EMPLOYMENT TRIBUNALS

Claimant: **Mr William Britten**

Respondent: **The Lion Hotel (Berriew) Limited**

Before: Employment Judge J Bromige

Representation (Submissions Only)

Claimant: Written Submissions
Respondent: No Submissions Received

JUDGMENT ON CLAIMANT'S APPLICATION FOR PREPARATION TIME ORDER

Preliminary Matters

1. The above claim was heard at Wales Employment Tribunal, sitting at Welshpool Magistrates Court, on 24th April 2023. There was a significant delay in providing written reasons, with reasons being sent to the parties on 15th September 2023, due to the request for reasons not being promptly communicated to myself. Unfortunately, the same thing has happened with the Claimant's application for a preparation time order.

2. It appears that on or around 1st September 2023, so after written reasons had been requested but before they were promulgated, the Claimant made an application for a preparation time order. That application was unparticularised, and so EJ Moore directed the Claimant to set out the amount of time sought, in a schedule, within 14 days.

3. The Claimant complied with this direction on 14th September 2023, claiming a total of 3210 minutes of preparation time. The file was then referred to EJ Jenkins in November 2023, and he directed that the Respondent provide any comments to the application by 23rd November 2023. The Respondent did not do so.

4. The file was then referred to myself on 20th December 2023. It was unclear to me the exact basis that the Claimant was making the application, and given the absence of any input from the Respondent or their professional representatives (who were still on record for them), I made further directions for both parties to set out the basis of their respective applications and response.

5. The Claimant provided his application on 28th January 2024 (copying in the Respondent's representative). No response has ever been received by the Respondent nor their Representative, and I determine the application in the absence of any representations from the Respondent.

The Claimant's application

6. The Claimant's application is made under both Rule 76(1)(a) and (1)(b) of the Employment Tribunal Rules of Procedure 2013 (as amended). The grounds of the application are:

    a. The Respondent made several serious unfounded allegations against the Claimant in the ET1;
    b. The Respondent either failed to comply with the Tribunal Case Management Orders, and/or were repeatedly late in complying with them.
    c. Had the Respondent actively participated in the ACAS Early Conciliation Process then the case could have settled, saving time and resources;
    d. The Respondent has not paid the outstanding sum as part of the certificate of correction to the original judgment dated 15th September 2023.

7. The Claimant does not ascribe which part of Rule 76 each limb of the application is made under, but I approach the application that parts (a), (b) and (d) are allegations of unreasonable and vexatious conduct (so r.76(1)(a)), and part (c) refers to the Respondent having no reasonable prospects of success per r.76(1)(b).

The Law

8. The correct starting position is that an award of costs is the exception rather than the rule – see *Gee v Shell (UK) Limited* [2002] EWCA Civ 1479. Sedley LJ emphasised that the governing structure remained that of a cost-free, user friendly jurisdiction in which the power to award costs is not so much an exception to as a means of protecting its essential character.

9. Rule 76(1) of the ET Rules states:

    (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.

10. Dealing first with r76(1)(a), the headline description of 'unreasonable conduct' includes conduct that is vexatious, abusive or disruptive. When making a costs order on the ground of unreasonable conduct, the discretion of the Tribunal is not fettered by any requirement to link the award causally to particular costs which have been incurred as a result of specific conduct that has been identified as unreasonable (*McPherson v BNP Paribas (London Branch)* [2004] ICR 1398).

11. In *Barnsley Metropolitan Borough Council v Yerrakalva* [2012] IRLR 42 per Mummery LJ at [40]:

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 if had.

12. Turning to Rule 76(1)(b), the authorities in respect of this aspect of the rule and its earlier iterations in past rules do not link with the definition of no reasonable prospects of success under rule 37 of the ET Rules. The reason for this is clear – at the stage of a strike out application the Tribunal do not have the benefit of oral evidence and must take the Claimant's case at its highest. At the costs stage, the Tribunal have given a full judgment with access to all the relevant material from which to make an assessment.

13. As per Knox J in *Keskar v Governors of All Saints Church* [1991] ICR 493 (at 500E)

    The question whether a person against whom an order for costs is proposed to be made ought to have known that the claims that he was making had no substance, is plainly something which is, at the lowest capable of being relevant, and we are quite satisfied from the decision itself, in the paragraph which I have read and need not repeat, that the industrial tribunal did have before it the relevant material, namely that there was virtually nothing to support the allegations that the applicant made, from which they drew the conclusion that he had acted unreasonably in bringing the complaint.
    That in our view, does involve an assessment of the reasonableness of bringing the proceedings, in the light of the non-existence of any significant material in support of them, and to that extent there is necessarily involved a consideration of the question whether the applicant ought to have known that there was virtually nothing to support his allegations.

14. Further, in *Cartiers Superfoods Limited v Laws* [1978] IRLR 315, as per Phillips J at para [18]:
    …we think it is right to look and see what the party in question knew or ought to have known if he had gone about the matter sensibly.

15. Finally, for both parts of Rule 76, if the Tribunal concludes that either r76(1)(a) or (1)(b) is satisfied, the next stage is for the Tribunal to consider whether to exercise its discretion in favour of the party claiming costs with regards to all of the circumstances of the case.

Discussion and Conclusions

(1) The Unfounded Allegations

16. At §6 of the written reasons, I set out the contents of the ET3 which made nine particular serious allegations against the Claimant. The Respondent did not adduce any evidence about these at the final hearing, despite asserting in their pleaded case that there were signed witness statements to support the allegations. I found that Mr Davies, the Director of the Respondent, was not an honest witness, in part, because of the reliance upon these unfounded allegations.

17. One of the matters that the Respondent relied upon alleged that the Claimant had

sexually harassed a 16 year old female employee. Such an allegation was totally unproven, and in my judgment should not have been included in the pleadings, or should certainly have been withdrawn when it became apparent to the Respondent (who at this stage were professionally represented) that no evidence was to be adduced at the final hearing.

18. Therefore in my judgment this was unreasonable or vexatious conduct on the part of the Respondent. The ET3 is an important document. It is the first opportunity for the Respondent to set out its case. It is used to identify the nature of the Respondent's defence, and the issues to be determined. It is not to be used to attack or undermine the Claimant with unsubstantiated and potentially false allegations.

19. Therefore the Claimant has satisfied r76(1)(a). But that is not the end of the matter. I must look at the effect of the conduct (as per *Yerrakalva),* whilst not being limited to simple 'but for' causation (*McPhearson*). Applying those principles, I decline to award costs. This is in no way to condone the conduct of the Respondent, but there was minimal impact, or costs caused, by such conduct. I remind myself that this was a half day hearing, which determined some claims in favour of the Claimant and some for the Respondent. I was not required to hear evidence about these allegations, to make findings about them, nor was it necessary for the Claimant to call evidence in rebuttal (indeed, he did not). Whilst vexatious, it did not have any impact upon the conduct of the final hearing, nor did it drive up costs for the Claimant, no matter the understandable worry and concern he must have felt upon reading the ET3.

(2) Compliance with ET Orders

20. The Claimant does not identify which orders of the Tribunal the Respondent failed to comply with. Certainly, the parties failed to provide an agreed bundle, and the Respondent served a witness statement of a Mr Kendall on the morning of the hearing.

21. There appears to have been an issue with the parties exchanging bundles and witness statements prior to the hearing. The Claimant complained of the Respondent's lack of compliance on 10th April 2023. By the time the correspondence was dealt with, the Respondent's representative was on record, and with the exception of the statement of Mr Kendall, it appears that both parties complied with the amended direction of EJ Brace that all documents and statements were to be exchanged by 21st April 2023.

22. Again, whilst I do not condone such conduct, it is not unusual, even when both sides are represented, for the exchange of documents and statements to go down to the wire. Whatever happened the week before, both parties were ready and able to participate fully at the final hearing. The late service of Mr Kendall's statement also did not present a problem. In circumstances where the Respondent's representative came on record relatively late in the day, and effective preparation of the hearing was possible, I do not find that r76(1)(a) is satisfied for this part of the application.

(3) The remaining parts of the application

23. I can deal with (c) and (d) of the application relatively briefly. Firstly, the Tribunal

has no jurisdiction to investigate or explore what has or has not happened via ACAS as part of the Early Conciliation process. It may very well be that the Respondent adopted an unreasonable position during Early Conciliation, but they are entitled to do so. Further, I am not referred to any settlement correspondence once the Tribunal had accepted the ET1, and I am not asked to conclude that the Respondent acted unreasonably in rejecting any settlement offers.

24. Finally with part (d), the costs regime within the ET Rules is not designed to be punitive, and I cannot order costs in favour of the Claimant on the basis that the Respondent has failed to pay some or all of the judgment amount. If the Claimant wishes to seek recovery or enforcement of the judgment, that is a matter for him, but it would be wrong to conclude that this itself was unreasonable or vexatious conduct by the Respondent which attracts costs.

Conclusions

25. For the above reasons, the Claimant's application for a preparation time order is refused.

Employment Judge **J Bromige**

Date: 14th May 2024

JUDGMENT SENT TO THE PARTIES ON 15 May 2024

FOR THE TRIBUNAL OFFICE Mr N Roche