EMPLOYMENT TRIBUNALS

Claimant: **Mr S Monroe**

Respondent: **Gem Security Systems Ltd**

Heard at: **Bristol (days 3 to 5 via CVP)** **On: 24th – 28th June 2024**

Before: **Employment Judge David Hughes**
Mr P Bompas
Ms G Mayo

Representation
Claimant: In person
Respondent: Ms K Tucker, HR Consultant

JUDGMENT

1. The Claimant's application for a Preparation Time Order is dismissed.

REASONS

Background

1. In this case, the Tribunal gave judgment on 28.06.2024. The Tribunal found that the Claimant had been unfairly dismissed, but that there was a 95% chance that he would have been dismissed in any event.

2. Complaints of unfair dismissal under s103A of the Employment Rights Act 1996, for having made a protected disclosure, of having been subjected to a detriment for making a protected disclosure, of unfavourable treatment because of something arising in consequence of disability, of failure to make reasonable adjustments for disability and victimisation, were dismissed.

3. Our judgment was sent to the parties on 22.07.2024.

4. On 24.07.2024, written reasons were requested. These were prepared, dated 13.08.2024.

The present application

5. On 15.08.2024, the Claimant emailed the Tribunal, applying for a preparation time order (PTO) under rules 76(1)(a) and (2) of the Employment Tribunal Rules 2013 ("the Rules").

6. The Respondent was contacted by the Tribunal, and asked to send any response to the Tribunal by 01.10.2024. A response was received, dated 30.09.2024.

7. The matter was then brought to the attention of the Employment Judge who had presided at the final hearing, on 07.10.2024.

The parties' contentions

The Claimant

8. The Claimant contended that the Respondent acted unreasonably "*…in the manner that it conducted itself and its participation in the proceedings. It also breached numerous case management orders and directions. As a direct result of the Respondent's conduct:*

   A. I had to submit a strike out or unless order application to the Employment Tribunal, and repeat this application;
   B. the originally scheduled hearing had to be postponed;
   C. the case management orders had to be varied so that the Claimant, instead of the Respondent, had to prepare the final hearing bundle"

9. The Claimant set out at length his submissions as to the Respondent's alleged unreasonable conduct:

   (a) The Respondent failed to comply with directions issued by the Tribunal on 18.11.2022, and had to be sent a reminder before complying on 16.12.2022 and 22.12.2022. Even then, it did not copy the Claimant into its response;

(b) Because of the above, the Claimant himself had to make a submission to the Tribunal on 13.01.2022;

(c) The Respondent failed to comply with a Case Management Order made on 23.05.2023, in that it failed to give disclosure by the deadline in the CMO. This led to the Claimant applying for a strike-out or unless order, on 18.08.2023. The Respondent eventually gave its disclosure on 29.09.2023;

(d) The Respondent is said to have "*…repeatedly misled the Tribunal*…" in saying that it had met the requirements of the CMO (as updated);

(e) There were differences between the parties regarding the draft hearing bundle. A further CMO was issued on 01.11.2023, directing that the parties agree the hearing bundle index by 08.11.2023, and the bundle be produced by 15.11.2023. The Claimant says that the Respondent "*…consistently refused to make most of the changes I had requested. This resulted in a bundle which was unusable to me as the index did not properly identify the documents and the documents were not put in chronological order".* The Claimant says that it fell to him to produce the final hearing bundle;

(f) The final hearing was postponed from January to June 2024, the Claimant says due to the impasse reached.

10. The Claimant says that he had to print out all of the documents in the draft bundle, re-arrange them into a chronological sequence, provide a clear index, then scan the documents into a pdf. This was accepted as the final hearing bundle on 28.02.2024.

11. The Claimant says that he spent 100 hours composing and sending over 30 emails in preparation of the case, and 50 hours in the hearing itself. He seeks a PTO in the sum of £6,600, equating to an hourly rate of £44.

12. The Claimant sent with his application a 139-page pdf document of supporting material.

<u>The Respondent</u>

13. The Respondent's response starts off by saying that it "*…successfully defended…"* the Claimant's claim, and that the *"…Tribunal's decision to dismiss the majority of Mr. Monroe's claims reflects the lack of substance in the allegations raised and demonstrates that our defence was well-founded*". This is not, strictly speaking, correct: the Claimant did succeed in part of his claim, so the entirety of the claim was not successfully defended, and the entirety of the defence was not well-founded. That said, the Claimant's success was small and, in reality, we consider that the Respondent is likely to have viewed our decision as a success for it.

14. The Respondent's submissions make the following points:

    (a) The Claimant made repeated attempts to have its response struck out. The Respondent says that these attempts "*…served to prolong the process and create unnecessary complications…*";
    (b) The Claimant refused to accept the Respondent's proposed hearing bundle, despite the Tribunal confirming that it was adequate, instead insisting that documents be re-ordered, which resulted in avoidable delays;
    (c) The Claimant then produced his own bundle, which failed to meet the Tribunal's requirements, leading to delays on day one of the hearing;
    (d) The Claimant is then said to have refused to engage constructively in finding a solution to the issues with the bundle, leading to the Respondent having to address the issues alone;
    (e) The Respondent refers to the Claimant's initial demand, in excess of £60,000, and compares this with the sum awarded of under £2,000. It refers to a "*…last-minute attempt to secure an additional £5,000 for withdrawing the matter..",* contending that this suggests "…*that his motivations were primarily financial rather than founded on legitimate concerns"*;
    (f) The Respondent also says that it incurred substantial costs, approximately £17,000, in defending a claim that it describes as "*…largely baseless…"*, adding "*...we respectfully suggest that Mr Monro's conduct warrants consideration for a potential costs order in our favour"*;

15. The Respondent has not, however, expressly asked for a costs order.

Law

16. Rules 75 to 77 of the Employment Tribunal Rules 2013 provide as follows:

75.— Costs orders and preparation time orders
(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.

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;
(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.
(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—
(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and
(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.
(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's

contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.
(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

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.

17. Save where the application is made pursuant to rule 76(3), the question of whether or not a PTO is to be made is one of discretion. A finding by the Tribunal that the conditions provided for by rule 76(1)(a) and/or (2) would mean that the Tribunal then has to exercise a discretion as to whether to make the PTO – Yerrakalva -v- Barnsley Metropolitan Borough Council & Anor[1]. The making of a PTO is the exception, rather than the rule[2]. However, the exercise of the discretion is not dependant upon any causal nexus between the conduct relied upon and the costs incurred – see McPherson -v- BNP Paribas (London Branch)[3], and the Court of Appeal has cautioned against an over-analytical approach to the exercise of a broad discretion[4]. Mummary LJ said:

41. 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. The main thrust of the passages cited above from my judgment in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed….

42. On matters of discretion an earlier case only stands as authority for what are, or what are not, the principles governing the discretion and serving only as a broad steer on the factors covered by the paramount principle of relevance.

[1] [2011] EWCA Civ 1255 [2012] I.C.R. 420
[2] Yerraklava per Mummary LJ @ para 7.
[3] [2004] EWCA Civ 569 [2004] I.C.R. 1398
[4] Yerraklava per Mummary LJ @ para 39 – 42.

A costs decision in one case will not in most cases pre-determine the outcome of a costs application in another case: the facts of the cases will be different, as will be the interaction of the relevant factors with one another and the varying weight to be attached to them.

18. It is for a party seeking a PTO or a costs order to establish that the jurisdiction to grant one is engaged, in which case it is then for the Tribunal to satisfy itself that it is right and proper to exercise the discretion to make such order – see Haydar -v- Pennine Acute NHS Trust[5].

19. Rule 2 provides as follows:

2. Overriding objective
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.
A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

Consideration

20. Procedurally, rule 77 simply requires that the application be made within 28 days of the judgment having been sent to the parties, and that the "paying party" had had a reasonable opportunity to make representations. In this case, the Claimant has made his application within that time limit, and we are satisfied that the Respondent has had a reasonable opportunity to make representations in response.

21. Is the jurisdiction in rule 76(1)(a) and/or rule r76(2) made out?

[5] UKEAT/0141/17/BA

22. The Claimant has made lengthy representations on these points, referring us to the pdf document to which we have referred above.

23. We are mindful of the overriding objective in considering this application. Parties are entitled to have the Tribunal time that is necessary to consider their cases properly, but not to endless Tribunal time. In this case, it seems to us that the most proportionate way of proceeding is to consider whether, if we were to accept all of his characterisation of the Respondent's behaviour, we would exercise our discretion to make a PTO in the Claimant's favour. Put simply, if we were to decide that, even if we accepted each and every one of the Claimant's contentions, we would not exercise our discretion in his favour, it would be disproportionate to determine each and every point.

24. We are mindful that the making of a PTO is the exception, rather than the rule, in this Tribunal. We note that we criticised the preparation of the case in our reasons for our decision[6], noting that differences about the bundle had required the intervention of the Regional Employment Judge. We also observed that the parties did not find it easy to stick the matters relevant to the issues that had been identified by Employment Judge Bax[7].

25. One matter we disregard as irrelevant is the suggestion that, if the Claimant's motives in bringing his claim were "*primarily financial*", there was somehow something dishonourable about that. We made and make no finding as to what the Claimant's motivations were. But the remedy most often sought before this Tribunal is an award of monetary compensation. There is nothing dishonourable about someone seeking compensation to which they believe themselves entitled.

26. That said, the Claimant spends considerable time in his application saying why he contends the Respondent has behaved unreasonably and/or has breached directions. But he devotes no notable attention to attempting to persuade us that we should exercise a discretion in his favour to make a PTO.

[6] @ para 9
[7] @ para 37.

27. We consider that the Respondent's observations – albeit made with some slight exaggeration – that it was required to spend a significant sum of money defending the Claimants claim, and did so with a large degree of success, to have much merit. The blunt truth of this case is that the Claimant enjoyed a minimal degree of success, in one element of his claim.

28. Even if the Claimant were right in every one of his contentions – and in considering whether we might exercise our discretion in his favour, we approach that question on the basis that he is right on them (without deciding the matter) – we would not be minded to make a PTO. It is unquestionably right that the bulk of his claim failed, and that even where he enjoyed success on his claim for unfair dismissal, we found a 95% probability that he would have been dismissed in any event.

29. It seems to us that the broad justice of the case points overwhelmingly towards not exercising our discretion to make a PTO. It is therefore disproportionate to determine whether the Claimant's specific allegations of unreasonable conduct are well-founded.

_____

Employment Judge David Hughes

_____

Date 18 October 2024

REASONS SENT TO THE PARTIES ON

5 November 2024

Jade Lobb

FOR THE TRIBUNAL OFFICE