



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: S/4102180/20

Held on 27 October 2020

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Employment Judge N M Hosie

Mr A Stephen

Claimant

Chivas Brothers Limited

Respondent

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the respondent's application for 30 an award of expenses is refused.

REASONS

1. The claimant submitted a claim form on 13 April 2020. He claimed that he 35 was unfairly dismissed. The claimant advised that he had prepared the claim form with advice and assistance from his trade union. However, no trade union representative was named on the claim form. The respondent's solicitor submitted an ET3 response form on 22 May 2020. The respondent admitted

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the dismissal but claimed that the reason was conduct, gross misconduct, and that it was fair.

2. The case was listed for a case management preliminary hearing by telephone 5 on 3 July 2020. However, the claimant failed to provide his contact details, as requested, and the hearing was conducted in his absence. The Note which I issued following that hearing is referred to for its terms. I directed the claimant to advise the Tribunal, within 7 days from the date of the Note, whether it was his intention to proceed with the claim and advised that, should 10 he fail to do so, I would consider striking out the claim on the basis that it had not been actively pursued.

3. As the claimant failed to respond, a strike-out warning letter was sent to him on 22 July 2020. The claimant failed to respond and I issued a Judgment 15 dismissing the claim on 5 August 2020.

Respondent's application for expenses

4. On 30 August 2020, the respondent's solicitor sent an e-mail to the Tribunal 20 with an application for an award of expenses on the basis that the claimant's behaviour in the case was "unreasonable". On 1 September the respondent's solicitor sent a further e-mail to the Tribunal with a request for an additional award of expenses which meant that the total sum claimed, inclusive of VAT, was in the region of £3,000.

25 Claimant's response

5. On 29 September, the claimant sent a letter to the Tribunal, by way of an attachment to an e-mail. The following are excerpts:-

30 *"I accept that the actions that led to my dismissal were my own but still feel I did not deserve to be dismissed.*

Throughout the dismissal and appeal process, Chivas Brothers failed to meet any of the deadlines for the appeal process.

I appealed my dismissal on 7 December 2019 and should have had a hearing within 14 days. Chivas Brothers never contacted me about the hearing until the end of January 2020.

5 *My hearing took place on 4 February 2020 and I was told I would be informed of the outcome within 14 days. I was only informed of the outcome after I requested an update approximately six weeks later.*

10 *Even the copy of the Minutes from my appeal hearing only contained selected pieces of information and were missing large chunks of the conversations and dialogue.*

When I spoke to my union representative after my dismissal, I was advised that I had good grounds for unfair dismissal at a Tribunal hearing.
15 *Consequently, I agreed for the union to raise an action against Chivas Brothers based on that.*

However, as time went on, I became frustrated at the lack of information I was receiving from the union. When I was able to contact a union
20 *representative for an update, I was advised that the case was not as strong as they first thought and asked if I wished to carry on. I decided that the whole issue was exhausting and affecting my mental health, so I informed them to withdraw the request for a Tribunal hearing. The union representative informed me that he would see to it and inform the Tribunal and Chivas* 25 *Brothers of this.*

As far as I was concerned, that was the end of the matter.

I did receive letters from the Tribunal but was of the belief that the union would
30 *deal with it as they had said they would.*

I was astonished to then receive a letter from Chivas Brothers solicitors asking for £3,000 in expenses for a case that was not pursued. I wish to challenge the claim as I feel it is unfair and another case of oppressive
35 *behaviour against me by Chivas Brothers. I feel that I should not be charged for legal fees from a company that chose to make an example out of me and ignore the actions of others.*

I was never advised by the union at any time that I could be responsible for legal fees and especially for a Tribunal hearing which was no longer going
40 *ahead.*

I don't have any of that money as I am now paid the minimum wage in my current employment. Any money I have is used to support my partner and
45 *three year old autistic son. Having to pay legal fees would have a dramatic impact on our household finances and quality of life."*

6. By e-mail on 13 October 2020, the respondent's solicitor advised the Tribunal as follows: -

"We write further to the Tribunal's email below and the correspondence from Mr Stephen.

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We have reflected on all that he says and maintain our application for expenses. The issues that the claimant has experienced in relation to his claim are, in our view, the responsibility of his union and he may have recourse against them as a result. However, it does not alter the respondent's 10 position that it has incurred costs as a result of a claim not actively pursued, whether by the claimant or his representative.

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We therefore maintain our application. We would be happy for the Tribunal to deal with our application on the basis of the written submissions we have made."

Discussion and decision

7. Rule 75(1)(a) in Schedule 1 of the Employment Tribunals (Constitution and 20 Rules of Procedure) Regulations 2013, along with Rule 76, gives Employment Tribunals the power to make an expenses order against one party to proceedings ("the paying party") to pay the expenses incurred by another party ("the receiving party") on a number of different grounds.

25 8. So far as the current case is concerned, the respondent's solicitor applied for an expenses order on the ground that the claimant had acted unreasonably in terms of Rule 76(1)(a).

9. The case law makes it clear that the action of withdrawing a claim is not in 30 itself unreasonable (**McPherson v. BMP Paribas (London Branch)** [2004] ICR 1398).

10. However, as LJ Mummery said in **McPherson** at para.29: - *"On the other side, I agree with Mr Tatton-Brown, appearing for BMP Parabis, 35 that the Tribunal should not follow a practice on costs, which might encourage speculative claims, by allowing applicants 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 cost sanction."*

11. On the basis on the information before me, it did not appear that the claim in

5 this case was a speculative one. There was nothing to suggest that the claim had been raised with the intention of provoking a settlement offer from the respondent, and no intention of ever proceeding to a hearing if no offer was made. The claim was one of unfair dismissal and the issue, therefore, was whether the respondent had acted reasonably. While there was a lack of 10 detail, the claimant's position appeared to be that the respondent had acted inconsistently in that they had treated others more leniently for similar misconduct and that there were unreasonable procedural delays.

12. The claimant was critical of his trade union and alleged a lack of 15 communication. While there was some attraction in the contention by the

respondent's solicitor that were I to make an award of expenses against the claimant he might have a right of recovery against the trade union, I would not imagine that would be at all straightforward.

20 13. The issue for me was whether the way the claimant had conducted the proceedings had been unreasonable and I had to consider the totality of his conduct.

14. An award of expenses in the Employment Tribunal is the exception rather
25 than the rule. Albeit with some hesitation, mindful of the comments of LJ Mummery in **McPherson**, the substantial costs incurred by the respondent and feeling, no doubt, a sense of injustice, I arrived at the view that the claimant had not acted unreasonably and that the respondent's application should be refused.

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15. In arriving at this view, I also had regard to the claimant's ability to pay, as I could do in terms of Rule 84. I had no reason to doubt what he said about his financial circumstances and responsibilities in his letter of 29 September 2020. His disposable income is such that it is unlikely he would be able to satisfy any meaningful award of expenses in the foreseeable future.

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Employment Judge

N M Hosie

Dated

3rd of November 2020

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Date sent to parties

3rd of November 2020