EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103114/2023

Held by means of the Cloud Video Platform on 1 July 2024

Employment Judge W A Meiklejohn
Tribunal Member Ms D McDougall
Tribunal Member Mr R Martin

Mr M Dibnah	**Claimant** **Represented by:** **Mrs C Dibnah,** **Claimant's wife**
Craigclowan School and Nursery	**Respondent** **Represented by:** **Mr C Robertson,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the claimant's application for a Preparation Time Order is refused.

REASONS

1. The Employment Tribunal met by means of the Cloud Video Platform on 1 July 2024 to deal with an application made on behalf of the claimant for a Preparation Time Order ("PTO"). This application was opposed by the respondent.

Applicable Rules

2. The provisions within the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 dealing with PTOs are, so far as relevant, as follows.

Rule 75 Costs orders and preparation time orders

… (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. "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 …

Rule 76 When a costs order or a preparation time order may or shall be made

(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 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 …

Rule 77 Procedure

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.

Application

3. The claimant's application for a PTO was set out in Mrs Dibnah's email to the Tribunal on 30 April 2024. In brief summary the application was in three parts –

(a) Failure to comply with the Tribunal's orders of (i) 20 November 2023 relating to hearing dates and (ii) 5 December 2023 relating to responding to the claimant's schedule of loss.

(b) Alleged conduct on the part of Mr Robertson relating to preparation of the joint bundle of documents.

(c) The respondent's application for a Strike Out Order.

4. The claimant's position was that the respondent had not complied timeously with the Tribunal's orders, that Mr Robertson had behaved unreasonably and disruptively in the preparation of the joint bundle and that the application for a Strike Out Order had been vexatious.

Objection

5. The respondent's position was that -

(a) The Order of 20 November 2023 had been complied with. It was accepted that the Order of 5 December 2023 had not been complied with timeously which was due to a mistake on the part of Mr Robertson when diarying the date for compliance.

(b) It was disputed that Mr Robertson had acted inappropriately in connection with the joint bundle. It was said that only Mrs Dibnah had difficulty in accessing the electronic file containing the joint bundle; other recipients had no such difficulty.

(c) There had been valid grounds for the strike out application. The respondent had not requested a separate hearing but had asked that the matter be dealt with at the start of the final hearing. The reason for the decision not to proceed with the application had been explained.

6. The parties agreed that the claimant's application for a PTO should be determined without a hearing.

Discussion

7. We reminded ourselves that Rule 76(1) required us to consider making an Order where the grounds upon which we could do so were made out, but that it was a matter for our discretion as to whether it was appropriate for an Order to be made. It is a feature of litigation in the Employment Tribunal that expenses are not normally awarded against the unsuccessful party, and we approached matters by looking at each of the allegations in the PTO application.

8. We considered firstly the matter of compliance with Orders of the Tribunal. We were satisfied that the respondent had provided hearing date information in an email dated 4 December 2023. That complied with the Order of 20 November 2023. We were also satisfied that the respondent had not complied timeously with the Order of 5 December 2023. Mr Robertson accepted this.

9. Mr Robertson explained within his objection to the PTO application that the non-compliance arose due to his mistake when recording the date for compliance in his diary. We considered that while timeous compliance with Orders of the Tribunal is important, not every instance of failure by a party to do so should result in an Order for expenses or a PTO against that party. The normal practice of the Tribunal where there is a failure to comply is to issue a reminder. This indicates that late compliance will usually be accepted.

10. In this case the non-compliance was inadvertent and relatively minor. There had been no material prejudice to the claimant as the hearing date was not imminent. We were satisfied that it would not be appropriate to make a PTO in these circumstances.

11. We next considered the allegations regarding preparation of the joint bundle. We noted that there had been no Order of the Tribunal requiring a joint bundle. That said, it normally assists the Tribunal where a joint bundle is provided and of course Rule 2 requires parties to co-operate

generally with each other and with the Tribunal to further the overriding objective to deal with cases fairly and justly.

12. We noted the assertions made about Mr Robertson's conduct in relation to the preparation of the joint bundle. It was stated that he had acted unreasonably and disruptively. We considered that it was normal for there to be dialogue between the parties about the contents of the joint bundle. Parties will not always agree about what should and should not be included. Some coming and going was to be expected. The issue for us was whether there had been conduct which came within Rule 76(1).

13. It was clear that preparation of the joint bundle did not go as smoothly as Mrs Dibnah would have wished. Her inability to access the electronic versions sent via Sharepoint must have been frustrating. It was apparent that some documents which she wanted to include did not find their way into the bundle as quickly as they might have done.

14. The assertion in the PTO application was that there was conduct on the part of Mr Robertson which was unreasonable and disruptive. We were not persuaded that the difficulties narrated by Mrs Dibnah in relation to the joint bundle were disruptive of the proceedings such as to engage Rule 76(1). The final hearing was not delayed. A joint bundle was provided.

15. We noted the nature of the conduct found to be disruptive in ***Garnes v London Borough of Lambeth and another EAT 1237/97***. We found no conduct on the part of Mr Robertson which came anywhere close to the threshold for acting disruptively. There had been some inconvenience and frustration for Mrs Dibnah, but nothing which could be described as deliberately obstructive on the part of Mr Robertson.

16. We reminded ourselves that "unreasonably" should be given its normal meaning. It did not equate to "vexatiously" – ***Dyer v Secretary of State for Employment EAT 183/83***. In ***Yerrakalva v Barnsley Metropolitan Borough Council and another 2012 ICR 420*** Mummery LJ stressed that the vital point in exercising the Tribunal's discretion to order costs was to look at the whole picture of what happened in the case and to ask whether there had been unreasonable conduct in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it

and what effects it had. In the present case we recognised that some issues had arisen during preparation of the joint bundle but we were not satisfied that there had been unreasonable conduct such as to engage Rule 76(1).

17. Turning to the respondent's application for a Strike Out Order, we were satisfied that there had been a reasonable basis for making the application. The respondent believed that untruthful information had been communicated to a witness. While that might not be the strongest basis for seeking strike out, it was stateable.

18. We took note of Mr Robertson's point that the respondent's application had been made on the basis that it should be dealt with at the start of the final hearing. It had been the Tribunal's decision to fix a separate preliminary hearing to deal with the matter. This would have put the respondent to additional cost, and it seemed to us that this was a reasonable basis for the decision to withdraw the application. We found no conduct here on the part of the respondent which engaged Rule 76(1).

Decision

19. For the reasons set out above we decided that the application for a PTO should be refused.

Employment Judge: W A Meiklejohn

Date of Judgment: 14 August 2024

Entered in register: 19 August 2024

and copied to parties