**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4103235/2015**

**Held in private in Dundee on 12 July 2019**

**Employment Judge I McFatridge**
**Tribunal Member WS Gray**
**Tribunal Member J Priestley**

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| **Mr Donald Nutt** | **Claimant**<br>**In person - written submissions** |
| **Scottish & Southern Energy plc** | **Respondent**<br>**Represented by Pinsent Masons - written representations** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Tribunal is that the respondent should pay to the claimant Twenty Thousand Pounds (£20,000) towards the claimant's expenses in terms of Rule 78(1)(a) of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1.

## REASONS

1. This case has an extensive history which is well known to the parties and is only briefly summarised here. The claimant was dismissed in 2015. He raised a claim that he had been unfairly dismissed by the respondent. He also made a claim that he had been automatically unfairly dismissed in that the sole or principal reason for his dismissal was that he had made protected disclosures. He also raised a claim that he had suffered detriment as a result of having made protected disclosures. The initial hearing dealt with liability only. The claimant represented himself and the hearing lasted for a substantial number of days spread out over a period of years. The outcome was that the Tribunal made a finding to the effect that the claimant had been unfairly dismissed by the respondent. The claims of automatic unfair dismissal and detriment in relation to the making of protected disclosures were not upheld. Neither party appealed this judgment.

2. Subsequently a remedy hearing took place where the claimant was represented by Agent and Counsel. The Tribunal ordered re-engagement. The order for re-engagement was made on 30 November 2017. The respondent appealed that judgment. The appeal did not pass the sift and was eventually disposed of by the EAT on 18 December 2018. In the meantime the Tribunal's order to re-engage the claimant no later than 20 February 2018 had not been complied with by the respondent. A further remedy hearing was fixed. In advance of this the respondent indicated that they would not be re-engaging the claimant. They did not seek to argue that it was not reasonably practicable for them to reinstate the claimant; they simply said that they were not going to. A further remedy hearing took place on 20 February 2019 following which the Tribunal made an award under section 117(3)(a) of the Employment Rights Act 1996 together with a penalty of 52 weeks' pay in terms of section 117(3)(b) of the said Act. The Tribunal ruled however that, as contended by the respondent, the effect of the statutory cap was that the amount of the penalty was effectively deducted from the amount which would otherwise have been awarded in terms of section 117. The issuing of a final judgment was complicated by the fact that the awards required to be grossed

up and some time was spent in negotiation between the parties before a final remedy judgment was issued on 29 April 2019.

3. Subsequent to this the claimant has appealed the remedies judgment. His appeal relates to the way the Tribunal dealt with the statutory cap. That appeal is pending.

4. In the meantime on 24 May 2019 the claimant made an application for expenses. He sought expenses under section 77. It was his position that the respondent had acted unreasonably in terms of section 76(1)(a). He referred to the previous findings of the Tribunal following the various hearings. He stated that the total figure claimed was over £20,000 and offered to provide further calculation of this. He indicated he'd had representation during the hearing from Simpson & Marwick, Dundee; Muir Myles Laverty, Dundee; and Kippen Campbell of Perth. He was also assisted by Counsel at the remedy hearings.

5. The respondent objected to the application. The Tribunal advised that they wished to deal with the application by way of written representations and invited written representations from the parties. The claimant was to provide further details of the reasons for the application no later than 21 June and the respondent to provide their written response no later than 6 July. The Tribunal then met on 12 July in order to consider the position. The claimant duly provided further details and the respondent provided a substantial five page document containing 25 numbered paragraphs indicating why expenses should not be awarded.

6. The Tribunal met on 12 July and considered the written submissions. The Tribunal also considered the evidence and productions which had been before them during the extensive history of the case including in particular the outline history of what had occurred in the period between the Tribunal ordering re-engagement and the final remedy hearing which had occurred on 19 February 2019.

**Discussion and Decision**

7. The Tribunal agreed with the respondent that the claimant's application for costs was based essentially on four points. The Tribunal's view with regard to each point was as follows. We have put these points in the order which is most suitable for this judgment rather than the order in which they were put by the claimant.

**Point 4 – Unreasonable conduct in relation to without prejudice letter sent to the claimant while he was unrepresented**

8. The claimant referred in his further particulars to a without prejudice letter sent by the respondent's previous solicitor's early stage in the proceedings in which they issued a costs warning. It was the claimant's position that whilst these approaches were perhaps a normal part of Tribunal process this particular letter was oppressive and as he put it a veiled threat. He considered this to be a "blatant attempt to strong arm an unrepresented claimant into abandoning his case for fear of suffering further and unsustainable financial loss." He characterised the letter as unreasonably aggressive and manipulative and trading on the claimant's lack of legal expertise to put an unreasonable amount of pressure on him.

9. The Tribunal did not consider this to be unreasonable behaviour by the respondent. As the claimant stated, such letters can be a normal part of Tribunal process. The Tribunal accepts that in certain circumstances such a letter could be oppressive and could amount to unreasonable behaviour. Having looked at the detailed terms of the letter from Clarkslegal the Tribunal considered that this was not the case here. The respondent set out their view on the evidence and the reason for that view. At that time the claimant was claiming in respect of protected disclosures. Various points are made regarding this claim which were eventually accepted by the Tribunal. They also make the point that in their view a fair procedure was followed. They refer extensively to Mr Allan having made the decision to dismiss and their view that he was entirely independent of what had gone on before. Eventually the Tribunal came to a different view and accepted the claimant's position that this

was what the claimant referred to as an "iago situation" and that Mr Allan's decision had been to some extent manipulated by what he had been told by others. It is inevitable that when a solicitor is writing such a letter on behalf of their client they will try to put their client's position as strongly as possible. In the view of the Tribunal Clarkslegal did not in any way go beyond this and there was nothing reasonable about this. Their conduct would not meet the required threshold of unreasonableness required to engage the Tribunal's discretion to award expenses in terms of Rule 76(1)(a).

**Point 2 – a failure to provide correct information in relation to remedy**

10. The claimant refers to a failure to disclose evidence which would have been prejudicial to the respondent's claim. He refers to errors in the transcript of the meeting on 1 August which was referred to in the original liability judgment. He states that if he had not produced an alternative transcript and if the Tribunal had not taken time to listen to the recording the evidence would have been lost. The Tribunal agrees with the respondent's position that whilst it is unfortunate that the transcript was incorrect the reason the Tribunal adopts an adversary process so that the parties can test the evidence being provided by the other party. In this case this is exactly what Mr Nutt did. The Tribunal listened to the recording and based its decision on this. The claimant alleges that Ms Harley gave incorrect evidence regarding pensions. This point was raised by the Tribunal itself in their remedy judgment. The Tribunal's view was that they had already dealt with this issue. It showed a lack of forethought and care by Ms Harley but at the end of the day the respondent had also provided the basic documents relating to pension which allowed a more accurate figure to be calculated. At the end of the day what happened here was what happens in a lot of Tribunal hearings. Evidence is tested and the Tribunal reaches a view. This does not amount to unreasonable behaviour such as to trigger the threshold under Rule 76(1)(a).

11. The claimant also refers to having since discovered various documents no doubt through a GDPR request. He refers to a report written by Lorraine Hamdani in January 2016 stating that she had known that the case was risky,

that the evidence was light that she had "delivered the outcome the business was looking for". He also refers to a further document which shows that on 28 July 2014 Emma Illingworth was looking to facilitate an exit for him under the voluntary early release scheme which is a form of redundancy.

12. Whilst parties to the Tribunal process are under a duty to disclose documents to the other side which are relevant to the case the Tribunal's view was that in the present case they would require much more information regarding these documents before they could properly reach a view as to whether or not the respondent's behaviour had been unreasonable. The context of the March 2016 document is unclear and it is possible that it would have been protected by privilege. The July 2014 document would certainly have been admissible however, without more, we cannot make any finding that the respondent failed in their duty of disclosure. In any event if these documents say what the claimant says they say all they would do is reinforce the decision which the Tribunal actually came to at the end of the day. Looking at matters overall the Tribunal's view is that so far as evidence is concerned what has gone on here is part of the warp and weft of the normal Tribunal process which goes on every day. We do not consider that meets the threshold under 76(1)(a).

**Point 3- that a hearing might have had to be adjourned**

13. The claimant refers to a failure to provide correct information in relation to remedy. It would appear that the claimant has sought to raise this as a separate matter to his more general complaint as to the way the respondent dealt with the order for re-engagement in that he has in mind the terms of section 76(3) which provides a specific remedy from a specific circumstance where a hearing has to be adjourned or postponed because an employer has failed to adduce evidence of vacancies. The Tribunal's view is that Rule 76(3) has no application in this case because no postponement or adjournment occurred. The issue of how the respondent dealt with the Tribunal's order for re-engagement in general terms is considered next.

**Point 4- An unreasonable failure to engage with the re-engagement process**

14. The Tribunal considered that the claimant's principal allegation of unreasonableness related to the way in which the respondent dealt with the order made by the Tribunal that the claimant be re-engaged.

15. As noted above the Tribunal's involvement in matters was that the claimant was originally supposed to have been engaged by 16 January. A judgment without reasons was issued on 30 November following a remedies hearing which had taken place over six days ending on 28 November. The reason for this being sent out in this way was so as to advise the parties of the Tribunal's decision as quickly as possible and give the parties maximum opportunity to deal with the issue of re-engagement. The respondent then sought a reconsideration of the date of re-engagement and the Tribunal agreed to this so that the claimant was due to be re-engaged by 20 February. The written reasons were issued on 8 January albeit that the final section 115 figure was delayed so that the parties could agree the amount of grossing up. As noted above, an appeal was then lodged. The matter finally came back to the Tribunal in February 2019. The essence of the claimant's position is that the respondent behaved unreasonably by refusing to engage with him or his representatives and refusing to make any attempt to engage with the Tribunal's order for re-engagement. The Tribunal were aware that this complaint was made vociferously by the claimant at the final remedy hearing in February 2019. The claimant's position is that there was no point at which the respondent dealt with the issue of re-engagement with anything approaching good faith. The claimant said that he was given false information with regard to the availability of jobs and told to apply as if he were an external candidate. He complains that the respondent failed to engage with any of his representative's correspondence and that this continued for the best part of a year. It was his position that if the respondent had had no intention of re-engaging him in any circumstances they should have advised him of this in early 2018 giving him the opportunity to avoid spending further time and expense and removing uncertainty. The claimant states that it is clear that the respondent took the decision it was in their own interests to refuse to comply

with the re-engagement order. He refers to another document which he has received through subject access which Lorraine Hamdani has commented that the company could simply 'refuse to comply and take the financial hit'. The claimant then goes on to state

> "Although there is provision for non-compliance with reinstatement and re-engagement orders, this does not mean that a blatant refusal to comply or even to assess practicability can be seen as reasonable. This refusal costs the claimant and the Tribunal time and expense and was based on the company doing what it wanted to do, ignoring the orders of the Tribunal and taking no account of the harm done to the claimant."

The claimant sets out the history of the matter in paragraph 11. The Tribunal felt it appropriate to consider the claimant's comments in paragraph 12 under this head as well. He categorises the respondent's behaviour as dishonest.

16. As noted above most of the claimant's criticisms of the way the respondent dealt with re-engagement was highlighted in his witness statement given at the s117 hearing in February 2019. The claimant was not extensively cross examined on this. Indeed, even in their submissions the respondent does not in any way seek to set out an alternative factual narrative. Instead the respondent's position is that they have acted within the bounds of the law and that they were entitled to do this. It is their view that at least initially they were entitled to pursue an appeal. They accept that there was a period when they were changing legal agents when correspondence from the claimant's legal representatives were not replied to. Their position is that the sole remedy available to the claimant is that set out under section 117 of the Employment Rights Act. They referred to the recent case of ***Mackenzie v The University of Cambridge [2019] EWCA Civ 1060*** as confirming this and stating that in their view this case shows that the employer has a choice; re-engage or make the additional payment. It is their view that both are legitimate courses of action. They clarify that Mrs Hamdani's statement was "once we have more information from the judge we will be better placed to know if we can practicably comply with the re-engagement order or whether or not we will refuse to comply

and take the financial hit by way of penalty". They state it is not unreasonable for the respondent to discuss the options open to it when faced with a re-engagement order.

17. The Tribunal's view is that all that the ***Mackenzie*** case decides is that the courts do not have a power to order specific performance of an order to re-engage by an Employment Tribunal. It is quite clear from the terms of the Employment Rights Act that the order for re-engagement is a statutory construct. Employment Tribunals do not have a right to order specific performance to the effect that an employer is forced to re-engage a former employee and the Court of Appeal quite correctly decided that in those circumstances they did not have that power either. There is also no doubt that in terms of the legislation if an employer does not comply with an order for re-engagement the only order which can be made against that employer is the order that an additional penalty be paid under section 117. It is also noteworthy that in our final remedies judgment the Tribunal agreed with the respondent that in the particular circumstances of this case the interaction of sections 115, section 117 and the provisions relating to the statutory cap meant that effectively the additional penalty on the employer who failed to comply with a re-engagement order is nil. We understand that the claimant has appealed this part of our judgment to the EAT and it may well be that the EAT disagree with us however our clear view was that on the basis of the authorities and the words of the statute we were required to deduct the amount of any penalty from the overall capped sum.

18. The Tribunal's view was therefore that what the respondent did in this case was legal. The question under Rule 76(1)(a) however is whether or not we considered that they had behaved unreasonably. The view of the Tribunal was that the respondent had behaved unreasonably. We accepted on the basis of the claimant's unchallenged evidence at the remedy hearing and on the basis of the assertions he made in his submissions on the costs issue which have not been contradicted that the respondent did not at any point engage with the claimant or his representatives with regard to re-engagement. They told the claimant where he could find a list of vacancies and that he was free to apply

for these jobs as an external candidate. This was unreasonable. The respondent had an order made by the Tribunal and the reasonable course of action would have been for them to either comply with it or to advise the claimant that they were not prepared to do so. It is clear to us that up until the point where the respondent eventually said they would not be complying on 23 January 2019 the claimant had hopes that the respondent would comply with the order. The Tribunal notes that the respondent gave absolutely no reason for their decision and did not at any point seek to argue that it was not reasonably practicable for them to comply with the Tribunal order. They simply stated that they would not be doing this.

19. The Tribunal's view is that we required to address the issue of reasonableness or unreasonableness as an industrial jury. What would an independent observer fully appraised of the facts make of the case? Would they believe that the respondent had behaved reasonably or unreasonably? The unanimous view of the Tribunal was that the respondent had behaved unreasonably. What they did was legal but then in practically every case where expenses are awarded for unreasonable behaviour for things such as late lodging of productions, late amendment, last minute postponement applications and so on; the paying party's actions have been entirely legal. The Tribunal's view is that in most cases where an employer, having been subject to an order for re-engagement, decides that they cannot comply and advises the employee of this at an early stage there will be no question of them having acted unreasonably. In this case however the Tribunal's view was that the respondent's actions were unreasonable. There was absolutely no engagement with the claimant at all in the period initially allowed for re-engagement to take place (i.e. up to 20 February). The respondent points out that they were entitled to put in an appeal however it is also noteworthy that their appeal did not pass the sift and even after a Rule 3(10) hearing the Employment Appeal Tribunal did not consider that their appeal disclosed any reasonable grounds for bringing the appeal. Their statement that it was up to the claimant to monitor vacancies and then apply as an external candidate was unreasonable. Their failure to respond to correspondence from the claimant's representative was unreasonable. Their delay in advising the respondent of

their decision that they would not be re-engaging him and their failure to give any reason for this or seek to justify their decision in any way was also unreasonable.

20. It is also noteworthy that despite the fact that the respondent's representatives had listened to six days of evidence at the remedy hearing regarding the claimant's current impecuniosity and despite being requested to do so by the claimant's agents they made absolutely no payment to account in the period to February 2019. of the sum which had been awarded under section 115 and which they knew must inevitably be awarded under section 117.

21. In all the circumstances the Tribunal felt that the threshold contained in Rule 76(1)(a) had been met. The threshold having been met, the Tribunal also considered that in all the circumstances of the case it was reasonable for it to exercise its discretion in favour of making an award of expenses.

22. The claimant sought a costs order of £20,000 in terms of Rule 78(1)(a). He offered detailed assessment on the basis that he says that his total costs were more than this. The Tribunal notes that in the case of ***Yerrakalva v Barnsley Metropolitan Borough Council and another [2012] ICR 420*** the Tribunal does not have to determine whether or not there is a precise causal link between the unreasonable conduct in question and the specific costs being claimed. On the other hand the Tribunal does require to look at the whole picture of what has happened and identify the unreasonable behaviour and the consequence of this has been.

23. In this case the unreasonable behaviour was in relation to the order for re-engagement. The claimant was represented during the whole of this period by solicitors and by Counsel. The Tribunal's view is that he is highly likely to be correct when he states that his total costs are more than £20,000.

24. The Tribunal notes that as long ago as 1981 in the case of ***Lothian Health Board v Johnston [1981] IRLR 321*** the EAT observed that it is preferable for a Tribunal to award a fixed sum rather than go to taxation. The Tribunal does not have ready access to taxing masters or legal accountants. Although we

can call for the account to be taxed by the Auditor of Court, this official is typically not familiar with Employment Tribunal procedures. Although the taxing process can be carried out by an Employment Judge the judge may not be familiar with the taxation process or the applicable rules of sederunt. Whichever method is adopted the process is likely to be time consuming and creative of further expense. The Tribunal took the view that unless it was unavoidable, asking the claimant to submit a detailed account of costs and thereafter carrying out a taxation would be disproportionate. We believe we are entitled to take a broad brush approach. The respondent's position was that if the Tribunal was minded to award costs that the award should not exceed £20,000. They called upon the claimant to produce a detailed breakdown of costs but they do not address the issue of proportionality beyond this. In all the circumstances the Tribunal's view is that looking at matters as a whole it is appropriate that the respondent pay the claimant the sum of £20,000 towards his expenses in terms of Rule 78(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

25. In his application the claimant also indicated that he believed that the respondent ought to be ordered to pay a financial penalty in terms of section 12A of the Employment Tribunals Act 1996. Section 12A states

> "Where an employment tribunal determining a claim involving an employer and a worker –
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> (a) concludes that the employer has breached any of the worker's rights to which the claim relates, and
>
> (b) is of the opinion that the breach has one or more aggravating features,
>
> the tribunal may order the employer to pay a penalty to the Secretary of State (whether or not it also makes a financial award against the employer on the claim)."

The phrase 'aggravating features' is not defined within the legislation. The Tribunal's view is that the time for us to have considered making an award under section 12A would have been at the same time as we made our decision

"in relation to the worker's rights to which the claim relates". We therefore consider that the application is made too late. Furthermore, our view is that even if we are wrong in this any aggravating features which might exist are insufficient to allow us to exercise our discretion as to whether or not to make such an award. Accordingly, we decline to make an award under section 12A.

**Employment Judge:** **Ian McFatridge**
**Date of Judgment:** **06 August 2019**
**Date sent to parties:** **06 August 2019**