EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111910/2018

Preliminary Hearing held by written submissions on 1 August 2019

Employment Judge A Kemp

Mrs J Henry	**Claimant** **Represented by** **Ms J Redpath** **Solicitor**
Highland Health Board	**Respondent** **Represented by** **Ms L Gallagher** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The respondent's application for expenses is refused.

REASONS

Introduction

1. The respondent has made an application for an award of expenses in relation to a hearing that took place on 8 February 2019, and the matters related to that, in so far as a claim was pursued by the claimant under section 47E of the Employment Rights Act 1996. It is set out in email dated 11 July 2019.

2. The claimant has objected to the application, by email dated 24 July 2019. By emails dated 25 July 2019 each party confirmed that it was content for the matter to be determined by the written submissions made, and I am satisfied that it is in accordance with the overriding objective to do that. Both parties are represented by solicitors who set out their arguments succinctly and clearly.

The respondent's submission

3. In summary, the respondent argued that the claimant had acted unreasonably in making her application to amend, there was no sufficient explanation as to why it had not been done timeously, and it had no reasonable prospects of success as there had been no written application for flexible working, which is what the statute required. The respondent had written to set out its position on 23 December 2018, well in advance of the preliminary hearing and was put to expense in attending that hearing. The Tribunal's discretion should be exercised in favour of making an award.

The claimant's submission

4. In summary, following the earlier preliminary hearing held by telephone on 26 November 2018 the claimant had provided information that supported a claim under section 47E of the Act. Her memory had been affected by an accident, and it was increasingly difficult for her to remember detail. The claimant believes that she did submit a written application but cannot remember to whom and when. She did not act unreasonably. The preliminary hearing held on 8 February 2019 was necessary to discuss other issues as well as that of the amendment. No award of expenses should be made.

The law

5. The relevant rules found within the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 are-

> **"74 Definitions**
>
> (1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party …. In Scotland, all references to costs (except when used in the expression 'wasted costs') shall be read as references to expenses.
>
> **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……
>
> **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…… has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part)……..;
>
> (b) any claim or response had no reasonable prospect of success……."

6. Regard must be had to the overriding objective in Rule 2 when making a decision as to expenses, which was set out in the Note following the earlier Preliminary Hearing.

7. Unlike court actions, in Tribunals expenses do not necessarily follow success, and the fundamental principle remains that they are the exception not the rule. For example in ***Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78*** Lord Justice Mummery stated the following:

> "The ET's power to order costs is more sparingly exercised and is more circumscribed by the ET's rules than that of the ordinary courts. There the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the ET costs orders are the exception rather than the rule. In most cases the ET does not make any order for costs. If it does, it must act within rules that expressly confine the ET's power to specified circumstances, notably unreasonableness in the bringing or conduct of the proceedings."

8. In regard to the issue of the pursuit of a claim that is alleged to have been without reasonable prospects of success, in ***Cartiers Supermarkets Ltd v Laws [1978] IRLR 315***, decided under the then Rules which provided that the conduct of the party was frivolous, the EAT held that it was necessary "to look and see what that party knew or ought to have known if he had gone about the matter sensibly". But in ***Lothian Health Board v Johnstone [1981] IRLR 321*** the EAT in Scotland indicated that that did not lay down a general proposition. Later, in ***Keskar v Governors of All Saints Church of England School [1991] ICR 493*** it was held that if the person "ought to have known that the claims he was making had no substance" that was at least capable of being relevant.

9. A warning letter as to expenses will not lead inevitably to an award, but is one factor to take into account. In ***Peat v Birmingham City Council UKEAT/0503/11*** a costs order was made where a warning letter was given, and the unsuccessful claimants were legally represented. The issue is not considered only when the claim is commenced, but includes whether it is properly pursued (**NPower Yorkshire Ltd v Daly [2005] All ER (D) 403.**

Discussion

10. Whilst I can understand why the respondent has made the application, I consider that it ought to be refused. The starting point is that expenses are the exception. I then take into account that the claimant is said by her solicitor to have believed that she had made an application as required by the statutory provision, but could not recall sufficient details of it. There are short time limits to pursue claims in Tribunal, they had already expired, and I consider that it is not unreasonable to make an application to amend a claim where the claimant believes that one is likely or possible to exist. That does however then require consideration as matters progress, both as to its detail and to the evidence to support it. Whilst more could have been done by the claimant, such as seeking an order for documents, that is not likely to have led to any recovery given that the respondent denies, after making a search, that it ever received a written application under the section from the claimant. A view could have been taken as to prospects earlier, but I do not consider that that was so unreasonably delayed by the claimant as to fall within the terms of the Rule. I also take into account that there was to be a preliminary hearing in any event on case management issues, which included an application for strike out of the breach of contract claim made by the respondent which I refused, and on the nature of the claims being pursued overall, such that I do not consider that the expense sought can be said to be wholly and solely attributable to the unreasonable pursuit of a claim with no reasonable prospects of success. Whilst that does not result of itself in the rejection of the application for expenses, the fact that the expense was also incurred for another issue or issues is a not unimportant factor.

11. Although therefore the respondent is correct to state that the application to amend was made late, with inadequate specification of it, and I dismissed it, on balance I consider that it was not in accordance with the overriding objective to grant the application made for expenses, having regard to the overall circumstances as set out above. I have accordingly refused the application.

Employment Judge: Alexander Kemp
Date of Judgment: 01 August 2019
Date sent to parties: 02 August 2019