EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4112631/2018

Hearing Held on written submissions

Employment Judge: Mr A Kemp
Members: Mr S Gray
Mr S Currie

Ms N Falenta — **Claimant**
In person

Heriot- Watt University — **Respondents**
Represented by:
Mr M Leon
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is that the respondent's application for expenses under Rule 75 of the Employment Tribunals Rules of Procedure is refused.

REASONS

Introduction

1. The respondent has made a claim for expenses in relation to the dismissal of a claim for harassment made by the claimant, other claims having earlier been dismissed.

2. The claimant had presented claims for direct discrimination on grounds of race and age, indirect discrimination, breach of contract, harassment, victimisation and detriment contrary to the Fixed Term Employee (Prevention of Less Favourable Treatment) Regulations 2002. The claims in respect of direct discrimination, indirect discrimination, breach of contract, victimisation and detriment contrary to the Fixed Term Employee (Prevention of Less Favourable Treatment) Regulations 2002 were heard at a final hearing on 1 to 5 April 2019. All such claims were dismissed by a Judgment dated 3 May 2019.

3. The claim in respect of harassment was not heard at the same time because of the illness of a witness, and was heard at a separate final hearing on 7 and 8 August 2019. By Judgment sent to parties on 23 August 2019 the Tribunal dismissed that claim.

4. The respondent's submission is that the harassment claim had no reasonable prospects of success and it sought an order for expenses by application dated 13 September 2019. Initially the claimant, when asked to respond to the same, indicated that she dd not wish to do so. The tribunal wished to give her a further opportunity to do so, and she took that by email dated 3 October 2019. In that she indicated that she was content that the application be determined by written submission, rather than at an oral hearing, and on 10

October 2019 the respondent confirmed that it was also content that that be the position.

5. The tribunal is satisfied that in the circumstances it is in accordance with the overriding objective to consider the application on the basis of the written submissions.

Respondent's submission

6. The respondent argues that the claim for harassment had no reasonable prospects of success. It refers to the Judgment at paragraph 108 where it states:

> "The criticism of the events in relation to the marking for course 1, and the claims over the new PGCILT course, did not have reasonable prospects of success."

7. It states that the defence of these elements of the Claimant's harassment claims caused material expense to the Respondent in respect of the following:

- The Respondent required to obtain and analyse evidence in relation to the marking of PGCAP exams and also the PGCILT.
- Witnesses for the Respondent required to be precognosed in relation to these matters.
- Documents required to added into the bundle and indexed.

8. The respondent argues that the remainder of the harassment claims had no reasonable prospects of success. It refers to an expenses warning given to the claimant by letter dated 25 July 2019 sent on a "without prejudice save as to expenses" basis. The Claimant acknowledged receipt of the expenses warning.

9. In the letter the respondent set out (i) the law, (ii) the problems with the claim as the respondent saw them (iii) explained that the defence of the claim caused expense for the respondent (iv) gave the claimant an opportunity to withdraw her claim without any risk of an award of expenses against her;(v) explained what expenses might be awarded against her; and (vi) identified sources of free legal advice in her local area which she was strongly advised to seek.

10. The respondent states that its expenses as incurred in relation to the harassment claim are in the sum of £11,329.90, although no account of expenses or other detail is given, and that the expenses incurred in relation to the harassment claim following the expiry of the deadline specified in the expenses warning are £5,173 although again no account of expenses or other detail is given.

Claimant's submission

11. The claimant disputes that any award should be made. She disputes a number of points of detail. She argues that no deposit order was sought or made. The respondent had not called two of its witnesses, Ms Chowdhry and Dr Vallejo, to give evidence during the Continued Hearing between 7th and 8th August 2019. She had engaged in email correspondence with the respondent in relation to the bundle of documents. She could not reply to the warning in time as she the appointments she made to seek legal advice at Gorgie/Dalry Citizens Advice Bureau in Edinburgh were preceded by a minimum waiting time of 2 weeks. It was in the interests of justice that she was given more time to arrange a free legal consultation, as she did not have the financial means to pay for a solicitor. The letter on 25th July 2019 did not include a breakdown of the respondent's expenses.

12. It is also understood that the claimant has sought to appeal the first decision of the tribunal (on the claims excluding that for harassment), the present status of which is not known.

Law

13. The relevant Rules, within Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) 2013 are as follows:

> "**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……."

14. Regard must be had to the overriding objective in Rule 2 when making a decision as to expenses.

15. Unlike court actions, in Tribunals expenses do not 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."

16. The fact that the Claimant is a litigant in person, who is not legally qualified, is one factor to consider. In ***AQ Ltd v Holden [2012] IRLR 648*** the EAT stated this:

> "…lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional adviser. Tribunals must bear this in mind when assessing the threshold tests in [what is now Rule 76(1)(a). Further, even if the threshold tests for an order of costs [the English term for expenses] are met, the tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice."

17. The EAT in that case did confirm that that does not mean that litigants in person, such as the Claimant, are immune from expenses orders, and that some were found to have acted unreasonably even when allowance of their lack of experience and objectivity is made.

18. In ***Vaughan v London Borough of Lewisham [2013] IRLR 713*** another division of the EAT endorsed those comments, and observed in that case that there had been a "fundamentally unreasonable appreciation of the behaviour of her employers and colleagues."

19. That case also held that the failure to seek a deposit order is not a bar to an award of costs, or expenses, later, and that the test is whether objectively there were reasonable grounds for the pursuit of the claim, not whether the Claimant genuinely believed in the claim subjectively.

20. 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.

21. 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, but there the unsuccessful Claimants were legally represented.

22. 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***.

23. The Tribunal may take into account the Claimant's ability to pay any award, but that does not have to be decided at the point of any award and can take account of changes in the future (***Arrowsmith v Nottingham Trent University [2012] ICR 159***). There is only a requirement to take that matter into account (***Brooks v Nottingham University Hospitals NHS Trust:***

UKEAT/0246/18/JOJ reported on 17 October 2019). Any award should be reasonable and proportionate in the circumstances (***Herry v Dudley Metropolitan Council [2017] ICR 610.***

Discussion

24. The tribunal found this matter a difficult one, and the decision made was a narrow one against the respondent, which had made a strong submission. On balance however it considered that it was not appropriate to make an award of expenses as sought by the respondent.

25. Whilst the claimant's arguments on the application were not always relevant to the issue before the Tribunal, what was in her favour was that at least a part of her claim did require consideration, although the latter two aspects of it were not ones reasonable to pursue, and without those the initial element was liable to be outwith the jurisdiction of the tribunal even if the facts alleged by the claimant were held to have been what happened. As it transpired the Tribunal did not consider that it would have been just and equitable to allow the issue to proceed, but the claimant was entitled to argue that it was, and had a statable case to put forward on that issue of jurisdiction. In short therefore the claim was not one without any merit.

26. It took into account that the claimant was representing herself at the hearing The respondent was legally represented, and did send the claimant a clear warning as to expenses, of which she acknowledged its receipt. She had the opportunity to take independent advice about that. She did not however have legal representation at that stage, and only mentioned seeking advice from the Citizens Advice Bureau. The fact that she did not have independent legal advice was a factor to weigh in the balance.

27. A further factor was that English is not her first language.

28. The lack of an application for a deposit order is no bar to an award, although it is a matter that can also be considered in the round.

29. The Tribunal did have sympathy with the application for expenses made by the respondent, which had set out its position clearly, including a suggestion that independent legal advice be sought, and it has been wholly successful in defending the claims made against it. Save for applying for a deposit order, which was not certain to have been granted in any event, it did all that it could to avoid the expense of the hearing, and work leading up to it.

30. Against the factual background and the law set out above the tribunal came to the conclusion, not without reservation, that it was not appropriate to exercise its discretion to make an award of expenses.

31. The application is accordingly dismissed.

Date of Judgment: 07 November 2019
Employment Judge: A Kemp
Entered Into the Register: 14 November 2019
And Copied to Parties