EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107094/2019

5 **Application for expenses - Held by written submissions on 10 February 2020**

Employment Judge M Sangster

Mr RA McFarlane	**Claimant** **Represented by** **Mr T McGrade -** **Solicitor**
AB 2000 Limited	**Respondent** **Represented by** **Mr W Walsh -** **Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the respondent's application for expenses is refused.

REASONS

25 **Introduction**

1. The respondent made an application for an award of expenses against the claimant. They allege that the claimant acted unreasonably in bringing and conducting the proceedings. In relation to this, reliance is placed on the fact that the claimant withdrew her claim on 24 September 2019, the day before
30 the final hearing, which had been set down for 3 days, was due to commence.

2. The claimant's claim was dismissed by judgment dated 24 September 2019, following the withdrawal of her claim.

3. The respondent's application for expenses was made on 21 October 2019. This was opposed by the claimant, as intimated in correspondence dated 4
35 November 2019. Following enquiry from the Tribunal, both parties confirmed

that they were content for the application to be considered by reference to written submissions. These were submitted to the Tribunal by the respondent on 5 December 2019 and by the claimant on 9 December 2019.

4. The respondent's application for expenses, the claimant's objection to this and the written submissions for each party were considered by the Tribunal on 10 February 2020.

Summary of respondent's submissions

5. The claimant acted unreasonably in raising her claim, resulting in all expenses incurred by the respondent in defending the claim, in the sum of £8,863.99, being incurred unnecessarily. She had no intention, from the outset, of proceeding to a final hearing. Rather, her claim was issued solely in the hope that it would lead to an offer of settlement. The factors which led her to withdraw her claim should have been known to her prior to issuing the claim.

6. In the alternative, the claimant acted unreasonably by continuing with her claim beyond the point that she realised, or should reasonably have realised, that she was no longer intending to pursue her claim. The claimant should, reasonably, have realised that prior to 24 September 2019 and withdrawn her claim at that point. Her failure to do so resulted in the respondent incurring additional expenses.

Summary of claimant's submissions

7. The claimant did not act unreasonably in bringing or conducting the proceedings. She did not issue the claim solely with a view to settlement, with no intention to proceed to a hearing. She had been employed by the respondent for 24 years prior to her dismissal and believed she had been treated extremely badly by her employer when they chose to dismiss her.

8. She withdrew her claim as a result of the following:

   (i) Advice which she received on 11 & 20 September 2019, following discussions with a potential witness on 11 September 2019, that the

prospects of her claim succeeding had reduced. Whilst it was still felt, on balance, that her claim would succeed, she was advised that the amount she would likely recover was now relatively small. This required to be weighed against the fact that she was privately funding
5 the cost of professional representation for her claim and, whilst she had secured alternative employment, her income was considerably reduced; and

(ii) She felt unable to deal with the requirement to give evidence and be cross-examined, given the impact that her dismissal had had upon
10 her health.

Relevant law

9. The provisions in relation to expenses orders are contained within rules 74-78 & 84 of the Employment Tribunals Rules of Procedure, found at schedule 1 of the ***Employment Tribunals (Constitution and Rules of Procedure)***
15 ***Regulations 2013*** (the Rules of Procedure).

10. Regard must also be had to the overriding objective, in rule 2 of the Rules of Procedure, when making decisions in relation to applications for expenses.

11. The relevant law in relation to expenses (referred to as 'costs' in England and Wales) was referred to by the Employment Appeal Tribunal in ***Ayoola v St***
20 ***Christopher's Fellowship*** [2014] UKEAT/0508/13, (which was followed in ***Abaya v Leeds Teaching Hospital NHS Trust*** [2017] UKEAT 0258/16). At paragraphs 17-18, Her Honour Judge Eady QC stated:

'17. As for the principles that apply to an award of costs in the Employment Tribunal under the 2004 Rules, the first principle, which is always worth
25 *restating, is that costs in the Employment Tribunal are still the exception rather than the rule, see* ***Gee v Shell UK Ltd*** *[2002] IRLR 82 at page 85,* ***Lodwick v London Borough of Southwark*** *[2004] ICR 884 at page 890,* ***Yerrekalva v Barnsley MBC*** *[2012] ICR 420 at paragraph 7. Second, it is not simply enough for an Employment Tribunal to find unreasonable conduct or that a*
30 *claim was misconceived. The Tribunal must then specifically address the*

question as to whether it is appropriate to exercise its discretion to award costs. Simply because the Tribunal's costs jurisdiction is engaged, costs will not automatically follow the event. The Employment Tribunal would still have to be satisfied that it would be appropriate to make such an order, see ***Robinson and Another v Hall Gregory Recruitment Ltd*** *UKEAT/0425/13 at paragraph 15.*

18. On this point, albeit addressing the previous costs jurisdiction under the 2001 Employment Tribunal Rules, the EAT (HHJ Peter Clark) in ***Criddle v Epcot Leisure Ltd*** *[2005] EAT/0275/05 identified that an award of costs involves a two-stage process: (1) a finding of unreasonable conduct; and, separately, (2) the exercise of discretion in making an order for costs.'*

12. The Court of Appeal, in ***McPherson v BNP Paribas (London Branch***) [2004] ICR 1398 (CA), held that it is not unreasonable conduct, per se, for a claimant to withdraw a claim, and the Court observed (per Lord Justice Mummery, at paragraph 28) that it would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs on withdrawal in circumstances where such an order might well not be made against them if they fought on to a full hearing and failed. The Court further commented that withdrawal could lead to a saving in costs and Tribunals should not adopt a practice on costs which would deter claimants from making *'sensible litigation decisions'*.

13. Lord Justice Mummery was also clear however (at paragraph 29) that Tribunals should not follow a practice on costs that might encourage speculative claims, allowing claimants to start cases and to pursue them down to the last week or two before the Hearing, in the hope of receiving an offer to settle, and then, failing an offer, dropping the case without any risk of a costs sanction.

14. Lord Justice Mummery stated that the critical question in this regard was whether the claimant, in all the circumstances of the case, has conducted the proceedings unreasonably. It is not whether the withdrawal of the claim is, in itself, unreasonable.

15. In ***Yerrakalva v Barnsley Metropolitan Borough Council and anor*** 2012 ICR 420, CA the Court of Appeal stated at paragraph 41 that *'The vital point in exercising the discretion to order costs 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 & Decision

16. From the papers, the Tribunal concluded the relevant chronology was as follows:

    (i) The claimant's employment terminated on 4 February 2019. Her claim was lodged on 23 May 2019. The respondent's response was lodged on 25 June 2019. A notice of hearing was issued on 27 July 2019, confirming the hearing would take place just over 8 weeks later, on 25-27 September 2019.

    (ii) The claimant met with her representative on 6 September 2019, to discuss preparations for the hearing. The claimant had discovered in July/August 2019 that the member of the HR team who had been involved in her dismissal (SL) was no longer employed by the respondent. It was agreed the claimant would contact SL to ascertain if she would be agreeable to speaking with the claimant's representative, with a view to her potentially being called as a witness at the hearing.

    (iii) On 11 September 2019 the claimant's representative spoke with SL. The claimant's representative felt, as a result of that discussion, that the claimant faced considerable difficulties in establishing one of the central aspects of the case, related to the reason or principal reason for dismissal.

    (iv) Later that day, the claimant's representative sent an email to the claimant expressing the concerns which he now had in relation to the

claim, as a result of his discussion with SL. He arranged a time to discuss these matters in detail with the claimant. The timing of that discussion was delayed slightly due to a variety of matters, including commitments on the part of the claimant's representative and the claimant's availability, having secured alternative employment. It took place on Friday 20 September 2019 and matters were, at that stage, discussed at length.

(v) The claimant then considered matters over the weekend. Having done so, she took the decision to withdraw her claim. This was confirmed to the Tribunal on 24 September 2019, at 10.09am.

17. The respondent's application for expenses against the claimant was advanced solely on the basis that the claimant acted unreasonably in bringing and/or conducting the proceedings. It is therefore a fairly narrowly drafted application. It does not include a complaint that the claimant or her representative have acted vexatiously, abusively or disruptively in the bringing or conducting the proceedings, or that the claim had no reasonable prospects of success.

18. The Tribunal reminded itself that expenses orders in Employment Tribunals remain the exception and not the rule and that, in the majority of Employment Tribunal cases, the unsuccessful party will not be ordered to pay the successful party's costs.

19. The Tribunal then considered whether the claimant acted unreasonably in bringing or conducting of the proceedings. For the reasons set out below, the Tribunal was not satisfied, in all the particular circumstances of this case, that the claimant acted unreasonably in bringing or conducting the proceedings.

20. In relation to issuing the proceedings, the Tribunal did not accept that the claimant raised her claim speculatively, solely in the hope that it would lead to an offer of settlement. The claim form was completed by the claimant's representative, who is legally qualified. The basis for the claim is set out in a 'paper apart' to the ET1 form, extending over three pages. It sets out the background and why it is believed that the claimant's dismissal was

substantively and procedurally unfair. There is a stateable claim, which was not dismissed on initial consideration. In relation to the intentions of the claimant, it is clear that, following receipt of the notice of hearing, a meeting was arranged with her representative to discuss preparation for the hearing. She attended that meeting. She then contacted a potential witness and arranged for them to speak with her representative, which he did. The claimant required to meet the costs of her solicitor undertaking each of these actions. These are not the actions of a claimant who does not intend to proceed with a hearing in relation to her claim and has raised her claim on a purely speculative basis.

21. In relation to the reasons for withdrawal of the claim, the Tribunal was satisfied that, to use Lord Justice Mummery's phrase in ***McPherson***, the claimant made a "*sensible litigation decision*". This was based on the information available to the claimant at that stage, weighed against the cost of proceeding, and also taking into account her health at that time. These were valid and understandable reasons for the claimant to withdraw her claim, at that time. As stated in ***National Oilwell Varco (UK) Limited v Van De Ruit*** EATS0006/14 *'It would tend towards discouraging people from taking a cold, hard look at their case if matters such as that were thought to be not reasonable, because that would tend to suggest that departing from a case at the last minute will be regarded as unreasonable conduct.'*

22. The Tribunal then considered the respondent's assertion that the factors which led the claimant to withdraw her claim ought to have been known to the claimant prior to issuing the claim and/or the claimant ought reasonably to have withdrawn her claim prior to 24 September 2019. In relation to this, the Tribunal considered the chronology and explanations set out above. The Tribunal noted that the claimant did not become aware that SL was no longer working with the respondent until July or August 2019, well after her claim was lodged. The Tribunal did not feel it would be reasonable for the claimant to contact SL prior to becoming aware that she no longer worked with the respondent. Once she became aware of this, it was raised at an appropriate stage with her representative, during a meeting which had been scheduled to

discuss preparation for the hearing. The chronology demonstrates that appropriate and timeous actions were taken, once this matter was raised. In light of this, whilst it would clearly have been preferable for the claimant to have concluded sooner that she wished to withdraw her claim, the Tribunal was not satisfied that her failure to do so rendered her conduct of the proceedings, considered as a whole, unreasonable.

23. Having decided that the claimant did not act unreasonably in bringing or conducting the claim, the Tribunal did not required to consider whether to exercise discretion in favour of the respondent and make an expenses order against the claimant.

Employment Judge: M Sangster

Date of Judgement: 13 February 2020

Entered in Register,

Copied to Parties: 20 February 2020