EMPLOYMENT TRIBUNALS (SCOTLAND)

Cases Nos: 4123712/2018 and 4100596/2020 (V)

Held remotely by means of the Cloud Video Platform on 26 July 2021

Employment Judge: W A Meiklejohn
Tribunal Member: Ms N Elliot
Tribunal Member: Mr A Grant

Miss M Craig	**Claimant**
Glasgow City Council	**Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the respondent's application for a costs order under Rule 76 of the Employment Tribunal Rules of Procedure 2013 is refused.

REASONS

1. We held a Judge and Members meeting by means of the Cloud Video Platform on 26 July 2021 to consider the respondent's application for a costs (expenses) order under Rule 76 of the Employment Tribunals Rules of Procedure 2013.

Background

2. Case no 4123712/2018 came before us for a final hearing on 10, 11, 12, 13 and 16 March 2020. As explained in our Judgment, the hearing required to be adjourned on 16 March 2020 and, because of the coronavirus pandemic, did not resume until December 2020. In the meantime the claimant submitted a second claim (4100596/2020) which was combined with her earlier claim by an order dated 6 October 2020. The combined cases came before us for a continued hearing on 1, 2, 3, 4, 7, 8, 9, 10, 11 and 23 December 2020.

3. In a reserved Judgment dated 11 January 2021 and sent to parties on 25 January 2021 we decided that the claimant's claims of sex discrimination and victimisation did not succeed and we dismissed those claims.

Applicable rules

4. Rule 74 (**Definitions**) of the Employment Tribunal Rules of Procedure 2013 provides, so far as relevant, as follows –

> "*(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.*
>
> *(2) "Legally represented" means having the assistance of a person (including where that person is the receiving party's employer) who –*
>
> *….(b) is an advocate or solicitor in Scotland…."*

5. Rule 75 (**Costs orders and preparation time orders**) provides, so far as relevant, as follows –

> "*(1) A costs order is an order that a party ("the paying party") make a payment to –*

(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented…."

6. Rule 76 (**When a costs order or a preparation time order may or shall be made**) provides, so far as relevant, as follows –

"*(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 has no reasonable prospect of success…."

7. Rule 77 (**Procedure**) provides as follows –

"*A party may apply for a costs order or a preparation time 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. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application."*

8. Rule 78 (**The amount of a costs order**) provides, so far as relevant, as follows –

"(1) A costs order may –

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party.

(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined….in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of

Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles…."

Respondent's application

9. By their solicitor's letter dated 9 February 2021 (the "application") the respondent applied for an award of expenses against the claimant. The application referred to a warning letter sent by the respondent's solicitor to the claimant on 1 June 2020 (the "warning letter"). The application was ambiguous as to whether the respondent was seeking expenses from 1 July 2020 or 1 August 2020 (although this was unlikely to be of much significance as the bulk of the expenses incurred by the respondent following the warning letter would have been incurred after 1 August 2020).

10. The warning letter referred to the list of issues in case no 4123712/2018 and identified problems which the claimant was said to face, on the presumption that her evidence would not be contradicted, in relation to those issues. We deal with these below. They broadly fall into three categories namely (a) the substance of the allegation occurred before any protected act was done, (b) the alleged treatment did not amount to a detriment and (c) the claimant had not shown any causal connection between the protected act and the imposition of any detriment.

11. In the application the respondent argued that the content of the warning letter had been substantively endorsed by our Judgment. The claimant's response to the warning letter was quoted and it was stated by the respondent that it was "*not obvious that the Claimant gave this warning the attention it deserved".* In her response the claimant said "*the pursuit of justice is of greater concern than the possible financial detriment to which you refer".*

12. The basis of the application was that the claimant (i) conducted the proceedings in a way which was vexatious and/or otherwise unreasonable in terms of Rule 76(1)(a) and (ii) knew or ought to have known that her claims had no reasonable prospect of success in terms of Rule 76(1)(b). The

application was opposed by the claimant. The parties agreed that the application should be determined without a hearing.

Our approach

13. We noted that in ***Scott v Russell 2013 EWCA Civ 1432*** (a case concerning costs awarded by an Employment Tribunal) the Court of Appeal in England had cited with approval the definition of "vexatious" given by Lord Bingham in ***Attorney General v Barker 2000 1 FLR 759, QBD (Div Ct)*** –

> "*the hallmark of a vexatious proceeding is….that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process".*

14. In relation to what amounted to unreasonable conduct, we noted what the Court of Appeal said in ***Yerrakalva v Barnsley Metropolitan Borough Council and another 2012 ICR 420*** –

> *"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had."*

15. In ***AQ Ltd v Holden 2012 IRLR 648*** the Employment Appeal Tribunal said this –

> "*A tribunal cannot and should not judge a litigant in person by the standards of a professional representative….lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. Tribunals must bear this is in mind…."*

16. In ***Oko-Jaja v London Borough of Lewisham UKEAT 417/00*** the Employment Appeal Tribunal said this –

> "*The complaint which this Appellant pursued was a complaint of victimisation. It is well recognised in our courts and tribunals that it is often difficult in such cases for a complainant to be able to provide direct evidence of victimisation. An applicant will often rely upon being able to show, through cross-examination of the relevant witnesses, that the Respondent's stated reasons for the relevant treatment were not in fact the true reasons for that treatment."*

17. We reminded ourselves that, in dealing with an application for expenses, we had to apply a two-stage test. Firstly, we required to consider if the ground upon which expenses were sought was made out. Secondly, if it was, we had to exercise a discretion as to whether or not to actually award expenses.

18. We also reminded ourselves of what Lord Hope of Craighead said about *"detriment"* in ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11*** –

> "*Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?"*

This illustrates that the threshold for *"detriment"* is a low one.

Discussion

19. We proceeded to look at the matters referred to in the warning letter. We dealt with this by looking at the relevant issue and the respondent's assertion of the problem with the claim.

1.1 Was the claimant treated less favourably than her colleagues, John Beaton and Kenneth Prentice, were or would have been when asked to visit the property in Bearsden Road, Glasgow on 10 October 2017?

20. The problem was said to be that the claimant had led no evidence that Mr Prescott *"previously allowed"* her comparators to be accompanied on similar visits and that, as the claimant had no pleadings to support this allegation she could not make up the deficiency in cross-examination.

21. Irrespective of the claimant's pleadings, we noted that the list of issues was agreed and included the issue set out above. It was not correct to say that the claimant had led no evidence about this. Mr Beaton's witness statement referred to a visit to a property in Lenzie Way undertaken jointly with Mr Prescott. This was also referenced in Mr Prescott's witness statement which confirmed the date of the visit as 12 September 2017.

22. We considered that the claimant had established an evidential basis for her assertion that she had been treated less favourably than a male comparator. The respondent's criticism was not well-founded.

1.2 If so, was the claimant's sex the reason or part of the reason for that treatment?

23. The problem was said to be that this allegation could not be pursued without a male comparator. In our view there was no problem because the claimant had identified Mr Beaton as one of her comparators.

3 Was the claimant given an "additional workload" in October 2017 and if so, did that amount to a detriment?

24. The problem was said to be that as the substance of this allegation occurred before any protected act was done, this claim must fail. From the claimant's evidence we established that the "*additional workload",* being the allocation of Ward 23 to the claimant and Mr Prentice, occurred prior to the events about which the claimant was complaining. Accordingly the claimant did face the problem identified by the respondent.

4 Did Stephen Sawers fail properly to investigate the claimant's complaint and/or did he unreasonably decide to reject it, and if so did that amount to a detriment?

25. The problem was said to be that the claimant in her evidence had not been able to show any more than the alleged detriment chronologically followed the doing of the protected acts or at least one of them. In the absence of a causal connection being shown between the protected act and the imposition of any detriment, the claim must fail. As this argument arises more than once we will refer to it as the *"causation problem".*

26. Our view of this was that the claimant was entitled to cross-examine Mr Sawers with a view to establishing a link between his treatment of her and a protected act. As we came to a similar conclusion on other matters we will refer to it as the *"cross-examination point".*

5 Did the respondent knowingly permit James Prescott to remain the claimant's leave approver between May and December 2018 and, if so, did that amount to a detriment?

27. The problem was said to be that, even by the wide definition given to the word, the treatment alleged did not amount to a detriment. Our view of this was that the claimant had given evidence that she did consider this to have been a detriment. Based on ***Shamoon***, it was capable of being a detriment but probably only if we found that the respondent had *"knowingly"* allowed Mr Prescott to remain the claimant's leave approver. The claimant was entitled to cross-examine Mrs Laurie and Mr Prescott about this. We did not consider the respondent's criticism to be well-founded.

6 Did the respondent knowingly permit James Prescott to act as the claimant's team leader on 20 (should read 24) December 2018 and, if so, did that amount to a detriment?

28. The problem was expressed in the same terms as for the preceding point. Our view of it was also the same, ie for the same reason (substituting "*team leader"* for "*leave approver"*), the respondent's criticism was not well-founded.

7 Did James Prescott confront the claimant on the stairwell on 10 January 2019 and if so, did that amount to a detriment?

29. The problem was the causation problem. Our view of it was the cross-examination point. Accordingly we did not consider the respondent's criticism to be well-founded.

8 Did the relocation of the claimant's geographical area amount to a detriment?

30. The problem was the causation problem. Our view of it was the cross-examination point. Accordingly we did not consider the respondent's criticism to be well-founded.

9 Did the referral of the claimant to Occupational Health on 19 March 2019 amount to a detriment?

31. The problem was expressed in the same terms as for points 5 and 6 above. Our view of this was that the evidence showed that the claimant had been referred to Occupational Health while Mr Prentice, whose absence commenced at the same time, had not. The referral was capable of being argued to be a detriment. The claimant was entitled to cross-examine the respondent's witnesses about this. The respondent's criticism was not well-founded.

10.1 ….the commencement and pursuit of disciplinary action against (the claimant) in October 2017.

32. The problem was said to be that as the substance of this allegation occurred before any protected act was done this claim must fail. We considered that this criticism was well-founded insofar as it related to the commencement of disciplinary action but not insofar as it related to the pursuit of that action.

33. The decision to take disciplinary action against the claimant was taken on or around 18 October 2017. Ms Dyer's investigation meeting with the claimant (during which the claimant did what we found to be her first protected act) took place on 7 November 2017. The disciplinary hearing took place on 30 November 2017. It followed that nothing which occurred prior to 7 November 2017 could amount to detriment because of a protected act. Conversely,

anything which occurred after 7 November 2017 was capable of being a detriment because of a protected act. Accordingly we found that the respondent's criticism was well-founded in part only.

10.2 The rejection of her application for the post of Environmental Health Officer.

34. The problem was said to be the causation problem. Our view of it was the cross-examination point. Accordingly we did not consider the respondent's criticism to be well-founded.

35. Having looked at the matters referred to in the warning letter, we went on to consider whether (i) there had been vexatious or unreasonable conduct on the part of the claimant for the purposes of Rule 76(1)(a) and (ii) the claim had no reasonable prospect of success for the purposes of Rule 76(1)(b).

Rule 76(1)(a)

36. We decided that the claimant had not acted vexatiously in her conduct of the proceedings. The threshold for vexatious conduct, as set out in paragraph 13 above, had not been met. It could not be said that the claim had little or no basis in law. It was accepted by the respondent that the claimant had done protected acts. She had alleged detriments. She contended that the detriments were because of her protected acts. These are the key elements of section 27 (**Victimisation**) of the Equality Act 2010 ("EqA").

37. If any part of the claim succeeded, the claimant would be entitled to compensation for injury to feelings. We did not believe that it could be said that the effect of the proceedings was to subject the respondent to inconvenience, harassment and expense which was out of proportion to any gain likely to accrue to the claimant.

38. The pursuit by the claimant of her claim was not in our view a use of the Employment Tribunal process for a purpose which was significantly different from the ordinary and proper use of that process. The Tribunal exists to deal with, amongst other things, complaints brought under EqA. The claimant

believed she had a valid claim and the Employment Tribunal was the only forum in which she could litigate that claim. There was no abuse of the Tribunal process.

39. We next considered whether the claimant had acted unreasonably in the conduct of the proceedings. As identified in the warning letter, there were aspects of the claim which were bound to fail. These were the "*additional workload"* aspect and the elements of the disciplinary process which pre-dated the first protected act. Our view was that the rest of the claim was arguable and could only be decided by us once we had heard all of the evidence. We did not believe the claimant had acted unreasonably in pursuing matters to their conclusion.

40. Another factor in our consideration of whether the claimant had acted unreasonably was the existence of the second claim (4100596/2020). Once that claim had been combined with the original claim (4123712/2018) it was inevitable that the hearing which had been adjourned in March 2020 would require to continue. The warning letter pre-dated the combining of the claims. We did not understand the respondent to be suggesting that there had been unreasonable conduct by the claimant in relation to the second claim.

Rule 76(1)(b)

41. We moved on to consider whether the claim could be said to have no reasonable prospect of success. That was the position in relation to the two aspects referred to in paragraph 39 above. However, it was not the position in relation to the rest of the claim.

42. It seemed to us that some aspects of the claim had a better prospect of success than others. Looking at the list of issues, the parts of the claim which related to Mr Sawers' investigation and the omission to inform the claimant of the change in office location were stronger than, for example, Mr Prescott remaining as the claimant's leave approver and the referral to Occupational Health. In saying that, we recognise that the compliant relating to the change in office location was brought in by the claimant's second claim

(4100596/2020) and was not therefore part of the claim at the time the warning letter was sent.

43. We noted that the respondent had chosen to issue the warning letter when other options were available. There could have been an application to strike out the claim (or part of it) under Rule 37(1)(a). There could have been an application for a deposit order (or orders) under Rule 39 if the respondent believed that the claim (or part of it) had little reasonable prospect of success.

44. Looking at matters in the round, we came to the view that the only conduct of the claimant which could be regarded as unreasonable was her pursuit of the two aspects of her claim referred to in paragraph 39 above ("*additional workload"* and the elements of the disciplinary process which pre-dated the first protected act). These were also the aspects of her claim which had no prospect of success.

45. We considered what effect that conduct had. We found that it had very little effect. The continued hearing in December 2020 would still have been required to deal with the other aspects of the original claim, and with the second claim. The further cross-examination of Mr Prentice and the evidence of Mrs Ham and Dr Meechan would still have been required to deal with the allegation of witness intimidation. If the claimant had withdrawn the two aspects of her claim which could not succeed, it would not have made any material difference to the length of the continued hearing.

Disposal

46. For the reasons set out above, our decision is that the respondent's application for a costs (expenses) order under Rule 76 should be refused.

Employment Judge: Sandy Meiklejohn
Date of Judgment: 30 July 2021
Entered in register: 20 August 2021
and copied to parties