EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104821/2017

Held in Dundee on 13 December 2019

Employment Judge I McFatridge
Tribunal Member N Rowlands
Tribunal Member M Keenan

Ms W Swankie	**Claimant** **Represented by** **Mr Whelan,** **Solicitor**
Arbroath Town Mission SCIO	**Respondent** **Represented by** **Mr MacMillan,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the respondent must pay the claimant Twenty Thousand Pounds (£20,000) as a payment towards the claimant's expenses in the case.

REASONS

Introduction

1. In this case the claimant lodged a claim with the Tribunal in which she claimed she had been unfairly dismissed by the respondent. She also claimed that she had been automatically unfairly dismissed and had suffered a detriment as a result of making public interest disclosures. The hearing took place over a total of 19 days spread over a period of more than a year. The end result was that the claimant was successful in all of her claims and reference is made to the Judgment issued by the Tribunal on 25 September 2019.

2. On 21 October 2019 the claimant's representative wrote to the Tribunal seeking an award of expenses. The claimant's representative wrote again on 24 October 2019 attaching an account of expenses. This extends over 19 pages and brings out a total sum of £30,913.69 plus VAT of £6182.74 in respect of fees (total £37,411.59). It also brings out a figure of £315.16 in respect of outlays most of which being the cost of travel to the Tribunal in Dundee from the claimant's base of Arbroath (also the base of her solicitor) and associated parking costs. The respondent responded by e-mails dated 25 October and 21 November 2019 setting out a number of objections to the claim. A preliminary hearing was fixed in order to deal with the issue of expenses. The hearing took place on 13 December 2019 and both parties made legal submissions. It should be recorded that at the outset of the hearing the respondent's representative withdrew one of the claims he had made in his e-mail of 21 November 2019 which was to the effect that the outcome of the Employment Tribunal proceedings were the cause of the respondent putting their premises in the market.

Claimant's submissions

3. The claimant had submitted written submissions in advance of the hearing and expanded upon these orally.

4. The claimant made the application on two separate bases. The first was that the respondent had acted vexatiously, abusively, disruptively or otherwise unreasonably in the way that the proceedings had been

conducted. The second was on the basis that the respondent's response had no reasonable prospect of success. The claimant's representative referred to the technical criticisms made by the respondent's representative of their application. It was the claimant's position that there was absolutely no requirement for the claimant to submit a schedule of costs along with their application for costs. Following clarification of the respondent's position the claimant's representative indicated that in his view there was absolutely no requirement that the party claiming costs required to identify which particular rule or paragraph or words of each rule which the party was relying on in order to support their claim. The point was covered by Rule 77. There was no requirement for any technical form of words to be used beyond that. In any event, if any issue of timing arose the Tribunal had the power to deal with this in terms of Rule 5. The claimant's representative referred to the ***Ayoola*** case which made it clear in paragraph 52 that there was no requirement for a schedule of costs to be lodged at any stage far less with the initial application. (***Ayoola v St Christopher's Fellowship UKEAT/0508/13***.) The claimant's representative indicated that in his view the authorities were now to the effect that the Tribunal requires to adopt a three-stage test to determine whether a costs order should be made. The first stage is that the claimant requires to satisfy the Tribunal that the statutory provisions in Regulations 76(1)(a) or 76(1)(b) have been met. Secondly, the claimant requires to satisfy the Tribunal that it would be appropriate for the Tribunal to exercise its discretion to award costs and thirdly that it would be appropriate for the paying party to meet such costs having regard to their means.

5. In relation to the first point the claimant's representative confirmed that he was claiming in respect of both section 76(1)(a) and section 76(1)(b). With regard to section 76(1)(a) the hearing of the claim had been set down to be completed within three days. As it transpired it was conducted over 19 days. He referred to paragraphs 140-150 of the Tribunal judgment and drew attention to the various comments that the Tribunal had made in relation to the behaviour of witnesses on cross examination. His view was that the respondent's conduct of the proceedings and in particular the conduct of the respondent's witnesses in cross examination met the threshold set out in 76(1)(a). The respondent's witnesses had made it

clear that they had no desire to assist the Tribunal but instead sought to obfuscate and fence with the claimant's representative during cross examination. It was his position that each witness had acted abusively, obstructively and unreasonably. He also made the criticism overall that the respondent had acted unreasonably through the whole process. He made the point that the respondent had never corresponded with the claimant's agent in relation to potential settlement. He referred to the Tribunal's note of 17 August 2018 where it was noted that this was not a particularly complex or high value case.

6. The claimant's representative pointed to the disparity between the comparatively modest amount awarded to the claimant of around £19,000, a sum which was reduced essentially because the claimant had retired following her dismissal. He contrasted this with the fact that in their most recent accounts the respondent would appear to have paid around £60,000 in legal fees for the Tribunal to their own agents in addition to the almost £40,000 of costs incurred by the claimant. He referred to the incident on 14 August which had been the subject of the Tribunal's previous Note of 18 August.

7. With regard to the second limb under section 76(1)(b) he maintained his view that the respondent had no reasonable prospect of successfully defending the claim by the claimant at the outset. He referred to paragraphs 182 and 185 of the Judgment. He noted that the Tribunal had been in absolutely no doubt that the claimant was dismissed on the grounds that she had made protected disclosures. He also pointed out that the Tribunal had then gone on to consider whether, even if they were wrong in this, the dismissal would have been fair or unfair in general terms under section 98. The Tribunal had expressed the view that the dismissal was unfair in quite categorical terms and had set out a number of bullet pointed reasons for coming to this conclusion. He also referred to the fact that the Tribunal had commented that at various early stages in the proceedings the respondent had been asked to obtain proper legal advice. These requests had come from the claimant herself, from the solicitors instructed by the claimant who had previously represented the respondent and indeed from OSCR. The respondent had wilfully proceeded without

taking any independent legal advice as to the whistleblowing issues raised by the claimant or in relation to employment law. It was the view of the claimant's representative that it would have been obvious from the outset that the respondent had no reasonable prospect of successfully defending the claim against them. He also referred to the Tribunal's finding at paragraph 193 that the claimant had behaved perfectly properly in relation to those matters which had led to her being automatically unfairly dismissed.

8. The position of the claimant's representative was that the threshold in terms of section 76(1)(a) and section 76(1)(b) had quite clearly been met. It was his view that it would be appropriate for the Tribunal to exercise their discretion in awarding costs essentially for the reasons previously set out. It was his view that the level of expense incurred by the claimant would never have been at the level which was actually incurred had the respondent acted responsibly and reasonably. In his view the Tribunal would have been concluded or at most five days if it had not been for the behaviour of the respondent's representatives. He pointed to the injustice that on the basis of the Tribunal's findings the claimant who had acted perfectly appropriately and responsibly throughout would find herself £18,000 out of pocket if she did not receive an award of expenses.

Respondent's submissions

9. The respondent's representative made a number of discrete points in relation to the application. First of all it was the position of the respondent's representative that the application had not been fully submitted within the time limit permitted. They accepted that the original application for costs was lodged in time but this simply stated that the claimant was looking for a costs order. The claimant then wrote to the Tribunal on 24 October enclosing their account of costs. The respondent's representative indicated that although it was arguable that this had been submitted out of time this was not the specific point that he was making. The specific point he was making was that it was not until the claimant's e-mail of 31 October that the claimant confirmed that she was seeking costs in terms of section 76(1)(a) and 76(1)(b). He also made the point that in the e-mail of 31 October the claimant's representative omitted to include the words 'or

otherwise unreasonably' quoting from section 76(1)(a) and that the claimant could not now seek to obtain costs on the basis that the respondent's conduct of the case had been 'otherwise unreasonable' but could only do so on the points highlighted in the letter of 31 October. It was his position that when a claimant seeks expenses they must give the basis on which costs are sought. He accepted there was very little law on the subject and he had not been able to find a case in point. He accepted that whilst the Rules which predated the 2013 Rules had a specific provision which allowed a party to apply to be permitted to make an application for costs late there was no such specific provision in the current Rules and indeed in the previous Rules the party had to specifically apply for consent to make a late application and this had not happened in this case. He accepted however that Rule 5 of the 2013 Rules would probably have application in this type of situation.

10. In general terms he accepted that the claimant was correct in stating that there was now a three-stage test and had no difficulty with any of the cases cited by the claimant's representative. It was his view that the first stage was for the Tribunal to look at issues in the round. It was the respondent's position that there was a triable issue in this case and that there had been from the outset. He made the point that the claimant at no time provided the Tribunal or the respondent with a copy of the alleged written disclosures which had been made. The form that these disclosures took was not clearly set out and would require the claimant to lead evidence and the respondent was not in a position to take a view on the matter until this evidence had been led. It was his view that, overall, a lot of time had been taken up because the Tribunal required to draw inferences from the evidence rather than being provided with direct evidence in relation to the disclosure. With regard to the specific criticism of the respondent's witnesses he accepted that the Tribunal's criticism within the initial judgment was stark. He also pointed out however that the claimant was not immune from criticism herself. He referred to the section of the judgment which dealt with the previous application which had been made for costs in relation to the incident of 14 August and surrounding events relating to the reference to the EAT. He referred to the well-known judgment statement of Sir Hugh Griffiths in the case of ***ET Marler Limited***

v Robertson [1974] ICR 72 which was referred to with approval in the case of ***Salinas v Bear Stearns International Holdings and another [2005] ICR 1117***.

> "Ordinary experience in life frequently teaches us that that which is plain for all to see once the dust of battle has subsided was far from clear to the contestants when they took up arms. To order costs in the Employment Tribunal is an exceptional course of action and the reason for, and the basis of, an order should be specified clearly …."

He also referred to the fact that the Tribunal itself used similar words in its own judgment at paragraph 199. He referred to a number of cases making the basic point that in employment law cases expenses are the exception rather than the rule. He made the point that the employment relationship is always an emotional as well as an economic relationship and that passions can run high.

11. The respondent's representative also made a specific point regarding the difficulty he had had in obtaining instructions from the respondent given the particular way the respondent's witnesses ended up giving evidence. The respondent is a charitable organisation and the three respondent's witnesses were three of the key individuals within that organisation. For substantial periods of time while the case was going on these individuals could not give any instructions because they were embargoed as they were in the middle of giving evidence. He pointed out that Ms Milton had been giving evidence for a period of three months. Her evidence finished on 2 July. Mr Marshall's evidence started on that day and his evidence was not completed until 12 December partly because another respondent's witness had been interposed. The consequence of this was that between 9 April and 12 December one or other of the respondent's witnesses were under embargo. With regard to the cross examination he accepted this was lengthy. He felt that some extraneous issues had been explored and referred to the schedule which he had produced as part of his submissions in the main case. He believed that there were other reasons that the cross examination lasted as long as it did in addition to alleged prevarication by the witnesses. He referred to the ***Iola*** case and the need for the Tribunal to scrutinise the figures sought by the claimant

and set out reasons for any conclusion as to the appropriateness of any sum awarded. On this basis he had a number of criticisms of the account. He noted that it is not until halfway down page 5 that the hearing started. It was his view that none of these costs prior to then could in any way be laid at the door of the respondent. He also pointed out that day three of the hearing only ran for about 40 minutes. This was because an issue arose regarding documents. The claimant's representative required to obtain various documents from the respondent and then consider these before the next diet of hearing. On 10 May Ms Milton required to be sent home after lunch because Tribunal were concerned that she may be unwell. With regard to the incident referred to in the tribunal's Note the matter was res judicata since the Tribunal had already considered the claimant's application for an award of expenses in respect of this process and refused it. His position was that even if the tribunal were minded to find that there had been unreasonable behaviour by the respondent and their witnesses the case would not have lasted the three or five days suggested by the claimant if that had not taken place. His view was that at the most the Tribunal should be awarding expenses of a few more days of the Tribunal at around £1000 per day.

12. With regard to ability to pay he referred to the various documents which had been lodged. The respondent had been advanced money by an anonymous well-wisher to enable them to meet the principal sum awarded to the claimant which had been paid over shortly after the Tribunal judgment. Their account showed that in the last two years they had been losing around £140,000 to £160,000 per annum. These losses could not continue and the respondent had now ceased practically all of their operations apart from the church and all of the staff apart from the pastor had been dismissed by reason of redundancy. Their accounts show £3000 in the bank. They had put their premises up for sale. The premises were believed to be worth around £235,000. From the sale of the premises they would require to pay back the loan from the well-wisher. They would also require to pay the costs of the sale. The respondent hoped to be in a position to purchase smaller premises with what was left from the sale proceeds in order to carry on their charitable function as a church. If they required to pay a substantial amount of costs to the

claimant then this would be jeopardised. The respondent's representative also confirmed that the respondent had recently agreed to sell a car parking area next to their premises to a local garage at a price of £10,000. The sale proceeds had not yet been paid over but with the cost of sale and legal fees coming off it was expected that there would be around £9000 free proceeds. These would go first of all to part repayment of the well-wisher. He pointed out that in cases where a claimant was being required to pay expenses Tribunals had usually been loath to make an award which would result in the claimant losing their house. He indicated that in the present circumstances it was the respondent who if they required to pay a substantial sum would effectively be homeless after they have sold their premises since they would be unable to afford anything else. He referred to the authorities of ***Gee -v- Shell UK Limited [2002] EWCA civ 1479***, ***Power v Panasonic [2005] WL1767599*** and ***Yerrakalva v Barnsley MBC [2012] ICR 420*** as well as the ***Bear Stearns*** case previously referred to.

Discussion and decision

13. The current rules relating to payment of expenses are contained in Rules 74-84 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1. Section 77 deals with procedure. This states

> "A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application."

14. The Tribunal notes that all that is required is for the party to "apply for a costs order". It was the Tribunal's view that this was precisely what the claimant did in the e-mail of 21st. The e-mail was submitted within the 28 day period. We consider that there is nothing in the Rule which required the claimant to do more than simply state they were seeking a costs order. We entirely reject the respondent's submissions in this regard which

appeared to us to be seeking to add unnecessary formality in a way which is not only not required by the Rules but would be contrary to the overriding objective. In any event, even if the Tribunal were wrong in our assessment that no more was required than the claimant actually did, we were in no doubt we would have decided to extend the time limit contained in Rule 77 using our powers under Rule 5. The Tribunal also considered that there was nothing in the respondent's suggestion that because the claimant in her representative's e-mail of 31 October had only referred to the respondent acting vexatiously, abusively or disruptively (omitting the words 'or otherwise unreasonably') this meant that the Tribunal was precluded from applying the full text of Rule 76. Once again the Tribunal consider that the respondent is seeking to add entirely unnecessary formality.

15. The Tribunal accepted the claimant's submission that we required to approach matters on the basis of a three-stage process. The first stage in the process was for the Tribunal to consider whether the threshold contained either in section 76(1)(a) or 76(1)(b) or both had been met.

16. Section 76 states

> "(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 (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; or
>
> (b) any claim or response had no reasonable prospect of success."

17. With regard to Rule 76(1)(a) Tribunal accepted the various criticisms made by the claimant's representative about the way the respondent had conducted the proceedings. The Tribunal considered that in many respects the way the three respondent's witnesses behaved was scandalous. We refer to the various criticisms already made in our detailed merits Judgment. We also consider that their conduct was unreasonable. The Tribunal was in absolutely no doubt that the case

lasted longer than it should have as a result of the behaviour of the respondent's witnesses.

18. We shall not go into any greater detail regarding the Tribunal's view of this however at this stage since the Tribunal's view of the current issue is that it is of greater relevance to consider whether the threshold was also met in terms of section 76(1)(b). In view of the Tribunal this was a case where the respondent had no reasonable prospect of success from the outset. We entirely adopted the position of the claimant's agent which was that the respondent, whilst they were dealing with the issues raised by the claimant, entirely failed to respond to the suggestions made in various quarters that they should take proper legal advice. Had they done so and followed that advice then the likelihood is that the claimant would never have been subjected to discipline or dismissed in the first place. That is not however relevant to the issue posed by section 76(1)(b). What is highly relevant in the view of the Tribunal was that it must have been obvious to the respondent from the moment the claim was lodged that they would be highly unlikely to successfully defend this.

19. It is clear from our Judgment that in the Tribunal's view there were a number of "smoking guns" in the adminicles of evidence which would cause the respondent considerable difficulty.

20. It is not necessary for us to rehearse all of these here but one of the respondent's difficulties was the fact that their invitation to the disciplinary hearing on 17 July 2017 (document 59) refers inter alia to the claimant damaging the Christian witness and testimony and bringing the organisation into disrepute. The subsequent paragraphs detail that she expressed concerns regarding the Board's conduct to OSCR that were inappropriate and untrue.

21. The Tribunal rejected the respondent's submission that there was always a case to be tried on the disclosure aspect of the claim because the written version of her disclosure was not lodged. The point we should make is that the respondent appeared to be aware of the terms of the disclosure made when they invited the claimant to a disciplinary hearing. More important, the respondent had available to them the claimant's own

statements in relation to what had been said and the letter from Thorntons and from OSCR from which they could readily infer what the disclosure actually was. Furthermore, if this had been an issue for the respondent it became clear by the end of the Tribunal that the respondent could have simply asked OSCR to send them a copy of this. The respondent had the clear statement from Thorntons about what the claimant had told them. The tribunal's view is that any reasonable employer would have taken advice on their prospects of success and given the fact that the reasons given for dismissal involved reporting the organisation to the organisation's regulator the advice they most likely have received was that their chances of successfully defending the claim were minimal. With regard to the ordinary unfair dismissal claim the Tribunal would refer to the various bullet points which we have mentioned in our substantive judgement. Quite apart from anything else this is a case where the claimant is asked to attend a disciplinary hearing but the final decision is then made at a board meeting at which the claimant has no right to be present and where the decision is being made by people who were not at the disciplinary hearing. The Tribunal's view was that it would have been clear to a reasonable employer from the outset that the respondent had no reasonable prospect of success.

22. The Tribunal were also of the view that the respondent's witnesses were aware of this fact and that this was the primary driver behind the scandalous and unreasonable conduct of the case. The Tribunal's view was that the reason the respondent's witnesses prevaricated in answering questions and tried to fence with the claimant's representative during cross examination was because at the end of the day they knew that if the true facts came out they would certainly lose their case.

23. The Tribunal's view was therefore that the threshold in terms of both 76(1)(a) and 76(1)(b) were met. That is not however the end of the matter since the Tribunal requires to go on to decide whether or not it is appropriate to exercise its discretion to award costs. In general terms the Tribunal accepted the representations of the respondent's representative to the effect that the award of costs is the exception rather than the rule in Tribunal cases. We also, incidentally, accepted the point made by the

claimant's representative that one of the reasons for this is that in most cases the threshold set out in Rule 76 is not met but nevertheless it appears to us that even where the threshold is met as in this case the issue of whether or not an award of costs should flow from this is something which requires careful consideration by the Tribunal. We accepted the position of the respondent's representative that the Tribunal is required to take a broad overview of the case and look at matters as a whole.

24. We note the position of the claimant's representative that effectively if costs are not awarded the claimant ends up having her rights entirely vindicated but substantially out of pocket. We did not however think that this was something which was particularly persuasive. It is a fact of life that civil litigation costs money. It is not uncommon for individuals to win their case but be out of pocket. The fact that the Tribunal is generally a no costs regime means that injustice may happen in a substantial number of cases where the threshold fixed in Rule 76 is not met. We are also mindful of the point made by the respondent's representative that emotions can run high in employment cases and that in the heat of the moment parties may conduct themselves in a way which, with the benefit of hindsight they would not wish to have done. We take on board entirely the quote from the case of ***Marler Limited v Robertson [1974] ICR 72*** the respondent's representative referred us to.

25. That having been said the Tribunal's view was that in this case it was appropriate to exercise our discretion to make an award of expenses. The Tribunal considered that it must have been clear to the respondent from the outset that they would be unable to successfully defend the claim. They proceeded to act in a way which was entirely and completely inappropriate and not in accordance with modern day employment practice. Instead of trying to seek an accommodation with the claimant or even approaching the Tribunal process with a view to concentrating on the areas of dispute and minimising costs the respondent chose to defend the case to the hilt and to obfuscate and prevaricate in their evidence which had the effect of dragging the case out. The Tribunal is mindful of the fact that the respondent is an organisation which is run by a committee and of

the difficulties in obtaining instructions which the respondent's agent referred to however at the end of the day the way the respondent behaved throughout the whole process was entirely unreasonable. This resulted in the joint expenditure by the two parties of nearly £100,000 in respect of an employment dispute in respect of a 79 year old woman earning under £18,000 per annum. The Tribunal's view was that the claimant was perfectly justified in raising her claim and as noted above it would have been obvious as soon as the claim was raised that the respondent would lose given the various evidential smoking guns which we have referred to.

26. With regard to the amount of the award, we were urged by the claimant's representative to submit their account for taxation by the Auditor of Court. The respondent's position was that we should deal with the case summarily which would of course mean that we would require to make an award which was below the Tribunal's summary limit of £20,000.

27. The Tribunal heard the evidence regarding the respondent's current financial situation with great sadness. It was clear from the evidence of all of the witnesses in the case the respondent carried out a substantial amount of good works in the Arbroath area over a period of many decades. It is no doubt a source of great sadness to the claimant that many of the services which she built up are now no longer being offered by the respondent. The Tribunal accepted the evidence of the respondent that having incurred losses at the rate of around £150,000 a year there is no doubt that the respondent's only possible action was to withdraw from carrying out much of their activities and put their premises up for sale. The Tribunal accepted that the sale price will be around £235,000 out of which the respondent will require to pay the loan which they obtained to pay the claimant's damages and the costs of the legal conveyancing and estate agency costs involved in processing this. The Tribunal noted that the respondent proposed to purchase a shop front with what was left with a view to conducting their services from there and also carrying on such other activities as they wished to do. The Tribunal felt the need to maintain a roof over their heads was something which we required to take into account.

28. With regard to the claimant's detailed statement of account the Tribunal were of the view that this was entirely reasonable. Hourly rates charged were well within what the Tribunal would regard as reasonable for a relatively senior solicitor conducting a case such as this before the Employment Tribunal in Dundee. The Tribunal could see nothing inherently wrong with allowing the claimant's solicitor to charge for his travel time and expenses in travelling between Arbroath and Dundee. The claimant is based in Arbroath. It was entirely reasonable for her to instruct a solicitor in Arbroath. The Tribunal noted the various criticisms made by the respondent's representative however we note that there is no requirement for the Tribunal to identify any causative link between the unreasonable conduct found and the costs ordered. The Tribunal's understanding is that we required to decide whether the threshold set out in Rule 76 is met and then if so whether to exercise our discretion in order to award costs. There is no requirement that we go through the account line by line and decide whether the claimant would have incurred these costs anyway even if the respondent had behaved entirely reasonably. Furthermore, given our finding that we considered that the respondent's defence of the claim had no reasonable prospect of success we cannot excise the claimant's detailed entries on those grounds. With regard to the costs incurred in relation to the respondent's motion to strike out the claim in August we have already dealt with this in our main judgment. We decided that since this was a matter based purely on the respondent's unreasonable conduct of the case (which we did find to be unreasonable) our judgment not to make an award was primarily that the major part of the cost was caused by the fact that the claimant's representative sought the adjournment following the reference to the EAT.

29. We also take the point that, although we do not put too much weight on it, the claimant's representative was extremely tenacious in continuing with his cross examination of the respondent's witnesses well beyond the point where their credibility had been damaged. Some costs would have been avoided if a less tenacious representative had simply noted various discrepancies in the evidence of the respondent's witnesses and moved on. What we say is not to be interpreted in any way as a criticism of the

claimant's representative since at the end of the day he has conduct of the case and it was a matter for his professional judgment.

30. At the end of the day taking all of the above matters into account including the respondent's now limited means it is the Tribunal's view we should summarily assess that we should make an award of expenses and summarily assess these at £20,000. The respondent shall therefore pay to the claimant £20,000 towards their expenses.

Employment Judge: **Ian McFatridge**
Date of Judgment: **09 January 2020**
Date sent to parties: **09 January 2020**