# EMPLOYMENT TRIBUNALS

**Claimant:** Mr C Godfrey

**Respondent:** Ensinger Limited

**Heard:** in chambers **On:** 5 September 2024

**Before:** Employment Judge S Jenkins
Mr P Bradney
Ms J Kaye

# JUDGMENT

The Claimant's application for a preparation time order is refused.

# REASONS

**Background**

1. Following a judgment delivered at the conclusion of a seven-day hearing, on 28 November 2023, the Claimant submitted an application for a preparation time order ("PTO") pursuant to rule 76 of the Employment Tribunals Rules of Procedure ("Rules"). The Claimant specifically contended that the Respondent had acted unreasonably by failing to engage with alternative dispute resolution ("ADR") during the conduct of the proceedings in this case. The Claimant pursued an order in the sum of £6,321.00 reflecting 147 hours of preparation time. The Respondent resisted the application.

2. Both parties agreed that the application could be considered by the Tribunal "on the papers" without a hearing, and we therefore arranged a time to deliberate in chambers to consider the application.

**Law**

3. Rule 76(1)(a) provides that a PTO may be made, and that the Tribunal 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;*"

4. Rule 77 deals with the procedure for making a PTO application and

provides as follows:

"*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.*"

5. In that regard, the Claimant had submitted a written application within the applicable time period, and the Respondent had also responded in writing. In the circumstances, we considered that we could consider the application in light of those written representations, without requiring a hearing. There were then, unfortunately, some delays in scheduling a day for the tribunal to convene to consider the PTO application.

6. The general approach to be applied by Tribunals when considering costs and PTO applications has been clarified by the appellate courts on several occasions. The cases generally involve costs applications, but the principles apply equally to PTO applications.

7. In Gee v Shell UK Ltd [2003] IRLR 82, Sedley LJ said:

"*It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to ordinary people without the need of lawyers, and that, in sharp distinction from ordinary litigation in the United Kingdom, losing does not ordinarily mean paying the other side's costs.*"

8. The Court of Appeal reiterated, in Yerrakalva v Barnsley Metropolitan Borough Council and anor [2012] ICR 420 at paragraph 7, that:

"*The ET's power to order costs is more sparingly exercised and is more circumscribed by the ET'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 ET costs orders are the exception rather than the rule. In most cases the ET does not make any order for costs. If it does, it must act within rules that expressly confine the ET's power to specified circumstances, notably unreasonableness in the bringing or conduct of the proceedings. The ET manages, hears and decides the case and is normally the best judge of how to exercise its discretion.*"

9. In Millan v Capstick Solicitors LLP and others (UKEAT/0093/14), Langstaff J, the then President of the EAT, described the exercise to be undertaken by the Tribunal as a three-stage exercise, which can be paraphrased as follows:

    1. Has the putative paying party behaved in the manner proscribed by the Rules?

    2. If so, the Tribunal must then exercise its discretion as to whether or not it is appropriate to make a costs order. It may take into account ability to pay in making that decision.

3. If the Tribunal decides that a costs order should be made, it must decide what amount should be paid or whether the matter should be referred for assessment. The tribunal may take into account the paying party's ability to pay.

10. We noted that the Court of Appeal, in Yerrakalva at paragraph 41, further stated, "*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.*"

11. The Claimant put his application on the basis that the Respondent had acted "unreasonably" in its conduct of the proceedings. The EAT, in National Oilwell Varco (UK) Limited v Van de Ruit (UKEATS/006/14), noted that the EAT, in the unreported case of Dyer v the Secretary of State for Employment (UKEAT/183/83), had concluded that "unreasonable" is to be construed in the normal English construction of that word, and that it does not take colour from the words which appear before it in rule 40(3) which are "vexatiously, abusively, disruptively".

12. As we have already noted, the basis of the Claimant's contention of unreasonable conduct on the part of the Respondent revolved around its failure to engage with ADR. HHJ Tayler, in the very recent EAT decision of Leeks v University College London Hospitals NHS Foundation Trust [2024] EAT 134, in the context of a judgment which overturned the decision of the Employment Tribunal in that case that a refusal to enter into ADR could not be described as unreasonable behaviour, summarised the key decisions of civil courts in such circumstances, whilst contrasting the general approaches to costs between the civil courts and the employment tribunals.

13. At paragraphs 44 to 51, the Judge outlined the Tribunal Rules and Presidential Guidance relating to ADR, noting, at paragraph 51 that, "*Both judicial mediation and assessment are voluntary* processes".

14. At paragraph 53, the Judge noted that, "*The direction of travel in the Civil Courts and Tribunal is increasingly to encourage alternative dispute resolution. In the Civil Courts a failure to engage with alternative dispute resolution may result in the defaulting party failing to recover their costs and possibly even having an award of costs made against them.*"

15. The Judge then included extracts from several civil court judgments, including from that of Briggs LJ in PGF II SA v OMFS Co I Ltd [2014] 1 WLR 1386, where he said, at paragraph 52:

"*While in principle the court must have that power[1], it seems to me that a sanction that draconian should be reserved for only the most serious and fragrant[2] failures to engage with ADR, for example where the court had taken it on itself to encourage the parties to do so, and its encouragement*

[1] The power to order an otherwise successful party to pay all or part of the unsuccessful party's costs.
[2] It is presumed that "flagrant" was intended.

*had been ignored.*"

16. Judge Tayler also noted, at paragraph 58 in Leeks, that, "*It is important, as I have already mentioned, to bear in mind the different costs provisions in the Employment Tribunal, in which costs do not follow the event and are the exception rather than the rule, and the Civil Courts in which costs usually do follow the event, and are generally the rule rather than the exception.*"

**The communications regarding ADR**

17. With regard to the Claimant's application, it was noted that, following receipt of the Respondent's response on 4 January 2023, the Claimant's representative had sent a "without prejudice save as to costs" email to the Respondent's representative on 25 January 2023, setting out his position and asserted weaknesses of aspects of the Respondent's position, putting forward an offer of £30,000 in full and final settlement. The Respondent rejected that and made no counter-offers.

18. ADR, in the form of either or both judicial assessment and judicial mediation, is a standard agenda item for case management preliminary hearings involving discrimination complaints. For either of those matters to be taken further, both parties have to indicate a willingness. If both do, the Tribunal will then assess whether either or both options are appropriate.

19. In this case, in the agendas for a preliminary hearing on 30 March 2023 before Employment Judge Sharp, the Claimant indicated a willingness to mediate, whilst the Respondent did not. The matter was therefore not taken further and was not mentioned in Judge Sharp's Record of Preliminary Hearing.

20. A further preliminary hearing took place on 3 July 2023 before Employment Judge Grubb, to deal with some interlocutory matters that had arisen. The Claimant's representative, in his application and submissions, noted that mediation was again briefly discussed by Judge Grubb and that the Respondent was invited to consider the point again at a later stage once the Claimant had submitted his schedule of loss, but did not do so. Judge Grubb did not however make any reference to mediation in her Record of Preliminary Hearing.

21. The Claimant's representative repeated the £30,000 settlement proposal in an email to the Respondent's representative of 25 August 2023, in which he recorded the intention to make an application for costs on the basis that the Respondent had declined to participate in early conciliation, had declined to enter into without prejudice settlement discussions, and had twice declined to take part in judicial mediation. The Respondent did not respond, and nor did it respond to a chaser email sent by the Claimant's representative on 9 November 2023.

22. The Claimant also referenced an email sent to the parties by the Tribunal on 11 October 2023, indicating that Employment Judge Brace was considering listing the case for a Dispute Resolution Appointment ("DRA"). That was in the context, as noted by Judge Brace, of the Wales Employment Tribunal introducing non-consensual DRAs for longer

hearings. The communication noted that the parties would need to ensure that witness statements were exchanged by the stipulated date of 16 October 2023 in order to make effective use of the DRA.

23. In the event, issues arose regarding disclosure and expert evidence which had to be addressed at a further preliminary hearing on 9 November 2023, such that statements were not able to be exchanged as directed, which meant that no DRA ever took place.

## Conclusions

24. We noted the approach that should be taken in relation to considering applications for PTOs and, as directed by the EAT in Millan, we focused first on whether the putative paying party, i.e. the Respondent, had behaved in the manner proscribed by the rules, i.e. had been unreasonable in its conduct of the proceedings.

25. We noted that the outcome of the hearing in this case had been mixed, and could perhaps be described as something of a "score draw". The Claimant's constructive unfair dismissal claim and discrimination arising from disability claim had been unsuccessful, whereas his claims of failure to make reasonable adjustments and of victimisation had succeeded, albeit in relation to the former only in relation to one out of six asserted reasonable adjustments.

26. We also noted that we had awarded the Claimant a total of £10,402.91, including interest, by way of compensation, of which £5,000.00 was awarded in respect of injury to feelings.

27. We noted that the Claimant had left the Respondent's employment to immediately take up new employment, and that, bearing in mind that the Claimant's salary with the Respondent was not particularly high, his compensation for lost salary would always have been relatively limited. Even factoring in the inclusion of a basic award for unfair dismissal, that indicated that the Claimant's £30,000 settlement proposal must have been predicated on an injury to feelings award in the middle Vento band, indeed an award quite some way into that band.

28. We noted that the Respondent's representative, in its written response to the Claimant's application, which the Claimant's representative did not dispute in his subsequent submissions, noted that, in discussions between the parties after we had delivered our judgment on liability, where we had given our provisional view that the Claimant's witness statement did not seem to indicate that an award in the middle band was likely, maintained the view that a middle band award would be appropriate.

29. We ultimately did not consider that the Respondent had acted unreasonably in not engaging with ADR.

30. Even in civil courts, as noted in PGF II SA , the sanction of costs should be reserved for only the most serious and flagrant failures to engage with ADR, for example where the court had taken it on itself to encourage the parties to do so, and its encouragement had been ignored.

31. ADR in the employment tribunal is voluntary, and although discussions regarding ADR took place in this case, there was nothing to indicate that the discussion had been anything more than the normal discussion that takes place in cases such as this one.

32. Furthermore, the discussion that we understand took place between the parties after we delivered our judgment on liability, referenced at paragraph 28 above, suggested that the Claimant and his representative would have been unlikely to have settled for a sum which factored in an injury to feelings award in the middle band.

33. In the circumstances, and notwithstanding that the Respondent's legal costs incurred in defending this case are likely to have been more than even the Claimant's opening settlement offer of £30,000, we did not consider it unreasonable for it to take the view that it preferred to maintain its defence through to the final hearing.

34. We therefore refused the Claimant's PTO application on the basis that he Respondent's conduct had not been unreasonable.

35. For the avoidance of doubt, had we considered that the Respondent had acted unreasonably, we nevertheless would not have considered it appropriate to exercise our discussion to order a PTO against it. As noted at paragraph 10 above, the Court of Appeal in Yerrakalva, indicated that the focus should be on the effect of any unreasonable conduct.

36. As we have noted, the discussions the parties had after we had issued our judgment on liability proved unsuccessful, even where we had provided a provisional view on the likely injury to feelings award. We doubted that any ADR process, had it been entered into, would have led to a positive resolution, such that the same amount of time would have had to have been expended in relation to the hearing in any event.

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Employment Judge S Jenkins
Date: 6 September 2024

JUDGMENT SENT TO THE PARTIES ON 9 September 2024

FOR THE TRIBUNAL OFFICE Mr N Roche

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