EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111229/2019 & 4112518/2019 (P)

Held by written representations on 2 October 2020

Employment Judge I McFatridge

Mr A Higgins	**First Claimant Represented by: Mr Grieve, Solicitor - Written representations**
Mr G E Villiers	**Second Claimant In person - Written representations**
University of St Andrews	**Respondent Represented by Ms McGrady, Solicitor - Written representations**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is

(One) The first claimant Mr Higgins shall pay to the respondent the sum of Four thousand Five hundred pounds (£4500) towards the expenses of defending the claim.

(Two) The second claimant Mr Villiers shall pay to the respondent the sum of Four thousand Five hundred pounds (£4500) towards the cost of defending the claim.

REASONS

1. I issued a judgment in this case on 30 July 2020 following a two-day preliminary hearing on employment status held on 22 and 23 June 2020 with the parties subsequently submitting written submissions which were considered on 15 July. Following this the respondent's representative submitted an application for expenses. The parties were asked for written submissions and Mr Villiers provided his own submissions. Mr Higgins had been represented by Mr Villiers at the main hearing but decided that he would seek separate representation in respect of the application for expenses. Written submissions were made on his behalf by Mr Grieve.

2. Although the submissions were made in writing and are available to all parties it is as well to set out each party's position in brief. In summarising this I do not see to detract from the comprehensiveness of the submissions made in each case.

Respondent's submissions

3. The respondent made their claim on two bases. The first of these was that the claims had no reasonable prospect of success and secondly that the claimants had acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing of the proceedings and the way the proceedings had been conducted. With regard to the first strand of their argument it was their position that the claim had no reasonable prospect of success for a number of reasons. The first of these was that Mr Higgins had brought a claim of unfair dismissal which is a claim which can only be made by an employee. Despite this Mr Higgins asserted on various occasions that he was either a worker or voluntary worker engaged by the respondent and also stated that he believed that the Jujitsu Club was his employer. Such a claim against the respondent was misconceived from the start. Mr Villiers brought an unlawful deduction of wages claim. In order to succeed he had to show that he was a worker engaged by the respondent. This claim also had no reasonable prospect of success. The respondent's position is that both Mr Villiers and Mr Higgins were warned on numerous occasions that this claim had no reasonable prospect of success. The respondent's position from the outset was they were neither workers nor

employees engaged by the respondent. At the preliminary hearing both claimants indicated that they had not received any payments from the respondent since 2012. The respondent's representative indicates that I pointed out to the claimants at the preliminary hearing that this fact would cause them considerable difficulty in maintaining their claim and that I advised them both at the hearing and in the subsequent note to take legal advice in relation to the matter.

4. Furthermore, the respondent points to the fact that this was a case where witness statements were used and the witness statements provided by them in advance of the hearing made it abundantly clear that the claimant's position and assertions in relation to employment status were incorrect.

5. The respondent's representative then goes on to quote various parts of the judgment where I refer to the fundamental and incontrovertible fact that whatever their relationship with the Jujitsu Club the claimants had no contractual relationship with the University who were the sole respondent in the case.

6. The second ground on which the respondent sought expenses was in relation to their claim that the claimants acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing of the proceedings and the way that the proceedings had been conducted by firstly bringing the proceedings in circumstances where the claims had no reasonable prospect of success and secondly in the way that the proceedings had been conducted.

7. The respondent's position was that the claims had no reasonable prospect of success for the reasons already given by them in relation to their first ground and that the claimants knew that their claims had no reasonable prospect of success but continued regardless. The respondent's position is that the claimant said what they believed to be helpful to their position rather than what they believed to be true. It was also their position that the claimants blatantly lied and attempted to mislead the Tribunal on many points.

8. The respondent in particular relies on the fact that Mr Higgins had asserted at the preliminary hearing on 17 April 2020 that he had not been paid by the respondent since 2012. It is the respondent's position that this caused me to advise the parties that in those circumstances their claim was in some difficulty. The respondent's position is that rather than take legal advice as I suggested the respondent then made a series of inventive submissions designed to support their position. The respondent alleged that this included Mr Higgins being deliberately misleading about the source of payments into his bank account. The respondent then refers to the various points in the judgment where I set out the sequence of evidence in relation to those matters. The respondent also relies on the various statements I made regarding Mr Villiers and his tendency to seek to obfuscate and reply with legal arguments to questions of fact. The respondent also refers to various stand alone matters at paragraph 24 of their submissions including the claimants' scattergun approach to the evidence, their inclusion of a large number of documents that were unnecessary and not relevant, their continued objections to documents being placed in the bundle by the respondent and their application to strike out the response. They also point out the claimants changed their position on their employment status throughout the proceedings and made reference to the various documents which were lodged, unnecessarily in the respondent's view, by Mr Villiers.

9. Furthermore, the respondent's position was that the claimants had acted vexatiously. They set out the history of the matter and confirmed their view that this was a claim which was brought not with any expectation of recovering compensation but out of spite to harass the respondent or for some other improper motive using the definition in ***Marler Ltd v Robertson [1974] ICR 72***.

10. The respondent indicated that the cost to their clients of this case were in excess of £21,000 plus VAT. They accepted that some of that was arguably not incurred solely in relation to the defence of the claim but for related matters and their application was for the sum of £18,000 plus VAT (£21,600).

Claimants' submissions

11. Mr Villiers began by referring to the well-known case of ***Balls v Downham Market High School and College [2011] IRLR 217 EAT*** and Lady Smith's judgment in that case. This was the case where the issue was whether or not to strike out a claim without a hearing on the basis that it had no reasonable prospect of success. Lady Smith pointed out that there was a high test and that the word 'no' shows that the test is not whether the claim was likely to fail but whether there is no prospect of it succeeding. I did not find this case entirely in point since it basically refers to the difficulty a tribunal has in assessing the strength of a case without hearing any evidence. Mr Villiers does however point out that initially he did not have in his possession all of the information on who was paying whom and that the e-mail and documents showing the coach payment system being used in September 2014 was not found until 17 April 2020 and that he did not identify the payment made to Mr Higgins in September 2014 until Mr Higgins had obtained his bank statements on 20 May 2020. This sets out the reasons why he considers that he was a worker and 'likely an employee' basically summarising the evidence and arguments which he deployed unsuccessfully at the hearing. In fact he goes on to state that he ought to have succeeded in his claim for those reasons.

12. Mr Villiers then states that he believed that had the Tribunal correctly decided that he was a worker then the case of ***Nethermere (St Neots) Ltd v Gardiner and Taverna*** showed that a mere three year period as a worker was sufficient to conclude an implied employment contract had developed and it seemed reasonable to him to conclude that Mr Higgins was an employee at the time of his dismissal in 2019. He then goes on to maintain his position that the original Tribunal judgment is incorrect and makes reference to documents which he has discovered following the hearing. He makes reference to an employment status check. The closing position appears to be that despite the clear terms of the judgment he still considers that he was an employee of the University.

13. With regard to the suggestion that the claim was brought vexatiously Mr Villiers refers to my statement that Mr Villiers had managed to persuade himself that given his interpretation of the law both he and Mr Higgins were

employees. He indicates that this was an honestly held belief and because of this the case can't be vexatious. With regard to the change of position by Mr Higgins he refers to the fact that a payment of £90 was made on 30 September 2014 and that this was a payment made by the University. He then states that the respondent's allegations are unreasonable as the fact of the matter is that Mr Higgins was paid on one occasion since 2014.

14. With regard to the issue of the evidence Mr Higgins gave regarding the payments marked St Andrews Univ he sets out his position regarding what occurred. He notes that I did not accept this in my judgment. He also notes that Mr Higgins' witness statement states that the payments after July 2017 were from the club.

15. In paragraph 63 then indicates that he wishes access to the recording of the hearing. I do not see any possible justification for providing that at this stage.

16. With regard to the claimants' scattergun approach Mr Villiers accepts in paragraph 65 of his submission that 'on self review after the fact that he was a terrible representative' and he apologises to the Tribunal but goes on to say it must be a common problem when people attempt to represent themselves or are represented by an amateur. He does not accept that this can be characterised as vexatious, abusive or unreasonable. Mr Villiers sets out his position regarding the bundle at some length to justify his application to strike out the response. He makes the point that the respondent refused to co-operate with Mr Higgins and himself in relation to arbitration by ACAS.

17. With regard to inability to pay he states that the amount of £21,600 would be sufficient to render both himself and Mr Higgins bankrupt. He refers to Mr Higgins being a self-employed architect and that the building industry was shut down for several months due to Covid-19 pandemic causing him (Mr Higgins) cash flow problems. He indicates that he is a Civil Servant with HMRC whose salary has fallen in real terms by 20% since 2010 and that he now has additional travel costs. He has attached to his submissions a substantial number of documents which essentially relate to his contention that the original Tribunal judgment was incorrect.

18. Mr Higgins' submission were prepared by Mr Grieve. Mr Grieve is also highly critical of the initial judgment. He criticises the fact that I did not make findings of fact in relation to a number of matters which I have stated to be irrelevant but where he considers I ought to have made factual findings. Mr Grieve indicates that in his view there was absolutely nothing wrong with what Mr Higgins did in changing his position at the hearing. He sets out his understanding of what this consisted of. He is also highly critical of the evidence led by the respondent and states that the inter-relationship between the University of St Andrews, the Athletics Union and the Jujitsu Club was not straightforward.

19. He makes various assertions in relation to what he considers the evidence to have been at the hearing. He makes the point that the Tribunal has clearly come to a concluded view on the matter but that the Tribunal's view could not be known in advance. His position is that whilst the respondent put forward the view that there was no reasonable prospect that any other interpretation could be put on the information he feels that this is not a view which could readily be shared without a detailed examination of the facts and without detailed evidence. Mr Grieve makes a point about the control which the University could exert over the Jujitsu Club and the Athletics Union. He states that an order for costs against a party is a rare step and one which is only considered to be appropriate in exceptional circumstances. He accepts that the legal authorities put forward by the respondent are sound and will assist the Tribunal. He draws a distinction between obfuscation and prevarication and lying. He makes the point that a lay person trying to make sense of circumstances where payments in relation to services have come from more than one source at different times may well be confused as to who is paying him. He also refers at various parts of his submission to the suggestion that the respondent could have entered into dialogue with Mr Higgins regarding his suspension which would have resulted in the matter being resolved without Tribunal proceedings having to be raised.

20. In his submission Mr Grieve does not make any reference to Mr Higgins' financial position although Mr Villiers who by this time was not representing Mr Higgins does do so. I gave Mr Higgins' representative the opportunity

to comment on this and provide any further information relating to Mr Higgins' means which he wished but received no further response.

Discussion and decision

21. I will start by saying that the respondent has set out a helpful list of the authorities in relation to this issue in paragraph 4 onwards of their submission. I note that Mr Grieve for Mr Higgins agrees that these are appropriate authorities and I have found them helpful.

22. The jurisdiction to make an award of costs is contained within section 74-78 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1. It is clear from the rules and from the authorities that in exercising my discretion I require to adopt a two-stage approach. First of all I required to decide whether any of the thresholds set out in rule 76 have been met. Secondly, if these thresholds have been met then I have to exercise my discretion reasonably as to whether a costs order should be made at all and if so how much. The two threshold criteria which the respondent is relying on this case are contained in rule 76(1) which states

> "(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 has no reasonable prospect of success."

23. Like the respondent I consider that it is appropriate to consider the question of whether the threshold fixed by rule 76(1)(b) has been met first.

24. It is clear from the terms of both of the claimants' response to the application for expenses that they still do not accept that they were neither employees nor workers engaged by the university and for this reason I shall paraphrase my judgment below.

25. In order to succeed in their claim the claimants would require to show that they were either an employee in terms of section 230(1) of the Employment Rights Act 1996 or a worker in terms of section 230(3) of the said Act. A

pre-requisite of them doing this was to establish that there is a contract between themselves and the University. A contract requires there to have been at some stage a consensus or agreement between the parties to that contract. In order to establish the existence of any contract at all the claimants required to overcome what initially appeared to be some very difficult facts. The first of these is that the Jujitsu Club and the University have separate legal personalities. I have been criticised by Mr Higgins' agent for using three paragraphs of my judgment to precisely set out the legal relations and connections between the three bodies involved namely the University, the Athletics Union and the Jujitsu Club. I did so in some detail in order to deal with the various irrelevant assertions made by the claimants. The fact of the matter is that the start point and the end point are that the Jujitsu Club and the University are separate. The fact that in some ways they operate in concert or that one organisation has the opportunity to exercise control over the other is not relevant. It is a feature of modern employment relationships that often employees of one company spend their days working under the control of an entirely separate company. Supermarket cleaners may be employed by a facilities management company who are engaged by the supermarket. The standards they work to are set by the supermarket and the supermarket dictates what the cleaning company can do. None of that is relevant if the contractual nexus is between the cleaner and the cleaning company. The cleaner does not miraculously become an employee of the supermarket.

26. It therefore follows that whatever agreement was entered into between the claimants and the Jujitsu Club is not relevant for the purpose of examining whether or not there was a contract of employment with the University.

27. I have been criticised for not making detailed findings as to what this contract with the Jujitsu Club was. The reason I did not do so was first of all that it was irrelevant. Secondly, I was faced with the situation where I had limited evidence from the claimants themselves who I found to be unreliable witnesses and the evidence of the two independent witnesses was contradictory.

28. The fact of the matter, which the claimants well knew, was that Mr Higgins had been engaged by the committee of the Jujitsu Club and had brought

along with him Mr Villiers as a member of his team. It may also be that Mr Villiers was personally hired by the committee of the Jujitsu Club. In order to succeed the claimants' position would have to be that the Jujitsu Club has authority to enter into binding contracts on behalf of the University. Their position is that despite having received no payments from the University for a substantial number of years the University had somehow agreed to take upon itself the obligation to pay them both at the rate of the minimum wage over this entire period and to give Mr Higgins the full rights of an employee. One is tempted to suggest if the committee of the Jujitsu Club had this power why they did not simply appoint Mr Higgins a Professor of Linguistics and have done with it.

29. It appears to me that the claim was doomed from the outset.

30. Mr Villiers makes the point that in a substantial number of recent cases individuals who were engaged on apparently self-employed terms have been found by the courts to be employees or workers. He points out that the law is complex in this area. I shall consider this further below as it relates to the question of unreasonableness however I should say at this stage that on the basis of the facts I found which were essentially clear from the written record there was no possibility of any Tribunal making a finding that these claimants were either employees or workers engaged by the University.

31. For the avoidance of doubt I would make no such assertion if the claim had been that the claimants were workers or employees engaged by the Jujitsu Club. My view is that if that had been the assertion then it would not be said in advance that the claim had no reasonable prospect of success even although at the end of the day the (strictly obiter) findings which I made did not wholly support the claimants.

32. In my view it is clear that the threshold met by rule 76(1)(b) has been met in this case.

33. With regard to rule 76(1)(a) I note that the respondent allege that the claimants' conduct in this case falls in to one of the higher categories of culpability namely being vexatious. It is their view that the claimants started

these proceedings without any real hope of success purely in order to harass the respondent in connection with an ongoing dispute about something else. I have to say that it is this aspect of the application which has caused me most difficulty.

34. On the one hand it is clear that the claimants' main grievance against the respondent is in relation to the dispute over Mr Higgins being banned from University buildings. The proceedings before the Employment Tribunal can be seen as one campaign in that ongoing war. I can see that from the point of view of the University who have been caused considerable legal expense on the matter on the basis of a number of extremely fanciful suggestions by the claimant that this explanation may appear to make sense.

35. That having been said and having considered the matter carefully, including Mr Villiers' representations, my view is that Mr Villiers at least did not see the Tribunal application in those terms. My view is that the claimants found themselves in dispute with the University over a separate matter. I take into account the statements Mr Higgins' agent made that they felt they were banging their head against a brick wall in getting the University to deal with the matter. It then appears to me that Mr Villiers and Mr Higgins genuinely formed the view on the basis of a misguided appreciation of the law that they may well fall into the category of worker and could make a claim to the Tribunal. My view however is that at some level at least the purpose of the proceedings was for them to obtain compensation for unfair dismissal and in Mr Villiers' case six years of payments at the rate of the National Minimum Wage for work which they had been prepared to do free of charge for the Jujitsu Club. I have narrowly come to the view that the claim was not lodged vexatiously because the claimants did at some level believe that they might succeed in their claim and that their enthusiasm led them to overlook the fundamental defects in their case. Going on from that however I have absolutely no doubt that the bringing of the proceedings was unreasonable. It was clearly unreasonable to bring a case which has no reasonable prospect of success. I also consider that all of the other matters raised by the respondent under this head are well-founded.

36. With regard to the issue of the bank statements and whether or not Mr Higgins changed his position there appears to be some confusion in the mind of at least Mr Higgins' agent as to what my findings were.

37. For the avoidance of doubt I should say that at the preliminary hearing for case management purposes the respondent made an application for Mr Villiers to provide copies of his bank statements with a view to establishing what payments he had had from the University. Mr Higgins volunteered that he had not received any payments since 2012. My initial impression was that both Mr Higgins and Mr Villiers wished to avoid lodging their bank statements. I explained to them that my understanding of the case at that time was that they were trying to establish that they were employees/workers engaged by the respondent. I indicated that they might be in some difficulty if their position was that they had not been paid anything since 2012. If this was truly their position then it was likely the respondent would be content for them not to lodge their bank statements. There was then some to-ing and fro-ing and at the end of the day both parties thought it would be a good idea for the bank statements to be lodged. I have recalled that I did make the point that if the claimants' position was that they had not received any payments since 2012 the matter of the bank statements was unlikely to be particularly important and if there was to be any substantial cost incurred by Mr Higgins in lodging these then he should apply to the Tribunal for the order to be set aside.

38. We then got to the evidential hearing. It is perfectly correct that by this time Mr Higgins had identified a payment from the University made in 2014. Unfortunately, this was not of particularly great help to him since the payment was for coaching which he had done for the University at a one off event and also for certain architectural services which he had provided to them clearly on a self-employed basis.

39. The issue for me and the area where both I and the respondent's representative felt that Mr Higgins' behaviour was unconscionable was that in his witness statement he referred to having received various payments from the University much more recently. He did so on the basis that his bank statement showed payments which he had received from the Jujitsu Club but that his bank had abbreviated the name of the payer to St Andrews

Univ. The respondent's representative had however lodged the Jujitsu Club bank statements and it was crystal clear that these payments had come from the Jujitsu Club and that the name of the payer had been abbreviated. She attempted to put this to Mr Higgins and he prevaricated and gave a number of random different answers to the question. I then intervened and squarely put to him what was clearly the case when one compared his bank statements with that of the Jujitsu Club. He accepted that, in my words, he "knew fine" that these payments had come from the Jujitsu Club. I had thought that was the end of the matter but to my astonishment when re-examining him Mr Villiers sought to have him backtrack on this and maintain the position in his witness statement that these payments had come from the University. Mr Higgins duly obliged and changed his evidence once again.

40. On the issue of unreasonableness I also stand by the various statements I made in my original judgment in relation to Mr Villiers' scattergun approach to the evidence and the way that each of the claimants sought to obfuscate rather than assist the Tribunal. I would also agree with the respondent's position that the claimants lodged substantial numbers of unnecessary and irrelevant documents however I should say that this alone would not in the usual way lead me to consider that the threshold of unreasonableness was met.

41. At the end of the day I considered that one of the most unreasonable aspects of the claimants' conduct of the case was that having been clearly advised in the respondent's pleadings and at the preliminary hearing that there were difficulties they did not seek advice or even reconsider their position but instead, as the respondent says, went on to invent more and more ingenious arguments to get round the clear difficulties they were in.

42. Having established that the threshold under rule 76(1)(a) and (b) has been met I now require to exercise my discretion as to whether or not to make an award of expenses in this case. I do so on the basis that as can be gleaned from the above I take the view that the claimants were misguided rather than malicious. I also however take into account that on the figures given by the respondent's representative the respondent is required to pay the sum of £18,000 plus VAT in relation to this case together with a small

amount of additional fees for matters which do not concern this case and with which I am not to be concerned.

43. I have very limited information as to the claimants' means although I do note the limits of an argument based solely on inability to pay as suggested in the case of ***Kovacs v Queen Mary and Westfield College and another [2002] EWCA Civ 352***. At the end of the day my decision is that the claimants' case had no reasonable prospect of success and yet they unreasonably brought the proceedings and continued the proceedings even after this was pointed out to them. Their conduct of the case was also unreasonable in a number of respects. I feel that in the circumstances it would be inappropriate for me not to mark the claimants' conduct as deserving of an award of expenses. I do so appreciating that expenses are unusual in Employment Tribunal cases.

44. With regard to the amount to be awarded I take into account the limited information I have regarding means. I also take into account the points made regarding the lack of engagement by the University in efforts to deal with the problem extra-judicially. I can only place limited weight on this since where a party is faced with a claim which has no reasonable prospect of success they may quite legitimately feel that there is no point in engaging in any negotiating process. I do however take into account that the claimants did not have the benefit of legal advice, (although they were urged to get it), and I take on board what Mr Villiers has said regarding the difficulties that lay individuals may have in conducting tribunal proceedings when it is an unfamiliar environment. Having taken all matters into account I consider it would be appropriate for the claimants to pay £9000 between them towards the respondent's total costs. This is half of the costs excluding the vat element. I do not have any information regarding the likelihood that the university will be able to recover the vat element paid on the fee but in any event I feel the appropriate figure to balance out the various factors in this case is £9000.

45. I have considered whether the liability should be split unevenly however I believe that each claimant was equally culpable in this case. I did consider whether to simply make an award of £9000 on a joint and several basis however on reflection I have decided that it would be appropriate to make

an order that each claimant pays the sum of £4500 to the respondent towards the costs incurred in defending the claim.

Employment Judge:	**Ian McFatridge**
Date of Judgment:	**08 October 2020**
Date sent to parties:	**12 October 2020**