



EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case No: 4107673/2019 (A)

Hearing on Expenses held in chambers on 7 September 2021

Employment Judge: M Sutherland (sitting alone)

10 **Mr D Naique**

Claimant
Written Representations

15 **Lothian Health Board**

Respondent
Written Representations
by David James, Solicitor

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the Claimant's application for a preparation time order is refused.

25

REASONS

Introduction

1. A hearing on expenses was held in chambers to determine the Claimant's application for a Preparation Time Order in respect of the Respondent not accepting liability for payment of travel expenses until 15 July 2020.

30

2. Neither party was in attendance and the matter was determined with reference to the written submissions prepared by the parties.

Background

- 5 3. On 5 July 2019 the Claimant lodged a complaint for constructive unfair dismissal and for payment of travel expenses (“travel expenses for work carried out outside my base location. Total calculated to be £712.50”). In response the Respondent’s position was that the tribunal does not have jurisdiction because the Claimant not been continuously employed for 2 years and because expenses are excluded from a claim for unlawful deduction from wages.
10
4. A Case Management Preliminary Hearing (‘CMPH’) was held on 20 September 2019. The issues considered at that hearing were 1. his claim for travel expenses 2. a possible application to amend to include a complaint of whistleblowing 3. a possible application to amend to include a complaint of race discrimination; 4. a possible application to amend to include a claim for automatically unfair dismissal in absence of 2 years service. An order was issued but not in respect of his claim for travel expenses.
15
5. A Case Management Preliminary Hearing was held on 3 March 2020. The issues considered at that hearing were 1. his claim for travel expenses 2. an application to amend to include a complaint of race discrimination and 3. his complaint of unfair dismissal. Various orders were issued including giving him leave to amend to make a claim for breach of contract in respect of travel expenses.
20
- 25 6. On 20 April 2020 the Claimant made an application to amend to include a claim for direct discrimination and separately for breach of contract (which part extended to 3 short paragraphs).
7. A Case Management Preliminary Hearing was held on 18 June 2020. The issues considered at that hearing were 1. his claim for travel expenses 2. his application to amend to include a complaint of race discrimination and 3. his complaint of unfair dismissal 4. the Respondent’s application for strike out in respect of his complaint of unfair dismissal. Various orders were issued including an order issued to the Respondent (but not the Claimant) pertaining to his claim for travel expenses.
30

8. Following a Case Management Preliminary Hearing on 18 June 2020 the Respondent accepted that the claim contained a complaint for breach of contract and that the Claimant did not require to make an application to amend to include such a claim. On 17 July 2020 the Respondent emailed the claimant conceding liability for the breach of contract claim and sought to arrange payment for the losses which the Claimant had identified as amounting to £712.50. On 20 August 2020 the respondent informed the tribunal that the claimant had refused to accept this payment in settlement of this complaint. On 27 September 2020 the Claimant advised that the losses flowing from the breach of contract instead amounted to £50,000. He also sought an unspecified uplift for failure to follow the ACAS Code of Practice.
9. A Preliminary Hearing was heard on 11 November 2020 in respect of various applications to amend and an application for strike out. By Judgment dated 11 November 2020 the applications to amend were refused and the complaint of constructive dismissal was struck out. The following was noted in that Judgment -

"Breach of contract

4. *The Respondent made an application for expenses under Rule 77 of the Employment Tribunal Rules on grounds of unreasonable conduct in respect of the Claimant's refusal to accept the Respondent's offer to pay the sum sought following their acceptance of liability.*
5. *The Claimant made a claim for "travel expenses for work carried out outside my base location. Total calculated to be £712.50." Initially this was understood to be a claim for unlawful deduction from wages. Following the preliminary hearing on 18 June 2020 the Respondent accepted that this was a claim for breach of contract and admitted liability. The Respondent offered to pay the sum sought of £712.50 which the Claimant refused to accept.*
6. *At the Preliminary Hearing on 7 September 2020 it was explained to the Claimant that "remedy for a breach of contract claim is to compensate the individual for the actual losses suffered that result from a breach of contract in order to put him/her into the position they would have been had the breach of contract not occurred. Accordingly, as the Claimant had identified his losses as £712.50 in this regard, this was the amount of payment offered to him by the Respondent". The remedy is to put the employee in the same financial position they would have been in had Respondent not acted in breach by failing to pay travel expenses.*
7. *On 27 September 2020, and in response to an order to consider whether he was willing to accept this offer, the Claimant advised he was seeking damages in the region of £50,000 in respect of losses flowing from his decision to accept a contract of employment with the*

Respondent which they then breached and also flowing from his decision to resign from the Respondent following the breach of contract.

8. *In light of the continued dispute on remedy, a final hearing on remedy will be listed and the Respondent's application for expenses will be considered at that hearing.*

9. *The Claimant was unhappy that he required to bring proceedings in order to receive payment of his travel expenses. He was referred to Rules 74 to 84 of the Employment Tribunal Rules. To enable any such application to be dealt with at the remedy hearing, the Claimant shall within 3 weeks (i.e. by 2 December 2020) make any application for a preparation time order in respect of the Respondent not admitting liability until 15 July 2020, and shall include a breakdown of the time spent by him on working on this aspect of his claim for that period and at the applicable rate (understood to be £40 an hour)".*

10. A final hearing was held on remedy on 3 March 2021. No application for a preparation time order was made prior to or at the final hearing.

11. By Judgment issued to the parties on 31 March 2021 the Claimant was awarded damages for breach of contract in sum of £819.38. The award included damages in sum of £712.50 being the amount of the travel expenses. An uplift of 15% (£106.38) was added for failure to arrange a meeting to discuss his related grievance without unreasonable delay.

12. On 10 June 2021 the claimant made an application for a preparation time order in sum of £2152.50 in respect of the Respondent's failure to accept liability until 15 July 2020 in the following terms –

"Application for Preparation Time in respect of the respondent not accepting liability until July 15 2020. Includes a breakdown of the time spent working on breach of contract claim at the applicable rate of £41/Hr. I will first calculate the obvious hours spent at the hearing: 1. 20 Sept. 2019 At 2:00 PM. One hour allocated. £41 X 1 hour = £41 2. 30 March 2020 at 2:00 PM. One hour allocated. £41 X 1 hour = £41 3. 18th June 2020 at 2:00 PM. Hearing lasted for 2.5 hours approx. £41 x 1.5 hours = £61.50 Total: £143.50 Additionally, the time spent outside of the hearing to prepare for the case including complying with the orders following the hearing I have calculated the preparation time order as follows: 1. 5th July 2019 to 19th September 2019 £41 X 12 hours = £ 492 2. 21st Sept 2019 to 29th Mar 2020 £41 X 27 hours = £1107 3. 31st Mar 2020 to 17th Jun 2020 £41 X 10 hours = £410 Total: £ 2009 Grand Total for Preparation Time: £2152.50"

13. On 10 June 2021 the respondent opposed the Claimant's application on the basis that he had failed to specify grounds for the application and in any event the application was out of time.

14. On 22 June 2021 the claimant was ordered to provide a summary of the steps taken in pursuing his claim for breach of contract until 15 July 2020 and the time spent in respect of each step. He was also ordered to provide an explanation as to why his application was not made within the 28 day time limit and why it would be just and equitable having regard to the overriding objective to extend the time period allowed.
- 5
15. On 26 July 2021 the Claimant advised that his application was made on the grounds that the Respondent acted unreasonably in failing to admit liability and on the ground that the Response had no reasonable prospects of success.
- 10
- The Claimant advised that being a litigant in person he was unaware of the 28 day time limit to make the application and the judgement did not advise this. The Claimant did not provide a summary of the steps taken pursuing the complaint for breach of contract. The Claimant did not specify the time taken in respect of those steps. The Claimant simply repeated his earlier calculation but added 6 hours in respect of time spent preparing the Preparation Time application.
- 15
16. On 27 July 2021 the Respondent opposed the application on the following grounds: the tribunal rules have been highlighted to the claimant on a number of occasions; the preparation time order was raised at the preliminary hearing on 11 November 2020; that the appeal courts have made clear that a litigant in person is expected to take steps to familiarise themselves with the rules; the Respondent understood that the claim for travel expenses was a complaint of unlawful deduction from wages which a tribunal did not have jurisdiction to consider and that this view was shared by two different employment judges; once the claim was characterised as one of breach of contract liability was promptly admitted and an offer to pay the claimant the sum of money sued for it was made; the claimant was ordered to provide a summary of steps taken to advance his claim and the time taken in respect of each step but has failed to do so; and in any event the Tribunal should not exercise its discretion to make such an order in these circumstances.
- 20
- 25
- 30
17. It was decided that the issue would be determined at a hearing in chambers on written representations and without attendance of the parties.

The Law

18. Under Rule 77 of the Employment Tribunal Rules of Procedure a party may apply for a preparation time order ('PTO') at any stage up to 28 days after the date on which the judgement finally determining the proceedings was sent to the parties. Under Rule 5 the tribunal may extend or shorten anytime limit specified in these rules.
19. Under Rule 75, a PTO is an order that a party make a payment to the other party in respect of their preparation time while not legally represented. Preparation time means time spent in working on the case, except for time spent at the final hearing. Under Rule 76 a tribunal may make a PTO, and shall consider whether to do so, in specified circumstances including where it considers that (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing or conducting of proceedings (or part thereof) or (b) the claim or response has no reasonable prospect of success.
20. Where the grounds are established the tribunal has a duty to consider making a PTO but has discretion as to whether do so. First, a tribunal must consider whether the ground is established; if so, it must consider whether it is appropriate to exercise its discretion in favour of making a PTO.
21. The following factors may be relevant but not solely determinative of that exercise of discretion: awarding a PTO is the exception – a PTO (and other awards of expenses) are not made in the substantial majority of tribunal cases; the tribunal are entitled to assume that a party has been properly advised; the tribunal may have regard to ability to pay. The vital point in exercising the discretion is to look at the whole picture of what happened in the case including consideration of the other party's conduct (*Yerrakalva v Barnsley Metropolitan Borough Council and nor 2012 ICR 420, CA*).
22. Under Rule 79 the tribunal shall decide the number of hours in respect of which a PTO should be made on the basis of information provided by the party on time spent and the tribunals 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. The amount of a PTO shall be the number of hours multiplied by the applicable hourly rate (£41).

Discussion and decision

23. Judgment finally determining the proceedings was sent to the parties on 31 March 2021. The claimant's application for a PTO was made on 10 June 2021, 71 days after judgment was sent. The application for a PTO ought to have been made by 28 April 2021, 28 days after judgement was sent. The Claimant advised that he was not aware of the time limit and the Judgment did not advise of it.
24. The circumstances giving rise to the application for a PTO were known to the Claimant in July 2020 when the admission of liability was made. The Claimant advised of his intention to apply for a PTO at or before the Preliminary Hearing in November 2020. The Claimant was advised at the Preliminary Hearing on 11 November 2020 that he was entitled to bring a PTO and was expressly referred to Rules 74 to 84. Following discussion at that hearing he was directed to make an application for a PTO by a specified time limit to enable his application for a PTO to be considered at the remedy hearing. The Claimant elected not to do so. Although it is recognized that he is a litigant in person he was fully aware, from at least November 2020, that he wished to make a PTO, that Rules regulated the making of a PTO, and that a time limit had previously been specified for the making of a PTO. In these circumstances he ought reasonably to have taken steps to ascertain the relevant time limit following issue of the final judgment.
25. The Respondent on advice understood that his complaint was for unlawful deduction from wages. The Respondent mounted a reasonable defence based upon that understanding namely that expenses are excluded from a claim for wages. Once that misunderstanding was resolved the Respondent admitted liability and offered to make payment of the monies sought. Neither the Respondent nor their Representative acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing or conducting of proceedings in this regard.
26. The Respondent ultimately accepted that his claim as originally pled contained a complaint for breach of contract in respect of their failure to travel expenses. The Respondent then accepted liability for failure to pay travel expenses. Accordingly their defence of the complaint (based upon a misunderstanding

that it was a complaint for unlawful deduction from wages) had no reasonable prospect of success.

27. Where a ground is established the tribunal must consider whether it is appropriate to exercise its discretion in favour of making a PTO. Awarding a PTO is the exception. The Claimant advised spending 53.5 hours of preparation time in respect of his complaint prior to the admission of liability (4.5 hours attending three Case Management Hearings and 49 hours preparing for and complying with orders in respect of those case management hearings). Having regard to the issues discussed at those hearings and the orders issued it is considered that the Claimant did not spend 53.5 hours of preparation time in respect of his claim for travel expenses and has instead has provided details of preparation time spent by him in respect of all complaints and applications. The Claimant was ordered to provide a summary of the steps taken in pursuing his complaint for breach of contract, and a breakdown of the time spent pursuing this complaint, but failed to do so. Whilst it is estimated that the Claimant spent a very small fraction of that time on this complaint, the tribunal has simply not been provided with that information by the Claimant. Accordingly the tribunal cannot conduct its own assessment of what it considered to be reasonable and proportionate on the basis of information which has not been provided. Furthermore, following the admission of liability, the Claimant refused to accept an offer to pay the sum initially sought by him and instead sought £50,000. Following a final hearing on remedy the Claimant was awarded damages for breach of contract in sum of £819.38.

25

30

5 **28.** In the circumstances, and having regard to the overriding objective including the Claimant's status as a litigant in person, it is not considered to be in the interests of justice either to extend the time limit or, in any event, to exercise discretion in favour of making a PTO. The application for a preparation time order is accordingly refused.

10

Employment Judge:

M Sutherland

Date of Judgment:

14 September 2021

Date Sent to Parties:

16 September 2021