EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100163/2017

Employment Judge: M A Macleod (sitting alone)

Aleksandra Cielesz	Claimant In Person
Motherwell & District Woman's Aid	Respondent Represented by Ms L McSporran Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the respondent's application for a wasted costs order is refused.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 18 January 2017 in which she complained that the respondent had unlawfully discriminated against her on the grounds of sex. The case proceeded to a hearing on the merits which was heard by the Tribunal on 29 and 30 November 2017, and 5 March 2018.

2. On 24 August 2017, prior to the commencement of the hearing on the merits, the respondent submitted an application for wasted costs, which was duly intimated to the claimant's then solicitor, Mr Winston Brown of Messrs Brown & Co, Solicitors.

3. A hearing was fixed to take place in relation to this application on 2 November 2017, but was postponed owing to the unavailability of the Employment Judge allocated to hear it. Unfortunately, due to an

administrative error, that hearing on costs was not rescheduled prior to the commencement of the hearing on the merits.

4. Following the conclusion of the hearing on the merits, the respondent's solicitor sent an email to the Tribunal, again duly intimated to Mr Brown, reiterating that the application was outstanding. It was noted that Mr Brown had submitted a witness statement and had not indicated his intention to attend at any hearing. Accordingly, it was confirmed that the respondent and the claimant were content for the application to be dealt with by way of written submissions.

5. Mr Brown did not respond to the Tribunal's correspondence about the costs application, and accordingly, the Employment Judge resolved that the application should be dealt with in chambers.

The Application

6. The respondent made an application on 24 August 2017 for a wasted costs order under Rule 80 of the Employment Tribunals Rules of Procedure 2013 against the claimant's representative (at that time), Mr Winston Brown of Brown & Co, Solicitors, 161-165 Greenwich High Road, London SE10 8JA.

7. The application asserted that from the lodging of the ET1 on 18 January 2017 until the PH on 16 August 2017, the claimant's solicitor had acted negligently in pursuit of claims on behalf of the claimant such as to justify a wasted costs order in favour of the respondent.

8. It was said that he had failed to act with the competence reasonably expected of ordinary members of the legal profession.

9. The respondent then set out the chronology on which they relied.

10. In the ET1, dated 18 January 2017, it was stated that the claimant was dismissed for a pregnancy related reason and claimed sex discrimination. There was no specification of the discrimination claim.

11. A Preliminary Hearing was held on 24 March 2017. In the claimant's agenda for that hearing, the claims were stated to be sex discrimination and

unfair dismissal on the grounds of making a protected disclosure. The claimant was ordered to confirm if the unfair dismissal claim were to be pursued, given that it was not mentioned in the ET1, and to provide further and better particulars of the sex discrimination claim, including specification of the statutory basis of the claim of discrimination.

12. Mr Brown confirmed on 5 April 2017 that the claimant was not pursuing the claim of unfair dismissal, but that at that stage, claims of direct and indirect discrimination were being pursued, set out in his email of 8 April 2017. The statutory basis of the claims were not specified.

13. The respondent's solicitor sent an email to the Tribunal, copied to the claimant's agent, on 18 April, asserting that the position as set out by Mr Brown did not disclose a prima facie case of direct or indirect discrimination on the grounds of sex.

14. As there was no response from Mr Brown, a costs warning letter was sent by the respondent's solicitor to him on 20 April 2017, reiterating that no prima facie claim of direct or indirect sex discrimination was made out.

15. An application for strike out, or alternatively a deposit order, was submitted by the respondent with a further "brief and unfocused" response by Mr Brown dated 19 June. No further clarification or specification of the claims was provided by Mr Brown. A hearing on the application took place on 16 August 2017, and it was only during that hearing when an application to amend the claim was made on the claimant's behalf by counsel instructed by Mr Brown. The amendment was allowed by the Tribunal and, for the first time, correctly specified the statutory basis of the complaint of discrimination being pursued. It was accepted by the claimant's representative, in the course of the hearing, that the claim of indirect discrimination was ill founded and would not be pursued. That claim was withdrawn and dismissed.

16. The respondent submitted that Mr Brown had had many opportunities to clarify the position but consistently failed to do so until the amendment of 16 August. Up to that point, they argued, the claimant's claim was bound to

fail and therefore her solicitor failed in his duty to the court, amounting to an abuse of process, which conduct caused the respondent to incur unnecessary costs.

17. The respondent argued that the claimant's solicitor's conduct had placed them, a not-for-profit organisation with charitable status supporting women, children and young people who have experienced domestic abuse throughout Scotland under significant financial strain, which was avoidable had Mr Brown properly presented the claimant's claim.

18. The respondent submitted that it had incurred £1,762.80 in the period affected by this conduct, in legal fees, and asked that the Tribunal grant a wasted costs order against Mr Brown for the legal fees incurred in that period.

Mr Brown's Witness Statement

19. On 28 November 2017, Mr Brown intimated that the claimant would be representing herself at the forthcoming merits hearing (thereby, it was understood, withdrawing from acting on her behalf), and submitted a witness statement signed and dated 28 November 2017.

20. In the witness statement, Mr Brown said that a telephone case management discussion took place on 24 March 2017 before Employment Judge Robert Gall, and that during that hearing, the nature of the case was explained in full and "it was made clear that the claimant was claiming sex discrimination because of her pregnancy." He went on to say that it was agreed that the claimant would provide further details of the claim of direct sex discrimination, and in response to that, the respondent would confirm if they wished to proceed with an application for strike out of that claim. He said that his note of the hearing indicated that Employment Judge Gall and the respondent were fully aware of the factual basis of the claim and that it was accepted by the Employment Judge that this was a claim of direct sex discrimination. He suggested that no issue was taken by the Employment Judge that the claim had been wrongly pleaded, or that an alternative heading for the claim should have been put forward.

21. Mr Brown then referred to the amendment application submitted and granted at the PH of 22 September 2017. He said "I am informed that the amendment application was permitted in part because the respondents knew throughout what the basis of the claim was and the amendment was really just a relabelling exercise. The same argument can be made in relation to the wasted costs application. The respondents were fully aware what the factual basis of this claim was from the outset."

22. Mr Brown, in his witness statement (which also appears to be a submission in respect of the application), concluded by saying that he did not accept that there was any basis for a wasted costs order as claimed.

Discussion and Decision

23. The application for a wasted costs order in this case is made under Rule 80(1):

> *(1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs –*
>
> *a) As a result of any improper, unreasonable or negligent act or omission on the part of the representative; or*
>
> *b) Which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.*
>
> *Costs so incurred are described as "wasted costs".*

24. Rule 81 sets out the effect of a wasted costs order, whereby the order may order the representative to pay the whole or part of any wasted costs of the receiving party, or disallow any wasted costs otherwise payable to the representative, including an order that the representative repay to its client any costs which have already been paid. The amount to be paid, disallowed or repaid must be specified, in each case, in the order.

25. Rule 84 requires the Tribunal to take into account the representative's ability to pay any order.

26. Rule 74(1) defines "costs" as "fees, charges, disbursements or expenses incurred by or on behalf of the receiving party…"

27. **Ridehalgh v Horsefield 1994 3 All ER 848 CA**, a Court of Appeal decision in relation to the application of section 51(7) of the Senior Courts Act 1981, upon which Rule 80 is based, emphasized that a legal representative should not be held to have acted improperly, unreasonably or negligently simply because he or she acts on behalf of a party whose claim or defence is doomed to fail. In addition, the court said that negligent conduct should be understood in a non-technical way to denote failure to act within the competence reasonably to be expected of ordinary members of the profession.

28. **Radcliffe Duce and Gammer v L Binns (t/a Parc Ferme) EAT 0100/08** is an EAT decision in which Mr Justice Elias said that where a wasted costs order is concerned, the question is not whether the party has acted unreasonably, but a more rigorous test. It is necessary to demonstrate that the representative's conduct amounted to an abuse of process. In that case, there was no evidence that the claimant would have withdrawn the claim even if advised to do so by the legal representative, and therefore there was no basis for inferring that any costs had been incurred as a consequence of any misconduct.

29. In my judgment, the conduct of which the claimant's representative is accused in this case is a failure to make clear a legitimate basis for a claim of sex discrimination until a Preliminary Hearing at which an application to amend the claim was granted. It is suggested that the claimant's representative acted negligently by failing properly to frame the claim from an early stage, thus necessitating an application for strike out by the respondent, which in itself was the point at which the application to amend was provoked.

30. It is helpful, at this point, to consider the terms of the Judgment of Employment Judge Gall dated 18 August 2017, in which he granted the application for amendment of the claim. One of the most important considerations for him, it appears, was that the respondent had been kept waiting to understand the claim fully and the basis of it, but "It cannot, however, be said in my view that they, putting it colloquially, did not see this coming. The difficulty has been cause, it appears by the claimant's representative at the time referring to the wrong section and to the wrong protected characteristic." (paragraph 28)

31. Employment Judge Gall also considered the possibility of a wasted costs order being made against the claimant's representative in the earlier stages, confirming for the avoidance of doubt that that representative was not counsel for the claimant at that hearing, Mr Mensah, and that "That possibility may be something to be kept in mind".

32. Further, it is appropriate to review the earlier PH, to which Mr Brown has referred, on 24 March 2017 before Employment Judge Wiseman, following which, at paragraph 5, the Tribunal directed the claimant's representative to provide specification of the statutory basis of the complaints of discrimination and further particulars of each complain by, or before, 7 April 2017.

33. Mr Brown wrote to the Tribunal on a separate matter on 5 April (confirming that his client did not intend to pursue a claim that she had been dismissed following the making of protected disclosures; and on 8 April, confirmed that the particulars of the sex discrimination claim were, in relation to direct discrimination, that "On 13 October 2016 Ms Harris came to the claimant and said that Women's Aid would not be extending her probation. This was an act of direct sex discrimination because the claimant was pregnant."

34. In my judgment, this is a finely balanced matter. The claimant's representative did make at least one attempt to clarify the direct sex discrimination claim, in April, but only did so effectively at the PH of 16 August when counsel sought to clarify the matter on his client's behalf.

35. There is no doubt that Mr Brown failed, himself, to satisfy the requirement to plead a relevant case on behalf of the claimant, albeit that the facts set out in the ET1 were the basis for that case being introduced by amendment in August 2017. That he was not present at the PH on 16 August (and indeed in his witness statement makes erroneous reference to 22 September) implies that the corrective work to the pleadings was undertaken by Mr Mensah, who is exonerated from criticism by the Tribunal, rather than by him, but he did instruct Mr Mensah to appear on behalf of the claimant at that hearing.

36. While Mr Brown's conduct of the case to that point was unimpressive, and his failure to clarify the claim difficult to understand when it was so readily corrected by counsel at the PH in August, I am not persuaded that his conduct amounted to an abuse of process. It is clear that authorities do not require a full finding of professional negligence to be made by the Tribunal, but also that more than a finding that a representative has not acted well during the proceedings is required.

37. There is no doubt that Mr Brown was given more than one opportunity to correct the difficulty with the claimant's pleadings. It is apparent that there is no evidence to suggest that any of the delay arose from the actions or omissions of the claimant herself, who seems, justifiably, to have relied upon the representation of Mr Brown until it was withdrawn from her.

38. The question is, essentially, whether Mr Brown's conduct up to that August hearing amounted to an abuse of process. In my judgment, on balance, and on the information before me, it did not. It was conduct which was not impressive, nor indeed commendable, but in my judgment it did not cross the line to being an abuse of process. It is perfectly possible that Mr Brown simply did not understand that his case was not properly made out, or how that could be, but there was a factual basis for a competent claim to be advanced, and that was done from August, to the point where a merits hearing was able to proceed on entirely understandable grounds for determination by the Tribunal.

39. Accordingly, I am not, on balance, persuaded that the conduct of Mr Brown between the lodging of the ET1 and the granting of the amendment application in August amounted to negligent conduct and an abuse of process. I accept that the respondent did incur some unnecessary expense in dealing with this matter, but of itself that is not the determinative question.

40. The respondent's application for a wasted costs order is therefore refused.

Employment Judge: M MacLeod
Date of Judgment: 02 May 2018
Entered in Register: 04 May 2018
and copied to parties