



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4107419/2018**

**Held in Edinburgh on 10 and 20<sup>th</sup> December 2019**

**Employment Judge: J Porter  
Tribunal Member: Ms L Brown  
Tribunal Member: Mr T Lithgow**

**Ms K O'Donnell**

**Claimant  
Absent**

**Times Newspapers Ltd**

**Respondents  
Absent**

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

It is the Judgment of the Employment Tribunal to dismiss the respondents' application for expenses in these proceedings.

### **REASONS**

1. In these proceedings the claimant claimed unfair dismissal. She also claimed direct discrimination, harassment and victimisation under the protected characteristic of gender reassignment.

2. There was a multi-day Hearing in the case which commenced on 2<sup>nd</sup> May 2019 and ended on the 12<sup>th</sup> July 2019. By Judgment dated the 20<sup>th</sup> August 2019 the claimant's claims were dismissed.
3. In terms of a letter of 18<sup>th</sup> September 2019 the respondents claim expenses (costs) under Rule 76(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. In advancing this application, the respondents rely upon the claimant's alleged vexatious, abusive, disruptive and otherwise unreasonable conduct in these proceedings. The respondents particularised such conduct as the leading of evidence from certain witnesses namely Christine Burns MBE, Jane Francesca Fae, James Morton, Enid Shelmerdine, Martin Barrow, Robin Ash and Michael Prowse. To this end, the respondents stated that these witnesses did not and could not have provided any evidence relevant to the matters in dispute before the Tribunal.
4. In terms of a letter of 14<sup>th</sup> November 2019 the respondents' application was resisted by the claimant.
5. The case was set down for a Hearing on Expenses (on written submissions only) on the 10<sup>th</sup> December 2019. Thereafter there was a Members Meeting in the case on the 20<sup>th</sup> December 2019;

### **The Law**

6. Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 provides:

**“When a costs order or a preparation time order may or shall be made**

76. 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 (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;"

7. The terms of Rule 76(1) impose a two stage test on Tribunals. Firstly, a Tribunal must ask itself whether a party's conduct falls within the terms of Rule 76(1); and if so it must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party.
8. In determining stage 1 of this process, a Tribunal should take into account the "nature, gravity and effect" of a party's unreasonable conduct (**McPherson v BNP Paribas (London Branch)** 2004 ICR 1398 CA). A Tribunal should not however misunderstand this to mean that the circumstances of a case have to be put into sections such as "nature", "gravity" and "effect" with each section being analysed separately – **Yerrakalva v Barnsley Metropolitan Borough Council and another** 2012 ICR 420. The Court of Appeal in the latter case commented that it was important not to lose sight of the totality of the circumstances and that the vital point in exercising the discretion to order expenses (costs) is to look at the whole picture.
9. As the Court of Appeal reiterated in **Yerrakalva v Barnsley Metropolitan** expenses in the Employment Tribunal remain the exception rather than the rule. The reason why expenses (costs) orders are not made in the substantial majority of Tribunal cases is that the Rules of Procedure contain a high hurdle to be surmounted before any such order can be made. Even if a Tribunal is satisfied that a party's conduct is within Rules 76(1)(a) the Tribunal's discretion encompasses the requirement that any award of costs be compensatory not punitive. Further, in terms of Rule 84 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, a Tribunal may have regard to the paying party's ability to pay in awarding expenses.
10. The Tribunal noted that reasonableness is a matter of fact for the Employment Tribunal. It will be difficult to argue that the Tribunal has made an error of law unless it can be shown that the Tribunal has neglected relevant considerations.

## Discussion and Decision

11. The respondents' application for expenses (costs) is based upon the witness evidence of Christine Burns MBE, Jane Francesca Fae, James Morton, Enid Shelmerdine, Martin Barrow, Robin Ash and Michael Prowse. Insofar as Christine Burns MBE, Jane Francesca Fae and James Morton is concerned, the respondents state that these witnesses never worked for the respondents and as such could not comment on the matters before the Tribunal and that their evidence was adduced as a lobbyist tool to try and bolster the claimant's weak case and put undue pressure on the respondents.
12. Insofar as the evidence of Enid Shelmerdine, Martin Barrow, Robin Ash and Michael Prowse is concerned the respondents' position is that the evidence of these witnesses is not relevant to the issues in the claim being evidence of alleged discrimination and behaviour in the workplace when such evidence was not part of the allegations made by the claimant before this Tribunal.
13. In her letter of 14<sup>th</sup> November 2019 the claimant submitted that the evidence of Christine Burns, Jane Francesca Fae and James Morton provided factual material used to cross examine the respondents' witness of the Times' coverage of trans issues. Insofar as Enid Shelmerdine, Martin Barrow, Robin Ash and Michael Prowse are concerned the claimant submitted that it was important to show the treatment by the respondents of other vulnerable individuals within their organisation.
14. In considering this matter, the Tribunal drew a distinction between the evidence of Christine Burns, Jane Francesca Fae and James Morton, and Enid Shelmerdine, Martin Barrow, Robin Ash and Michael Prowse.
15. Insofar as Enid Shelmerdine, Martin Barrow, Robin Ash and Michael Prowse were concerned, these individuals gave evidence of their treatment within the respondents. Enid Shelmerdine gave evidence about allegations of age and sex discrimination and the behaviour of Mr Witherow, the Editor of the Times towards

her. Mr Prowse gave evidence on the behaviour of Mr Witherow towards him. Mr Ash gave evidence of his treatment by the respondents before and after having a protected characteristic namely disability. Mr Barrow's evidence likewise related to the culture within the respondents.

16. The Tribunal concluded that all of these witnesses (Shelmerdine, Barrow, Ash and Prowse) gave evidence around the issue of the culture of the respondents. To that end, in the Judgment of the 20<sup>th</sup> August 2019 the Tribunal stated:

*“Observations on the evidence*

*91. The claimant's case included allegations that there was a culture of discrimination in the workplace generally. In deliberating and formulating the findings in fact above the Tribunal found there to be insufficient evidence of such a culture.”*

17. The Tribunal therefore accepted that it was the claimant's case that there was a culture of discrimination within the workplace generally. The Tribunal did not accept any evidence of such; however, as the Tribunal accepted that the claimant brought a case that there was a culture of discrimination the Tribunal concluded that the leading of evidence to support such a case could not meet the definition of vexatious, abusive, disruptive or otherwise unreasonable conduct in terms of Rule 76(1). Accordingly, the Tribunal concluded that any application by the respondents in respect of expenses in leading the evidence of these witnesses fails in terms of the first stage of the test in Rule 76(1).
18. The Tribunal then proceeded to consider whether the leading of evidence from Christine Burns MBE, Jane Francesca Fae and James Morton amounted to vexatious, abusive, disruptive or otherwise unreasonable conduct in the way these proceedings were conducted in terms of Rule 76(1). The Tribunal considered this to be a distinct issue from the leading of evidence from the witnesses Shelmerdine, Barrow, Ash and Prowse. The witnesses Burns, Fae and Morton never worked for the respondents and instead gave general evidence on the nature of trans gender

coverage by the respondents with reference to the quantity and content of particular articles published by the respondents

19. The Tribunal had difficulty in identifying the relevance of this evidence in the cases pled before it. To this end, the Tribunal noted that there was a Minute of Amendment produced by the claimant on the 4<sup>th</sup> June 2019 which included for the first time a case of harassment based on the publication of articles concerning gender reassignment which the claimant stated were inaccurate, misleading, unnecessarily referred to the subject's reassignment or were pejorative. After hearing from parties the Tribunal refused the amendment.

20. In paragraph 8 of the Judgment of the 20<sup>th</sup> August 2019 it is recorded:

*"8. The claimant produced a further Minute of Amendment on 4<sup>th</sup> June 2019. The Tribunal deliberated on this Amendment on the 5<sup>th</sup> July 2019 and heard from the parties on the 8<sup>th</sup> July 2019. In terms of an oral judgment of that date the Amendment was refused."*

21. The Tribunal were of the view that had the Amendment been allowed, the evidence of the witnesses Burns, Fae and Morton would have been relevant to the issues in this case. However, without the amendment the Tribunal was in difficulty seeing the relevance of that evidence. In these circumstances the Tribunal considered that the leading of the evidence from these witnesses was tantamount to vexatious, abusive, disruptive or otherwise unreasonable conduct in the way these proceedings have been conducted in terms of Rule 76(1). In reaching this conclusion, the Tribunal had regard to the fact that the relevance of these witnesses had been queried (by letter from the respondents to the claimant of 15<sup>th</sup> April 2019) in advance of the full Hearing on the Merits. In these circumstances the Tribunal was of the view that stage 1 of the two stage test in Rule 76(1) had been satisfied in respect of the evidence of the witnesses Burns, Fae and Morton.

22. The Tribunal however reminded itself that the second stage of the test is to consider whether it is appropriate to exercise its discretion in favour of awarding costs against

the claimant. To this end, the Tribunal gave consideration to the fact that the evidence of the witnesses Burns, Fae and Morton took up less than a day of the 16 days allocated to hearing this case. The Tribunal noted that cross examination of these witnesses was limited as the respondents maintained their position on the relevance of the evidence of these witnesses throughout.

23. Further, the Tribunal considered it appropriate to exercise its discretion in considering the claimant's ability to pay expenses or costs under Rule 84. To this end, the Tribunal considered the unchallenged statement given by the claimant in her letter of 14<sup>th</sup> November 2019 where she stated:

*"I presently have no income and no savings left, having used those to support myself and my children between January 2018, while I worked on the case to the present day. I have debts of £21,000. I live in rented accommodation and do not own any other property or any significant assets. I bore the costs of bringing witnesses to Scotland from the rest of the UK and abroad."*

24. After taking into account all of these issues, and further, taking into account the fact that the Tribunal's power to order expenses (costs) remains more sparingly exercised and is more circumscribed than that of the ordinary courts, it is the decision of the Tribunal not to exercise its discretion to award expenses (costs) in all the circumstances of this case.
25. Accordingly, it is the decision of the Tribunal to dismiss the respondents' application for expenses in these proceedings.

**Date of Judgment: 20 December 2019**  
**Employment Judge: Jane Porter**  
**Entered Into the Register: 20 December 2019**  
**And Copied to Parties**