EMPLOYMENT TRIBUNALS

Claimant: Mr K Croucher

Respondent: Total BGS Energy Limited

Before: Employment Judge Heather

JUDGMENT ON COSTS

The judgment of the Tribunal is as follows:

Respondent's application for Preparation Time Order

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

REASONS

Introduction

2. The claimant had been employed by the respondent as a Business Development Manager. The claimant stated in his claim form that her was employed from 1 March 2021 until 18 January 2024.

3. Early conciliation began on 23 October 2024 and ended on 28 October 2024.

4. The claimant made a claim for breach of contract in relation to unpaid commission on 28 October 2024.

5. The claimant set out in his claim form that he understood that the claim should have been made within 3 months of ending his employment. He explained that he was unable to function normally due to ill health.

6. The Notice of Claim and Notice of Hearing were sent to the parties on 7 November 2024. The claim was listed for hearing on 13 February 2025. A further Notice of Claim and Notice of Hearing was sent to the parties on 19 December 2024 (in the same terms as the Notice of Claim and Notice of Hearing which was sent on 7 November 2024).

7. Case Management Orders were set out in the Notice of Hearing which included:

"*8. The claimant must by 4 weeks from the date of this letter send to the respondent:*

8.1 a document setting out how much s/he is claiming and how the amount has been calculated;

8.2 copies of all supporting documents and evidence.

9. The respondent must by 6 weeks from the date of this letter send t the claimant copies of all its relevant documents and evidence. The respondent must prepare a file of its own and the claimant's documents and send a hard copy to the claimant.

10. The claimant and respondent must send to the Tribunal, by 7 days before the hearing, one paper copy and an electronic copy of the file (without the pleadings, orders and correspondence with the Tribunal) and an electronic copy in Word or other editable format of all the witness statements."

8. The respondent's response was received on 16 January 2025. The response set out that:

a. the respondent had no knowledge of the early conciliation process commenced by the claimant but that the respondent would have refused to take part;

b. the claimant was employed from 23 March 2021 until 17 January 2024;

c. the claim was out of time;

d. the substance of the claim was denied;

9. The response included copies of relevant documents including:

a. contract of employment;

b. email correspondence from 2022 regarding company handbook;

c. email correspondence from 2021, 2022 and 2023 regarding respondent approving paid and unpaid time off for the claimant to attend medical and other appointments;

d. email correspondence from 28 November 2023 to 17 January 2024 regarding commission payments and calculations;

10. An Amended Notice of Final Tribunal Hearing was sent to the parties on 23 January 2025 setting out that the time estimate for the hearing was extended from 2 hours to 3 hours.

11. On 28 January 2025 the Tribunal wrote to the parties directing that:

"1. The claimant must be prepared to give evidence about why he says that it was not reasonably practicable for him to present his claim within 3 months pf the date of non-payment and also why he says that the further period of time, after the expiry of the 3 month time limit up to 28 October 2024 was reasonable in his particular situation.

2. The claimant and respondent must read carefully and comply with the order at paragraphs 8 to 10 in the letter from the Tribunal dated 19 December 2024."

12. At the hearing on 13 February 2025, I made the following relevant findings of fact:

a. Mr Croucher's health began to deteriorate from around October 2023 with a worsening of his symptoms following the end of his employment in January 2024;

b. Mr Croucher was aware from at least November 2023 that there were ongoing issues with his commission payments;

c. Mr Croucher sought medical help in February 2024 and had his first appointment with a heath practitioner in around March 2024;

d. Mr Croucher had regular meetings and contact with various health professionals on a virtually weekly basis from March 2024 onwards;

e. Mr Croucher had various therapies and medications from March 2024 onwards. Initially the treatment was not helping but Mr Croucher has become more stable from around October 2024 as he has been diagnosed as having had a [omitted] and is receiving more targeted and appropriate treatment for his specific condition;

f. Total BGS Energy received information about potential poaching around July / August 2024 – that is supported by documentary email evidence filed with the ET3 Response;

g. Mr Croucher was undertaking sales work on a self-employed basis during the period from March 2024 – until around July / August 2024;

h. Mr Croucher became aware in August or September 2024 that he may be able to make a claim against Total BGS Energy Limited when he spoke with a friend who had been through a similar situation and that friend suggested that he contact ACAS;

i. Mr Croucher contacted ACAS on 23 October 2024 and early conciliation ended on 28 October 2024;

j. Mr Croucher's ET1 was lodged on 28 October 2024, the paperwork having been completed by his wife who assists him due to his dyslexia and difficulties that he has in using computers.

13. I concluded that it was reasonably practicable for the claim to have been brought in time because:

a. Mr Croucher knew that there was a dispute between him and the respondent about commission payments from November 2023;

b. The onus was on Mr Croucher to make enquiries or to take advice about whether or how he could pursue a claim about the commission payments and to make himself aware of the relevant deadline (which would have expired in February 2024 as time began to run in November 2023).

c. It would not have been an onerous task for Mr Croucher to make enquiries about how to pursue a claim. He could have asked his wife for support or used online search engines or websites such as the Citizen's Advice Bureau or ACAS for guidance.

d. Mr Croucher's evidence that he was "*not able to function at all"* was at odds with the fact that he was working from March 2024 until around July / August 2024 and the entry in his medical records on 17 May 2024 that he has been working long hours on building a house extension, both of which required an ability to work methodically, manage tasks, complete paperwork and engage in complex conversations.

14. Because I concluded that it was reasonably practicable for Mr Croucher to have brought his claim in time, the Tribunal did not have jurisdiction to consider his claim and the claim was dismissed. The Tribunal did not consider the merits of the claim in relation to commission payments.

Application for Preparation Time Order

15. The respondent made a written request for a Preparation Time Order by email on 5 March 2025. The email refers to a costs order but as the respondent is not represented I have treated the application as an application for a Preparation Time Order.

16. The email of 5 March 2025 states that the reason for making the application is "*the claimant acted unreasonably in bringing the proceedings, leading to unnecessary costs on our part*".

17. On 23 April 2025 the respondent sent further information to the Tribunal including:

    a. the respondent made it clear to the claimant from the outset (including to ACAS) that the claim was out of time;

    b. the respondent had to dedicate a considerable amount of time to preparing a full defence;

    c. the claimant's decision to continue with a claim that was plainly out of time amounts to unreasonable conduct which resulted in unnecessary allocation of time and resources to the claim by the respondent;

    d. details of time spent by Head of Sales (14 hours), Group Operations Manager (11 hours) and Field Sales Manager (4 hours).

The claimant's response

18. The Tribunal wrote to the claimant on 17 April 2025 seeking his response to the application. The Tribunal has not received any response from the claimant.

19. Accordingly, the Tribunal does not know what the claimant's views are.

20. The Tribunal does not have any information about the claimant's financial means except the limited information that was available at the hearing on 13 February 2025.

The law

21. Rule 74 of The Employment Tribunal Procedure Rules 2024 ("ET Rules") states:

    (2) The Tribunal must consider making a costs order or a preparation time order 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 of it, or the way that the proceedings, or part of it, have been conducted,

(b) any claim, response or reply 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 that hearing begins.

22. Rule 77 of the ET Rules states:

(1) The Tribunal must decide the number of hours in respect of which a preparation time order should be made, on the basis of—

(a) information provided by the receiving party on the preparation time spent, and

(b) the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required.

(2) The hourly rate is £44 and increases on 6 April each year by £1.

(3) The amount of a preparation time order must be calculated by multiplying the number of hours assessed under paragraph (1) by the rate under paragraph (2) which is applicable to the year beginning 6 April in which the preparation time was spent.

23. Rule 82 of the ET Rules states that:

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

24. The Tribunal must adopt a three stage approach when considering an application for a Preparation Time Order. Firstly, is the Tribunal's power under Rule 74 (2) engaged. Secondly, should the Tribunal exercise its discretion to make a Preparation Time Order. Thirdly, if the Tribunal exercises its discretion to make a Preparation Time Order the Tribunal decides the amount to award. (*Haydar v Pennine Acute NHS Trust* UKEAT/0141/17).

25. In a recent decision of the Employment Appeal Tribunal - (*Mr M Willis v 1) GWB Harthills LLP 2) Miss Hester Russell 3) Mrs Elizabeth Lord: [2025] EAT 79*), HHJ Tayler, having reviewed the relevant legal principles applicable to costs order applications, summarised the three-stage approach the Tribunal should follow in deciding such applications:

"6. The application of these rules can be split into three stages:

Stage 1: is there conduct that could warrant making a costs order ("threshold conduct")

Stage 2: if so, should an award of costs be made ("the discretionary decision") – the Employment Tribunal may have regard to ability to pay at this stage

Stage 3: if so, what amount of costs should be awarded ("the quantum decision") – the Employment Tribunal may also have regard to ability to pay at this stage

7. At stage 2 a wide range of factors can be relevant, such as the party's subjective belief in the merits of a complaint or defence, the type of complaint and whether the party had the benefit of legal advice. Rule 84 gives the Employment Tribunal the power to have regard to the paying party's ability to pay as part of the Stage 2 discretionary decision. An Employment Tribunal might conclude where a party is guilty of threshold conduct, and there are no other factors pointing against making a costs order, that a party's total inability to pay is such that no costs order should be made. In other cases, the Employment Tribunal might decide it is appropriate to make a costs order but take account of the party's ability to pay in limiting the award when making the Stage 3 quantum decision.

8. There is no requirement to identify these stages in the analysis of an application for costs, although they may provide a useful framework to ensure a necessary component is not missed…."

26. While the threshold tests for making a costs order are the same whether or not a party is represented, in the application of the tests it is appropriate to take account of whether a litigant is professionally represented or not. Litigants in person should not be judged by the standards of a professional representative (*AQ Ltd v Holden [2012] IRLR 648*).

27. "Unreasonable" has its ordinary English meaning and is not to be interpreted as if it means something similar to "vexatious" (*Dyer v Secretary of State for Employment EAT 183/83*).

28. In determining whether to make a costs order for unreasonable conduct, the tribunal should consider the "nature, gravity and effect" of the paying party's unreasonable conduct (*McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA).* However, the correct approach is not to consider "nature", "gravity" and "effect" separately, but to look at the whole picture.

29. While a precise causal link between unreasonable conduct and specific costs is not required, it is not the case that causation is irrelevant. However, the tribunal must look at the entire matter in all its circumstances (*Yerrakalva v Barnley MBC [2012] ICR 420*). Mummery LJ gave the following guidance on the correct approach:

> *"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. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances".*

30. Whether a claim or a defence had reasonable prospects of success is an objective test. It is irrelevant that the party genuinely thought that their case had reasonable prospects of success (*Scott v. Inland Revenue Commissioners [2004] ICR 1410 CA, at [46]*).

31. Whether a claim or a defence had no reasonable prospects of success from the outset is to be judged by reference to the information that was known or was reasonably available at the start of the proceedings (*Radia v. Jefferies International Ltd EAT/0007/18, at [65]*). The tribunal should be wary of being wise with hindsight. But *Radia* is not authority for the proposition that, as long as a claim had had reasonable prospects of success at the outset, pursuing it after it has become clear that it does not have reasonable prospects of success will not engage the costs jurisdiction.

32. In *Cartiers Superfoods Ltd v Laws [1978] IRLR 315*, the EAT said that the Tribunal must: "*... look and see what the party in question knew or ought to have known if he had gone about the matter sensibly."*

33. *Radia*, at [62], is also authority for the proposition that there may be an overlap between unreasonable conduct under rule 74(2)(a) and no reasonable prospects of success under rule 74(2)(b).

34. Costs awards are compensatory, not punitive – (*Lodwick v Southwark London Borough Council [2004] ICR 884 CA*).

35. The Presidential Guidance on General Case Management states:

> "*17. Broadly speaking, costs orders are for the amount of legal or professional fees and related expenses reasonably incurred, based on factors like the significance of the case, the complexity of the facts and the experience of the lawyers who conducted the litigation for the receiving party.*
>
> *18. In addition to costs for witness expenses, the Tribunal may order any party to pay costs as follows:*
>
> *18.1 up to £20,000, by forming a broad-brush assessment of the amounts involved; or working from a schedule of legal costs; or, more frequently and in respect of lower amounts, just the fee for the barrister at the hearing (for example);*
>
> *21. When considering the amount of an order, information about a person's ability to pay may be considered. The Tribunal may make a substantial order even where a person has no means of payment. Examples of relevant information are: the person's earnings, savings, other sources of income, debts, bills and necessary monthly outgoings."*

36. Last but not least, discretion must be exercised so as to give effect to the overriding objective (rule 2) to deal with cases justly and fairly, having regard to: (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.

Analysis and conclusions

Did the claimant act unreasonably in bringing the proceedings? (ET Rules 74(2)(a)

37. The fact that the claimant was unsuccessful in his claim does not necessarily mean that it was unreasonable for him to bring the proceedings.

38. The respondent says that the claim was "*clearly out of time*". But the Tribunal has a discretion to extend time if it was not reasonably practicable for proceedings to be brought in time.

39. The claimant has a right to put forward his reasons and evidence for not bringing proceedings in time. I take into consideration that the claimant was unrepresented, that his health began to deteriorate from October 2023 and that he was very unwell at certain times between October 2023 up to and including the hearing in February 2025. The claimant is not to be judged against the standard of a legally represented claimant. I am satisfied that the claimant acted in good faith and believed that he had good reason for bringing his claim out of time.

40. I conclude that the claimant did not act unreasonably in bringing the claim out of time and seeking the Tribunal's adjudication as to whether it was reasonably practicable for the claim to have been brought in time.

Did the claim have no reasonable prospect of success? (ET Rules 74(2)(b)

41. As the Tribunal did not have jurisdiction to consider the claim the claim was bound to fail. However, that is not the same as saying that the claim had no reasonable prospects of success. The substantive claim has never been considered by the Tribunal.

42. The decision in relation to the claim being out of time was not straightforward and took several hours of Tribunal time to hear the evidence and consider the point. Although the decision was ultimately made that it was reasonably practicable for the claim to have been brought in time, I do not characterise the time limit point as one that had no reasonable prospect of success.

Decision

43. The threshold tests set out in ET Rule 74(2)(a) and 74(2)(b) have not been met because the claimant did not act unreasonably in bringing the proceedings and the claim was not one that had no reasonable prospects of success.

44. As the threshold test has not been met the Tribunal does not have discretion to make a Preparation Time Order and the respondent's application for a Preparation Time Order is dismissed.

Approved by:
Employment Judge Heather
11 July 2025