EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Miss Nathalie Cross-Padden	**v**	**Kitrinos Healthcare (charity No. 1172586)** **Kitrinos Healthcare Ltd** **Team Kitrinos Non-Profit Ltd**

Heard at: London South Employment Tribunal

On: 4 August 2023 (in chambers)

Before: Employment Judge P Klimov (sitting alone)

JUDGMENT

The Claimant's application dated 12 May 2023 for a preparation time order succeeds. The Respondents are ordered to pay to the Claimant the sum of **£6,485.88** in respect of the Claimant's preparation time while not legally represented.

REASONS

Background

1. The relevant background to this claim and my findings and conclusions are set out in written Reasons dated 20 May 2023 ("**the Reasons**"). This Judgment must be read together with the Reasons to understand the reasoning in full.

2. On 12 May 2023, the Claimant applied for a preparation time order pursuant to Rule 76 (1) (a) and Rule 76 (1) (b) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("**the ET Rules**") in the total sum of £6,485.88.

3. There was a delay by the Tribunal in sending my instructions to the parties, for which I apologies, but on 17 July 2023, the Tribunal sent an email to the Claimant and Respondents giving the Respondents until 24 July 2023 to provide submissions in response to the Claimant's application, and for the Claimant to respond to the Respondents' submissions by 31 July 2023, if she so wished.

4. No representations by the Respondents have been received by the Tribunal.

The Law

1. Rule 76 provides:

   76 (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. The following key propositions relevant to costs orders may be derived from the case law:

3. There is a two-stage exercise to making a costs order. The first question is whether a paying party has acted unreasonably or has in some other way invoked the jurisdiction to make a costs order. The second question is whether the discretion should be exercised to make an order (*Oni v Unison* UKEAT/0092/17/LA).

4. While the threshold tests for making a costs order are the same whether or not a party is represented, in the application of the tests it is appropriate to take account of whether a litigant is professionally represented or not. Litigants in person should not be judged by the standards of a professional representative (*AQ Ltd v Holden* [2012] IRLR 648).

5. For term "vexation" shall have the meaning given by by Lord Bingham LCJ in *AG v Barker* [2000] 1 FLR 759:

   "*[T]he hallmark of a vexatious proceeding is … that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be , its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.*"

6. 'Unreasonable' has its ordinary English meaning and is not to be interpreted as if it means something similar to 'vexatious' (*Dyer v Secretary of State for Employment* EAT 183/83).

7. In determining whether to make a costs order for unreasonable conduct, a tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct — (*McPherson v BNP Paribas (London Branch)* 2004 ICR 1398, CA)

8. While a precise causal link between unreasonable conduct and specific costs is not required, it is not the case that causation is irrelevant. In *Yerrakalva v Barnley MBC [2012] ICR 420* Mummery LJ said:

> "*41. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the Claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment Tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances*".

9. Whether a claim or response had reasonable prospects of success is an objective test (*Radia v Jefferies International Ltd* EAT 0007/18). It is irrelevant whether the party genuinely thought that the claim/response did have reasonable prospects of success – (*Scott v. Inland Revenue Commissioners* [2004] ICR 1410 CA, at para.46).

10. In considering whether a claim or response had no reasonable prospects of success, the tribunal is not to look at the entire claim/response, but each individual cause of action – (*Opalkova v Acquire Care Ltd* EAT/0056/21, unreported, at para.17).

11. Under Rule 79 of the Rules a tribunal must decide the number of hours in respect of which a preparation time order should be made. This assessment must be based upon:

    (a) information provided by the receiving party in respect of his or her preparation time, and

    (b) the tribunal's own assessment of what is a reasonable and proportionate amount of time for the party to have spent on preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and the documentation required.

12. The current hourly rate is £43 (Rule 79(2)).

13. The amount of preparation time order shall be the product of the number of hours assessed under Rule 79(1) and the current hourly rate (Rule 79(3)).

14. Rule 77 of the Rules provides that: "*No [preparation time order] 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.*"

15. In interpreting, or exercising any power given to a tribunal under the Rules, it must seek to give effect to the overriding objectives set out in Rule 2 of the Rules, which requires the tribunal to deal with a case fairly and justly, "*including so far as practicable—*
   (a) ensuring that the parties are on an equal footing;
   (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
   (c) avoiding unnecessary formality and seeking flexibility in the proceedings
   (d) avoiding delay, so far as compatible with proper consideration of the issues; and
   (e) *saving expense*."

Conclusions

16. Having considered the matter, I am satisfied that I can deal with it fairly and justly on paper. Ordering a hearing to determine the application will be disproportionate to the complexity and importance and will result in further unnecessary delay and costs. In any event, the Respondents did not ask for a hearing.

17. The Respondents were given a reasonable opportunity to make representations. They chose not to do so.

18. Considering the background to this claim and the events at the final hearing, as recorded in my Reasons, I have no difficulty in finding that the Respondents' response had no reasonable prospect of success and that was known to them from the start of the proceedings. The Respondents' defence was centered on the argument that the Claimant was not an employee, but a self-employed, when it was plainly obvious that she was an employee, and the Respondents knew that.

19. Although not legally represented at that time, the Respondents had been advised in clear terms by their external HR professional that they were in breach of the law and the Claimant's claim was likely to succeed. The advice was given first some months before and then immediately after the Claimant presented her claim.

20. Notwithstanding, the Respondents chose to put the Claimant to trouble and expense of taking her claim all the way to the final hearing, just to capitulate at the hearing, accepting that they had no defence to any of the Claimant's

complaints in the claim. This, in my judgment, is an egregious example of unreasonable and indeed vexatious conduct. Put it bluntly, the Respondents knew (or at any rate this should have been obvious to them) that they were going to lose, but they were trying to make as much of a nuisance of themselves as possible in the hope that the Claimant would give up.

21. Therefore, I find that on the facts both Rule 76(1)(a) and Rule 76(1)(b) of the ET Rules are engaged.

22. I also find that the nature, gravity and effect of the Respondents' unreasonable and vexatious conduct justifies me exercising my discretion and making a preparation time award against them. I accept the arguments put forward by the Claimant in her application of 12 May 2023, to which the Respondents chose not to respond.

23. Finally, I have reviewed the Claimant's costs schedule and am satisfied that the amount of time spent in preparing and prosecuting the claim, as recorded in the schedule, is reasonable and proportionate to the complexity of the issues in the claim and conduct by the Respondents in the proceedings.

24. For these reasons, I find that the Claimant's application must succeed. I, therefore, make this preparation time order pursuant to Rules 75-79 of the ET Rules for the Respondents to pay to the Claimant the sum of £6,485.88 in respect of the Claimant's preparation time while not legally represented.

Employment Judge Klimov

4 August 2023

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