter, where ultimately the Claimant's claims were dismissed.

19. The Respondent's case, therefore, is that the Claimant acted unreasonably by refusing to accept the Respondent's point of view. I take into account the relative bargaining power of the parties, and the administrative resources available to each. The Claimant was a lone individual bringing a claim against the Respondent company. The Respondent had the benefit of being able to involve managers and HR specialists.

20. I also feel important to consider a wider point. The Employment Tribunal is designed to be a forum where an individual, without having to pay fees, can bring a claim against his or her employer, without the fear that they will lose more than they stand to gain from making such a claim. Exceptions, of course, can be made, and that is why it is possible for a Costs Order or a Preparation Time Order to be awarded against a Claimant. The making of such an order, however, is very much the exception, not the rule.

21. As explained above, a Tribunal will only make such an order when a Claimant has behaved unreasonably. The Claimant, in this case, had his view on his entitlement to holiday, and the Respondent had its view. For a Claimant to be considered to have behaved unreasonably, simply because he disagreed with the case put forward by the Respondent, is not how Rule 77 was intended to operate. If unreasonable behaviour was to be inferred from a party disagreeing with their opponent's interpretation of the claim, then it would follow that every losing party in the Employment Tribunal would find themselves faced with an application for costs. It would defeat the purpose of the Employment Tribunal being a relatively level playing field where individuals can make a complaint against much larger organisations.

22. I therefore do not find that by bringing this claim and not accepting the Respondent's (opposing) view, the Claimant has behaved unreasonably in these proceedings.

23. County Foods Ltd additionally feel that the claim made by Andrzej Denis had no reasonable prospect of success because:

County Foods complied with more than the required notification (both verbal and written) to each employee, of days when the business would be closed for business. This included the allocation of paid holiday.

The Claimant had taken, and been paid, his full holiday entitlement for both holiday years; 21/22 and 22/23, for this reason, no further monies were due. This was confirmed in writing to the Claimant and additionally shown to him electronically and in printouts handed to him prior to the hearing taking place.

24. As noted above, what I must into account in the "no reasonable prospect of success" provision is not the same as that when assessing whether a claim should be struck out or not. In assessing whether or not the Claimant's claim had no reasonable prospect of success when considering an argument for costs I have the benefit of having heard all the evidence in relation to the Claimant's claims and the Respondent's response to those claims.

25. The mere fact that the Claimant has lost does not of itself mean the claim had no reasonable prospects of success. As long as the Claimant's case was arguable it cannot be said it had no reasonable prospects.

26. Although it is true that the Claimant ultimately lost his case, and the findings of the Tribunal at the final hearing concluded that the Respondent had correctly calculated the Claimant's holiday, I do note paragraph 30 of the written reasons which were given after the final hearing. Paragraph 30 stated:

30. The email of 3 February 2021 is in the bundle at [54]. It gives a breakdown of "planned" holiday in the form of a table. There are nine dates within the table; eight of which correspond to statutory bank holidays and the ninth is shown as to January 2022. This is described as "Bank Holiday". The Tribunal finds some sympathy with the Claimant's argument that this was described as a bank holiday when it was nothing of the sort. The Tribunal also feels that the Respondent could have been a lot clearer in making it apparent to staff that January 2022 was a business closure day, for which staff would be required to use one day of annual leave.

27. I conclude that, based on information he had received and the way in which he interpreted it, the Claimant had at least an arguable case. I therefore do not find that the Claimant's claim had no reasonable prospect of success.

28. The Respondent's application for a Preparation Time Order therefore fails.

29. Even if I am wrong about my findings of no unreasonable conduct, and that the claim was not one that had no reasonable prospects of success, this would not automatically lead to the making of a preparation time order. Such conduct on the part of the Claimant only opens the gateway to such an order being considered. The Tribunal has discretion as to whether to make such an order. Having considered the Claimant's means, and the relative status of the parties, even if I had found the Claimant had acted unreasonably or that the claim had no reasonable prospect of success, I would still not order a Preparation Time Order to be made.

_____

Employment Judge G. King
Date: 22 July 2023

Judgment sent to the Parties on 07 August 2023

For the Tribunal Office