EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113492/2019

Held 19 May 2021 by way of written submissions

Employment Judge: R Gall

Mr J Coleman	**Claimant** **Representing himself**
Hi Audio Visual Limited	**Respondent** **Represented by:** **Ms C Greig - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the application for expenses made by the respondents in terms of Rule 76 of the Employment Tribunals (Rules of Constitution & Procedure) Regulations 2013 is refused.

REASONS

1. The hearing in this case took place in person on 26 February and 6 October 2020. The evidence was not concluded in the day initially set down for hearing in February 2020. A further day of hearing was set down for 23 March 2020. The coronavirus pandemic meant however that it was not practicable to proceed with that continued hearing. The second day of hearing took place on 6 October 2020. The case concluded that day. Judgment was issued, being dated 12 October and sent to parties on 26 October 2020. The claim was unsuccessful.

2. The respondents made an application for expenses. This was opposed by the claimant. Both parties agreed that determination of the application would be after consideration of written submissions. Both parties were given time to make their written submissions and made written submissions. Each was given an opportunity to comment on the submissions of the other.

3. The case related to commission said by the claimant to be due to him by the respondents. He maintained that there was an initial "lead in" period of 6 months, during which a threshold level of sales was not in place as far as he was concerned. This meant that he was due commission on any sales made by him in that time. The respondents said, in contrast, that there was such a threshold in place from the first day of the claimant's employment with them. If the threshold applied, it meant that the claim would be unsuccessful. If it was not in place, then the claim for commission was well-founded, the amount due then requiring to be determined.

4. In support of their respective positions in the claim, the parties each pointed to events and emails. The respondents also referred to a written employment contract sent to the claimant. The claimant responded by highlighting that the contract was unsigned. He referred to a payment of £1,400 which had been paid to him and which he said was commission. The respondents said this was a discretionary payment and did not reflect what the claimant said would have been due to him had the commission arrangement he alleged to have been applicable been in place in reality.

5. The background to the employment of the claimant by the respondents is narrated in the Judgment of the Employment Tribunal. There had been a friendship between the claimant and the main figure within the respondents, Mr Callen. There had been a previous working arrangement between the claimant and the respondents. The claimant had worked as a consultant with the respondents at that point.

6. The claimant was represented when the claim was presented on 26 November 2019. He was no longer represented by 16 January 2020. He conducted the hearing himself.

Application for Expenses and Opposition to that.

Respondents' submissions in support of the application.

7. By email of 16 November 2020 the respondents made their application for expenses. They submitted that expenses should be awarded by the Employment Tribunal as the claim had had no reasonable prospect of success. In addition, they submitted that expenses should be awarded as the claimant had acted unreasonably in bringing the proceedings.

8. In support of their application the respondents referred to the history to the claim, their position as they had set it out to the claimant and also to the Judgment in the case.

9. The respondents narrated that they had intimated to the claimant that his case was based on an alleged contractual obligation. That obligation was not supported by the written contract, however. They informed the claimant's then representative of this as being their position. This was done on 16 December 2019 following upon the claim being presented on 26 November 2019. They suggested that the claim be withdrawn to avoid legal costs for the respondents. The claim was not withdrawn.

10. The claimant began acting on his own behalf. The respondents sent him a costs warning on 16 January 2020. In the email to the claimant they had referred to his position of basing his claim on an alleged agreement that targets and commission began to operate only from April 2019. That date was 6 months after his employment with the respondents had commenced. The respondents referred to the draft contract of employment sent to the claimant on 2 occasions, on 15 August 2018 and 28 October 2018. That contract referred to rolling targets applicable from commencement of the claimant's employment on 1 October 2018, they said.

11. On that basis the respondents referred to the Rules of the Employment Tribunal as detailed in the Employment Tribunal (Rules of Constitution & Procedure) Regulations 2013 ("the Rules"). They said to the claimant that if he continued with his claim they would seek an order in terms of Rule 76 (1)

(a) and (b). This was on the basis that the claim had no reasonable prospects of success and that it was unreasonable of the claimant to bring the claim or to continue with it.

12. In their application for expenses, the respondents said that they had, therefore, always maintained that the written contract specified the arrangement between the parties in relation to commission. The claimant had not taken issue with the terms of the written contract at the time it was sent to him. Payment of £1,400 was a discretionary payment, not a payment of commission in terms of any contractual arrangement. They then referred to the Judgment.

13. The Judgment had found that the arrangement between the parties in relation to commission was as set out in the contract sent to the claimant, it being of relevance that there had been no challenge to those terms at the time. The Judgment also confirmed that the payment in the sum of £1,400 was a discretionary payment. The claimant's evidence on those matters had been rejected.

14. In those circumstances the application should be granted, the respondents submitted.

Claimant's submissions in opposition to the application.

15. On 21 December 2020 the claimant sent an email to the Employment Tribunal setting out his opposition to the application made by the respondents.

16. He said that his claim was based on what he said had been a verbal agreement between himself and the respondents to defer application of targets in calculation of commission for the first 6 months of his employment. No written contract of employment had been in place. He had, he said, refused to sign a contract. In addition, he had had a long friendship with Mr Callen. He had previously worked successfully with him. Those elements meant that, in his mind, proceeding on the basis of a verbal agreement was not a cause for concern.

17. The claimant said he always felt he had a valid and strong case given his refusal to sign the contract, his longstanding history with the respondents and the payslip which was issued at time of the payment to him of £1,400. That payslip referred to the amount as being commission.

18. He pointed to the Judgment which had not found that he was, as the respondents had argued, in a dire financial situation at time of the payment to him of £1,400. He had in fact been found by the Employment Tribunal to have been in a strong financial position at that time.

19. In summary, the claimant said he had sought to obtain money he regarded as being due to him on the basis of a verbal agreement he viewed as being reached between himself and the respondents. He had not taken the decision to proceed with the claim lightly. He disagreed with the assertion that the case had no reasonable prospects of success.

Applicable Law.

20. The terms of Rule 76 state, insofar as relevant to this application:-

> *"**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;*

21. In Scotland all references to "costs" are to read as references to expenses. That is in terms of Rule 74.

22. In its decision as to whether to make an expenses award, an Employment Tribunal should be conscious that such an award is the exception rather than the rule. This is confirmed in ***Yerrakalva v Barnsley Metropolitan Council and another ("Yerrakalva")*** 2012 ICR 420.

23. The case of ***Salinas v Bear Stearns International Holdings Inc and another*** 2005 ICR 1117 saw Mr Justice Burton in his then role as President of the Employment Appeal Tribunal refer to the high hurdle which required to be cleared in terms of the provisions of the Rules if an award of expenses was to be made. The Rules in place at that time were not the 2013 Rules They contained, however, contained provisions which were to the same effect.

24. Any award of expenses is compensatory rather than punitive.

25. Each case is different, one to the other. Previous cases are of assistance in construing the Rules. The Employment Tribunal must apply its mind to the facts and circumstances supporting/arguing against any award of expenses as those exist in the case before it in which such an application is made. Whilst previous cases are of help, it is the terms of the Rules which must be applied.

26. In relation to the grounds on which the application was made, the Employment Tribunal has to determine whether the conduct of the claimant in bringing the proceedings involved him acting unreasonably. (the Rule 76 (1) (a) ground). It must also determine whether the claim had no reasonable prospect of success (the Rule 76 (1) (b) ground). That is stage one.

27. If it is persuaded that either of those tests have been met, the Employment Tribunal then must go on to decide in stage two, if it is appropriate that it exercises its discretion and makes an award of expenses in the case.

28. The decision to be made by the Employment Tribunal in such an application therefore involves the exercise of discretion. Previous cases have indicated factors which are likely to be in the mind of the Employment Tribunal in carrying out that exercise of discretion.

29. Thus, the Employment Tribunal may have regard to whether the person against whom such an award is sought had legal representation. An unrepresented party should be judged less harshly than a professionally represented party. The case of ***AQ Ltd v Holden*** 2012 IRLR 648 confirms that. This is on the basis that an unrepresented party is more likely to lack the objectivity and knowledge of law and practice which a legally qualified

representative has, and would therefore bring to assessment of the position. An unrepresented party is not however protected from there being an award of expenses against him/her. Their position as being unrepresented is, however, something to which the Employment Tribunal may properly have regard.

30. In assessing whether conduct (in this case in bringing proceedings) was unreasonable, unreasonable is to be given its natural meaning. The whole picture must be considered. Factors such as the nature, gravity and effect of the conduct are relevantly considered. The cases of ***McPherson v BNP Paribas (London Branch)*** 2004 ICR 420 and ***Yerrakalva*** are helpful in that regard, together with ***Khan v Heywood and Middleton Primary Care Trust*** 2006 ICR 543.

31. In relation to whether the claim had no reasonable prospects of success, it is not enough to resist an award being made on that ground that a claimant had a genuine belief that he/she was right. Although the Rule in place at the time of decision in the case referred to a claim being misconceived, the case of ***Hamilton-Jones v Black*** EAT 0047/04 is of relevance notwithstanding the alteration in terms of the Rules to the grounds of a potential award in this area.

32. The fact however that a party is unrepresented remains a relevant factor for the Employment Tribunal potentially to take into account in exercising its discretion in its application of the Rules to the matter before it.

33. It is also of relevance that a "warning letter" was sent to the party against whom an application for expenses is subsequently made. Such a letter places that party "on notice".

34. In terms of Rule 84 an Employment Tribunal may have regard to the ability of the paying party to pay an award of expenses in reaching its decision as to whether to make such an award or, if it does make such an award, as to the amount of any such award. In this case the Employment Tribunal had no information before it as to the claimant's ability to pay.

Discussion and Decision

35. I regret it has taken until now to be able to consider and determine this application. To an extent this has been caused by obtaining clarification that both parties were content to proceed by way of written submissions. The opportunity was then given to each party to comment on the submission of the other. Pressure of Employment Tribunal business and difficulties caused by the pandemic have also contributed to the delay. Apologies are tendered for the passage of time from the date of the application being made until allocation of time was achieved to enable the matter to be decided.

36. I can understand the respondents' position and why it is that the application was made. They did not regard the case as having merit. They had flagged up to the claimant the contract which had been sent to him, the terms of which supported the respondents' contention that there was no commission payment due to the claimant. They had put him on notice of their intention to make this application in the event of success.

37. The claim did not succeed. The basis of successful resistance by the respondents, as found by the Employment Tribunal, was largely as the respondents had mapped out in their costs warning letter to the claimant. The written contract had been sent to the claimant on 2 occasions without comment from him in reply. He had joined the respondents as an employee and had then worked with the respondents for many months after the contract was sent to him. The terms of the contract provided for a threshold target from day 1. The payment of £1,400 was made by the respondents without there being any legal obligation to make that payment, the Employment Tribunal found in its Judgment. Again that reflected the respondents' position as detailed to the claimant's representative in December 2019 and repeated directly to the claimant in January 2020.

38. Looking to the application made, I have to assess whether it was unreasonable for the claimant to commence his claim and whether the claim had no reasonable prospect of success. Those are the grounds relied upon

by the respondents as forming the basis on which they urge me to award expenses to them.

39. At time of the claim being prepared and also at the time when the respondents first made their approach to flag up the potential application for an award of expenses, the claimant was represented.

40. Dealing firstly with what is said to be the unreasonableness of bringing the proceedings, the claimant's position was that he had not signed the contract. He said he had not seen and had possibly deleted the email from Mr Callen in August of 2019 which sent a copy of the contract to him. This evidence was not accepted at the hearing. The claimant said he had not received a hard copy of the contract on starting with the respondents in October 2019. Again this evidence was not accepted at the hearing. The claimant said he did receive a copy of the contract by email on 28 October 2019. He had, he said, at that time challenged the provision in the contract which dealt with commission and which stipulated the requirement to meet the threshold target from the start of employment. That challenge had been verbal. This evidence was also not accepted at the hearing. In his evidence, the claimant relied on what he said had been agreed with his then, but now no longer, friend Mr Callen. Having heard the competing evidence, I concluded that there was no agreement to the effect contended for by the claimant between him and Mr Callen in relation to the basis of commission.

41. It is unclear to me from the respondents' submission whether a copy of the written contract was sent to the claimant's then solicitors in December 2019. I appreciate that the respondents' solicitor refers to a telephone conversation as being the means by which that communication took place. It is not said that there was a follow-up by a copy of the contract (albeit unsigned) being sent to the claimant's then solicitor.

42. There is no reference in the email sent directly to the claimant in January 2020 to there being a copy of the contract being sent to him at that time.

43. I mention all this background to "set the scene" in effect for what the position was when the claimant's solicitor received the telephone call in December

2019, giving notice of the intention to seek expenses if the claim was not withdrawn.

44. It is, in my view, very difficult to say that a decision to bring proceedings was an unreasonable act by the claimant. He had his view of what had been discussed and agreed between Mr Callen and himself. That was that the contract was unsigned and that, when received by him, had been disputed in relation to what it provided as to the time from which the threshold for commission would be applicable. He said that the verbal agreement between him and Mr Callen was that for the first 6 months of employment there was no threshold before commission was payable.

45. In assessing the position in relation to the unreasonableness of bringing of proceedings, I keep in mind that the claimant had legal advice at this stage. The advisor had conflicting accounts of events, one from his client and one from the respondents' solicitor. It appears she/he did not have the benefit of sight of the contract. Even, however, had that been with the advisor, it was unsigned and, according to the claimant, his/her client, had not been received by him until late October 2019. The claimant's position was that he had, at that point, taken issue with the terms of the document. The claimant also said that there was a verbal agreement between himself and Mr Callen as mentioned above.

46. Although the conflict in the evidence on those points was resolved at the hearing in favour of the respondents, I do not see that the claimant's conduct in bringing the claim was unreasonable. There was a basis for the claim, even if it was found, when evidence was heard and legal principles were applied to that evidence, that the claim was unsuccessful. There was evidence to be tested in relation to what was said, if anything, between the claimant and Mr Callen as to commission and when the threshold applied, whether the proposed contract was received and what objection, if any, was taken by the claimant to its terms in relation to commission. It is now known that the claimant's version of critical events was not accepted. His claim was unsuccessful. Looking at the position when the proceedings were brought,

however, I do not see that the claimant's conduct in taking that step was unreasonable.

47. I recognise that a claimant genuinely holding the view that he was right is insufficient of itself to make bringing of proceedings reasonable, if an objective view is that it was unreasonable to bring the claim. I also recognise that the facts as found after evidence are that a contract was sent to the claimant pre employment, that a copy was given to him at the start of his employment and that a further copy was sent to him towards the end of the first month of his employment, that contract containing the provisions on commission as the respondents argued governed that matter. Given the evidence of the claimant, albeit not accepted, as to not receiving the contract on some of those occasions, as to agreement between himself and Mr Callen and as to challenges he said he made to the terms of the contract at the end of October, there were clear issues to be heard and determined. It was not argued by the respondents that the claimant was being in any way vexatious, abusive or disruptive in bringing the proceedings or in their conduct. For clarity, I did not form that view on hearing his evidence.

48. I also had to consider the decision by the claimant to continue with the claim, keeping in mind as a relevant factor the expenses warning communications to the claimant's solicitor and subsequently to the claimant himself. Was the claim one which had no reasonable prospect of success?.

49. The consistent position of the claimant was that he had not signed the contract. That was factually correct. It appears, as mentioned, the draft employment contract was not before his advisor. The claimant said he had a verbal agreement with the Mr Callen in terms of which commission would be paid for the first 6 months, without reference to a threshold target. There had been reference by the claimant in a pre-employment email, as referred to in the Judgment, to a degree of nervousness on his part as to levels of sales in the first few months as he got "up and running again".

50. I do not see that it can be said that the claim had no reasonable prospect of success. It is important to keep in mind that for an award of expenses to be

made the requirement is that the claim had **no** reasonable prospects. It is not a question of whether it looked difficult to succeed, or whether the claimant ought to have realised that he was unlikely to be successful. Even applying those tests, given the claimant's position as to the facts, I would have found it hard to conclude that the claim had no reasonable prospect of success.

51. Certainly, a careful analysis involving recognition of there being a contract, albeit not signed, but one which supported the respondents' position and which had not been objected to in writing by the claimant, would have been likely to have led to potential problems with his case being highlighted to, or appreciated by, the claimant. The claimant had his own position on evidence, however, as to the verbal exchanges between himself and Mr Callen. Those extended to the payment to him of an element of money which was in his mind properly labelled "commission". There was disputed evidence around this payment and the circumstances in which it had been made.

52. I concluded that it could not be said that the case had no reasonable prospect of success on the basis of an objective view of the claim as presented, taking into account the defence submitted. In so concluding, I had regard as part of my assessment to the expenses warnings given both to the claimant's representative and to the claimant when he was unrepresented. The warning email to the claimant did not supply a copy of the contract which had, in the respondents' accepted evidence, been sent and given to the claimant during his employment, without objection being taken by him. The warning email did not refer to the payment of £1,400 made to the claimant and seek to argue that the payment was inconsistent with the arrangement the claimant said applied.

53. Had I found that the bringing of the proceedings was an unreasonable act or concluded that the claim had no reasonable prospect of success, I would have found it hard to exercise my discretion to make an award of expenses. The claimant was ill judged in proceeding with the claim, given the impact and significance of the documentation, in particular the contract sent to him. Wiser counsel might have led him to withdraw his claim or to discuss some arrangement in settlement. There was however a basis on which he could

legitimately advance his case, especially in an unrepresented capacity, notwithstanding the objective, properly informed view which may well have been taken as to prospects of success in the case. That objective view would not have been, however in my view, that his claim had no reasonable prospect of success.

54. I understand the respondents' frustration in facing the claim and in devoting the time to preparation and appearance at Tribunal. I also understand the financial impact of legal costs to which they have been put. I keep in mind that they were successful in resisting the claim. Expenses do not however follow success in the Employment Tribunal. Awards of expenses are the exception rather than the rule as mentioned above.

55. Having carefully considered the Judgment, the application and opposition to it, and having reviewed the principles and authorities, I concluded that the application fell to be refused. I have refused it for the reasons set out above.

Employment Judge: Robert Gall
Date of Judgment: 20 May 2021
Entered in register: 25 May 2021
and copied to parties