



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4120668/2018

Held in Glasgow on 22 November 2019

Employment Judge: M Sutherland
Members: R McPherson
A McMillan

Mr J Guetta

Claimant

Mhairi Shaw

Respondent

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the Claimant is ordered to pay to the Respondent the sum of £2,000 in respects of costs.

REASONS

1. The Respondent made an application for payment of legal representation costs of £10,192.60 by the Claimant on the grounds that the Claimant acted vexatiously and unreasonably in bringing proceedings against her and separately that the claim against her did not have reasonable prospects of success. The Claimant opposed that application.
2. The stated preference of both parties was that the matter be considered by way of written representations and a hearing in chambers was arranged for today. Parties were given reasonable opportunity to make written representations in relation to the application and those representations have been taken into consideration.
3. Under Rule 77 a party may apply for a costs order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. Judgement in respect of the

Respondent was sent to the parties on 21 June 2018. The application for expenses was made on 19 July 2018 and is accordingly made in time.

4. Under Rule 76 “(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that— (a) a party (or that party’s representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or (b) any claim or response had no reasonable prospect of success.”

5. This entails consideration of the following:

- a. Has the Claimant acted vexatiously or otherwise unreasonably in the bringing of the proceedings against the Respondent?
- b. Alternatively, did his claim against the Respondent have no reasonable prospects of success?
- c. If so, should the tribunal make any award of expenses in the exercise of its discretion and if so, what should be that amount of that award?

a. Has the Claimant acted vexatiously or unreasonably in the bringing of the proceedings against the Respondent?

6. The Respondent asserted that the Claimant acted vexatiously or unreasonably because the Claimant did not believe and has never believed that she was biased against him. At the final hearing the Claimant expressly stated that he did not believe the Respondent was consciously or sub-consciously anti-Semitic but rather that she accepted and applied the investigation report which the Claimant asserted was anti-Semitic and this tainted her decision. Following brief discussion this led to the immediate withdrawal of the claim against the Respondent at the final hearing. The Claimant did not therefore act vexatiously or unreasonably in this regard.

b. Did the claim have no reasonable prospects?

7. The Respondent asserted that the claim had no reasonable prospects of success.
8. The Claimant made a complaint of direct discrimination because of his religion against his employer the Council and the Respondent as the disciplinary officer who took the decision to dismiss.
9. The complaint of direct discrimination against the Respondent was withdrawn on the fourth day of the final hearing but proceeded against the Council.
10. In his claim the Claimant asserted that the less favourable treatment by the Respondent because of his religion was that: 1. at the disciplinary hearing the Claimant sought to discuss and challenge allegation 3 as anti-Semitic but the Respondent decided to drop it as an allegation in order to silence him; 2. The Respondent's decision to dismiss the Claimant was tainted; 3. At the appeal hearing the Respondent said "a normal teacher would not do that"
11. The Claimant asserted by implication that both the Council and Respondent were liable because direct discrimination was done by the Respondent during the course of her employment with the Council (sections 109 and 110 of the Equality Act 2010).
12. The Respondent stated in her Response to these allegations: 1. allegation 3 was dropped because there was no evidence to substantiate the allegation and it was not therefore necessary to discuss allegation 3; 2. The decision to dismiss was taken because the Claimant had shown an extract of an 18 rated film and had not shown genuine remorse; 3. The words were those of a parent indicating that a responsible teacher would not have shown a film which required them to stand in front the screen to hide inappropriate scenes. The Council stated that the alleged treatment did not amount to less favourable treatment and further this treatment was not because of his religion. The Council's Response, was in broadly the same terms in relation to each of these allegations.
13. At a preliminary hearing the Claimant advised that he was not relying upon a comparator and was therefore asked to set out the factors upon which he

intended to rely to indicate a causal link between the treatment and his religion. Those factors were not readily apparent from the further particulars provided.

14. Having regard to the above the tribunal considered that the Claim against the Respondent had no reasonable prospects of success. The Claimant was not treated less favourably than others. There was no basis upon which it could be inferred that this treatment was because of his religion.

c. Should the tribunal make any award and if so, how much?

15. The Tribunal must consider whether it is appropriate to exercise its discretion in favour of awarding costs against the party, taking into account the circumstances of the case and any relevant factors. Under Rule 84 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.
16. Awards of costs are rare, remaining the exception rather than the rule and certainly do not follow the event.
17. The Claimant was a member of a union and received advice and representation from that union during the course of the disciplinary process which led to his dismissal. The Claimant was not represented during the course of the tribunal process but received advice from Citizens Advice Bureau. Although misguided the Claimant was genuine in his belief that his claim had reasonable prospects of success.
18. The Council's Response, was in broadly similar terms to the Respondent's response in relation to each of the allegations. The Council did not seek to argue that the Respondent was not acting during the course of her employment and/or that the Council took all reasonable steps to prevent that treatment. Accordingly the defence of the Council and Respondent aligned and it is not apparent why the Respondent sought separate legal representation.
19. Under Rule 75(1) a costs order is an order that the paying party make a payment to the receiving party in respect of costs incurred while legally

represented. Under Rule 74(1) costs includes fees incurred for the purpose of, or in connection with, attendance at a Tribunal hearing. The cost were incurred by the Respondent whilst legally represented for the purpose of, or in connection with, attendance at a Tribunal hearing.

20. No costs warning was issued to the Claimant by the Council or by the Respondent – they did not explain to him why his case had no reasonable prospects of success or what costs he risked incurring if he continued. By way of an explanation, the Respondent asserts that it only became apparent at the final hearing that the Claimant had never believed she was biased. However, an assessment of prospect could readily have be made having regard to the claim and particulars. Nevertheless, it is not clear that such a costs warning would have had the desired effect and it is likely that only procedural justice from a tribunal would suffice.
21. The Claimant suggests that reasonable prospects can be inferred from the decision to list a lengthy hearing after two case management preliminary issues. That is not the purpose of these hearings and in any event it is difficult and often inappropriate for a tribunal to assess prospects without hearing evidence.
22. It is noted that the Claimant remains fit to teach as determined by the General Teaching Council for Scotland. The Claimant has monthly income of around £2,570 from a fixed term contract ending June 2020, savings of around £7,800, and a mortgage of around £57,400.
23. On balance the tribunal decided unanimously that it was appropriate to exercise its discretion in favour of awarding costs against the Claimant, taking into account the circumstances of the case and the relevant factors including the Claimant's ability to pay.
24. Under Rule 78(1)(a) an expenses order may order the paying party to pay the receiving party the whole or a specified amount, not exceeding £20,000.
25. The legal costs of £10,192.60 were reasonably and properly incurred and the time taken of around 88 hours and the hourly rate applied of around £115 is

considered broadly appropriate and proportionate to the importance and complexity of the issues.

26. On balance, taking into account the circumstances of the case, and the relevant factors including the Claimant's ability to pay, the Tribunal decided unanimously to make a costs order in sum of £2,000.

Employment Judge: Michelle Sutherland
Date of Judgment: 23 March 2020
Entered in register: 25 March 2020
and copied to parties

*I confirm that this is my judgment in the case of **4120668/2018 Guetta v Shaw** and that I have signed the judgment by electronic signature.*