EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4114760/2019 Expenses Hearing per Written Submissions

Employment Judge: M A Macleod

Gillian Wilkinson — Claimant

Parity Professionals Limited — Respondent

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the respondent's application for expenses against the claimant is refused.

REASONS

1. The claimant presented a claim to the Employment Tribunal in which she complained of constructive unfair dismissal, and a breach or breaches of section 44 of the Employment Rights Act 1996 (ERA).

2. The respondent presented an ET3 response in which they resisted all claims made by the claimant.

3. Following the submission of the ET3, the respondent made an application for strike-out of the section 44 claim, on 28 January 2020. The claimant opposed the application. A hearing was listed to take place on 9 June 2020 in order to address and determine that application.

4. Following that Hearing, the Tribunal issued a Judgment striking out the claimant's claim under section 44 of the Employment Rights Act 1996 on the grounds that it had no reasonable prospect of success.

5. The respondent submitted an application for expenses under Rule 76(1)(a) and (b) of the Employment Tribunals Rules of Procedure 2013, on 24 June 2020, arguing that the claimant acted unreasonably in bringing the section 44 claim and that that claim had no reasonable prospect of success.

6. The claimant opposed that application on 29 June 2020.

7. Parties indicated that they were agreeable to the Tribunal determining this application by written submissions alone, without the requirement for a hearing.

8. The Tribunal will therefore address the application and submissions made in support of it; the objections by the claimant and submissions made in response; and then set out its decision.

The Application

9. The basis for the application was set out under Rule 76(1)(a) and (b) of the Tribunals Rules of Procedure 2013. The respondent submitted that the claimant made the section 44 claim against the respondent alone with claims of constructive unfair dismissal and wrongful dismissal.

10. At a Preliminary Hearing for case management, on 21 April 2020, it was put to the claimant that the section 44 and wrongful dismissal claims had no reasonable prospect of success, and that she could continue to make her health and safety concerns plain as part of her constructive dismissal claim. She accepted that the wrongful dismissal claim should be withdrawn, and it was thereby dismissed. The Employment Judge recommended that the claimant then seek legal advice with regard to the section 44 claim.

11. The respondent narrated that despite these concerns being raised with her, the claimant persisted with her section 44 claim, and therefore they presented a strike-out application in relation to that claim to the Tribunal. A

hearing took place on 9 June 2020, following which the Tribunal issued a Judgment striking out the section 44 claim, on the grounds that it had no reasonable prospect of success.

12. The respondent's basis for the application under Rule 76(1)(a) was that the claimant was informed on a number of occasions that the section 44 had no reasonable prospect of success, and in particular at the PH on 21 April and in a letter from the respondent's solicitors on 15 May 2020. On each occasion, they submit, the claimant was advised that she could continue with her constructive dismissal claim, and raise the health and safety concerns as part of that claim. It was pointed out that in paragraph 58, the Tribunal Judgment observed that in reality the basis of her complaint against the respondent is that she was placed in a position where she felt that she had no alternative but to resign. The respondent submitted that this point was made repeatedly to the claimant prior to the PH.

13. The respondent therefore argued that the claimant's failure to withdraw the section 44 claim was unreasonable and that they were forced to incur tmie and expense as a result of this unreasonable refusal.

14. The basis for the respondent's application under Rule 76(1)(b) was that the claimant's claim under section 44 was misconceived. She was unable to establish that she was subjected to a detriment nor that she fell within one of the protected grounds as provided for by section 44. They pointed to the Judgment of the Tribunal in which it found that the strike-out application was "well founded".

15. The respondent therefore sought an award of expenses against the claimant in the sum of £5,121.20 plus VAT, set out in a schedule attached to the application.

The Objections

16. The claimant submitted that she had taken the Employment Judge's advice and spoken to Alun Thomas of Anderson Strathern. She said that based on the documents he reviewed and on their conversation, he had advised her

that "my claim was not unstateable, therefore there was a stateable claim. Had he advised otherwise, I would have withdrawn my claim on his advice."

17. She went on to say that the respondent's solicitors had advised her, as she would expect, that her claim had no reasonable prospects of success. She said she felt uncomfortable about being "bullied" into withdrawing her claim. Having received an unbiased opinion she felt it was appropriate to allow an Employment Judge to consider the question.

18. She pointed out that if the respondent had not chosen to submit an application for strike-out of the section 44 claim, they would not have incurred the expense of a separate PH, as that could have been considered as part of the merits hearing. She argued that it would be unfair for her to have to pay for a decision that was a result of the respondent's actions, not hers.

19. She submitted that the level of expenses sought appeared to be extraordinarily high, in any event.

Discussion and Decision

1. Rule 76(1) of the Employment Tribunals Rules of Procedure 2013 provides:

"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…"

20. The respondent's primary argument under Rule 76(1)(a) is that the claimant knew, or should have known, that pursuing her section 44 claim was bound to fail, particularly after the warnings given by them and the Tribunal to her.

21. The Note following Preliminary Hearing issued by Employment Judge Cowen dated 23 April 2020 is pertinent. At paragraph 8 of the Note, it is recorded that:

"The Tribunal reminded the Claimant that she should attempt to obtain legal advice in order to assist her to deal with the application [for strike-out] and that the Tribunal were not permitted to issue her with legal advice."

22. In addition, the Note reminds the claimant, at paragraph 10, that regardless of the outcome of the strike-out application, she could continue to pursue her claim for constructive unfair dismissal, including an assertion that a breach of duty by the respondent in relation to the claimant's own health and safety had occurred under the heading of a breach of trust and confidence.

23. It is useful to refer to the letter by the respondent's solicitors to the claimant dated 15 May 2020, to which the respondent has already adverted, in order to place this matter into context. The purpose of the letter was said to be to explain why the claimant's section 44 claim had no reasonable prospect of success, and to give her fair notice that, *"should you not withdraw your s44 claim before further work and expense is incurred in preparation for the hearing on 9 June, an application for recovery of the Respondent's legal expenses may be made against you."*

24. What followed was a detailed analysis of the claimant's section 44 claim, and a number of assertions that the claimant could not rely upon any of the grounds set out in the section.

25. The respondent then advised the claimant that both the claim itself and the documents which she had presented in support demonstrated clearly that her claim had no reasonable prospect of success, and warned her that if she persisted with the claim, she would face an application for strike-out as well as for expenses incurred in making such an application.

26. They repeated the suggestion made by the Employment Judge that the claimant should seek further advice on this matter, and observed that "This

is a technical part of the ERA and we do understand the challenge for party litigants."

27. Expenses will only be awarded against a party who has been unsuccessful before the Tribunal in circumstances where it can be demonstrated that they have acted unreasonably, under Rule 76(1)(a), or have brought a claim which had no reasonable prospect of success, under Rule 76(1)(b).

28. Given that the two issues appear to be closely related, it is appropriate to deal with them together.

29. The respondent argues that the claimant acted unreasonably in the face of the warnings which had been given to her by them in correspondence on 15 May, and in light of the discussion which had taken place before Employment Judge Cowen. Essentially, their position is that they warned her that the claim had no reasonable prospect of success, and therefore that continuing with the claim, notwithstanding the clear explanations given to her, was unreasonable conduct, causing the respondent to incur unnecessary expense.

30. The claimant's argument is two-fold, as I read it: firstly, that, having been encouraged to seek advice both by the Tribunal and by the respondent, she did so, and was given advice by Alun Thomas of Messrs Anderson Strathern that the case was not unstateable, which justified her placing the matter before the Tribunal to decide; and secondly, that the advice she received from the respondent's solicitor was not unbiased, and therefore she took it as a threat rather than advice.

31. It is not, at this stage, clear to the Tribunal precisely what advice the claimant received from Mr Thomas, who is known to the Tribunal to be an experienced and expert employment lawyer, but the claimant has said that he advised her that the claim was not unstateable. It may be said that such a statement, if made, is notable for its lack of conviction, but it is entirely understandable that the claimant would read it as meaning that it was worth proceeding with the claim. The difficulty for the Tribunal is that it is not known whether that statement was accompanied with any further advice,

and therefore does not take the matter much further than to say that the claimant, when she did, quite correctly, seek advice, that advice did not prove sufficient to deter her from continuing with this claim.

32. As to the warning letter issued by the respondent, which was comprehensive in its terms, it is important to recognise that this amounts to a common and understandable act on behalf of a respondent to seek to persuade a claimant to drop her claim, with a view to saving money for their client. The claimant is right, however; this does not represent impartial advice, but, while it may be an accurate representation of the law, an litigation tactic with a view to heading the claim off at an early stage. That the claimant did not adopt the advice within the letter may be very frustrating for a respondent, but in my judgment, it is understandable that she viewed the letter with a degree of reserve in light of the state of the proceedings at that time.

33. It is plain that the respondent's letter did contain an accurate statement of the law, and was reflected in the Tribunal's Judgment. At that time, however, it was not unreasonable for the claimant, in my judgment, to wish to continue with her claim in order to have it tested before the Tribunal. She could not anticipate the outcome of the strike-out application, but she says that she believed that the advice she received meant that she had a stateable claim, and that had the advice not encouraged her to believe that, she would have withdrawn it.

34. In my judgment, it was not unreasonable for the claimant to persist with her claim in light of what she knew at the time. She had not been given legal advice from the adviser she consulted that her claim was without any reasonable prospect of success, and accordingly she considered herself justified, not unreasonably, in persisting to defend the strike-out application.

35. This is associated with the second part of the application, in which it is said that the claim had no reasonable prospect of success. It is quite clear that in the context of the strike-out application, and having heard submissions from both parties, the Tribunal concluded that it had no reasonable prospect

of success, and accordingly in one sense the respondent is right. However, in order to make an order that the claimant should be held accountable for the expense incurred by the respondent in advancing the strike-out application, it is my judgment that an award should only be made where the Tribunal considers it in the interests of justice to do so. In this case, as the respondent has pointed out, this claim falls within a very technical part of the Employment Rights Act 1996. The Tribunal's Judgment took some time to examine the claim and to explain the reasons behind the decision that the claim had no reasonable prospect of success.

36. In my judgment, it would not be in the interests of justice to grant the respondent's application. In order to find that the claim was misconceived and that expenses should be awarded on that basis, it would be necessary to find that the claim had no reasonable prospect of success at the time of conception or during the course of their currency (**Hosie v North Ayrshire Leisure Ltd EAT 0013/003**). I am persuaded that it is not appropriate to exercise the Tribunal's discretion to award expenses against the claimant in this case notwithstanding that the Tribunal made a finding that the claim had no reasonable prospect of success: that finding was made after a careful and lengthy examination of the matter following arguments by both parties, before the Tribunal. It is also a relevant factor in my decision that the claimant is an unrepresented party who was in possession of advice tending to suggest that the claim was not doomed to fail, even though it subsequently did.

37. Accordingly, it is my judgment that the respondent's application for expenses against the claimant should be refused for these reasons.

Employment Judge: Murdo Macleod
Date of Judgment: 15 October 2020
Entered in register: 16 October 2020
and copied to parties