EMPLOYMENT TRIBUNALS

Claimant: **Mr D Thorpe**

Respondent: **Apex Evolution Limited**

Heard at: **East London Hearing Centre**

On: **11 September 2023 (in chambers)**

Before: **Employment Judge P Klimov (sitting alone)**

JUDGMENT

The Respondent's application dated 14 August 2023 for a preparation time order succeeds.

The Claimant is ordered to pay to the Respondent the sum of **£1,161** (27 hours @ £43/hour) in respect of the Respondent'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 my judgment dated 20 July 2023 ("**the Liability Judgment**"). This Judgment must be read together with the Liability Judgment to understand the reasoning in full.

2. The issue of costs was raised by the Respondent at the end of the hearing on 20 July 2023. I explained to the Claimant what that meant and the likely steps that would have to be followed (see paragraphs 34-37 of the Liability Judgment).

3. On 14 August 2023, the Respondent 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**") for the total of 27 hours.

4. On 31 August 2023, the Tribunal sent an email to the Claimant giving him until 5 September 2023 to provide submissions in response to the Respondent's application.

5. No representations by the Claimant 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. Costs awards are compensatory, not punitive – (*Lodwick v Southwark London Borough Council* [2004] ICR 884 CA).

6. The fact that a costs warning has been given is a factor that may be taken into account by a tribunal when considering whether to exercise its discretion to make a costs order, however a warning is not precondition to the making of an order — (*Raveneau v London Borough of Brent* EAT 1175/96)

7. Under Rule 84 of the ET Rule, the tribunal may, but is not required to have regard to the paying party's ability to pay.

8. 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.*"

9. "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).

10. 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)

11. 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*".

12. 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).

13. 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).

14. 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.

15. The current hourly rate from 1 April 2023 is £43 (Rule 79(2)).

16. 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)).

17. 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.*"

18. 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

19. 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 Claimant did not ask for a hearing.

20. The Claimant was given a reasonable opportunity to make representations. He chose not to do so.

21. Considering the background to this claim and the Claimant's conduct at the final hearing, as recorded in my Liability Judgment, I have no difficulty in finding that his claim had no reasonable prospect of success, and that should have been apparent to the Claimant from the start. His claim was speculative

and not grounded on any facts that could be sensibly said to give rise to any legal rights.

22. I am cognizant that the Claimant is a litigant in person. However, he is an intelligent person, and I do not see how, in light of the concessions he was prepared to make at the hearing (as recorded in paragraphs 24 - 32 of the Liability Judgment), he could be under any illusion that he had a valid legal claim for a bonus payment.

23. Furthermore, he presented no evidence to support his claim for a £15,000 bonus payment and could not even explain on what legal basis he says the Respondent owed him that money, or how he calculated that amount.

24. Notwithstanding all that, the Claimant chose to put the Respondent to trouble and expense of defending his hopeless claim all the way to the final hearing. This, in my judgment, was a prime example of unreasonable and indeed vexatious conduct. Put it bluntly, the Claimant knew (or at any rate this should have been obvious to him) that he was going to lose but was still determined to have his day in court.

25. Despite that determination to go all the way, the Claimant had failed to comply with the Tribunal's orders, which had been in order to have his claim duly prepared for the hearing. His failure to properly engage with the Tribunal process has caused the Respondent further difficulties and additional costs. The Respondent warned the Claimant several times about this and urged him to engage with the Tribunal process properly. In correspondence with the Claimant the Respondent also explained to him why it considered his claim as having no reasonable prospect of success and urged him to seek legal advice. It gave the Claimant several costs warnings. All that was to no avail.

26. The Claimant's surprising conduct at the final hearing, when he accepted all the Respondent's evidence without any challenge and did not present any evidence of his own to contradict the Respondent's evidence, further amplifies the unreasonableness of his conduct of the proceedings.

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

28. I also find that the nature, gravity and effect of the Claimant's unreasonable and vexatious conduct justifies me exercising my discretion and making a preparation time award against him. I accept the arguments put forward by the Respondent in its application of 14 August 2023, to which the Claimant chose not to respond.

29. Finally, I have reviewed the Respondent's time schedule and am satisfied that the amount of time spent in preparing and defending the claim, as recorded in the schedule, is reasonable and proportionate to the complexity of the issues in the claim and conduct by the Claimant in the proceedings. The Claimant did not provide any representations as to his ability to pay for me to have regard to when deciding on the Respondent's application.

30. For these reasons, I find that the Respondent's application must succeed. I, therefore, make this preparation time order pursuant to Rules 75-79 of the ET Rules for the Claimant to pay to the Respondent the sum of **£1,161** (27 hours @ £43/hour) in respect of the Respondent's preparation time while not legally represented.

Employment Judge Klimov
Dated: 11 September 2023