EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107039/2019

Held via written submissions on 14 April 2020

Employment Judge R Gall

Mr D Nisbet	**Claimant** **Not represented**
Trac Engineering Limited	**First Respondent** **Not present**
Network Rail Infrastructure Limited	**Second Respondent** **Represented by:** **Mr M Love -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the application made by the second respondents for expenses against the claimant is refused.

REASONS

1. The claimant in this case brought a claim against two respondents. This Judgment concerns an application for expenses made by the second respondents.

2. The history to the claim, insofar as relevant to expenses, is that the second respondents have always stated that the claim had no viable basis insofar as directed against them. They maintained that it had no reasonable prospects of success as far as brought against them.

3. The claimant was employed by the first respondents. They were subcontractors to Balfour Beatty Ltd. Balfour Beatty Limited were in turn subcontractors to the second respondents.

4. The claimant failed a test to detect drugs or alcohol. This, he maintained, was due to having taken over the counter prescription medicine. He maintained that he had not taken any illegal substances. The second respondents refused an appeal presented to them, on the basis that the claimant had broken Sentinel Scheme Rules. This, they said, was also a breach of their own Rules. In those circumstances the claimant would not be permitted to undertake any work for a period of 5 years from date of the test as a contractor or employee where a PTS certificate was required or where the position was designated as a Safety Critical post.

5. A Preliminary Hearing (PH") was held on 7 August 2019. The claimant was asked as to the basis on which he said the Employment Tribunal had jurisdiction in this matter as far as the second respondents were concerned. He was also asked to clarify his position as against the second respondents in that he had said that there had been discrimination by the second respondents against him.

6. The claimant's position, in summary, was that he wished to challenge the decision of the second respondents as to his "tickets". The decision they had taken, mentioned above, led to inability on his part to work on the rail infrastructure for a period of 5 years. He said that they had had the final say and their decision impacted on his ability to work. On that basis he regarded the Employment Tribunal as being the appropriate body to receive and to deal with a claim. The remedy he sought was that his "tickets" were put "back in place". In relation to discrimination, he did not argue that he had a protected characteristic under the Equality Act 2010. His position was that he had been treated unfairly.

7. Given this clarification by the claimant, the second respondents applied on 22 August 2019 for strike out of the claim against them. They recognised that the claim could properly proceed against the first respondents.

8. The first respondents did not participate in any element of the argument as to strike out of the claim against the second respondents.

9. In their email of 22 August, the second respondents put the claimant on notice as to seeking recovery of expenses.

10. The application for strike out made by the second respondents was considered at a PH held on 14 October 2019. An Oral Judgment was issued that date, the Judgment being sent to parties on 15 October 2019.

11. That Judgment struck out the claim as brought against the second respondents. It detailed that the second respondents accepted that the claimant might have a potential remedy in a different forum. They explained that in taking the action about which the claimant complained they had acted on the recommendation of Balfour Beatty Limited.

12. In reaching the decision taken as set out in that Judgment, I explained that whilst I understood the frustration which the claimant had as to his situation and the unfairness which he felt existed, the test I had to consider was whether the claim as directed against the second respondents had any reasonable prospect of success. The fact was that the Employment Tribunal was a creature of statute. Although the claimant's position was that this was a work-related dispute and that on a logical basis, as he saw it, the Employment Tribunal should have jurisdiction, I concluded that there was no basis on which the Employment Tribunals did have such jurisdiction to deal with the claim as the claimant sought to advance it against the second respondents. The claim against the second respondents was therefore struck out in that Judgment.

13. At the PH in October 2019, when the PH was proceeding towards a close, the second respondents stated that they would seek expenses if the claim was struck out. On delivery of the Judgment they renewed this application.

14. It seemed to me that it was inappropriate to deal with that application there and then. I explained to the claimant that he had the right to object to that application. I set out to him the terms of Rule 84 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013. That Rule states that in considering whether to make an award of expenses and if so in which amount, a Tribunal may have regard to the ability to pay which exists on the

part of the person who might potentially be ordered to make any such payment. Opportunity was given to the claimant, within a period of time, to detail his income and outgoings and also any relevant capital. It was explained to him that he did not require to do this, it was only an opportunity being given to him if he regarded his ability to pay as being something which he wished the Tribunal to take into account in determining whether to make any award by way of expenses or as being something to which the Tribunal should have regard in fixing the level of any such award of expenses. The claimant was to submit any information, as appropriately vouched, by 5 PM on 11 November 2019.

15. There was, however, no information provided by the claimant by that date (or at any later date) in response whether in narrative form or backed up by any vouching. He did not ever reply to the Tribunal stating that he wished a hearing in relation to expenses.

16. In those circumstances this diet was set down for consideration of the application. The diet was appropriately intimated to both parties. It remains the case that there has been no contact in relation to the application from the claimant.

The issue

17. The issue for the Tribunal was whether an award of expenses was to be made in favour of the second respondents, any expenses being payable by the claimant.

Applicable law

18. Rule 76 provides, relevant to this case, that a Tribunal may make a costs order and shall consider whether to do so where it considers that (b) any claim or response had no reasonable prospect of success.

19. Rule 84 provides that in deciding whether to make a costs order and if so in what amount, the Tribunal may have regard to the paying party's ability to pay.

20. A two stage test is to be applied by the Tribunal in determination of an application for expenses. The Tribunal must firstly consider whether, again relevant to this case, the claim against the second respondents had no reasonable prospect of success. It must then go on to exercise discretion as, even if the conclusion of the Tribunal is that the claim did not have a reasonable prospect of success, an award of expenses does not automatically follow.

21. An award of expenses is the exception rather than the rule. That is confirmed in the case of ***Yerrakalva v Barnsley Metropolitan Borough Council and another 2012 ICR 420***.

22. In relation to whether a claim had no reasonable prospects, it is not enough that there was a genuine belief on the part of a claimant that there had been wrongdoing. An objective test is to be applied. The question is whether there were reasonable grounds for thinking that a claim lay. The cases of ***Hamilton Jones v Black UKEAT 0047/04*** and ***Radia v Jefferies International Limited UKEAT 0007/18*** are of relevance.

23. A degree of latitude is to be allowed to a lay person where no legal representation exists. That is confirmed in the case of ***AQ Ltd v Holden 2012 IRLR 648***. It is said in that case that a lay person may lack the objectivity and knowledge of the law of someone legally qualified. It is clear however that absence of legal representation or advice does not provide an answer to any such claim for expenses. The objective assessment referred to above requires to be undertaken.

24. Factors relevant in exercise of discretion include therefore whether a party is legally represented or not, whether legal advice was taken, and generally all the circumstances of the case.

25. Ability to pay may be something to which the Tribunal has regard. It may take account of that both in deciding whether to make any award and if so what amount is to be awarded. The Tribunal requires however to have relevant information and to be satisfied, as best it can be, as to the accuracy of that information. In this case it had no information from the claimant, despite the

opportunity to supply such information being given to him, with the purpose of that information being submitted having been set out fully to the claimant, including the possibility that he might put forward the position that his ability to pay meant that no award should be made or that any award made should be of a small amount.

Submissions

26. The second respondents maintained that the claimant had been given several opportunities to set out the basis of a sound claim against them. Form ET1 had provided that opportunity. At the PH on 7 August the claimant had also been asked about the basis of his claim against the second respondents. He had been ordered to provide further and better particulars detailing that basis of claim. The PH on 14 October had been a further opportunity for him to provide those details. He had not however set out any sound basis of claim against the second respondents. His case had been confirmed as having no reasonable prospect of success as against the second respondents. He then been given an opportunity to provide information as to his ability to pay. The Tribunal had heard nothing from him in relation to that.

27. A detailed schedule of costs or expenses had been submitted by the second respondents. The Tribunal should make an award in the amount sought.

28. There were no submissions from the claimant other than as stated at the PH on 14 October. His position in summary was that he believed he had a right of claim against the second respondents. What he was raising was related to his employment. He had consulted with ACAS and, he said, with a solicitor before raising his claim.

Discussion and decision

29. In this case I had determined on 14 October that the claim against the second respondents had no reasonable prospect of success. In relation to the question of expenses, the two-leg test referred to above requires to be carried out by the Tribunal. It is not enough in my view for the first leg of that test

(determination of whether the case had no reasonable prospect of success or ought to have been so viewed on objective assessment) to be met, for the Judgment to 14 October to be pointed to.

30. Determination of the first leg of the question involves assessment of whether, on an objective basis, the claimant had reasonable grounds for thinking that his claim had a reasonable prospect. The fact that I had found, after legal submission at the diet in October 2019, that the claim and the second respondent had no reasonable prospect of success was not conclusive in relation to the first leg of the test now to be applied.

31. The claimant said he had spoken with a solicitor prior to presenting his claim. He had spoken with ACAS in terms of the Early Conciliation Certificate procedure. He was aware that the second respondents were not his employer. His view was however that they had made a determination under the appeal procedure which had precluded him from obtaining employment in the particular rail sector positions for a period of 5 years.

32. I could understand why the claimant had presumed that an Employment Tribunal was properly the body to which to apply to obtain a remedy, arguing that the decision by the second respondents was unfair.

33. To me, it imputes too much knowledge to someone such as the claimant who was unrepresented, to say that he ought to have known that proceeding against the second respondents involved taking a case which had no reasonable prospect of success at an Employment Tribunal. I was entirely satisfied that the claimant was genuine in his view that there was a case against the second respondents and that the Employment Tribunal was the forum within which such a claim should be brought. Mr Love for the second respondents accepted in his submission at the PH on 14 October that a remedy for the claimant against the second respondents might exist in a different forum. This was not a case therefore where there was puzzlement as to why it was that the claimant thought that the second respondents might have any case to answer. The point which the second respondents took, quite properly as I determined in the Judgment issued on 15 October 2019, was

that there was no reasonable prospect of success in that claim in the Employment Tribunal.

34. It is of course not enough that the claimant had a genuine view that he had a sound claim. I had to apply an objective standard and come to a decision as to whether there were reasonable grounds on the part of the claimant for thinking that he had a prospect of success in a claim against the second respondents to the Employment Tribunal.

35. Having undertaken that exercise, my view was that I could not say he ought reasonably to have realised that he had no prospect of success in such a claim. I could not see that he ought to have known that there was no reasonable prospect of success in this claim against the second respondents as brought before an Employment Tribunal.

36. I have been careful to look at the point uninfluenced by any sympathy I might have for the claimant as an individual. I have not had regard to the particular position of this claimant. I am conscious that the claimant simply believing that something has “not gone his way” or is something about which he is unhappy, is not enough to meet the test of whether, objectively assessed, the claim is one which someone in the shoes of the claimant ought to have understood or appreciated as having no reasonable prospect of success.

37. This was not a claim which it was suggested had been raised as a vexatious act or as an abusive or disruptive act or as otherwise an unreasonable act. What was being said was that the claimant ought to have been able to realise that any action he might wish to take against the second respondents was not something which could be brought to an Employment Tribunal, despite the fact that the issue which he had with it was that the decision precluded him from working in particular roles in a particular sphere.

38. I was conscious that the second respondents had written to the claimant setting out why in their view his claim against them had no reasonable prospect of success. That is of relevance in assessing what the claimant ought to have appreciated. It is not conclusive however as correspondence from a party with an opposing interest, particularly if the recipient is an

unrepresented party, will generally and understandably be treated with caution when it says that the claim is without merit.

39. The initial question was therefore whether the claimant ought reasonably to have realised that his claim had no reasonable prospect of success. That was the first leg of the test applicable. I concluded that the first leg of the test had not been meet.

40. Strictly speaking therefore, it was not necessary for me to deal with the second leg of the test. It is appropriate however that I express my view on that.

41. Had I concluded that the first leg of the test had been met, in exercising my discretion I would not have made an award of expenses against the claimant in relation to the costs of the second respondents. Even had I been of the view that the claimant ought to have appreciated that the case had no reasonable prospects, and notwithstanding the extent of the account as submitted, I would have refused the application exercising my discretion in the second leg of the test.

42. There had been linkage between the first and second respondents in that the first respondents were subcontractors to Balfour Beatty Ltd, Balfour Beatty Ltd being subcontractors to the second respondents. I appreciate, as mentioned above, that the claimant had been put on notice that there was an issue around whether he had reasonable prospects of success in his claim against the second respondents. He had been present at the PH on 7 August and had not spelt out the basis of this claim after that. He had been warned as to costs being sought. That had not led to him abandoning the claim against the second respondents.

43. It is appropriate that a party in the shoes of the second respondents gives someone in the shoes of the claimant notice that expenses may be sought if the claim is not dropped. I can however understand the position of someone receiving such a notification as being that the party making that statement "would say that". Whilst it should cause the recipient to stop and think, it would not be unnatural for someone in the shoes of the recipient to be wary as to

accepting the assessment of prospects from the party who was to potentially be on the receiving end of any award which might be made by the Tribunal.

44. I see it therefore is relevant that a costs warning was given. I do not see it as conclusive in making an award of expenses that a claimant carried on notwithstanding a costs award.

45. There is a degree to which having legal proceedings raised against it is a hazard which that party takes by operating in business. Safeguards are there to deter spurious claims and to ensure that consequences may follow if such a claim is advanced. By a spurious claim I refer to one which ought to be recognised by a reasonable claimant as having no reasonable prospect of success, or one which is pursued as an unreasonable, abusive, disruptive or vexatious act.

46. Applying the tests set out above and looking to the circumstances of this case I concluded that it could not be said that there were not reasonable grounds for this claimant to think that he had a claim in the Employment Tribunals against the second respondents. Had I been of the view that he ought to have appreciated that there were no reasonable grounds for such a claim, for the reasons outlined above, I would not have exercise my discretion in making an award of expenses, particularly bearing in mind that an award of expenses remains the exception rather than the rule.

47. The application for expenses is therefore refused.

Employment Judge: R Gall
Date of Judgement: 21 April 2020

Entered in Register,
Copied to Parties: 21 April 2020