Case Number: 1804995/2022

1800897/2023

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms C Lee	v	**HKS Consultancy Group Limited**

Heard: on the papers in Leeds **On: 13 October 2023**

Before: Employment Judge JM Wade

JUDGMENT

1 The claimant's application for a preparation time Order dated 24 June 2023 succeeds.

2 The sum assessed as proportionate to be paid by the respondent to the claimant is £1050.

REASONS

Introduction

1 The claimant's claim for unpaid wages, notice pay and holiday pay succeeded after a one day hearing, with the Judgment sent to the parties on 5 June 2023. The award was uplifted for a failure to provide particulars of employment. The respondent's counterclaim was dismissed.

2 The claimant presented a preparation time order application with an eight page statement which set out details of alleged unreasonable conduct of the proceedings, and other reasons to make a preparation time Order, schedule of time spent and bundle. The schedule of preparation time spent on the case was from 20 June 2022 to the final hearing on 30 May 2023. The total hours claimed were 127; the total amount claimed was £5334. The rate claimed is £42 an hour. Some of the entries were manifestly unreasonable for example: "2 hours – post hearing planning"; and some were simply not pursuable for example: "speaking to HMRC ref overpayment of tax".

3 The respondent presented a one page letter – replicated below - objecting to the making of an Order. The claimant did not request an in person hearing to determine the application. The essence of the respondent's position is that it was not unreasonable to pursue its defence when at a previous hearing its defence was said to be reasonable.

The Law

4 Rule 76 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations says:

> 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;*
> *(b) any claim or response had no reasonable prospect of success; [or*
> *(c) 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.]*
>
> *(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.*

5 Rule 79 says this:

> *(1) The Tribunal shall decide the number of hours in respect of which a preparation time order should be made, on the basis of—*
>
> *(a) information provided by the receiving party on time spent falling within rule 75(2) above; and*
> *(b) 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 required.*
>
> *(2) The hourly rate is £33 and increases on 6 April each year by £1.*
>
> *(3) The amount of a preparation time order shall be the product of the number of hours assessed under paragraph (1) and the rate under paragraph (2).*

Further background and submissions

6 This was a short track claim for around £2000. The respondent is an agency which places carers and other staff. Its case was the claimant was “never an employee” at its head office.

7 There are no recordings of the previous hearings in the case. There was no deposit order or indication in previous orders that any party’s case had little reasonable prospects of success.

8 It is clear that an ordinary deductions from wages case of this quantum would have been determined at its first 2 hour hearing. The first hearing was converted to a case management hearing because the respondent appeared to present a

counterclaim not appreciating that it could not do so if its primary position was that there was no contract of employment.

9 The case management hearing identified the issues and gave directions. By a final hearing for three hours in February 2023 there was still not an orderly case ready for hearing and the Judge postponed it. It then came before me in May after the Tribunal was unable to allocate a Judge in April 2023.

10 The claimant's case is that the respondent's conduct led to this delay and that in fact, its defence was misconceived and its other actions vexatious, including in relation to settlement, or otherwise unreasonable. The respondent's position was this:

I would highlight that at no point during the proceedings did the Claimant ever give any indication that she believed that she was unreasonably being put to any additional costs by the Respondent and the Respondent refutes the Claimant's characterisation of its behaviour in the conduct of these proceedings. I would also raise that the Claimant only produced documentation in support of her claim at the final hearing, having not produced this earlier despite previous requests.

While the Respondent was unsuccessful in the defence of this claim, that does not mean that we acted unreasonably in defending it and it was, in fact, the Claimant who was warned at the earlier case management hearing that her claim was unlikely to proceed.

The Claimant appears to be seeking to recover all of her costs and time in bringing and preparing for this hearing, including time spent before any claim was filed as well as speaking to ACAS, addressing settlement, seeking legal advice and speaking to DWP and HMRC but the fact that she was ultimately successful does not mean that those were costs incurred as a result of any unreasonable behaviour on the part of the Respondent. In fact, the majority of the costs could have been avoided had the Claimant produced the documents as part of disclosure and for inclusion in the bundle as required rather than producing them in the course of the hearing itself. The Respondent cannot be deemed to have acted unreasonably in defending a claim when it had no opportunity to consider the evidence the Claimant was relying on before the hearing.

The majority of the costs that the Claimant is seeking to pursue relate to matters that are unconnected to this case, are related to without prejudice negotiations or the Claimant repeating work carried out previously, such as spending twice as much time preparing for the hearing after it was relisted as had been spent preparing initially. The amount of time spent on the issues also seems excessive.

The Respondent would contend that the amount of time the Claimant alleges was spent on the preparation is excessive and wholly unrealistic in line with the nature of this claim. It also cannot be in the interests of justice for the Claimant to seek costs that are 5 times the value of the claim and over twice the value of the award made. It is also simply unreasonable for the Claimant to seek 127 hours of preparation time given the nature of the claim and length of the hearing.

The Respondent defended the case based on what it believed the position to be and cannot be viewed as acting unreasonably in doing so when an earlier Employment Judge agreed that the defence seemed reasonable. The

Respondent contends that this cannot indicate unreasonable behaviour in the conduct of proceedings and that being unsuccessful in the defence of a claim does not mean that it acted unreasonably in the way it conducted the defence of a position genuinely held.

Discussion and Conclusions

11 It is right that the delay inherent in the case "journey" above does not all fall at the respondent's door. However, the respondent had declared to HMRC that the claimant was an employee and declared payments of wages to have been made to her as such, and set such costs against its revenue, when in fact all payments were not made to her, and she was underpaid. It then terminated her contract of employment when she became unwell. The idea of a "sub" - that is an advance – to an unpaid trainee - was not arguable in these circumstances. Something quite different was presented to HMRC. The claimant was a new employee, and in that sense "a trainee", but the idea that she would do so without pay was simply fanciful in all the circumstances of the respondent's business and its payroll arrangements. These were findings I made on the last occasion.

12 An Employment Judge may well have indicated that a defence of "never an employee" was arguable, without having seen the HMRC documentation, payslips, bank records, or heard the oral evidence, which I heard.

13 Nevertheless, I am satisfied that this defence was misconceived from the outset, that all the fundamental matters were known to the respondent or reasonably capable of being understood and known: how payroll and its accountants were approaching matters, and indeed, what payments had or had not been paid in comparison with those declared to HMRC in real time information.

14 I take that into account that neither of the parties had lawyers - in the case of the respondent, no doubt had it sought advice, that advice would have acknowledged the position above.

15 In short, I am satisfied that the respondent acted unreasonably in pursuing a misconceived defence from the outset, which has increased time and cost for the claimant.

16 In exercising my discretion, however, I consider that the preparation time hours sought are manifestly disproportionate to the claim. The parties may chose to spend as much time as they wish preparing or defending a case, but if that time is unreasonable and disproportionate to the matter the Tribunal may take that into account in the exercise of its discretion and must do so in assessing what is a reasonable amount of time to spend.

17 I also put out of my mind the complaints about engagement or not with settlement, and conduct which is unrelated to the proceedings. I also put out of my mind that the claimant's position is one of wishing to punish the respondent, and the costs rules above are not penal; they are, if the threshold is met, to compensate for time spent, subject always to what it is reasonable to spend.

18 In all those circumstances (and bearing in mind that costs applications in their content can also be disproportionate to the matter in hand), I consider that 25

hours at £42, the current rate, is the just assessment of the amount of time it was reasonable to spend in preparing the claimant's case. The key reasonable documents were the HMRC records, bank account transfers (whether claimant's or respondent's to prove payment or not) and payslip information, the claimant's starter information, and messages between the claimant and colleagues at work. Emails of the claimant at work were not disclosed by the respondent.

19 Other than documents, this was a case where oral evidence could be relatively concisely prepared. I also take into account that a litigant in person or lay representative will take longer to prepare a hearing file and statement, than a qualified representative. Nevertheless, there still comes a point when it is necessary to say, more time is disproportionate, however obstructive or difficult the other side's conduct.

Employment Judge JM Wade

13 October 2023