EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102259/20 (P)

Held on 19 April 2021

Employment Judge J M Hendry

Mr G Maitland	**Claimant In Person**
Integra Well Solutions Limited	**Respondent Represented by Mr G Pennel, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The respondent's application for expenses is granted and the claimant is ordered to pay the respondent the sum of Five Thousand Pounds (£5000)

REASONS

1. The claimant in his ET1 made various claims for holiday pay, medical expenses, salary and notice pay. The claim for salary had been resolved prior to the hearing. The claim for medical expenses and holiday pay were withdrawn. The principal claim in value was that he was entitled to a payment of the balance of his notice following termination of the service agreement. The matter progressed to a "CVP" hearing. The application was struck out. Detailed written reasons were sent to the claimant on 22 February 2021.

2. The claimant's application was struck out at a stage in the hearing after it became clear that the claimant accepted that he was in breach of his service agreement both in relation to disclosing confidential information and as apparent from his own evidence that he was not devoting his full time to the company's activities although justifying this by claiming that he was not paid for those activities.

3. In paragraph 45 the Judgment records:

"*In the present case the claimant's submissions in the course of his evidence were crucial. Given those admissions namely that sensitive information such as salaries and the company's financial position had been disclosed to his partner without authority he was by his own admission in material breach of his obligations and he appeared to accept he was although in his view he had done this innocently.*

46. Although this matter appeared clear the test that must be used to establish a material breach of contract was an objective one. The Service Agreement provided at Clause 16 that information should not be disclosed to third parties. It was apparent that the Claimant preferred to let his wife comment on correspondence from the company. She would photocopy these documents for him. There appeared to be no good reason for her to have access to the e-mails concerned and permission for such access had not been sought…..

47. In the light of the clear evidence that was before the Tribunal it was apparent that the Claimant's case could not now succeed. He had openly accepted the matters put to him carefully and methodically by Counsel. I was confident he had not been tricked into these admissions. Indeed, he seemed to readily accept the factual position put to him without realising the potential consequences of this actions. His claim had, no longer any, any reasonable prospects of success. Leading further evidence was, in these circumstances, pointless."

4. Following the issue of the Judgment the respondent's solicitor wrote to the Tribunal on 8 March making an application for an award of expenses. This account, which included Counsel's fees for conducting the hearing. The application referred to paragraph 76(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulation 2013 ("the Rules"). The

application was made on the basis that the claimant had acted unreasonably in bringing the proceedings, conducting them and that the claim had no prospects of success. The principal claim was for the balance of notice. The respondent's solicitor wrote:

"*The Claimant knew that the Service Agreement made no provision for payment of medical expenses. He also knew or should have known that medical expenses had been the subject of discussion with the Respondent and had been expressly excluded from the terms of his Service Agreement. In those circumstances, the Claimant knew or ought to have known that it was unreasonable to include a claim for medical expenses and a claim for that kind had no reasonable prospect of success. Regarding holiday pay, the Claimant was salaried. He knew that the Service Agreement provided that the holiday year ran from January to December. He knew or ought to have known that the claim for holiday pay was unreasonable and had no reasonable prospect of success. We wrote to the Claimant on 23 December 2020 stating that the holiday pay claim had no reasonable prospect of success and reserving our clients right to seek recovery of expenses that the holiday pay claim was not withdrawn. The Claimant did not withdraw the holiday pay claim until the outset of the hearing.*"

5. Separately it was submitted the claimant pursued the claim for breach of contract or notice pay unreasonably and that these had no reasonable prospect of success. In the course of his evidence to the Tribunal the claimant admitted he had passed e-mails containing confidential information and personal data to his partner. The claimant was in clear breach of the confidentiality provisions of his Service Agreement. The respondent's agent also referred to the fact that the claimant indicated that he had taken advice from a solicitor and this supported their submission that the claimant's actions were unreasonable. The claimant did not devote the whole of his time to the respondent company's interests as observed by the Tribunal.

6. The claimant was invited to respond in writing. The Tribunal wrote to him on 9 March 2012 asking him to confirm whether the application was opposed and if the matter could be dealt with by written submissions or if the claimant preferred a hearing by means of CVP. The letter also explained that the Tribunal could take into account the claimant's ability to pay. No submissions or information was received by the Tribunal at this point. It was only after a

second invitation to respond to correspondence that he wrote opposing the application arguing that an award was only made in exceptional circumstances and more generally that there was no basis for such an award.

Discussion and Decision

7. Rule 75(1)(a) coupled with Rule 76 gives the Employment Tribunal power to make an expenses order against one party to proceedings. Rule 76(1)(a) is in the following terms:

> "***When a costs order or a preparation time order may or shall be made***
>
> ***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;"*

8. This was not a case where the claimant could have raised the proceedings and gone into the hearing without an appreciation of the difficulties that he faced and the true situation that pertained to his working for others. The respondent company in their ET3 had flagged up that they believed that he was in breach of his contract with them in disclosing confidential information. The duties on him were readily apparent from the Service Agreement that he accepted. Similarly, the principal claim and the one to which most expense would in practice accrue was the claim for the balance of notice and also opposed on the basis that the claimant had not fulfilled the obligations on the Service Agreement by devoting his full time to the respondent's business.

9. The evidence for these matters was substantial and the claimant must have been fully aware of that. As narrated in the Judgment the fact that the claimant appeared on another company's website as Chief Operating Officer and that company also continued to sponsor the claimant's Visa in Oman up to the date of the hearing were matters he must have been fully aware of. The respondent did not seek strike out of the claim earlier but proceeded to a

hearing. It was submitted that the claimant acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing or conducting the proceedings.

10. The award of expenses is not the rule in Employment Tribunal cases and such awards are still relatively rare. The Employment Tribunal has a discretion in relation to the grant of an expenses application. There is a two-stage test. The first is whether the Tribunal considers that the Rule is engaged by the claimant's conduct. In the present case although the claimant was entitled to raise proceedings for withheld salary (he had been told it would be paid when he returned company property) that matter was resolved quickly. The vast bulk of the expenses occasioned by the claimant's actions arose in relation to the other claims. The two claims for medical expenses and holiday pay were misconceived and the claimant ultimately withdrew them. The expenses occasioned in defending these claims would be small and incidental to the main issue in this case which was the claim for the balance of notice.

11. I take into account the fact that the claimant was a litigant in person and should be judged less stringently in relation to his conduct than a litigant who is professionally represented. However, the claimant was not a candid witness. He knew when making these claims (retention of salary excepted), and it seems likely he either had legal advice or access to such advice, that they were misconceived. In the course of the hearing the claimant at one point asked for a short delay to allow him to take legal advice which he then did to assist him in relation to his submissions. Legal advice was apparently available to him. The claimant should have taken advice both in relation to the ramifications of disclosing confidential information to his partner contrary to the service Agreement and also in relation to the issue of devoting his full time to the respondent. If he had done so then he would have been aware that his claim for notice would founder. As is clear from the Judgment the claimant lacked candour and was evasive in relation to these matters.

12. In the circumstances, it is my view that the threshold test has been met. The Tribunal still has an unfettered discretion as to whether or not to make such an order. The factor that weighed most heavily as noted above was the claimant's lack of candour and the fact that as an intelligent person and one with access to legal advice, he should have realised he was in breach of his contract with the respondent and that accordingly his principal claim for notice was bound to fail. He had also raised tow other claims which he did not seek to justify at the hearing.

13. It should be noted that the claimant did not seek initially to respond to the application and the Tribunal has no information from him about his current financial position which the Tribunal would have been prepared to take into account.

14. The fees claimed by the respondent's solicitors have been carefully prepared and the sums sought appear in the Tribunal's experience to be modest. Taking account of the claimant possibly being entitled to instigate the proceedings I will not award the full sums sought but will reduce the award by about £750 to reflect that. The claimant shall pay the balance.

Employment Judge **J M Hendry**

Dated **22nd of April 2021**

Date sent to parties **22nd of April 2021**