EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101253/2020

In Chambers
4 November 2021

Employment Judge M Robison

Mr J Sharp	**Claimant** **Written submissions** **Mr F Sharp** **Father**
Kyowa Kirin International plc	**Respondent** **Written submissions** **Ms L Davis** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

1. The respondent's application for expenses dated 1 September 2021 is refused.

2. The claimant's application for a preparation time order is refused.

REASONS

1. A judgment finding that the claimant was unfairly dismissed and ordering the respondent to pay to the claimant the sum of £23,500.29 was issued on 12 August

2021, following a hearing of evidence which took place on 15,16,17 and 22 June and 9 July 2021.

2. This application for expenses was made by the respondent by e-mail dated 1 September 2021. It relates to a previous aborted final hearing, due to commence on 1 December 2020, which was adjourned on that date following the application of the claimant to amend his claim (set out in note and orders of Tribunal dated 1 December 2020, issued 5 January 2021).

3. The hearing on the application to amend took place on 8 February 2021. The Tribunal then allowed the application to amend, giving the respondent three weeks to lodge a response if so advised, and reserving the question of expenses until after the final hearing on evidence (see order of the Tribunal dated 8 February 2021).

Respondent's written submissions

4. The respondent makes an application for an expenses order under rule 78(1)(a) of the 2013 Rules in the sum of £10,335. The application is made by reference to rules 76(1)(a) and (c) of the 2013 Rules; that a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing began and/or due to the amendment application; and subsequent adjournment constituting disruptive and/or unreasonable conduct of the proceedings.

5. Ms Davies submitted that the claimant, at the hearing due to commence 1 December 2020, sought to lead evidence (in the form of an exceptionally detailed witness statement) containing a significant number of entirely irrelevant matters which sought to significantly expand the scope of the claim. She submitted that the Tribunal accepted that the ET1 provided no fair notice of these allegations; that as an alternative to having these sections of the witness statement removed (essentially not admitting this evidence), the Tribunal afforded the claimant the opportunity to amend, the effect of which would be that the full hearing would have to be relisted. The claimant opted to amend and have the hearing adjourned. The respondent argues that this was unreasonable and/or disruptive conduct and/or in essence an application for a postponement coming on the morning of the first day of a final hearing.

6. She argued that since the application came after the commencement of the full hearing, the hearing date was lost as a result and the amendment subjected the respondent to substantial cost due to not only extending the proceedings themselves but also in expanding the scope of the claim. The respondent required to call an additional witness, to revise its ET3 and to amend its witness statements and submissions in order to respond to the claim as amended.
7. The respondent seeks expenses in respect of the majority of costs incurred by the respondent in the period from the postponement of the full hearing on 1 December 2020. This relates to all work required as a result of the amendment/postponement including but not being limited to the requirement to review the amended ET1, prepare objections to the amendment application, attend the preliminary hearing to determine the application on 8 February 2021, prepare an amended ET3, include and prepare witness statements for an additional witness (Bill Aitken) and to amend all witness statements (other than for Nathan Hawes whose statement did not require amendment) and redraft submissions and prepare for the case as amended for the rescheduled full hearing in June 2021.
8. Ms Davis set out the expenses incurred were as follows (copies of invoices being produced, and sums excluding any matters unrelated to the postponement and VAT):
    1. 2 December – 26 February 2021 – invoice dated 26 February 2021 - £3,442.50;
    2. 1 March to 25 March 2021 – invoice dated 31 March 2021 - £990;
    3. 23 April to 30 April 2021 – invoice dated 30 April 2021 - £630;
    4. 12 May to 27 May 2021 – invoice dated 31 May 2021 - £2,272.50; and
    5. 1 June to 14 June 2021 – invoice date 24 June 2021 - £3,000.

Claimant's submissions

9. The claimant responded by letter dated 6 September 2021, resisting the application on principle and amount, and made an application for a preparation time order (PTO).
10. With regard to the context and background the claimant advised that the witness statement was submitted on 25 November further to the directions of the EJ R

McPherson of 24 September 2020 and 20 November 2020, with a copy to the respondent.

11. The content of that witness statement was not challenged by Ms Davis until the commencement of the hearing, when Mr Sharp responded to Ms Davis's objections and made three completely separate preliminary points, none of which implied or proposed that the claimant was seeking a postponement or adjournment of the full hearing. Rather, he was "invited [by the Tribunal] to make application to amend his claim to include those aspects of the claimant's case which had not been referenced in the ET1 but on which he intended to rely at the hearing"; he was not told that if he accepted the invitation there may be an application for costs; and Ms Davis did not suggest that she would. His position was that the adjournment was at the behest, or at least the initiative of the tribunal, not the claimant or his representative. It was not until the amendment was accepted that the Tribunal accepted that it would require further investigation by the respondent and thus further costs.

12. Mr Sharp submitted that Ms Davis's quoted selectively from rule 76(1)(a) and (c) merged two completely separate subparagraphs into one allegedly coherent section.

13. Mr Sharp submitted that following diligent research he had failed to find any case where a respondent has successfully applied for costs against a claimant who has been found to be unfairly dismissed (or been successful in his claim if for some other reason).

14. Regarding rule 76(1)(a), and referencing Foster v Rowes Garage Ltd UKEAT/0053/21/00, that "starting point was that an award of costs is the exception rather than the rule", he argued that given this was a standard unfair dismissal claim, it presented no issues or principles that are to be considered "exceptional" nor was the conduct of the tribunal hearing, which was accommodated within the four days originally set, in any way "exceptional" through any divergence from the standard accepted protocols.

15. He argued further by reference to relevant case law that in these typical cases, costs are awarded against a party only where the claim has no reasonable prospects of success; or there was unreasonable conduct; there was non-compliance with an order or other deliberate flouting of the rules.

16. He argued that it was perverse to suggest that the claimant (or his representative) has acted in any way vexatiously, disruptively, abusively or otherwise unreasonably in the way they conducted themselves. The claimant was found to be unfairly dismissed and awarded a significant financial award. Further, at no time did the Tribunal warn the claimant that there were no reasonable prospects of success or that he was pursuing his case in a manner considered to be unreasonable or disruptive and thereby could render him liable to a successful petition supporting a cost order.

17. With regard to rule 76(1)(c), the claimant did not make any application to postpone, the Tribunal having invited him to amend; it was therefore at the instigation of the Tribunal that the hearing was postponed. It is inappropriate of Ms Davis to suggest that this was unreasonable and/or disruptive conduct, given the Tribunal simply accepted the advice of the Tribunal. Ms Davis's position was that large sections of the claimant's witness statement would require to be removed, and that would result in delays through objections and interruptions, which itself would in have been likely to result in the hearing not being completed in the four days allocated.

18. The claimant argued that the sums sought were excessive; that only modest changes to the ET3 and three of the previously tabled witness statements were required. Mr Sharp argued that the amended ET1 referred exclusively to documents authored by nominated witnesses, and to matters within the direct knowledge of those witnesses in the main; that additions to the amended ET1 could have been dealt with in cross examination and/or minor changes to the original witness statements; there was no requirement to investigate matters unknown to any of the witnesses or to instigate new or novel arguments not already considered in the documented dismissal process. The respondent did not after all call Ms Sarah Holland, but instead Mr Aitken. The Tribunal had accepted the claimant's witness statement in its entirety and amended ET1 as being necessary to the full consideration of his claim of unfair dismissal. The claimant should not have to fund this investment of time by the respondent and to do so would represent an unfair and unreasonable penalty on the claimant reducing his award by 44%.

19. Turning to the PTO, Mr Sharp argued that the application was an intentional

attempt to delay payment of the award and cause anxiety and annoyance to the claimant and taking up time of the Tribunal service. Mr Sharp advised that he had spent 18 hours researching the detail of costs applications, and sought a PTO for £738, at the current rate of £41 per hour.

Respondent's response

20. Ms Davis made the following submissions in response (by e-mail dated 29 September):
    a. There is no foundation to the suggestion that the issue of lack of fair notice could have been raised sooner.
    b. Appeal decisions would not provide a basis for 'typical and representative' cases when it comes to costs or expenses awards. Expenses awards are routinely awarded in cases of late amendments/postponements and other unreasonable conduct.
    c. Mr F Sharp does not understand the difference between something being within someone's knowledge and the concept of providing fair notice. The case as amended was an entirely different case to that initially pled and required a significant amount of investigation and additional work.
    d. Sarah Holland was not called as a witness was because the respondent conceded that upon investigation, the witness statement had in error not been attached to the investigation report; not because she left the respondent's organisation.
    e. Mr Bill Aitken was called as a response to the introduction of a consistency argument relying on the claimant's treatment at the hands of another Kyowa employee (dealt with by Mr Aitken) He would have been required to have been called even if Ms Holland was also called and there was no interrelationship between the two witnesses at all.
21. Separately, the PTO application discloses no basis for a preparation time order. The suggested basis is simply the very fact that the Respondent made an (entirely appropriate) expenses application as a result of being subjected to a significant amount of additional cost as a result of the introduction of entirely new matters by the claimant.

Relevant law

22. Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, sets out when an expenses order may or shall be made.

23. Rule 76(1) states that a Tribunal may make an expenses order; and must consider whether to do so in the following circumstances:

    (a) it considers that 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 prospects of success; or

    (c) a hearing has been postponed or adjourned on the application of a party made less than seven days before the date on which the relevant hearing begins.

24. Rule 74 states that in Scotland all references to costs should be read as references to expenses. Rule 78 sets out the provisions regarding the amount of the expenses order and Rule 84 states that a tribunal may have regard to the paying party's ability to pay.

25. A Tribunal exercising its discretion whether to award expenses orders should consider all the circumstances of the case (*Yerrakalva v Barnsley MBC* 2012 ICR 420 CA). The courts have emphasised when considering costs or expenses generally, that awards of costs or expenses are the exception and not the rule (*Gee v Shell (UK) Ltd* 2003 IRLR 82 CA). Further, the aim in making an order is to compensate and not punish (*McPherson v BNP Paribas* 2004 IRLR 558). Whether a party is represented or not is a relevant factor, and party litigants are not to be judged by the standards of a legally qualified representative (*AQ Ltd v Holden* 2012 IRLR 648).

Tribunal's deliberations and decision

26. The Tribunal must consider whether to make an expenses order where it finds one or more of the grounds in rule 76 are met, here that the claimant has acted unreasonably in the way that the proceedings have been conducted ***or*** that a hearing has been postponed or adjourned on the application of a party made less than seven days before the date of the hearing.
27. This is a two stage test. The first question is whether one or both grounds have been made out. Only one of these circumstances need apply before the Tribunal is required to consider whether or not to exercise its discretion to make an award of expenses

First stage of test: has one of the grounds been made out?

28. This is a case where the claimant was successful. There is no question therefore that there were no reasonable prospects of success. There could be no dispute either that this is a case where the first listed final hearing was postponed. However, the claimant argues that the hearing was not postponed on the application of the claimant.
29. In particular he argues that he was not aware of any matters which might lead to a postponement until the actual commencement of the hearing. His position is that he was invited by the Tribunal to make an application to amend and he was not informed by the Tribunal that if he accepted this invitation, the consequential postponement of the hearing could or would lead to a claim against the claimant for costs, and nor did Ms Davis suggest they would seek expenses. His position is that Tribunal implied that the adjournment was at the behest, or at least the initiative of the Tribunal, not the claimant or his representative.
30. Mr Sharp again exhibited a tendency to reinterpret events and even statements in a way which suited his arguments, as he had during the hearing, and as Ms Davis argues in respect of some arguments in response.
31. In fact the Tribunal invited the claimant to make an application to amend, making it clear that the result of doing so was that the hearing would require to be adjourned. It is clear therefore that the inevitable consequential adjournment resulted from the application of the claimant. I accepted Ms Davis's argument that this was in essence an application to adjourn to allow the claimant the opportunity to amend. That is how it was treated at the time. Had the claimant not sought to

amend, then the hearing would not have required to be adjourned. Had the hearing proceeded, as parties were or should have been aware, there were aspects of the claimant's witness statement which in all likelihood would have not been allowed (or which may have resulted in an application being made during the hearing).

32. It should be noted that this was an "invitation" and not "advice". Mr Sharp has mischaracterised the circumstances in which the invitation was made because it was made clear to him that the result of his request to amend was that the hearing would require to be adjourned and that therefore was at the instigation of the claimant.

33. Further there is nothing in the rules which obliges a Tribunal to warn a claimant that a step which they might take might result in an application for expenses. Whether it was specifically stated or not, and notwithstanding the claimant had a lay representative, he ought to have known that it would have inevitable implications for expenses, which was made clear in the subsequent decision to allow the amendment.

34. I take the view then that the circumstances of the adjournment should be treated as an application to postpone or adjourn at the instigation of the claimant made less than seven days before the date on which the hearing was due to commence.

35. The Tribunal does not however accept that the claimant's decision to accept the invitation was unreasonable, if this is what Ms Davis means to suggest. It is not appropriate to automatically categorise an application to amend or postpone as unreasonable conduct.

36. To the extent that Ms Davis conflates the two provisions, I agree with Mr Sharp that it is not appropriate to do so. There is no need to show that in seeking a postponement, or indeed an application to amend which inevitably results in a postponement, is unreasonable conduct per se.

37. Given that I have characterised the circumstances as those falling within rule 76(1)(c), and given that only one of these circumstances need pertain to trigger the obligation on the Tribunal to consider whether an expenses award should be made, there is therefore no requirement to consider whether the claimant acted unreasonably etc or to consider whether in seeking to postpone he has acted unreasonably.

38. However, if it were necessary to consider this question, I accept the claimant's submissions that the claimant's conduct or that of his representative could not otherwise be characterised as unreasonable conduct, not least given that the conduct was to accept the invitation of the Tribunal.
39. I therefore find that section 76(1)(c) but not 76(1)(a) is made out; and I therefore require to consider whether an award of expenses should be made.

Second stage of test – should an award of expenses be made?

40. If one or more of the grounds is made out, while the Tribunal is obliged to consider whether or not to make an award of expenses, the Tribunal is not obliged to make any award.
41. In exercising my discretion, I take account of a number of factors, giving relevant weight as appropriate in the circumstances, including the fact that expenses are the exception rather than the rule; that they are compensatory not punitive; that lay representatives are not expected to meet the same standards as professional representatives; the conduct of the parties; as well as all the circumstances of the case.
42. My starting point is that expenses in the employment tribunal are the exception and not the rule. The rules relating to the payment of expenses are designed to focus in particular on unmeritorious cases. It could not be said that this case was an unmeritorious case.
43. As discussed above, I did not accept that the claimant's conduct could be said to be unreasonable: the claimant responded to an invitation from the Tribunal which was made on the basis that the Tribunal had already read the witness statement but also readily accepted that Ms Davis did not have fair notice of a number of matters (and in particular she was labouring under the assumption that the claimant made no challenge to the reasonableness of the investigation).
44. I did note at the time that Ms Davis did not object to that proposal to invite the claimant to amend and understood her to accept that the proposal was a reasonable compromise given the undesirability of ruling certain passages of the witness statement inadmissible should the hearing proceed on that date. This might have prolonged the hearing, as Mr Sharp suggested, and indeed it might

have meant that the hearing required to be adjourned part-heard and re-listed in any event.

45. In this case I take particular account of the background circumstances which led to the application to amend. I was aware that Ms Davis had, relatively shortly before the hearing was due to be heard on 1 December, made an application for a hybrid hearing (that is as I understand it she requested that one witness should give evidence by video which is what transpired in the end anyway). That application was considered in chambers on 20 November 2020, and a decision was made, without reference to parties as I understood it, to convert the hearing which was due to be in person to CVP and apparently as a consequence to order witness statements (although Ms Davis had previously opposed such an order).

46. I was aware of the very tight time scales in which parties were then required to prepare witness statements. In particular, the decision dated 20 November to order witness statements to be exchanged by 30 November meant that parties only had six working days to prepare statements.

47. I note that the claimant lodged the witness statement on Friday 27 November around 5pm, giving her just one working day (in fact a bank holiday in Scotland) to consider the witness statement before the hearing was due to commence on 1 December. I therefore accept that it was not until very shortly before the hearing that Ms Davis appreciated the implications of extensive passages of the witness statement.

48. However, this is a circumstance in this case to which I give weight. Through no fault of either party, witness statements were ordered giving parties minimal time to prepare them. Had witness statements been ordered to be exchanged in the normal window, they would have been exchanged at least two weeks prior to the first day of the final hearing. In such circumstances, Ms Davis would have been alerted to the fact that the evidence set out in the witness statements was in certain respects irrelevant to the extent that it was not addressed in the ET1 narrative. This matter would in all likelihood have been addressed prior to the commencement of the hearing; and may well have resulted in a postponement of the hearing which may have been outwith the seven day period.

49. At the hearing on 1 December there was a good deal of discussion regarding how to deal with the situation where the claimant's extensive witness statement

covered ground in respect of which the respondent clearly did not have fair notice of matters; and further where the claimant had apparently indicated that no issue would be pursued (for example in relation to the investigation); but where the matters were otherwise relevant to an unfair dismissal claim.

50. No conclusion was reached about how to deal with passages of the witness statement which might have otherwise been ruled out as irrelevant (due to lack of fair notice). That was because the compromise of adjourning and amending was accepted on the day. This allowed the claimant to make the necessary amendments; to include what he ought to have included in the ET1 narrative at the outset; and to give the respondent fair notice that these arguments were being pursued after all.

51. I accepted, notwithstanding the claimant's father's background in human resources, that he was a lay representative and I do not apply to him the standards which might be expected of a professional representative.

52. I accept that the claimant's representative did not appreciate the significance of the need to give fair notice to the other party in the ET1, and that the claimant's evidence was relevant to a claim for unfair dismissal. For example, the claimant had initially indicated that he took no issue with the investigation; clearly the claimant's evidence however did support such an argument but Mr Sharp did not realise that he needed to set out, at least in headline form, each aspect of the respondent's conduct which was a cause for concern. It was only when the claimant had set out what had happened to him in detail in the witness statement that it became apparent, to Ms Davis and then to the Tribunal, that the ET1 narrative did not support all of the arguments (which the witness statement did support), such that the respondent did not have fair notice, and such that the claimant accepted the need to amend to ensure that such evidence could be taken into account by the Tribunal.

53. I accepted that this did have a consequential effect for the respondent and that it did result in further investigation and at least some additional costs.

54. However, the additional investigation which was required and the amendments to the statements, was necessary to respond to the claimant's evidence as set out in the witness statement, and had the claimant been legally represented and

had these matters been introduced sooner, then the respondent would have required to undertake such investigation in any event.

55. Given in particular the fact that the claimant has a lay representative; that his conduct could not be said to be unreasonable; given the time frame in which witness statements were required to be exchanged; and given that the claimant was ultimately successful in his claim, and bearing in mind that expenses in the Tribunal are the exception, I came to the view that it was not appropriate, in all the circumstances of this case, to make an award of expenses.
56. The respondent's application for expenses is therefore refused.

Preparation time order

57. I agreed with Ms Davis that the application for a preparation time order, in respect of this application for expenses alone, was inappropriate. Although I have not granted the expenses application, it was entirely appropriate for it to be made. The claimant's application for a preparation time order is refused.

Employment Judge: Muriel Robison
Date of Judgment: 23 November 2021
Entered in register: 01 December 2021
and copied to parties