



EMPLOYMENT TRIBUNALS

Claimants: Ms A Tsiliepi
Mr G Kazakos

Respondent: GTA Food Services Ltd

UPON APPLICATION of the Claimant made by letter dated 13th June 2023 to reconsider the judgment on the Claimants' application for a preparation time order dated 19th April 2023 sent to the parties on 12th June 2023 under rule 72 of the Employment Tribunals Rules of Procedure 2013.

JUDGMENT

1. The application is allowed only to the extent that the preparation time order applications for both Mr Kazakos and Ms Tsiliepi are refused. I refuse to vary the decision not to award a preparation time order in this case and that decision applies to both Mr Kazakos and Ms Tsiliepi.

REASONS

1. On 16th March 2023 I entered a judgment in default for Mr Kazakos (1404070/22) under rule 21 against the Respondent for the total sum of £2, 235.30. On 16th March 2023 I entered a judgment in default for Ms Tsiliepi (1404074/22) for £212.
2. On 19th April 2023 Mr Dickson applied for a preparation time order in respect of both Claimants in the sum of £1, 492.40. I issued a judgment which was sent to the parties on 12th June 2023 rejecting the application and providing reasons. By error I omitted Mr Kazakos from inclusion in that judgment. I relied on the authority of **Health Development Agency v Parish [2004] IRLR 550** that conduct from the date of filing only can be considered to found any application for costs on the basis of conducting the proceedings 'vexatiously, abusively, disruptively or otherwise unreasonably' under rule 76. As the Respondent had not presented a response and therefore 'conducted' the proceedings a costs order could not be made on this basis. Further I determined that it could not be said that the response was misconceived as there was no response.

3. By email dated 13th June 2023 Mr Dickson applied for a reconsideration of that decision. I have considered his application carefully. I accept his point at paragraph 1. By error I omitted to refer to Mr Kazakos in the judgment and therefore his application for reconsideration of the judgment stands because it needs to relate to both claimants. Accordingly I apologise for the omission and vary the judgment to include reference to Mr Kazakos on this occasion.
4. Mr Dickson seeks a time preparation order of £299.30 for Ms Tsiliepi and £1193.10 for Mr Kazakos.
5. At paragraph 2 Mr Dickson takes issue with the finding that the Respondent had not provided any response to communications. He says that the Respondent did provide a response but it was to request information or evidence already provided or to unnecessary extra information or evidence which was then provided. Mr Dickson says that he had to respond to these requests and also take time off to comply with directions, prepare a skeleton argument and bundle and prepare for the hearing, all of which – according to the costs schedule - was done prior to the time for service of the response having elapsed.
6. At paragraph 3 Mr Dickson refers me to the authority of **Sunuva Ltd v Martin UKEAT/0174/17/JO** which he says does provide for recovery of costs pre action.
7. At paragraph 4 he says that the costs and loss of earnings incurred after the claim were £754.40 so even if the pre-action costs were not permitted to be recovered, those costs should be payable. It was asserted that notwithstanding its reliance on the case of **Parish** the Tribunal had failed to consider post claim costs.
8. At paragraph 5 it was submitted that a failure to comply with directions was unreasonable behaviour and that a defence could have no reasonable prospects of success even when one was not filed.
9. At paragraph 6 Mr Dickson questioned why it was found that the application was dismissed on the basis the response had no reasonable prospects of success as there was no response provided. The Respondent's behaviour, it was asserted, was disruptive and unreasonable.

The Law

10. Under Rule 75(2) a preparation time order is an order that a party 'the paying party' makes a payment to another party 'the receiving party' in respect of the receiving party's preparation time while not legally represented. The Tribunal's power to make a time preparation order is contained in Rule 76 as follows:

When a costs order or a preparation time order may or shall be made

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) 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.

(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—

(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and

(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

11. On the whole costs (and preparation time orders) are the exception rather than the rule (**Gee v Shell UK Ltd [2003] IRLR 32**) and unlike in the county court, costs do not follow the event.

12. If a Tribunal finds that there are grounds on which to make a costs or preparation time order under Rule 76(1)(a) or (b) it must then consider whether it should exercise its discretion to do so.

Rule 76(1)(a)

13. When considering whether Rule 76(1)(a) has been made out it is the conduct of a party in bringing or defending a claim, or continuing to pursue the claim or defence that can give rise to an award and not conduct occurring before the institution of the proceedings (**Davidson v John Calder (Publishers) Ltd and Calder Education Trust Ltd [1985] IRLR 97**). This was also the point made in **Health Development Agency v Parish [2004] IRLR 550** where, when dealing with the equivalent provision under the old rules, at paragraph 21 HHJ Richardson held:

'In our judgment the conduct of a party prior to proceedings or unrelated to proceedings cannot found an award of costs. In our judgment it is necessary for there to be a causal relationship between the conduct of a party in bringing or conducting proceedings and the costs which are awarded under rule 14.'

14. Mr Dickson has referred me to the authority of **Sunuva Ltd v Martin UKEAT/0174/17/JO** which I have considered. I am grateful to Mr Dickson for bringing this case to my attention. In that case the EAT overturned the effect of the second sentence of that paragraph as to the need for a causal link.

15. In that case the Claimant was dismissed for redundancy and instructed solicitors to write a letter before claim to the respondent before proceedings

commenced. The allegation was that the process was a sham. It was then conceded by one of the respondent's witnesses in evidence that despite saying in the ET3 that there was a pool, the claimant was only ever going to be dismissed. The issue before the EAT was whether there ought to have been costs awarded pre-action. There was a discussion of the relevant case law and paragraph 21 above was cited at paragraph 14 of that case. In particular, the EAT's attention was drawn to the Court of Appeal authority in **McPherson v BNP Paribas (London Branch) [2004] ICR 1398** and Mummery LJ's rejection of counsel's submission that a person's liability for costs was '*limited as a matter of construction of rule 14, by a requirement that the costs in issue were attributable to specific instances of unreasonable conduct by him.*' At paragraph 40 Mummery LJ held:

'The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring BNP Paribas to prove that specific unreasonable conduct by Mr McPherson caused particular costs to be incurred....Further the passages in the cases relied upon by Miss McCafferty are not authority for the proposition that rule 14(1) limits the Tribunal's discretion to those costs that are caused by or attributable to the unreasonable conduct of the applicant.'

And at 41:

'It is not however punitive and impermissible for a tribunal to order costs without confining them to the costs attributable to the unreasonable conduct. As I have explained the unreasonable conduct is a precondition of the existence of the power to order costs and it is also a relevant factor to be taken into account in deciding whether to make an order for costs and the form of the order.'

16. The test for whether a claim (or response) has no reasonable prospects of success is objective: **Vaughan v London Borough of Lewisham [2013] IRLR 713**.

Findings and Conclusions

17. The Claimants issued claims for holiday pay and unpaid wages on 6th December 2022. The claims were served on 26th January 2023 and the ET3 was due on 24th February 2023. The case was allocated to the Tribunal's short track and a hearing was listed for 6th March 2023 which was then adjourned on 2nd March 2023. Judgments were made on 6th March 2023 in default of the Respondent having presented any response to either claim.
18. The conduct in question is alleged to be the Respondent's stalling behaviour in asking for information that had already been provided in advance of the claim and then not providing a response. It may be said, that the lack of active co-operation in paying the Claimants the money due

resulted in them having to issue the claims and obtain a judgment from the Tribunal.

19. The fact remains however, that their action in obtaining such a judgment resulted in judgments in their favour. On one analysis the failure to provide a response allowed the Claimants to obtain a result. In that sense it cannot be said that the conduct is unreasonable. Otherwise it would have to be said that anyone who did not conciliate or co-operate with the other party pre-proceedings would be acting unreasonably. I have also not been presented with any evidence that the requests for information from the respondent were stalling tactics either by email or otherwise.

20. I do not consider that on the facts there is any evidence of unreasonable litigation conduct pre or post issue. The Claimants have obtained a default judgment for the monies that they claimed they were owed.

21. The respondent did not present a response and continue with it. Therefore it cannot be said to have no reasonable prospects of success.

22. Even if I am wrong on the above points, I would not exercise my discretion to award preparation time in this case. This case is a short track case. Judgments in default were issued so the parties were not in proceedings and did not participate in any hearing. There was no requirement to prepare for a hearing when the response had not been served. It is not proportionate in my findings for costs to be awarded in circumstances where the parties have obtained a judgment at the start of proceedings in default of a response being presented. The Tribunal's process has been used properly, efficiently and to the advantage of the parties and the application for costs is wholly out of proportion to the amounts claimed.

Employment Judge **A Frazer**
Date: 4th August 2023

Case No: 1404070/ 2022

1404074/ 2022

Judgment sent to the Parties on 21 August 2023

For the Tribunal Office