



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4107598/2017**

**Held in Edinburgh on 22 November 2019**

**Employment Judge J Porter**

**Mr C Grant**

**Claimant  
Absent**

**Matthew Barsaukas**

**Respondent  
Absent**

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

It is the judgment of the Employment Tribunal to dismiss the respondent's application for expenses in these proceedings.

#### **Introduction**

1. In these proceedings the claimant claimed unpaid wages and failure to provide him with a Statement of his Terms and Conditions of Employment. The claimant's claims were resisted and there were Preliminary Hearings on the matter on the 21<sup>st</sup> March 2018, the 29<sup>th</sup> of June 2018, the 11<sup>th</sup> of February 2019 and the 29<sup>th</sup> of March 2019. At the Preliminary Hearing on the 11<sup>th</sup> of February 2019 the then respondents Xpress CA Musselburgh Limited, Matthew Barsaukas T/AS CG01 and Xpress Colourart Group Limited were dismissed from the action as it transpired that between the commencement of the proceedings on the 22<sup>nd</sup> of December 2017 and the date of

that PH the respondent companies had been dissolved. At the PH on the 29<sup>th</sup> March 2019 an “unless order” was granted to the effect that the claimant provide Further and Better Particulars on the issue of his employee status by 12<sup>th</sup> April 2019.

2. The claimant provided Further and Better Particulars in response to the Unless Order on the 5<sup>th</sup> of April 2019. These Further and Better Particulars stated: “*I was never entirely sure who was actually my employer, however, after being afforded so much time to digest and look closely at this case, I believe the only person my employer could have been is Mr Matthew Barsaukas.*” The Further and Better Particulars were responded to by Matthew Barsaukas by email of 5<sup>th</sup> April 2019.
3. There was a full Hearing on the Merits on the case on the 29<sup>th</sup>, 30<sup>th</sup> and 31<sup>st</sup> July 2019. At the Hearing on the Merits the claimant represented himself as did the respondent. At the conclusion of the Hearing on the Merits the claimant’s claims were dismissed on the grounds of employee status. Oral reasons were then given.
4. In terms of an application of 5<sup>th</sup> August 2019 the respondents applied for an Order for Expenses. The application was resisted and a Hearing on Expenses (written submissions only) took place on 13<sup>th</sup> November 2019. The Hearing on expenses was continued to 22<sup>nd</sup> November 2019 for the purpose of attaining additional information from the parties.

## **The Law**

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

*“When a costs or 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 (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 ...”*

6. Where the conduct of a party is “*vexatious, abusive, disruptive or otherwise unreasonable*” Rule 76(1) provides that the Tribunal shall consider whether to make an expenses order. Accordingly, a Tribunal has a duty to consider making an order but has a discretion as to whether or not to actually make an award. In other words Rule 76(1) imposes a two stage test: first a Tribunal must ask itself whether a party's conduct falls under Rule 76(1)(a); if so, it must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding expenses against that party. In carrying out this exercise, it is appropriate for a litigant in person to be judged less harshly in terms of his or her conduct than a litigant who is professionally represented (***AQ v Holden*** 2012 IRL 648 EAT).
  
7. In ***Yerrakalva v Barnsley Metropolitan Borough Council and another*** 2012 ICR 420 CA Mummery LJ emphasised that the Tribunal has a broad discretion on the question of expenses and should avoid adopting an over-analytical approach. It was emphasised that the vital point in exercising the discretion to order expenses is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and in doing so to identify the conduct, what was unreasonable about it and what effects it had.

### **Discussion and Decision**

8. The respondent's application for expenses on this case was based on the claimant's failure to comply with orders timeously, and his alleged failure to provide particulars

and evidence to substantiate his allegation that the respondent was his employer. In considering this application, the Employment Tribunal deliberated on the chronology of this case. To this end, the Tribunal noted that at the PH on the 11<sup>th</sup> February 2018 the Employment Judge brought to the claimant's attention that a search on the Companies House website revealed that the respondent companies were dissolved and accordingly the claims against such companies were dismissed on the basis that the entities no longer existed. The Employment Judge observed that at the commencement of these proceedings on the 22<sup>nd</sup> of December 2017 the respondent companies had been live entities and that action by Matthew Barsauckas had been taken in the intervening period to reach a situation where these entities were dissolved.

9. The Employment Judge noted that in bringing his claims before this Tribunal the claimant had difficulty on the issue of his employment status and that in the particular circumstances of this case the claimant's employment status was far from clear cut. The evidence that existed and was brought before the Tribunal at the full hearing on the merits pointed to Xpress Colourart Group Limited, one of the dissolved companies, as the claimant's employer; however, there was conflicting evidence as to who the claimant actually worked for in the latter period of his employment. To this end, at the Preliminary Hearing on the 29<sup>th</sup> March 2019 an Unless Order was granted for Further and Better Particulars of the claimant's case to substantiate his allegation that he was either employed by or worked for the respondent. The claimant complied with the Order, stating at the outset of that response: "*I was never entirely sure who was actually my employer ...*" The Tribunal considered this statement to be a true reflection of the justifiable confusion that the claimant felt in determining who he was actually working for.
10. On the issue of the claimant's compliance with Orders, the Tribunal noted that there were occasions when the claimant was slow to comply with Orders. However, on balance, the Tribunal considered that, given that the claimant is a party litigant and given that the issues in this case are far from straightforward, the Tribunal was not of the view that this in itself constituted vexatious, abusive, disruptive or otherwise unreasonable conduct.

11. In all of these circumstances and taking into account the fact that the claimant represented himself in person, the Tribunal reached the conclusion that the test set out in Rule 76(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 had not been satisfied in that it could not be said that the claimant in the course of these proceedings acted vexatiously, abusively, disruptively or unreasonably or that the claim had no reasonable prospects of success.
  
12. In all of these circumstances (and after taking into account that an award of expenses is still the exception rather than the rule in Employment Tribunal proceedings) it is the decision of the Tribunal to dismiss the respondent's claim for expenses in these proceedings.

**Date of Judgement: 26<sup>th</sup> November 2019**  
**Employment Judge: J Porter**  
**Date Entered in Register: 27<sup>th</sup> November 2019**  
**And Copied to Parties**