EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112610/2018

Held in Glasgow on 5 September 2019

Employment Judge R Gall
Member P O'Hagan

Mr M Littler	**Claimant** **Represented by:** **Ms M Gribbon - Solicitor**
RJ Blasting (Scotland) Ltd	**First Respondent** **Represented by:** **Mr J Rennie - Solicitor**
Mr E McCafferty	**Second Respondent** **Represented by:** **-as above**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the first respondents acted unreasonably in the way that part of the proceedings were conducted and that the response had in one regard no reasonable prospect of success. Part of the proceedings were conducted unreasonably in the period after 4 October 2018. An award in respect of expenses in favour of the claimant, his expenses to be met by the first respondents, is therefore made. The account of expenses is recoverable to the extent of 80% of such sum of expenses as is specified by the Auditor of Court having carried out taxation in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993. The period for calculation of expenses is that running from 5 October 2018 until (and including) 5 September 2019.

REASONS

E.T. Z4 (WR)

1. This was a hearing upon the application made by the claimant for costs or expenses. That application was made in terms of Rule 76 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013. It followed upon Judgment of the Tribunal dated 26 April 2019, sent to parties on 29 April 2019.

2. At this hearing, both parties were represented by the solicitors who represented them at the hearing in the case itself. Ms Gribbon appeared for the claimant. Mr Rennie appeared for the first respondents, against whom the application was understood to have been made. The first respondents are, for ease, referred to in this Judgment as the respondents. The Tribunal for this hearing comprised the Employment Judge and one member, Mr O'Hagan. That was also the composition of the Employment Tribunal which heard submissions in the case and came to a decision in the case. As narrated in the Judgment, a member who heard evidence in the case, Mr Muir, was unfortunately not able to sit when submissions were made, due to a sudden deterioration in the health of a close family member. With consent of the parties the Employment Judge and remaining member heard submissions and made the decision in the case.

Preliminary issue

3. Prior to hearing submissions from parties in relation to the application for expenses, the Tribunal considered an application made on behalf of the respondents.

4. The respondents wished to produce an email detailing an offer which had been made to the claimant in the period immediately prior to the case proceeding. The claimant objected to this document being produced. It was said on behalf of the claimant that if the Tribunal did accept this document for consideration in the application for expenses, further documentation would be required from the claimant to put this document in context.

5. Mr Rennie said that the offer had been made and impacted upon costs in that the claimant had turned down the offer made. It had been made approximately 5 days prior to the first date of commencement of the hearing.

6. Ms Gribbon said that the email was not an open one. It was a snapshot of what had happened in settlement discussions. It would be misleading to look at one email.

7. In any event and more fundamentally the email set out an offer in settlement with the sum involved having been "beaten" by the claimant in that the Tribunal awarded him more than the respondents had offered to him in settlement. He had therefore been correct to pursue the matter to a hearing before the Tribunal.

8. Further, he was entitled to pursue the application to the Tribunal as no admission of liability was made in terms of the offer. Obtaining a declaration was something which he was entitled to do.

9. It was also important, Ms Gribbon said, to review admissibility of this proposed email with the background that what appeared to be said by the respondents was that the claimant had been unreasonable in refusing the offer made. What was at issue in the application before the Tribunal however was not the reasonableness or unreasonableness of the actings of the claimant. Rather, it was the actings of the respondents which were at issue and which had led to the application being made.

10. Mr Rennie accepted that the offer had been beaten but said it had not been beaten by much. It was relevant, he said, that the claimant had withdrawn his claim of disability discrimination. The offer made rendered it disproportionate to continue to Tribunal, Mr Rennie said. He urged the Tribunal to have regard to the email, viewing it as admissible and taking account of it in considering the overall picture.

11. After adjournment, the Tribunal ruled that the email was one which it was not persuaded was of relevance. It appeared to the Tribunal to comprise an offer which was rejected. The claimant had proceeded to the Tribunal hearing. As a result of succeeding he was awarded more than was offered. He also obtained a declaration that his dismissal was unfair and that he had been discriminated against through victimisation. He had made a judgment to refuse the offer. The Tribunal was not considering his conduct or its

reasonableness. The application for expenses was made on the basis of the respondents' alleged unreasonable conduct of proceedings. The view of the Tribunal was that the potentially unreasonable conduct of the respondents as referred to could not be explained or expunged by reference to an offer which was beaten by the award of the Tribunal, an offer which did not include any acceptance of the dismissal as being unfair or of discriminatory conduct as having occurred.

12. On that footing the email was not regarded as being admissible.

The issue

13. The Issue for the Tribunal was to determine whether an award of expenses would be made under Rule 76. That involved determination of whether the conduct of the respondents had been unreasonable in the way that the proceedings or part of them had been conducted by them. It also involved determination of whether there had been no reasonable prospect of success in defence of an element of the claim. If the Tribunal was satisfied in relation to either or both of those matters, then it required to consider whether it was appropriate to make an expenses award. If an award was considered appropriate, then the amount and means of calculation of any such award required to be addressed.

Applicable law

14. An award of costs is to be compensatory, not punitive.

15. The terms of Rule 76 set out circumstances in which a Tribunal may make an award order for expenses to be paid. A two stage process is involved. A Tribunal must come to a view as to whether the person potentially liable for expenses has acted unreasonably during conduct of the proceedings or part thereof. It must also determine, on the basis of the present application, whether the party potentially liable in terms of an expenses order has insisted upon a case or part of it which had no reasonable prospects of success. Having made that determination, a Tribunal then requires to consider whether an expenses order is appropriately made. The case of **Monaghan v Close**

Thornton Solicitors EAT 0003/01 is authority for that process being the appropriate one to be undertaken.

16. It was confirmed by the respondents that there was no requirement in this case for the Tribunal to consider ability to pay on their part in relation to whether to make an expenses order and if so in what amount. That is a matter potentially taken into account by a Tribunal under Rule 84.

17. Rule 78 deals with how the amount of any expenses order is to be determined. In this case the claimant requested that the account of expenses be remitted to the Auditor of Court in the Sheriff Court to determine amount in the event of success in the application.

18. The case of **Yerrakalva v Barnsley Metropolitan Borough Council** and another 2012 ICR 420 ("**Yerrakalva**") confirms that it is not necessary for and Employment Tribunal to determine a causal link between unreasonable conduct and specific costs. Causation is relevant, however it is not for the Tribunal to tease apart the case and to compartmentalise conduct. In that case Mummery LJ confirmed that an Employment Tribunal had a broad discretion and should avoid adopting an over analytical approach. The whole picture of what has happened in a case requires to be considered. Whether unreasonable conduct has occurred requires to be determined by the Tribunal. That conduct and why it was unreasonable, together with its effect should be confirmed in the Judgment. This case was endorsed by the Court of Appeal in **Sud v Ealing London Borough Council** 2013 ICR D39 ("**Sud**"). There it was said that an Employment Tribunal should adopt a broad-brush approach against the background of all the relevant circumstances.

19. The discretion which a Tribunal has in this area means that costs can be awarded in relation to "proceedings". Proceedings extend to the period prior to any hearing. The case of **Sunuva Ltd v Martyn** 2018 ICR D9 confirms this. In that case the claimant was awarded expenses relative to the period before form ET3 was received by the claimant from the respondents.

20. In considering whether behaviour has been unreasonable or not, cases referred to in the submission from the claimant as detailed below are also of relevance. Those cases were

- **McPherson v BNP Paribas (London Branch)** 2004 IRLR 558 ("**McPherson**")
- **Yerrakalva**
- **Daleside Nursing Home Limited v Matthew** UKEAT/0519/08 ("**Daleside**")
- **Nicholson Highlandwear Ltd v Nicholson** 2010 IRLR 859 ("**Nicholson**")
- **Cartiers Superfoods Ltd v Laws** 1978 IRLR 315 ("**Cartiers**")
- **Beynon v Scadden** 1999 IRLR 700 ("**Beynon**")
- **Vaughan v London Borough of Lewisham** 2013 IRLR 713 ("**Vaughan**")
- **Peat v Birmingham City Council** UKEAT/0503/11 ("**Peat**")

21. In considering whether a party was subjected to a detriment by any act done because of a protected act, "detriment" is to be viewed with the terms of paragraph 9.8 of the statutory Code of Practice on Employment of 2011 in mind. That paragraph states that a detriment is anything which the individual concerned might reasonably consider changes their position for the worse or puts them at a disadvantage.

Submissions

Submissions for the claimant

22. Ms Gribbon said that costs were sought from time of submission by the respondents of form ET3 until, and including, conduct of the expenses hearing. She asked that, if the Tribunal was with her, quantification of costs be remitted to the Auditor of Court for determination.

23. It was explained by Ms Gribbon that she accepted that the respondents were entitled to defend the unfair dismissal claim and had valid arguments on quantum relative to any award which might be made by the Tribunal in terms

of the unfair dismissal claim. There were cogent arguments, she said in relation to quantum and remedy.

24. The chronology was referred to by Ms Gribbon. The claimant had always said that his employment had been terminated. The respondents were aware of that being his position from the time before the claim was presented to the Tribunal. Ms Gribbon referred to the letters at pages 88, 89 and 90 of the bundle she produced for the expenses hearing. In those documents, together with the document at page 92, the claimant had said that he was dismissed.

25. In the response however at pages 93 and 94 of the bundle, the respondents had denied that the claimant was dismissed. They had said that the claimant wished to resign and that had led to termination of his employment. That position was denied by the claimant in terms of the letter at page 96. All of this was prior to the Tribunal claim being presented.

26. The pre-Tribunal correspondence, form ET1 and the claimant's evidence were all consistent. The respondents' position prior to the claim being lodged and their position in terms of form ET3 were also consistent in that they said that there had not been a dismissal. That had remained their position during the pre-hearing aspect of the Tribunal process. They had replied to a request for information and answers to questions by restating their position that the claimant had resigned. That had therefore been their position "*front and centre*", said Ms Gribbon.

27. Information as to the alleged resignation was then sought by the claimant. That was met with resistance. An order required to be obtained.

28. At the hearing, a voice file had been played. This was a recording of a telephone conversation between Mr Canavan of the respondents and the claimant. At the PH on 4 October 2018 a transcript of the voice file had been given to the respondents' solicitor. The voice file itself had been sent on by email on 4 October 2018. Prior to the hearing the voice file and transcript had been agreed as being accurate.

29. In terms of this call, it was obvious and manifest, said Ms Gribbon that there had been a dismissal.

30. Despite that, when an amended ET3 was submitted the respondents maintained that the claimant had resigned. At page 68 of the original bundle, the respondents had replied to an Order. They adhered to their position that there had been a resignation and gave details of a meeting which they said had occurred between Mr Canavan and the claimant prior to the call. That meeting, Ms Gribbon said, was a fabrication by the respondents.

31. The claimant had asked for details of the identity of employees who were said to have seen the claimant in the respondents' premises on the day of this alleged face-to-face meeting. She had given notice to the respondents that the claimant's mobile telephone records would be obtained. They would show the location of the phone and therefore the likely location of the claimant. He had not been at any meeting at the respondents' premises on the day suggested. It proved necessary to obtain those records. They had been produced to the respondents. They contained the information which it had been anticipated they would contain.

32. Despite all of this, Ms Gribbon said that the respondents had refused to engage with the obvious. They maintained their position at the hearing through Mr Canavan. He said that he did not argue with the Vodafone records. He did not therefore dispute the content of the telephone call and the content of the records. He maintained, however, that the claimant had resigned and that there had been a face-to-face meeting. That remained his position in evidence at the Tribunal. This was a false position, said Ms Gribbon. It was only after conclusion of all of the evidence in the case, in the evening prior to the final day of hearing when submissions were to be made, that the respondents accepted that the claimant had been dismissed rather than had resigned.

33. Ms Gribbon referred to the Judgment in the case which recorded that concession by the respondents. She referred to paragraph 192 in the

Judgment. It was noted there that the concession had not been prompted by anything new or anything unexpected which had come out during the hearing.

34. The evidence of Mr McCafferty was also referred to by Ms Gribbon. That in fact supported the claimant's version of events. The respondents would have been aware of this if they had prepared properly by obtaining a statement from Mr McCafferty. It would have been clear to them that their defence of resignation was not stateable.

35. The Judgment had recorded the dysfunctional relationship between Mr Canavan and Mr McCafferty. That had been apparent from the evidence. This was not a situation however where, much as it might be attempted to be painted in this way Ms Gribbon anticipated, Mr Canavan did not know the technicalities of the law and believed the claimant to have resigned. It might be advanced by the respondents that this was "*a muddle rather than fiddle*", Ms Gribbon said. In considering any such assertion, the Tribunal should keep in mind what had happened in the workplace. Mr Canavan had not told Mr McCafferty the truth about the additional duties that Mr Canavan had given the claimant. Mr McCafferty had been told by Mr Canavan that Mr Canavan would dismiss the claimant. Mr Canavan then denied that he had in fact done that, both in correspondence prior to the Tribunal hearing and at the Tribunal hearing itself.

36. It appeared therefore that the *modus operandi* of Mr Canavan was to tell lies. His behaviour could not be categorised as that of a muddled unqualified person. It went beyond that.

37. Ms Gribbon recognised that the Tribunal had not said that Mr Canavan had lied during evidence. It had however commented adversely on his credibility and had been diplomatic in its terms as to the evidence of Mr Canavan not being accepted.

38. Despite having evidence presented to them by way of voice files and Vodafone records and despite having witnesses in Mr McCafferty and Ms Fyfe who did not support their position certainly when it came to the Tribunal hearing, the respondents had maintained their position for just under a year

the claimant had resigned rather than being dismissed. This was unreasonable conduct, said Ms Gribbon. The defence to the claim of unfair dismissal by way of argument that the claimant had in fact resigned, was also a defence which had no reasonable prospect of success.

39. Turning to the victimisation claim, Ms Gribbon said that the protected act had been conceded as having occurred. The question was whether the claimant had been subjected to any detriment as a result of doing the protected act. The respondents would be aware that the threshold for a detriment to have occurred was not high. Ms Gribbon referred to paragraph 9.8 of the statutory Code of Practice on Employment of 2011. That said, as stated above, that a detriment was anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage.

40. The alleged detriment was the sending of an email to the claimant's new employers and the information contained within it. The email highlighted that the claimant had presented an Employment Tribunal claim. It had been said by the respondents that Mr McCafferty did not know who Mr McCheyne was. In evidence however both Mr Canavan, who saw the email before it was sent, and Mr McCafferty confirmed they did know who Mr McCheyne was. Again, there had been no engagement with the facts, Ms Gribbon said. The respondents were arguing that the position was black when they knew it was white. There been a complete mismatch between form ET3 and the evidence. If the respondents had engaged properly with the situation, they would have appreciated that, in circumstances where they accepted a protected act had been done, there had been a detriment. There might have been an argument as to remedy, Ms Gribbon recognised. How the events had impacted upon the claimant would be a matter to be placed before the Tribunal. Proper reflection on matters would have seen the respondents accept liability and potentially argue quantum. It would have seen them accept that motivation was not a relevant matter in this area.

41. Ms Gribbon emphasised that she was not arguing that a wasted costs order was potentially relevant. She sought expenses.

42. Ms Gribbon took the Tribunal to the authorities which she produced. Specifically, she took the Tribunal to paragraphs 40 and 41 of **McPherson** and paragraphs 40 and 41 of **Yerrakalva**.

43. It was accepted by Ms Gribbon that it was rare for a costs application to be made. There was however in this case a policy consideration. The witness, Mr Canavan, had been in a senior position as a company director. He had repeated false information in the court case over a lengthy period of time. There ought in that situation to be consequences by way of an expenses award.

44. The case of **Daleside** was of relevance. In that case the central allegation had been a lie and it was perverse, the EAT had held, to conclude that this was not acting unreasonably.

45. The case of **Nicholson** was also referred to by Ms Gribbon as supporting her position as was a passage in Harvey on Employment Law. The case of **Cartiers** said that it was necessary for the Tribunal to look at what the party potentially paying expenses knew or ought to have known if they had gone about the matter sensibly. Paragraph 3 in that case was worthy of note by the Tribunal. If proper investigation had been carried out by the respondents, and if they had followed a sensible route, dismissal would have been conceded as would victimisation with there being an argument only as to quantum. It was entirely unclear as to what had led to the concession as to the claimant being dismissed. It was perfectly obvious on the information available to the respondents that the claimant had been dismissed. The position should have dawned on the respondents far earlier than it did. Whilst expenses did not require to relate purely to the impact of the unreasonable behaviour, it was undoubtedly true that the case should have been far shorter and far more focused. Parties would have benefited, as would the taxpayer. The respondents were not party litigants. They ought to have prepared properly. The could not simply hope that something would turn up and ignore the relevant evidence. **Beynon** at paragraph 8 was of relevance.

46. There had been numerous opportunities for the respondents to take stock. They had not done so. Given the material which they had, and that which they should have had, it could not be said that there was a mistaken belief on their part. The case of **Vaughan** confirmed that any view on unreasonableness involved an objective test. A mistaken belief therefore by Mr Canavan, who might be said to have taken the view that lawyers might know but that he did not, was not of significance. The objective nature of the test meant that it was not met.

47. **Peat** was of relevance in that the Tribunal should consider that there had been a very very late concession in this case, after all the evidence was led. A proper assessment, as outlined in **Peat**, would have seen the respondents accept the position.

48. Ms Gribbon turned to the email of the June 2019 from Mr Rennie which set out his position in relation to the application for expenses.

49. Defending the claim of victimisation was a position which had no reasonable prospect of success, Ms Gribbon said. The case proceeding in respect of quantum alone would have been appropriate. Similarly there might have been evidence from the respondents to try to establish the prospects of dismissal. That was a matter upon which the Tribunal had made findings. That evidence however would have been in short compass. Evidence of relationship issues within the respondents could have been dealt with as part of the remedies hearing. Although the respondents stated that Mr Canavan still believed that the claimant had resigned, it was difficult to know why Mr Canavan maintained that position given the evidence which he had. This was not a technical legal point. It was fanciful to categorise the position of Mr Canavan as a misinterpretation or misconstruction of the facts. He had been presented with evidence which was quite clear. In fact, he had instructed a solicitor to repeat what he knew to be false information. That was unreasonable behaviour. It was reckless. It unnecessarily prolonged proceedings and added to the cost to parties and to the taxpayer. If Mr Canavan was of that view and wished the Tribunal to determine the case, there was no need for him to make the

concession. He should have made the concession far earlier, rather than maintaining what was a manifestly hopeless position, said Ms Gribbon.

50. As far as possible compromise and settlement was concerned, the Tribunal should look at the overall position in the matters which were before it. It should grant the expenses order, remitting the account to the Auditor of Court.

Submissions for the respondents

51. Mr Rennie confirmed that ability to pay was not an issue. He said that he had no issue with the authorities referred to by Ms Gribbon and endorsed her position that an application for expenses was unusual. He then referred to his email of 3 June 2019 which appeared at page 74 of the bundle he produced for the expenses hearing.

52. There had initially been an element of claim on the basis that there had been discrimination, the protected characteristic being said to have been disability. That ground of claim had been withdrawn. No costs should be awarded in relation to that.

53. Whilst it was correct that no concession had been made as to victimisation having occurred, the defence did not have "*no reasonable prospects*". There had been one email. Its terms had referred to ongoing litigation. There should be no costs awarded in relation to the victimisation element of the claim.

54. The argument advanced in point two of the email of 3 June was rehearsed. The Tribunal had decided that within 6 weeks of actual termination there was a 90% chance of the claimant being dismissed. For that to be the view taken, evidence from Mr Canavan and Mr McCafferty was necessary. Evidence was necessary from Mr Canavan as to the relationships between himself and Mr McCafferty, himself and the claimant and Mr McCafferty and the claimant. Some Other Substantial Reason ("SOSR") had been pled in the response form. The evidence was appropriately led to establish the position reflected in the Judgment.

55. Mr Rennie categorised what had happened in terms of the respondents' position as being a "*muddle rather than a fiddle*", using Ms Gribbon's

terminology. His position was that the respondents had a muddled position which was highlighted and unpicked in a skilful fashion at the Employment Tribunal. This led to the concession as to dismissal. It was only with the spotlight on the evidence given and the way matters had gone in that evidence being led that the concession was then appropriately made, said Mr Rennie. Mr Rennie repeated the assertion made in his email of 3 June that there was nothing in the Judgment to suggest that Mr Canavan had lied. He had misconstrued the situation and had misinterpreted the claimant's position. He had not sought to prolong the proceedings or to put the claimant to cost. His wish was that the Tribunal determine the case having heard all the evidence from the witnesses.

56. The point which Mr Rennie made in paragraph five of the email of 3 June was that there was substantial time taken up in discussion of possible commercial settlement. It was not accepted that the costs of that process should be recoverable by the claimant.

57. It also required to be borne in mind, said Mr Rennie, that the claimant had sought strike out or that a deposit Order be made. The Tribunal had not set the case down for a hearing on those points.

58. It had not been anticipated that witness evidence would come out as it did. What was happening now was that events were being looked back at through the lens of the Judgment. It was possible now to understand that Mr Canavan's evidence would be different to the position as had been set out in defence.

59. Mr Rennie confirmed that he accepted the authorities were as they were. His position in summary was that there had been no unreasonable conduct and that it was not the case that there was no reasonable prospect of success in the defence.

Brief reply from the claimant

60. Ms Gribbon said that the position for the respondents by way of submission was an oversimplification of the position. There had been a concession that dismissal had occurred. That it only happened after Mr Canavan had given evidence. That evidence from him was consistent with what was in form ET3. The surprise was that the respondents had maintained their position in face of the evidence, that of the voice file in particular. The respondents' witnesses had undermined both Mr Canavan and the position of the respondents as set out in the answer to the claim. The conclusion was either that the respondents did not know what evidence their witnesses intended to give or that they did know that evidence and had carried on regardless. Mr Canavan had adhered to the position for the respondents as detailed in form ET3.

61. Although the Tribunal had not set down the hearing in relation to the application for strike out or a deposit Order, the Tribunal did not have all the knowledge which the respective solicitors had. As had been set out in **Peat**, proper consideration of the correspondence and whole situation and a failure to engage can be unreasonable conduct. Ms Gribbon said that in this case she had shouted the position of the claimant from the rooftops as to the basis on which the claim was proceeding and had then won the case on those grounds. She repeated her position that she sought expenses from time of lodging of form ET3 until the date of the expenses hearing.

Discussion and decision

62. The first matter which the Tribunal required to address was whether the conduct of the respondents was unreasonable. It also had to assess whether resistance of the claim of unfair dismissal and of victimisation had, in either or both instances, no reasonable prospect of success.

63. The Tribunal kept in mind that simply as a party has lost a claim, it does not follow that their behaviour in resisting it is unreasonable. Equally it does not mean that the case had no reasonable prospect of success.

64. It also kept in mind that it was accepted by Ms Gribbon for the claimant that defence to the claim of unfair dismissal on the basis of there being SOSR was

legitimate, as was defence in relation to quantum of any award which might be made. Similarly, Ms Gribbon accepted a legitimate basis for dispute existed in relation to the quantum of any award in respect of victimisation.

Dismissal/resignation

65. In the view of the Tribunal there was perhaps some ground for confusion and legitimate resistance of the basis of claim when initially intimated, having regard to potential difficulty with recall of exactly what had happened or differing interpretations of what had happened. Fortunately, in many ways, recording of the telephone conversation between the claimant and Mr Canavan had taken place. Equally fortunately, it proved possible to recover the recording of the conversation. An important date in this context was the date on which the respondents were supplied with the transcript of that conversation and also the voice file. That date was 4 October 2018.

66. At that point, the content of the conversation in precise terms was known to the respondents. The opportunity was there to reflect upon the content of that conversation and to consider it against their initial position, as set out in form ET3, that the claimant had resigned from employment.

67. It was not ever disputed that the recording of the call was accurate or that the transcript was anything other than accurate. Mr Canavan did not say in evidence, nor was there any correspondence to this effect, that in some way the recording was a doctored version of the conversation or that it was not in fact Mr Canavan who had participated in the call with the claimant.

68. Notwithstanding the terms of the transcript and voice file, the respondents however adhered to their position that the claimant had resigned. This was specifically confirmed by them in the amended form ET3 submitted on 25 October 2018. Indeed in evidence, when the cross examined, Mr Canavan maintained that the claimant had not been dismissed and that the claimant could still have been employed by the respondents had he not resigned. That admittedly was prior to the voice file being played in Tribunal. It does not however get away from the fact that the respondents had the voice file and transcript since 4 October 2018.

69. On the voice file been played at the Tribunal hearing, Mr Canavan deflected any questioning as to it illustrating dismissal by saying that it showed he had been supportive of the claimant. He did not accept the reality of the situation in cross examination. The concession that dismissal had occurred was only made after closure of evidence at the point of submissions commencing.

70. In relation to the transcript, he said when that was shown to him at the Tribunal hearing that he had not seen it previously. That struck Tribunal as simply not credible.

71. The version of events which Mr Canavan had recalled and which he had confirmed, it appeared, to his solicitor in order that pleadings could appropriately be submitted, was entirely at odds with the unchallenged transcript and voice file.

72. In addition to the question of what was exchanged between the claimant and Mr Canavan, other aspects of the defence advanced by the respondents were undermined during the period prior to the hearing and in the hearing itself.

73. Mr Canavan had said that the claimant had visited the respondents' premises for a meeting. The mobile phone records of the claimant were obtained and demonstrated that his phone had been present at his home on the day in question, with a virtual certainty that the claimant was also at home. His evidence was that he was at home. Those records were available to the respondents prior to the hearing. Further, it was said that the respondents had two witnesses who had seen the claimant at their premises on the day when Mr Canavan said he was there. Under a degree of pressure from the claimant's solicitor, the respondents had named those people. One of them gave evidence at the Tribunal hearing. She did not, however, confirm the position in the way the respondents had pled it.

74. Mr Canavan said that the claimant had not had new duties assigned to him by Mr Canavan around this time. Mr McCafferty however was clear in evidence that Mr Graham had informed him of the claimant having those new duties. The transcript and voice file confirmed a brief discussion between Mr Canavan and the claimant about areas of responsibility consistent with him

having been asked to undertake those new duties. Despite this, Mr Canavan adhered in evidence to his position that the claimant had not been given new duties.

75. In course of 4 October therefore it ought, in the view of the Tribunal, to have become clear to Mr Canavan namely that dismissal had occurred. The conversation between the claimant and Mr Canavan was available to confirm that and on any reasonable view ought to have been seen to be confirming that. As recorded in the Judgment, the concession that the claimant had been dismissed rather than had resigned was not made after some unexpected twist in the evidence had occurred. The material which led to the concession ultimately made by the respondents was available to them, whether in terms of the transcript or voice file in one regard or from evidence of Mr McCafferty and Ms Fyfe, at an earlier date. There was no sense gained by the Tribunal that the evidence from those latter two witnesses differed from anything which they might have earlier said. There was certainly no query or clarification of their evidence sought by the respondents by way of referring them back to any earlier statement they might have made.

76. The conclusion therefore which the Tribunal reached was that the position of the respondents in arguing that there had been no dismissal constituted unreasonable conduct of the proceedings. The Tribunal was of the view that the defence on that basis constituted unreasonable conduct from 5 October 2018. The respondents had the transcript and voice file during the course of the preceding day. If the transcript had indeed not been seen by Mr Canavan prior to the Tribunal hearing, and/or the evidence of Mr McCafferty and Ms Fyfe had not been properly considered by them, that fell within the ambit of **Peat** as being an example of failure by the respondents to address their mind to the nature and extent of this evidence as against the case brought by the claimant. Unreasonable conduct also extended to adherence to their position in light of the mobile phone records and what ought to have been properly apparent to them from investigation with Mr McCafferty and Ms Fyfe.

77. The Tribunal was also of the view that the defence to the claim of dismissal by way of the argument that the claimant had resigned had no reasonable

prospect of success. It reached that view having regard to the same factors as led it to conclude that the conduct in resisting the argument that the claimant had been dismissed was unreasonable.

Victimisation

78. The respondents had sent an email to Mr McCheyne. Mr McCheyne was known to the respondents and in particular Mr McCafferty, the author of the email. Mr McCafferty accepted at the Tribunal hearing that he knew that Mr McCheyne was probably the line manager of the claimant and that he would assume that he was the claimant's line manager. The respondents had accepted, quite rightly, that a protected act had been done by the claimant, namely the raising of Tribunal proceedings. They denied the the claimant had been subjected to a detriment and denied that the reason it sent the email was because of the protected act. Mr McCafferty however accepted in evidence at Tribunal that the content of the email was as it was because of the raising of proceedings, the protected act. That however was only accepted at the hearing.

79. Again proper consideration of the position would have led to the respondents, if acting reasonably, accepting that the content of the email was as it was because of the protected act. It would also have led the respondents to accept that detriment had been caused to the claimant. It was unreasonable in the view of the Tribunal for the respondents to maintain that no detriment had been caused. A legitimate area of dispute was as to the extent of impact of the email.

80. In light of the evidence given as to awareness of the position of Mr McCheyne within the organisation by which the claimant was by then employed and indeed as to the probability that he was the claimant's line manager, resisting liability was regarded by the Tribunal as being unreasonable conduct of the proceedings, again having regard to **Peat** and the proper steps to be taken by a party in considering and addressing the issues before adhering to and maintaining a line of defence in the case.

81. Whilst the Tribunal has concerns as to the honesty of the evidence given by Mr Canavan, that echoing his apparent behaviour in dealing with the claimant and Mr McCafferty in other scenarios, it kept firmly in mind that its decision upon the application for expenses was not to be determined or tainted by any sense of disapproval of the behaviour of Mr Canavan. An award of expenses is to be made on the basis of it being compensatory, not punitive.

82. Given the position as set out in the previous two paragraphs, the Tribunal was also of the view that the defence that there was no detriment caused to the claimant by the sending of the email in the circumstances of there having been a protected act, was one which had no reasonable prospects of success.

Conclusion

83. The reality is that the claimant has been put to cost through the failure of the respondents to address the reality of the situation, having been presented with that by way of the transcript and voice file. They have also not engaged properly by obtaining, it appears, appropriate confirmation from witnesses of their position before or after stating that in the pleadings. These failures constitute unreasonable conduct. The reasons for that view being taken by the Tribunal are set out above. It is also the view of the Tribunal that maintaining the positions that the claimant had resigned and that there was no detriment due to a protected act comprised adopting of defences which had no reasonable prospect of success.

84. The Tribunal concluded that it was appropriate to make an award of expenses given this unreasonable behaviour and pursuit of lines of argument which had no reasonable prospect of success. There was no issue over ability to pay as detailed above. It seemed to the Tribunal perfectly appropriate, in exercise of its discretion, to make the award of expenses. Exercising that discretion, it determined that it was appropriate to award expenses in the period from 5 October 2018 given that that the transcript and voice file became available to the respondents the preceding day, 4 October. The Tribunal also viewed it as appropriate to award expenses from that date to the extent of 80% of expenses. The reduction from 100% is made on the basis that it would have

been reasonable for there to be evidence and argument as to the level of compensation in respect of both the victimisation and unfair dismissal claim, together with evidence and submissions in relation to there being SOSR. Expenses to that extent are awarded for the period 5 October 2018 to (and including) 5 September 2019.

85. In assessing the relevant date mentioned and the proportion of expenses specified, the Tribunal has had regard to the principles of **Yerrakalva** and the comments in that case that the Tribunal should adopt a broad-brush approach. That approach is also confirmed in the case of **Sud**. The Tribunal is encouraged in the latter case not to adopt an over analytical approach. As detailed above it is not appropriate to seek or try to establish any causal link between expenses and the conduct which has led to the award of expenses been made.

86. For these reasons, the Tribunal found that circumstances existed in terms of rule 76 where the conduct of the respondents fell within the terms of Rule 76 (1) (a) and (b). The facts and circumstances were also such that the Tribunal, again for the reasons identified, considered it appropriate to exercise its discretion and to award costs against the respondents, from the date specified and to the extent specified.

87. The claimant requested that, if the Tribunal found in his favour, costs were remitted to the Auditor of Court for taxation. Clearly parties may be able to agree costs, avoiding the need for the Auditor to make that determination. The Tribunal remits the account of the claimant in terms of this Judgment to the Auditor of the Sheriff Court for taxation in the event of agreement not being possible.

Employment Judge: Robert Gall
Date of Judgement: 23 September 2019

Entered in Register,
Copied to Parties: 27 September 2019