EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108945/2021

Held 25 October 2021 by Written Submissions

Employment Judge Neilson

Mr R Kincaid	**Claimant** **In Person**
Booth Welsh Automation Limited	**Respondent** **Represented by:** **Ms Salmond,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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

REASONS

Introduction

1. This was a claim for unlawful deductions of wages under section 13 of the Employment Rights Act 1996.

2. The hearing was held by CVP on 22 June 2021 and an oral decision dismissing the application was given on the day. The respondent sought written reasons and the full judgment was issued to the parties on 30 August 2021.

3. The respondent at the same time as requesting written reasons also made an application for expenses dated 13 July 2021 under Rule 76 of the Rules. The Claimant notified the Tribunal on 13 July 2021 that he opposed the application for expense but would provide further detail once he had the full judgment. The Tribunal notified parties on 16 July 2021 that the determination of the application for expenses would be dealt with by way of written submissions and that the claimant would have 14 days following issue of the full judgment to make written representations. The respondent was also provided with an opportunity to make further written representations. No further written representations on the issue of expenses have been made by either party.

4. The Tribunal has accordingly considered the application upon the basis of the written application from the respondent dated 13 July 2021; the documents submitted in support of that application; the brief response from the claimant dated 13 July 2021 and the judgment issued by the Tribunal on 30 August 2021.

Background & Submissions

5. The claimant alleged that he had suffered an unlawful deduction from pay in respect of a period of absence from work through ill health in the period from 18 to 26 January 2021. The claimant had been absent having being

diagnosed with Covid-19. He sought payment of a sum of £828.94 (being 80% of his normal wage). The claimant alleged that he was entitled to be paid at 80% of his normal wage as the respondent should have placed him on furlough leave.

6. The decision of the Employment Tribunal was that his claim was not successful. There was no contractual right to receive furlough pay. The claimant had not been placed on furlough leave. The claimant was absent on grounds of ill health and was contractually entitled only to statutory sick pay ("SSP"). There was no agreement to pay any furlough pay or any amount beyond SSP.

7. The respondent's application for expenses is made both on the basis of Rule 76(1)(a) (unreasonable conduct) and 76(1)(b) (no reasonable prospect of success).

8. In support of the application in respect of unreasonable conduct the respondent references comments made by the claimant in his correspondence with the respondent. Specifically that he stated that he considered the Respondent to be *"unprofessional", "quite ignorant", "bullying",* and an organisation guilty of *"flouting the law"* [page 36 of Respondent's Bundle of Documents] and that the respondents actions were *"disgusting", "bullying"* and *"law breaking"* [page 38 of Respondent's Bundle of Documents] and that the HR manager was *"arrogant"* [page 43 of Respondent's Bundle of Documents.] The Tribunal notes that these comments were in correspondence pre-dating the commencement of proceedings.

9. The respondent also alleged that the claimant states in his ET1 that the respondent is a *"company who are used to bullying people"* and *"who threatens their employees with the sack"* [page 9 of Respondent's Bundle of Documents]. The respondent alleges that the claimant had been employed by the respondent for less than 3 months at that stage and that the statements made by the Claimant in his ET1 were irrelevant to his claim.

10. It is the respondent's position that the Claimant brought a hopeless claim out of spite to harass the Respondent or for some other improper motive.

11. In respect of no reasonable prospect of success the respondent states that no agreement existed between the parties (implied or otherwise) that the claimant would receive wages rather than SSP during his period of sick leave and thus it automatically flows from that that the claim could not succeed. In addition there was no challenge by the claimant at the final hearing as to the fact there was no agreement to pay wages greater than SSP. It is the respondent's position that the unlawful deduction from wages claim had no reasonable prospects of success from the outset.

12. The respondent also makes reference to the costs warning letter issued to the claimant at the same time as the ET3 was lodged – 11 May 2021. The respondent maintains that the claimant can have been in no doubt as to the position the respondent took as to the hopelessness of his claim given the costs warning letter and the terms of the ET3. In addition the claimant would appear to have taken legal advice - per the terms of his e mail of 12 May 2021 – but still persisted with his claim.

13. Although the Claimant indicated in his e mail of 13 July that he would oppose the application for expenses he has not in fact made any further written submissions despite being notified by the Tribunal on 16 July to submit his written submissions within 14 days of receiving the full written judgment. The claimant did respond by an e mail dated 8 September 2021 following receipt of the judgment but he did not address the issue of expenses.

The Law

14. 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;

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

16. 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 - *Yerrakalva v Barnsley Metropolitan Council and another ("Yerrakalva") 2012 ICR 420*.

17. 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, provisions which were to the same effect.

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

19. 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.

20. 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.

21. 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.

22. 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.

23. 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 an 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.

24. 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 10 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*.

25. In considering conduct in the context of Rule 76(1)(a) it is not appropriate to consider conduct prior to the proceedings being raised – *Davidson -v- John Calder (Publishers) Limited and Calder Educational Trust Limited 1985 IRLR 97*.

26. 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.

27. 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.

28. 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".

29. 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 & Decision

30. The Tribunal is required to consider both the Rule 76(1)(a) ground and the 76(1)(b) ground. In respect of the former the Tribunal notes that the comments made by the claimant and referenced at paragraph 8 above all pre-date the commencement of proceedings. They are not directly relevant to a consideration of unreasonable conduct – although they might be said to be some evidence of the claimant's general state of mind or approach to what later occurred. The comments made by the claimant in his ET1 (paragraph 9 above) are potentially relevant. At the hearing itself the claimant did not lead any evidence to substantiate these comments. However other than these comments there is nothing else to establish that the claimant conducted himself in an unreasonable manner. The Tribunal noted that during the actual

conduct of the hearing itself the claimant acted responsibly and conducted himself in a civil manner – there were no comments made that could be said to evidence any unreasonable conduct. In all the circumstances the Tribunal is not satisfied that there is evidence to substantiate a claim that in bringing the proceedings the claimant was motivated by spite, was seeking to harass the respondent or was otherwise bringing the claim out of some improper motive. Clearly the claimant felt strongly about the fact that he should have been paid at a higher rate of pay. Whilst that arose out a mis-understanding on his part as to the legal position the Tribunal does not consider that he was seeking to harass the respondent or that he was acting out of spite. The Tribunal accepts that the claimant genuinely believed he had been "short changed" and was seeking legal address in respect of that.

31. In respect of Rule 76(1)(b) the Tribunal does, however, consider that the claimant was advancing a claim that had no reasonable prospects of success. As set out in the Judgment there was no factual basis for the claim. The claimant was unable to point to any agreement to pay him at a rate greater than SSP when he was absent. The claimant was not able to point to any agreement to place him on furlough leave. At the hearing the claimant accepted that his contractual entitlement was to SSP only. The basis of the claimant's claim rested upon an assertion that it could not be right for employers to refuse to pay furlough as to not pay was counter to the rationale for the scheme in the first place and would not stop employees coming into work if the alternative was SSP only. There never was any real factual or legal basis for the claim. The Tribunal accepts that the claimant is not legally qualified but it does appear that at some stage he took legal advice (see his e mail of 11 May 2021). The Tribunal is also conscious of the fact that what may look certain following the hearing of the evidence is not necessarily how matters looked at the outset. However even allowing for all of that the position remains that this was a claim that had no reasonable prospect of success from the first moment it was brought.

32. Having determined that there was no reasonable prospect of success the Tribunal must go on then to exercise its discretion to determine whether or not an award of expenses should be made in all the circumstances.

33. The Tribunal recognises that respondent was put to cost and that it set out its position to the claimant quite clearly in both the ET3 and the costs warning letter. However the Tribunal has also to have regard to the fact that the claimant was not legally represented. Whilst it would appear that the claimant did at some stage consult lawyers there was no evidence as to the nature or extent of the legal advice that the claimant received in May 2021. The claimant believed there should be an obligation upon the respondent to provide him with furlough pay. Whilst a genuine belief is not an absolute defence to a claim for expenses the Tribunal does take into account that the advent of the furlough system in March/April 2020 was a wholly new concept. It was something that employers, employees and their advisers had to get to grips with within a relatively short time frame. The Government issued a number of updated versions to the scheme. The legislation is complex and not easy to follow. It is easy to see how in these circumstances there could be a degree of mis-understanding about how the scheme would operate and about entitlement under the scheme. In these circumstances the Tribunal does not consider that it is in the interests of justice to make an award of expenses. The respondents application is accordingly refused.

Employment Judge: Stuart Neilson
Date of Judgment: 29 October 2021
Entered in register: 29 October 2021
and copied to parties