EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number 4112077/2019

Held on 20 December 2021

Employment Judge: P O'Donnell

Ms J Armstrong	**Claimant** **Represented by:** **Mr Smyth – Solicitor**
Drimvargie Limited	**Respondent** **Represented by:** **Mr Bansal - Representative**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the Respondent's applications for a Preparation Time Order under Rule 75 and for a wasted Costs Order under Rule 80 are refused.

REASONS

Introduction

1. The Respondent has made an application for a preparation time order under Rule 75 and/or wasted costs under Rule 80. This application is opposed by the Claimant.

2. Parties were agreed that the application could be dealt with on the papers relying on the Respondent's written application and the written objections lodged on behalf of the Claimant.

3. For the avoidance of doubt, the Tribunal will use the term "expenses" below as a shorthand for the preparation time order sought by the Respondent.

Respondent's submissions

4. The Respondent's submissions start by addressing the Rule 75 application in relation to the various claims in which the Claimant has been unsuccessful, that is, the deduction of wages (in respect of the April 2019 payment), unfair dismissal and notice pay claims.

5. In relation to the wages claim, the submissions make reference to the findings of fact regarding the Claimant's April 2019 wages and to evidence about what was discussed between the Claimant and Ms Bansal regarding these wages.

6. As regards, the unfair dismissal claim, it is asserted that it was proved that the Claimant was overpaid Statutory Sick Pay and that she had been overpaid in March 2019. It was submitted that the Tribunal found that the Claimant's complaint about her wages had no bearing on her dismissal and that the Claimant knew this which meant that her complaint was not made in good faith.

7. Finally, as regards the substantive claims, the submissions make references to findings in the judgment regarding the notice pay claim. Reference was made to the payments made to the Claimant on or before the termination of her employment and the terms of her letter of dismissal. It was submitted that the Claimant made no effort to contact the Respondent to clarify whether she had been paid the correct amount of notice of pay.

8. The Respondent's submissions then turn to the wasted costs application which is made in relation to a number of matters which, for the most part, arose in the course of the Tribunal proceedings.

9. First, there was the fact that the ET1 had been completed to say that the Claimant had not secured alternative employment whereas during the Tribunal process she disclosed information that she had secured new employment at the time the ET1 was lodged.

10. Second, it is submitted that it must have been clear to the Claimant and those acting for her that the correct notice pay had been paid.

11. Third, there was the production of the bundles for the final hearing. The Respondent set out what they considered to be the relevant procedural history of the claim relating to the directions made for the production of a joint bundle. It is then submitted that the Respondent came to the view that they would produce their own bundle because, in their view, there was no evidence that the documents they wished to include in the bundle would be included in a *"fair and proper manner*".

12. Fourth, there was the failure by the Claimant to lodge her witness statement as directed by the Tribunal in advance of the original dates of the final hearing on 24-26 March 2021.

13. The submissions conclude with a table setting out the hours which the Respondent says was spent in preparation in relation to each issue raised in their submissions.

Claimant's submissions

14. The Claimant's submissions started by setting out the relevant Rules of Procedure and making reference to *Lodwick v London Borough of Southwark* [2004] ICR 884 as authority for the principle that awards of expenses in the Tribunal are exceptional.

15. The submissions then turn to address each matter on which the Respondent's application is made.

16. In respect of the wages claim, it is submitted that it is not correct to say that the Claimant's evidence had changed and that the claim was not made in good faith. Reference is made to paragraphs 168-169 of the judgment. It is submitted that the judgment, at paragraphs 192-214, deals with the evidence relating to this claim in depth and that this was not a straightforward claim. Although the Tribunal held that this claim was not well-founded, there was no suggestion that it was improperly motivated.

17. In relation to the unfair dismissal claim, it is submitted that it is wrong to say that it was "proved" that the Claimant had been overpaid; this was not relevant to the claim and the Tribunal made no determination. It is not accepted that the Claimant knew that her wages complaint had no connection with her dismissal and the Tribunal found that the Claimant was acting in good faith.

18. As regards the notice pay claim, it is submitted that the allegation that the Claimant was not acting in good faith runs contrary to the findings made by the Tribunal. This is the type of claim which it is the Tribunal's role to resolve after hearing evidence. In relation to the assertion that the Claimant did not seek to clarify this with the Respondent before bringing her claim, it is submitted that the Claimant did start the ACAS Early Conciliation process but the Respondent did not engage with this.

19. Turning to the matters which arose in the course of the proceedings, it was accepted that the box on the ET1 was ticked to say that the Claimant was not working at that time and that this was not correct. However, it is submitted that the Claimant confirmed the correct position in subsequent correspondence such as the Schedule of Loss and there was no attempt to hide this fact. It was said that this was a minor error in completing the form and there is nothing in the application which sets out how hours were "wasted" as a result of this.

20. In relation to the Rule 80 application in respect of the notice pay claim, the same submissions as for the Rule 75 application are relied upon.

21. The submissions highlight the various Orders in relation to the preparation of the trial bundle. It is said that between March and September 2020 there were 18 emails between the Claimant's agents and the Respondent regarding case management. The majority of these relate to the bundle and two draft bundles were prepared by the Claimant's agent but the Respondent elected to proceed with their own bundle.

22. It is accepted that the Claimant's witness was not lodged and exchanged as required by the relevant Orders or before the hearing on 24 March 2021. It is submitted that this was an oversight in the course of the file being passed

between lawyers during the Covid lockdown period when normal handover processes could not be used.

23. It is submitted that any additional dates which were required to hear all the evidence were not caused by the late submission of the statement but were due to other issues.

24. Reference is made to the fact that the Claimant was successful in some of her claims. This is not a case where the Claimant has been wholly unsuccessful and the authorities make it clear that expenses do not follow success but are exceptional.

25. The submissions conclude by making various points about the Claimant's means and ability to pay. Further, submissions are made in relation to the sums sought by the Respondent and how these have been calculated.

Relevant Law

26. Rule 75 of the Employment Tribunal Rules of Procedure 2013 sets out the definition of a cost order:-

> *(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 or while represented by a lay representative;*
>
> *(b) the receiving party in respect of a Tribunal fee paid by the receiving party; or*
>
> *(c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.*

(2) A preparation time order is an order that a party ('the paying party') make a payment to another party ('the receiving party') in respect of the receiving party's preparation time while not legally represented. 'Preparation time' means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

27. Rule 76 sets out the test to be applied by the Tribunal in considering whether to grant an application under Rule 75:-

(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;

(b) any claim or response had no reasonable prospect of success; [or

(e) 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 begins.]

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—

(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and

(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

28. Rule 77 sets out the procedure for a costs order:-

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.

29. The principle in the Rules is that costs do not follow success as they do in other areas of civil litigation. Rather, the Tribunal has power to make awards of costs in the circumstances set out in the Rules.

30. Rule 80 deals with wasted costs order in the following terms:-

(1) A Tribunal may make a wasted costs order against a representative in favour of any party ('the receiving party') where that party has incurred costs—

(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or

(b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.

Costs so incurred are described as 'wasted costs'.

(2) 'Representative' means a party's legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit.

(3) A wasted costs order may be made in favour of a party whether or not that party is legally represented and may also be made in favour of a representative's own client. A wasted costs order may not be made against a representative where that representative is representing a party in his or her capacity as an employee of that party.

31. The Court of Appeal in *Ridehalgh v Horsefield* [1994] 3 All ER 848 set out guidance on wasted costs (approved by the House of Lords in *Medcalf v Mardell* 3 All ER 721) and, in particular, the tests applied in considering whether the actions of a legal representative fall within the scope of the Rule:-

a. 'Improper' means, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty.

b. 'Unreasonable' describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and the motive for such conduct is not determinative. The test is whether the conduct has a reasonable explanation.

c. 'Negligent' should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession. However, an applicant for a wasted costs order under this head needs to prove as he would have to prove in an action for negligence.

Decision

32. The Tribunal will address the application under Rule 75 relating to the substantive claims first and then deal with the application under Rule 80 relating to the procedural issues.

33. The submissions from the Respondent in relation to the application under Rule 75 do not specifically address the test that needs to be met for an award of expenses to be made. The Respondent makes various assertions about the substantive claims in their submissions but it is not expressly said how these matters satisfy the relevant tests in Rule 76.

34. The Tribunal does consider that the Respondent has fallen into the error of assuming that expenses follow success which is not how expenses are dealt with in the Tribunal. However, it also recognises that the Respondent is not legally represented and so has to take this into account when addressing their application under Rule 75.

35. To the extent that the Respondent relies on Rule 76(1)(a) in respect of the application relating to the substantive claims, the Tribunal considers that the various points made by the Respondent come nowhere close to establishing that the Claimant or her agent had acted "*vexatiously, abusively, disruptively or otherwise unreasonably"* in bringing the relevant claims or the way the proceedings relating to those claims were conducted. This test requires more than the Claimant simply being unsuccessful and nothing which has been asserted by the Respondent can be said to establish that the bringing of the claims or the conduct of them falls within the scope of Rule 76(1)(a).

36. Similarly, the Tribunal does not consider that the Respondent has established that the threshold for an award of expenses under Rule 76(1)(b) had been

crossed. Again, although the Claimant was unsuccessful in these particular claims (and it must be borne in mind that she was successful in other claims which formed part of the same proceedings), the Tribunal does not consider that the assertions made by the Respondent in their submissions demonstrate that the relevant claims had no reasonable prospects of success.

37. In relation to the specific claims, the Tribunal would make the following comments in respect of each claim.

38. In respect of the wages claim, it is worth noting that it was the Respondent's own case that the wages that had been paid to the Claimant were incorrect, albeit that they said the Claimant had been overpaid and not underpaid.

39. In seeking to establish this point, the Respondent's representative spent some time in cross-examination of the Claimant cross-referencing various documents, not all of which would have been in the Claimant's possession or knowledge (that is, time sheets, pay slips, the Respondent's payroll records and the Respondent's bank statements) and carrying out an arithmetic exercise. This was not a case where the calculation of the Claimant's wages could be seen in one simple document (such as a payslip) where it was obvious that the correct payments had been made. Matters were further complicated by the fact that the hours of work offered by the Respondent to the Claimant fluctuated and never actually matched the 30 hour working week in her contract.

40. Further, the specific issue relevant to the April 2019 wages related to the contractual terms around breaks. The Tribunal had to hear oral evidence about this because the written contract document (drafted by the Respondent) was silent in relation to a number of important matters relevant to the claim. Specifically, although the written contract made reference to the right to take breaks, it was silent on matters such as whether those breaks were paid, what would happen if an employee did not take a break (in terms of being paid) and the fact that break times were automatically deducted from working hours for the purposes of calculating wages. All of these issues required oral evidence from witnesses in order for the Tribunal to determine what had been agreed

either verbally or by custom and practice. The Claimant had raised issues around not being able to take breaks and working through these but, ultimately, the Tribunal found that there was not an express agreement that she would not have break times deducted from her hours when her wages were calculated in circumstances when she could not take breaks.

41. Given these issues, the Tribunal does not consider that the claim for deduction of wages in respect of the April 2019 wages could be said to have no reasonable prospects of success nor could it be said that bringing the claim was unreasonable or otherwise within the scope of Rule 76(1)(a). It was one which required evidence to be heard for the Tribunal to make the necessary findings of fact in circumstances where the Respondent's payroll system was less than transparent with no one document clearly establishing that wages were correctly paid nor there being clear written terms relating to the issues of breaks.

42. Turning to the unfair dismissal claim, the Tribunal considers that the assertions that the Respondent had "proved" that the Claimant was overpaid in respect of Statutory Sick Pay and other wages to be entirely irrelevant to its substantive decision. The dismissal claim did not rely on those payments but rather the assertion of a statutory right was the query raised by the Claimant about her April wage which the Tribunal found was made in good faith.

43. In any event, whilst the Respondent may believe that they "proved" the alleged overpayments, the Tribunal, for reasons set out in the substantive Judgment, made no findings about those matters, either way.

44. The Respondent makes a bald assertion that the Claimant was not acting in good faith in bringing her unfair dismissal claim (as opposed to asserting her statutory rights) but does not set out any basis for this assertion. There was certainly nothing in the evidence heard by the Tribunal at the final hearing that suggested that the Claimant did not have a genuine belief that her complaint about her wages had been the reason for her dismissal. The fact that, ultimately, the Tribunal did not consider that the evidence before it allowed the

Tribunal to reach a similar conclusion does not, without something more, mean that the Claimant was not acting in good faith.

45. It certainly does not mean that the unfair dismissal claim had no reasonable prospects of success or that bringing amounted to conduct which falls within the scope of Rule 76(1)(a).

46. Finally, as regards the substantive claims, the Tribunal turns to the notice pay claim. The Tribunal repeats the points made above about the lack of transparency in the Respondent's payroll system which also applies to this claim. In particular, the documents produced by the Respondent do not clearly and unambiguously set out how some of the sums paid to the Claimant at the end of her employment were calculated. In fact, they do not set out these calculations at all.

47. For example, there is no explanation of the period for which Statutory Sick pay was paid and how this was calculated. This is potentially important given that the period of the Claimant's sick leave overlapped with the notice period. There was also the question of whether the calculation of notice should be based on actual hours worked or the 30 hour week in the Claimant's contract.

48. This was another claim where evidence needed to be heard for there to be a determination of whether the correct payment had been made. The fact that the evidence, ultimately, established that the payment was correct does not mean that the claim had no reasonable prospects of success or that bringing it falls within the scope of Rule 76(1)(a).

49. For these reasons, the application under Rule 75 is refused.

50. Turning to the Rule 80 application, the Tribunal will address each of the matters falling under this Rule in turn. Before doing so, it is worth noting that the test in Rule 80 is a very high bar and requires serious conduct on the part of a legal representative

51. It is correct that the ET1 had ticked the box to say that the Claimant had not found a new job and that this was not an accurate reflection of the position.

The Respondent sought to make much of this issue at the substantive hearing but the Tribunal considers that this is nothing more than an error and certainly does not amount to improper, unreasonable or negligent conduct particularly where the error was corrected long before the final hearing and the correct position set out in the Claimant's schedule of loss and other correspondence. There was certainly no attempt by the Claimant or her agent to conceal or misrepresent the position regarding new employment when the whole proceedings are taken into account.

52. The Tribunal has some difficulty following the Respondent's argument in relation to the Rule 80 application as it applies to the notice pay claim. The Tribunal proceeds on the basis that the Respondent is arguing that the Claimant's agent should have known that the notice pay claim would not succeed.

53. Any instructions given by a party to their solicitor and any advice given by a solicitor to their client is privileged, meaning that the Claimant is not required to disclose such discussions. In this case, the Claimant has not waived her privilege and the Tribunal has no evidence as to what discussions were had between the Claimant and her solicitor about the notice pay claim.

54. In any event, it is not for the solicitor to decide what claims are ultimately pursued; they can only give advice and then act on their client's instructions. A solicitor, as an officer of the court, should not advance a claim they know to be untrue but that is not the situation in this case. As the Tribunal has set out above in relation to the Rule 75 application, this is a case where evidence had to be heard in order for all of the claims to be determined. There is certainly no basis on which it can be said that the solicitors in this case acted improperly, unreasonably or negligently in advancing the claims as instructed by their client.

55. In relation to the issue of the joint bundle, no evidence has been produced by the Respondent regarding the correspondence between them and the Claimant's agent about the bundle from which the Tribunal could reach any

conclusion that the solicitor's conduct in respect of the production of the trial bundle reached the necessary threshold under Rule 80.

56. Whilst it is correct that the direction for a joint bundle was not complied with and the Respondent says that this was the fault of the Claimant's solicitor, the Tribunal requires evidence before it is prepared to find that the solicitor was acting improperly, unreasonably or negligently.

57. In particular, from what was said at the substantive hearing, this is not a case where it is alleged that the solicitor was seeking to exclude certain documents from the bundle or refusing to include documents from the Respondent but, rather, that certain documents had been printed in such a way as to cut-off some information at the very top of the page to which the Respondent wished to refer in evidence.

58. The Tribunal has been provided with no evidence regarding the discussions about this issue and any attempts to resolve it from which it can make findings that the actions of the Claimant's solicitor amounted to improper, unreasonable or negligent conduct for the purposes of Rule 80.

59. Further, the lack of evidence means that it is entirely unclear why the Respondent required to create an entirely separate bundle as opposed to a short, supplementary bundle containing what they considered to be a properly printed version of the relevant documents.

60. Finally, turning to the issue of the witness statement, it is beyond question that the Claimant's statement was not lodged in advance of the final hearing and in compliance with the Tribunal's direction. The explanation given by the solicitor attending the final hearing in March 2021 was that she had been advised by the solicitor who previously had conduct of the case that this direction had been set aside. As the Tribunal indicated at the time, there was nothing in the correspondence from the Tribunal which expressly stated this and the confusion arises from a misreading, by the previous agent, of the effect of the Orders made to list the case for final hearing by way of Cloud Video Platform.

61. The Tribunal does expect all parties and representatives to comply with Orders and directions made by it. The Tribunal is satisfied that, in this case, the Claimant's agents did not deliberately fail to comply but, rather, came to a mistaken view as to what Orders were in play at the relevant time. The Tribunal also notes that it has not been provided with any correspondence from the Respondent or the Tribunal administration chasing the Claimant's agents for their statements and so, on the face it, the agents had nothing to suggest that the assumption that this Order had been superseded was mistaken.

62. In these circumstances, the Tribunal does not consider that the conduct of the Claimant's agent in relation to the witness statement is sufficient to get over the high hurdle of amounting to improper, unreasonable or negligent conduct. The Claimant's agent (or, more specifically, his firm) may wish to reflect on this matter to ensure that they have systems in place to avoid being in such a situation in future cases.

63. For the reasons set out above, the application under Rule 80 is refused.

64. Although it is not necessary given the Tribunal's decision above, the Tribunal would comment that, if it had decided to grant any aspect of the Respondent's applications, it would have considered, without further explanation, the sums sought (or, more specifically, the hours on which those sums are calculated) to be excessive, particularly in relation to the Rule 80 application.

65. For example, the Respondent sought <u>wasted</u> costs (emphasis added) in respect of the ET1 being ticked to say the Claimant had not found new employment based on 22 hours. The Tribunal finds it astonishing that this error would have caused the Respondent to carry out additional work amounting to over 3 working days (assuming a working day of 7 hours) in circumstances where the error was corrected by the Claimant in subsequent correspondence such as her schedule of loss. The Tribunal cannot begin to imagine what additional work the Respondent had to undertake in respect of this issue that would have taken over 3 working days to achieve.

66. Similarly, in respect of the issues relating to the bundle and the witness statement, the Respondent sought a sum for additional work amounting to 74 hours. This equates to 10.5 working days and, again, the Tribunal has difficulty in seeing what additional work would have been required that would have taken such a long time to complete in relation to these issues.

Employment Judge: **P O'Donnell**
Date of Judgment: **24 December 2021**
Entered in register: **29 December 2021**
and copied to parties