**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4105990/2022**

**Held in Glasgow on 26 March 2023 (In Chambers)**

**Employment Judge B Beyzade**

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| **Miss Charlene Wilson** | **Claimant In Person [per written representations]** |
| **The Nail & Beauty Zone Ltd** | **Respondent Represented by: Mr M Lumsden - Director [per written representations]** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**1. The judgment of the Tribunal is that:**

1.1. The Tribunal directs that the respondent's Preparation Time Order application as set out in respondent's Grounds for Preparation Time Order Application (hereinafter defined) be determined on the basis of both parties' written representations rather than at a hearing.

1.2. The respondent's application for a Preparation Time Order in terms of Rules 75 and 76 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the ET Rules") is refused.

**REASONS**

**Introduction**

2. This Judgment follows on the Judgment of the Employment Tribunal in respect of the above parties dated 07 December 2023 which was issued to the parties on 08 December 2023 ("the December 2023 Judgment"). In

summary, the decision of the Tribunal in the December 2023 Judgment was that the claimant's complaints of breach of contract (notice pay) under the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994, Art.3 and wrongful dismissal were unsuccessful following a Final Hearing during which the Tribunal heard and considered evidence on 14 November 2023.

3. Prior to the Final Hearing, a Preliminary Hearing had been held on 11 August 2023 before Employment Judge M Kearns, following which Judgment was issued to parties on 17 August 2023 dismissing the claimant's complaints of disability discrimination and arrears of pay (statutory sick pay). In addition, the Tribunal concluded that the claimant did not have sufficient qualifying service to claim unfair dismissal and that the Tribunal has no jurisdiction to hear such a complaint.

4. The respondent made an application for a Preparation Time Order against the claimant in terms of Rules 75 and 76 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the ET Rules") and the basis on which the respondent seeks a preparation time order was set out in the respondent's email to the Tribunal, with an attachment containing the grounds of the application, dated 04 January 2024 ("Grounds for Preparation Time Order Application").

5. The Tribunal's directions sent to the claimant on 06 February 2024 stated "Before the application is considered, you are invited to give reasons in writing by 21 February 2024 why the Order as requested should not be made. In the alternative, if you wish to state such reasons at a hearing you should notify this office by 21 February 2024 and a hearing will then be arranged."

6. The claimant took up the opportunity to make her own representations in writing and set out the basis on which the claimant resisted the respondent's application for a Preparation Time Order in the claimant's email to the Tribunal, with attachments, dated 19 February 2024 ("Preparation Time Order Application Response").

7. In the Grounds for Preparation Time Order Application the respondent sought a Preparation Time Order on the grounds that the claimant had breached the Tribunal's orders with respect to providing unredacted medical information, the claimant's alleged unreasonable conduct in bringing the proceedings, and further, that the complaints that had no reasonable prospects of success. Accordingly, the respondent sought a Preparation Time Order, in relation to their own time spent working on the case. The claimant's and the respondent's relative positions and submissions in respect of these grounds on which the respondent sought a Preparation Time Order were set out in the respondent's Grounds for Preparation Time Order Application and in the Claimant's Preparation Time Order Application Response respectively.

8. On 22 February 2024 parties were directed to provide any further written representations by 4pm on 21 March 2024 and that thereafter the Tribunal may decide the respondent's application on the basis of the correspondences received or at a hearing. Taking account of the parties' representations and the parties' and the Tribunal's availability, it would not have been practicable to arrange an oral hearing without unreasonable delay. Neither the claimant nor the respondent indicated that they objected to the consideration of the respondent's application without a hearing. I was satisfied that the claimant and respondent had been provided with a reasonable opportunity to make representations in writing in relation to the application in terms of Rule 77 of the ET Rules. In the circumstances, I decided that the respondent's application could be determined on the basis of the claimant's and the respondent's written representations, and that an oral hearing was unnecessary.

**Issue for determination**

9. The issues before the Tribunal for determination were whether or not the respondent's application for a Preparation Time Order against the claimant as set out in respondent's Grounds for Preparation Time Order Application was well-founded and, if so, whether or not to make an award of Preparation Time against the claimant, and, if so, on what basis and in what amount, having regard to the information available to the Tribunal.

**Respondent's Grounds for Preparation Time Order Application**

10. The respondent's Grounds for Preparation Time Order Application was sent to the Tribunal by email dated 04 January 2024.

11. The application refers to the claimant's complaints of unfair dismissal, direct disability discrimination, discrimination arising from disability, arrears of pay (statutory sick pay), breach of contract (notice pay) and wrongful dismissal. The application states that "All the complaints have been dismissed or withdrawn over a series of hearings."

12. The respondent's application quotes paragraphs 3 and 4 of the December 2023 Judgment (summarising the outcome of the Preliminary Hearing on 11 August 2023 before Employment Judge M Kearns).

13. The December 2023 Judgment is summarised in terms that "The claimant's complaints of breach of contract (notice pay) and wrongful dismissal are not-well founded and they are hereby dismissed."

14. The respondent states that the application is based on the Presidential Guidance General Case Management Guidance Note 7: Costs "which state that a party may be ordered to pay costs or preparation time to the other party where the paying party has breached an order or practice direction, a party has acted vexatiously, abusively, disruptively, or otherwise unreasonably in bringing or defending the proceedings or in its conduct of the proceedings; or the claim or response had no reasonable prospect of success." Although I note that the Presidential Guidance – General Case Management (Guidance Note 7: Costs) only applies in Employment Tribunal proceedings in England and Wales, the relevant section relied upon (paragraph 13 of Guidance Note 7) reflects the ET Rules in so far as they relate to the grounds for making Preparation Time Orders (considered below).

15. The respondent submits that "the Claimant breached orders of the tribunal with respect to providing unredacted medical information, was unreasonable in bringing the proceedings and that the claims had no reasonable prospect of success."

16. The following information is provided in relation to the claim for Preparation Time in the total amount of £1600.00:

"Preparation and time by Director – Michael Lumsden 35 hours x £40.00 per hour = £1,400.00

Preparation time x Spa Manager–Thara Zaheer 5 hours x £40.00 per hour = £200.00"

**Claimant's grounds of objection**

17. The claimant provided her Preparation Time Order Application Response by email dated 19 February 2024 sent to the Tribunal at 1.10pm and copied to Mr Lumsden, Director of the respondent (who represented the respondent at the Final Hearing).

18. The claimant stated that she believed that her claim had a genuine chance of success, that all the information she provided was honest and true, and that whilst she was disappointed in terms of the December 2023 Judgment, she respected the decision and did not present an appeal.

19. The claimant explains that the case has brought her an overwhelming amount of stress and that she would not have continued to pursue her claims if she did not believe she was correct to do so.

20. The claimant also states that having received advice from the Citizens' Advice Bureau, she has been advised to make the Tribunal aware of her financial situation. The claimant advises that due to her employer going into liquidation, she was made redundant at the end of November 2023 and she is currently seeking new employment. A copy of the notice of termination dated 24 November 2023 is attached to the claimant's email.

21. The claimant invites the Tribunal to consider her current financial situation in the event that if the Tribunal finds that a Preparation Time Order is required.

**Respondent's further submissions**

22. Mr Lumsden, on behalf of the respondent, sent an email to the Tribunal dated 07 March 2024 at 11.45pm setting out the respondent's further written representations.

23. With regard to the claimant not being in employment since the end of November 2023, he states that there is a shortage of Spa and Beauty therapists in the UK and in Glasgow with many jobs available, and that if the claimant had been unable to secure new employment, it is not because there were no available and suitable jobs.

24. In relation to the claimant's position that her claim had a genuine chance of success and all information she provided was honest and true, the respondent states "…we refer the Judge to the judgment of the Tribunal that "The claimant's complaints of breach of contract (notice pay) and wrongful dismissal are not-well founded and they are hereby dismissed." It is further stated, "The Claimant proceeded with multiple claims of unfair dismissal, direct disability discrimination, discrimination arising from disability, arrears of pay (statutory sick pay) and breach of contract (notice pay) and wrongful dismissal". All of the claims failed."

25. The respondent points out that the claimant was represented in relation to her claims by her partner who operates a debt collection agency in Glasgow and who had the ability to research the circumstances and legal basis in which such claims could be successful.

26. In response to the claimant stating that all information she provided was honest and true, the respondent draws the Tribunal's attention to paragraphs 51 to 54 of the December 2023 Judgment. It is submitted that those paragraphs draw into question the honesty and truth of the statements made in the claimant's claim and in the claimant's evidence.

**Relevant law**

27. According to Rule 74 of the ET Rules:

*(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.*

*(2) "Legally represented" means having the assistance of a person (including where that person is the receiving party's employee) who—*
*(b) is an advocate or solicitor in Scotland; or…*

28. Rule 75 of the ET Rules sets out the definition of costs orders (expenses orders in Scotland) and preparation time orders:

*"75.—*

*(1) A costs order is an order that a party ("the paying party") make a payment to—*

*(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;*

*(b) the receiving party in respect of a Tribunal fee paid by the receiving party; or*

*(c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal. (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."*

29. Rule 76 of the ET Rules sets out the test to be applied by the Tribunal in considering whether to grant an application under Rule 75:

*"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; [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."*

30. Rule 77 of the ET Rules sets out the procedure for making an application for a costs order and the Tribunal's determination of the same:

*"77. 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."*

31. Rule 84 of the ET Rules provides that:

> *"84. In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay."*

32. The grounds for making an expenses order and a Preparation Time Order under Rule 76(1)(a) and (b) of the ET Rules are the same.

33. The principle in the ET Rules is that an expenses award does not follow success as they do in civil proceedings in the ordinary courts outside the Employment Tribunal context. Rather, the Employment Tribunal has power to make awards of expenses and Preparation Time Orders in the circumstances set out in the ET Rules.

34. In the case of Yerrakalva v Barnsley Metropolitan Borough Council and another [2012] LC.R. 420, at paragraph 7 of the report of Mummery LJ's judgment in the Court of Appeal it was stated that "The employment tribunal's power to order costs is more sparingly exercised and is more circumscribed by the employment tribunal's rules than that of the ordinary courts. There the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the employment tribunal costs orders are the exception rather than the rule. In most cases the employment tribunal does not make any order for costs. If it does, it must act within rules that expressly confine the employment tribunal's power to specified circumstances ...".

35. In Salinas v Bear Stearns International Holdings Inc [2005] ICR 1117, EAT, Mr Justice Burton, then President of the EAT, expressed the view that the reason why costs orders are not made in the substantial majority of Employment Tribunal cases is that the Employment Tribunal Rules of Procedure contain a high hurdle to be surmounted before such an order will be considered.

36. In Hossaini v EDS Recruitment Ltd (trading as J & C Recruitment) and another [2020] LC.R. 491 the then Her Honour Judge Eady QC (now Mrs Justice Eady, President of the EAT) said (at paragraph 64), “It is common ground that there are three stages involved in the determination of a costs application: (1) the ET needs to determine whether or not its jurisdiction to make a costs award is engaged—here, whether the circumstances provided by Rule 76(1) existed; if so, (2) it must consider the discretion afforded to it by the use of the word “ may ” at the start of that rule and determine whether or not it considers it appropriate to make an award of costs in that case; only then would it turn to question (3), that is to determine how much it should award."

37. When determining whether or not a party’s conduct should be considered ‘unreasonable’, the word should be given its ordinary English meaning and is not to be interpreted as if it means something similar to ‘vexatious’ – see the unreported case of Dyer v Secretary of State for Employment (UKEAT 183/83).

38. In the case of National Oilwell Varco (UK) Limited v Mr Jonathan Van De Ruit UKEATS/0006/14/JW, The Honourable Lady Stacey referring to the Dyer v Secretary of Statement for Employment case stated “I am perfectly content to proceed on the basis that unreasonably is construed simply as a word in the English language. Therefore one has to ask whether this particular litigant acted unreasonably or rather, more accurately, one has to ask if EJ Hosie was entitled to find that this particular individual did not act unreasonably, taken overall.” In that case the Employment Appeal Tribunal upheld the Tribunal’s decision refusing to make an award, holding that the claimant had not acted unreasonably in circumstances in which the claimant withdrew all claims the day before a Pre-Hearing Review at which time bar and disablement were to be discussed (the claimant was concerned that despite having a case which was arguable, he might have lost his case and been ordered to pay expenses).

39. As HHJ Auerbach noted in Radia v Jefferies International [2020] IRLR 431: “61. It is well-established that the first question for a Tribunal considering a costs application is whether the costs threshold is crossed, in the sense that

at least one of r 76(1)(a) or (b) is made out. If so, it does not automatically follow that a costs order will be made. Rather, this means that the Tribunal may make a costs order, and shall consider whether to do so. That is the second stage, and it involves the exercise by the Tribunal of a judicial discretion. If it decides in principle to make a costs order, the Tribunal must consider the amount in accordance with r 78. … [Original emphasis]."

40. HHJ Auerbach considered the overlap between a claim or response having no reasonable prospect of success and unreasonable conduct: "64. This means that, in practice, where costs are sought both through the r 76(1)(a) and the r 76(1)(b) route, and the conduct said to be unreasonable under (a) is the bringing, or continuation, of claims which had no reasonable prospect of success, the key issues for overall consideration by the Tribunal will, in either case, likely be the same (though there may be other considerations, of course, in particular at the second stage). Did the complaints, in fact, have no reasonable prospect of success? If so, did the complainant in fact know or appreciate that? If not, ought they, reasonably, to have known or appreciated that?"

41. Rule 2 of the ET Rules states that:

*"2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, 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."*

**Discussion and decision**

42. The Tribunal will address the respondent's application under Rules 75 and 76 of the ET Rules relating to the substantive complaints.

43. The submissions from the respondent in relation to the application under Rules 75 and 76 of the ET Rules do not specifically address the test that needs to be met for an award of Preparation Time to be made. The respondent makes various assertions about the substantive complaints in their submissions but it is not expressly said or set out in any detail how these matters satisfy the relevant tests in Rule 76 of the ET Rules.

44. In relation to the December 2023 Judgment I consider that the respondent has fallen into the error of assuming that an award in respect of Preparation Time follows success which is not how Preparation Time Orders are dealt with in the Employment Tribunal. However, I also recognise that the respondent is not legally represented and so I have taken this into account when addressing the respondent's application under Rules 75 and 76 of the ET Rules.

45. To the extent that the respondent relies on Rule 76(1)(a) in respect of the application relating to the substantive complaints, I consider that the various points made by the respondent do not establish that the claimant or her representative had acted "vexatiously, abusively, disruptively or otherwise unreasonably" in bringing the relevant complaints or the way the proceedings relating to those complaints were conducted. This test requires more than the claimant simply being unsuccessful and nothing which has been asserted by the respondent can be said to establish that the bringing of the complaints or the conduct of them falls within the scope of Rule 76(1)(a) of the ET Rules.

46. Similarly, the Tribunal does not consider that the respondent has established that the threshold for an award of Preparation Time under Rule 76(1)(b) of the ET Rules had been crossed. Again, although the claimant was unsuccessful in terms of her complaints, the Tribunal does not consider that the assertions made by the respondent in their submissions demonstrate that the relevant complaints had no reasonable prospects of success.

47. In relation to the specific complaints, the Tribunal would make the following comments in respect of each complaint.

48. In respect of the arrears of pay complaint (being payment of statutory sick pay), it is worth noting that it was the respondent's own case in their ET3 Form was that no further payment were owed to the claimant. Paragraph 14 of the Reasons within Employment Judge M Kearns's Judgment dated 17 August 2023 records that "The amounts of SSP due to the claimant were paid to her in full at an earlier stage in the proceedings and the claim for SSP has been withdrawn and is accordingly dismissed." The claimant's representative confirmed that the claimant had now been paid, and that claim was withdrawn (which was an acknowledgment that the claimant's complaint in respect of SSP payments could not be pursued in circumstances in which she had now received payment). The claimant's withdrawal of her complaint in those circumstances cannot be described as unreasonable.

49. Having considered the evidence before the Tribunal at the Preliminary Hearing (including the documentary evidence before the Tribunal) on 11 August 2023, Employment Judge M Kearns concluded that the claimant had not established that she was disabled as defined by the Equality Act 2010 at the relevant time. Accordingly, the claimant's disability discrimination complaints were dismissed at the first substantive Preliminary Hearing. There was no finding made by the Employment Judge that the complaints had no reasonable prospect of success. In the circumstances, I am unable to conclude that the claimant's disability discrimination complaints had no reasonable prospects of success nor could it be said that bringing those complaints were unreasonable or otherwise within the scope of Rule 76(1)(a).

50. Given these issues, the Tribunal does not consider that the complaints that were determined within the December 2023 Judgment or any of the complaints (referred to above) within the Judgment of Employment Judge M Kearns dated 17 August 2023 could be said to have had no reasonable prospects of success nor could it be said that bringing those complaints were unreasonable or otherwise within the scope of Rule 76(1)(a).

51. Turning to the unfair dismissal complaint, Employment Judge M Kearns considered that the claimant does not have sufficient qualifying service to make a complaint of unfair dismissal and the Tribunal has no jurisdiction to hear such a complaint. Although it could be argued that the claimant's unfair dismissal complaint had no reasonable prospect of success on jurisdictional grounds, there is no evidence before me to suggest that the claimant was aware (or ought to have been aware) that the Tribunal did not have jurisdiction to consider her unfair dismissal complaint prior to the hearing before Employment Judge M Kearns. That complaint was dismissed at the first substantive Preliminary Hearing.

52. In terms of the Judgement of Employment Judge M Kearns, the respondent's representative had provided detailed written representations dated 04 August 2023 on evidential and legal matters, and the Tribunal had considered the evidence before it. At the Final Hearing before me, oral and documentary evidence was considered that were relied upon by both parties prior to reaching a decision.

53. The respondent makes a bald assertion that paragraphs 51-54 of the December 2023 Judgment draws into question the honesty and truth of the statements made in the claimant's claim and in evidence. There was certainly nothing in the evidence heard by the Tribunal at the Final Hearing that suggested that the claimant did not have a genuine belief in terms of her complaints of breach of contract (notice pay) and wrongful dismissal. The fact that, ultimately, the Tribunal did not consider that the evidence before it allowed the Tribunal to reach a similar conclusion does not, without something more, mean that the claimant was not being honest or truthful or not acting in good faith.

54. It certainly does not mean that the complaints of breach of contract (notice pay) and wrongful dismissal had no reasonable prospects of success or that the claimant bringing those complaints amounted to conduct which falls within the scope of Rule 76(1)(a).

55. These were complaints where evidence was needed to be heard for there to be a determination of whether notice pay was payable, and if so, in what amount. The fact that the evidence, ultimately, established that the claimant was not owed any payment in respect of notice pay does not mean that the complaints had no reasonable prospects of success or that bringing those complaints falls within the scope of Rule 76(1)(a) of the ET Rules.

56. If I were wrong to so conclude, and there were no reasonable prospects of success in respect of any of the claimant's complaints, I would not have determined that on the evidence before me, that the claimant had in fact known or appreciated that (nor that they ought reasonably, to have known or appreciated that). Mr Lumsden's submission that the claimant's partner who operates a debt collection agency in Glasgow and could have conducted research, would not be a sufficient basis for making such a finding. There is no evidence before me to show that the claimant's partner, who appeared before the Tribunal as a lay representative, had conducted any research (or in terms of whether they had the ability and resources to conduct any such research into employment law and procedure matters), or that they had communicated the same to the claimant.

57. The respondent also submits that the claimant breached the Tribunal's orders with respect to providing unredacted medical information. Employment Judge M Kearns considered this issue in detail at paragraphs 4, 5, 6 and 7 of her Judgment and Reasons dated 17 August 2023. Whilst I note that the claimant had initially provided partially redacted medical documents, a dispute arose between the parties about the redactions, and the Tribunal ordered the claimant to provide the unredacted medical documents, following which an Employment Judge would decide if the redacted material was relevant to the issue of disability status. Although there was further non-compliance, the claimant's representative had sent correspondences to the Tribunal explaining the claimant's reasons for this.

58. Following an application by the respondent for the claimant's complaints to be dismissed as a result of the claimant's repeated non-compliance, the unredacted records were provided on the same day as the respondent's

application and the Employment Judge determined that the medical documents in question were potentially relevant to the issues between the parties. That evidence was considered by Employment Judge M Kearns at the Preliminary Hearing on 11 August 2023, along with the other documentary evidence that was available at the time, following which the claimant's disability discrimination complaints were dismissed. Considering all the circumstances, I am unable to conclude that the fact that the claimant did not provide unredacted medical records until the respondent had made their application to dismiss the claimant's complaints, meant that the claimant's complaints or her conduct of her complaints falls within the scope of Rule 76(1)(a) of the ET rules.

59. Even if I had been so satisfied (and the grounds in Rules 76(1)(a) and/or (b) were established), taking account of the claimant's means and ability to pay, I would have declined to make a Preparation Time Order considering all the circumstances (including the claimant's means). The claimant had lost her employment at the end of November 2023 and the claimant was seeking new employment. The fact that there may be a shortage of Spa and Beauty therapists or suitable available employment in this field (no evidence relating to this was provided by the respondent), does not provide any or any substantial assistance in terms of assessing the claimant's means at the relevant time. I therefore considered the claimant's means based on the evidence that was before me.

60. For these reasons, the respondent's application under Rules 75 and 75 of the ET Rules is refused.

**Conclusion**

61. In the circumstances I refuse the respondent's application for a Preparation Time Order.

B. Beyzade

**Employment Judge**

27 March 2024

**Date of Judgment**

**Date sent to parties** **2 April 2024**

*I confirm that this is my judgment in the case of Miss C Wilson v The Nail & Beauty Zone Ltd 4105990/2022 and that I have signed the Judgment by electronic signature.*