EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100359/2017

Application for expenses - decided on the basis of written submissions

Employment Judge M Whitcombe

Mr L MacIntyre	**Claimant**
South Lanarkshire Council	**Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The response could not be described as having "no reasonable prospect of success" and therefore the application for expenses under rule 76(1)(b) of the ET Rules of Procedure is refused.

E.T. Z4 (WR)

REASONS

Introduction

1. All references below to "rules" are references to the Employment Tribunal Rules of Procedure 2013.

2. These reasons should be read in conjunction with the written reasons already promulgated in relation to the substantive issues. I gave oral reasons for my judgment in the presence of the parties at the conclusion of the hearing on 6th December 2018.

3. In a letter dated 4th January 2019, shortly prior to the promulgation of the written reasons subsequently requested by both parties, the claimant applied for "a costs order". In Scotland the equivalent term is an order for "expenses" (see rule 74(1).

4. The application was made under rule 76(1)(b) on the basis that the response had no reasonable prospect of success.

5. In response to my suggestion, both parties confirmed that they would prefer this application to be dealt with on the basis of written submissions rather than at a further hearing. That was proportionate given the cost of attendance at a further hearing and ensured that the respondent as the proposed "paying party" had a reasonable opportunity to make representations as required by rule 77. Rule 77 explicitly recognises the option of written submissions.

6. The parties' submissions were effectively contained in letters from Mark Underhill of the NASUWT dated 4th and 15th January 2019 and an email from Sean O'Neill of South Lanarkshire Council dated 25th January 2019.

Timing

7. Rule 77 provides that an application may be made at any time up to 28 days after the date on which the judgment finally determining the proceedings was sent to the parties. The judgment (without reasons) was sent to the parties on 7th December 2018. The effect of rule 4(4) is that the first day of the 28 day period was 8th December 2018. The last day on which an application for expenses could be made within time was therefore 4th January 2019. The application was sent on 4th January 2019 but received on 7th January 2019. I treat the application as having been "made" on the day the document was sent, which I find to have been 4th January 2019 in accordance with rule 4(6).

Whether the response had a reasonable prospect of success

8. I therefore turn to the test arising under rule 76(1)(b). The claimant must satisfy me that the response had no reasonable prospect of success in order to establish the jurisdiction to make an award of expenses.

9. In a little more detail, the principles are as follows. The rules regarding costs or expenses effectively provide for a two-stage test. The first stage requires me to examine whether one of the preconditions of an award of costs has been established. In this case, that is said to be that the response had no reasonable prospect of success (rule 76(1)(b)). If the party applying for costs or expenses persuades me that the test in rule 76(1)(b) is met then the second stage is discretionary – I have a discretion whether to make an award of costs or expenses at all, and if so regarding the amount or proportion of the costs incurred. I bear in mind that awards of costs or expenses are intended to be compensatory and not punitive. As always, the overriding objective applies to the exercise of my powers under the relevant provisions of the rules.

10. There is no requirement that a proposed "paying party" should have been given a costs warning, either in correspondence or by way of a deposit order (***Millin v Capsticks Solicitors LLP*** (UKEAT/0093/14, paragraph 68). Such a warning will be relevant if made, but it is not a precondition of an award. I have not been referred to any costs warning made by the claimant or his representatives in correspondence in this case.

11. I turn now to the way in which the response was put and the central issues in the case. The response was pleaded very concisely. I mean no criticism by saying that, since this was a case with simple facts and simple legal issues.

12. It was alleged that no sums were due to the claimant because the conditions arising under paragraphs 6.20 and 6.21 of the SNCT Handbook were not satisfied. The essence of the argument appeared in the next sentence, "*the Claimant did not suffer from a work-related injury or illness with the required certification to qualify for payments under those paragraphs.*" It was asserted, uncontroversially, that the claimant had been removed from his post in accordance with the respondent's disciplinary procedures while an investigation was ongoing. It was denied that the claimant's absence was inaccurately classified.

13. For more details of the contractual background, see paragraphs 3 to 12 of my written reasons on the substantive issues. For more details of the issues as

they were identified at the hearing, see paragraphs 13 to 15 of my written reasons on the substantive issues.

14. I bear in mind the danger of assessing the merits of a case with the benefit of hindsight once the issues have been resolved. I must assess whether there were nevertheless reasonable prospects of success for the respondent in this case, despite the fact that on my eventual findings the respondent was unsuccessful.

15. Even from that cautious starting point, my finding is that the respondent's central argument on contractual interpretation was bound to fail, was misconceived, and lacked any reasonable prospect of success. I will consider its separate strands.

    a. An absence through a work-related, stress-related illness is on any view a "work related…illness" for the purposes of paragraph 6.20 of the SNCT handbook. The respondent's argument that stress is not itself an illness is superficially correct but fails to engage with the obvious contention in this case that the claimant was ill because of the stress *of events at work*.

    b. Mr O'Neill's argument that the claimant was not ill at all was contradicted by the only witness he called as well as by copious medical evidence. The respondent had also recorded the reason for the claimant's absence as "sickness" in its records. This strand of the respondent's argument lacked any reasonable prospect of success.

    c. The suggestion that stress resulting from disciplinary proceedings or the threat of them was somehow different was similarly bound to fail, misconceived and without any reasonable prospect of success. There was absolutely no contractual basis for the respondent's contention that disciplinary proceedings were excluded from the general principle in paragraph 6.20. I was not referred to any contractual provision supporting that interpretation. On an ordinary and common-sense interpretation disciplinary proceedings are inherently and necessarily "work-related". The employment relationship is the essential context of disciplinary action. If stress-related illness results then it is also work-related.

16. There was just one strand of argument which in my assessment had a reasonable, though by no means strong, prospect of success. It concerned the evidential preconditions referred to in paragraphs 9 and 15 of my written reasons on the substantive issues. I analysed the medical evidence in

paragraphs 36 to 41 of my written reasons. While I reached the conclusion that the evidential preconditions arising from the provisions of the SNCT Handbook were met, I do not think that was the inevitable finding of any reasonable Tribunal. I nevertheless repeat the concerns expressed in the substantive reasons that the respondent was effectively criticising the adequacy of medical evidence to trigger a contractual entitlement when it had failed to make an OH referral asking the appropriate question. If the OH evidence had failed to address the correct issues then the respondent would be at least partly to blame for that.

17. Nevertheless, on this one point I find that the respondent's prospects of success reached the fairly low bar of "reasonable". Since success on this point would on its own have been sufficient for the respondent to win the case, I am not persuaded that the response taken as a whole lacked a reasonable prospect of success, however misconceived some of the respondent's other arguments might have been.

18. Rule 76(1)(b) focusses on the response as a whole, and not on specific contentions within that response. It can be contrasted with rule 39 which is concerned with "any specific allegation or argument in a claim or response" when considering whether a deposit should be ordered. Taken as a whole there was at least one point with reasonable prospects of success in the response, and success on that point would have led to a successful defence of the claim.

19. In summary, it is my conclusion that the threshold criterion for an award of costs under rule 76(1)(b) has not been met and the application for expenses therefore fails.

The size of the award, had one been made

20. Even if I had found otherwise, I would not have made an award in the sum sought by the claimant. In my judgment the sum of £1,000 plus VAT claimed was disproportionate to the complexity of the issues, the value of the claim (£1,931.22), the amount and complexity of the evidence and the likely length of the hearing (the 2 day allocation of time having been rather generous). This was a simple case with very little evidence. It was completed comfortably within a single day, including the time taken to reach my decision and to deliver oral reasons. It did not justify a brief fee of £1,000 or an advocate of 8 years' call with prior experience as a solicitor in private practice. While of course the claimant and his solicitors are free to instruct whoever they wish and I am sure that they will be delighted with Mr Edward's effective work, had an award of expenses been made it would not have been just for the

respondent to have been ordered to pay £1,000 + VAT when a less experienced representative commanding much lower fees could have conducted the case entirely competently on behalf of the claimant too. I would have awarded £600 plus VAT if I had concluded that the response lacked reasonable prospects of success.

Employment Judge: M Whitcombe
Date of Judgment: 01 February 2019
Entered in register: 04 February 2019
and copied to parties