



# **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4103880/2018 Hearing at Glasgow on 3 April 2019  
Employment Judge: M A Macleod (sitting alone)**

**Miss M C Aitken**

**Claimant  
Represented by  
Ms C Shirkie**

**Campbell Inns Ltd t/a The Dumfries Arms Hotel**

**Respondent  
Represented by  
Mr R Morton  
Avensure Ltd**

## **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is that the respondent's application for expenses is refused.

### **REASONS**

1. In this case, the claimant raised proceedings against the respondent in which she claimed that she had been unfairly constructively dismissed by the respondent, and also that they had discriminated against her on the grounds of disability.
2. The respondent resisted the claimant's claims.
3. On 17 August 2018, the claimant wrote to the Tribunal withdrawing her claims, and the Tribunal then issued a Judgment, of Employment Judge Mary Kearns, dismissing the claim.
4. On 14 September 2018, the respondent's representative wrote to the claimant to apply for expenses.
5. This hearing was fixed on 3 April 2019 in order to determine that application, which was opposed by the claimant. The claimant did not attend at the hearing, but was represented by Ms C Shirkie, a friend. The respondent was represented by Mr Morton, solicitor.
6. The respondent presented a bundle of documents to which reference was made by both parties.
7. It is appropriate in this Judgment to deal with the application itself, and then set out the respective submissions of the parties, before reaching a decision on the application.

## The Application

8. The background to the application was that a Preliminary Hearing was fixed to take place on 20 August 2018 and the following day in order to determine the claimant's disability status, which was in dispute between the parties. At that point, the claimant was represented by Mr Derek Stillie, solicitor, of Messrs Wallace Hodge, Ayr. On 17 August 2018 (29), the claimant's solicitor wrote to the Tribunal to state that *"Due to a deterioration of the Claimant's mental health she has instructed us to withdraw her claim. She does not feel that she is capable of giving evidence and taking the claim forward."* The letter went on to ask the Tribunal to accept it as formal intimation of her withdrawal of her claim.

9. The letter was copied to D W Shaw, solicitors, who were at that stage acting for the respondent.

10. The Employment Tribunal notified the respondent's agent of the withdrawal of claim by letter dated 17 August 2018, and also advised that the claim was dismissed under Rule 52 of the Employment Tribunals Rules of Procedure 2013, a copy of the Judgment being attached ((30/31).

11. On 14 September 2018, Mr Morton of Avensure Ltd intimated that he was now acting for the respondent, and confirmed that the respondent now wished to make application under Rule 76 for expenses of £1 ,450 plus VAT against the claimant (32).

12. The basis upon which the application was made, he said, was:

- i) *"bringing and pursuing a claim before the Employment Tribunal which from the outset had no reasonable prospects of success; and*
- ii) *the Claimant has behaved vexatiously, disruptively and otherwise unreasonably by withdrawing her claim at the eleventh hour, on the last working day before a two day Preliminary Hearing on 20 and 21 August 2018 (the 'Preliminary Hearing') to determine whether or not she was a disabled person for the purposes of the Equality Act 2010 and only after the Respondent had incurred significant costs/expenses in preparing for that Hearing. "*

13. Mr Morton went on to elaborate. He stated:

*"In making the above application, the Respondent relies upon:*

1. *the lack of evidence produced by the Claimant to support her assertions that:*
  - a) *at the material times referred to in her claim, she suffered from anxiety and depression; and/or*
  - b) *that condition amounted to a disability for the purposes of the section 6 of the Equality Act 2010; and/or*
  - c) *between 15<sup>th</sup> June 2018 when the Preliminary Hearing was listed and 17<sup>th</sup> August 2018 when the Claimant abandoned her claim, there had been a deterioration in the Claimant's mental health which led her to abandon her claim;*
2. *the Claimant's failure to exercise any of the alternative options that were available to her such as submitting an application for a postponement of the Preliminary Hearing rather than abandoning her claim; and*
3. *the very late stage at which the Respondent was notified by the*

*Claimant of her plans to abandon her claim and/or of the alleged deterioration in her state of health which she says led to that decision.”*

14. Ms Shirkie, representing the claimant, replied by email dated 18 September 2018 to oppose this application (34). In particular, Ms Shirkie said:

*7 must say that I am rather appalled at the stance taken by the Company and their representatives.*

*With reference to points (i) and (1) of Richard Morton’s email of 14<sup>th</sup> September 2018 - The claim was not brought before the Tribunal in any form of malice. The claim was raised due to the Company’s complete lack of understanding about Melissa’s medical condition and their treatment of her. Melissa’s medical records were submitted to the Tribunal. These clearly show that she has suffered from depression and anxiety for some 8 years. This in itself is a disability - known as an invisible illness. . .*

*With reference to point (ii) and (2&3) of Richard Morton’s said email - Melissa attempted herself to have the Tribunal postpone the Hearing and this was refused. As her mental health was - and still is - extremely fragile and having had her request for a postponement refused, she felt there was no alternative other than to abandon her claim. This was not an easy decision and it was certainly not taken lightly. The Company’s treatment of Melissa when she was an employee was appalling and has completely contributed to her fragile state. We are now eight months down the line and her health is only deteriorating.*

*I feel the Company’s claim for fees is vexatious and malicious and, in my opinion, yet again shows a complete disregard by the Company to Melissa’s fragile mental health.”*

15. Further exchanges took place between the parties prior to the expenses hearing. It is particularly important to have reference to Mr Morton’s email of 26 October 2018, which he referred to in his hearing as effectively being his written submission.

16. He observed that the claimant’s objection to the application for expenses failed to address the substance of the respondent’s application. He pointed out that in order to succeed in her claim, the claimant would have been required to establish that the respondent had knowledge or could reasonably be expected to have that knowledge of the claimant’s disability, which the respondent denied; that in relation to her section 15 claim she would have had to prove that the respondent had subjected the claimant to unfavourable treatment because of something arising in consequence of her disability, which the respondent again denied; that in relation to the section 20 claim she would have to demonstrate the steps required by a reasonable adjustments claim, which the respondent again denied, and suggested that there was no evidence of any of the matters required; and that in relation to the constructive dismissal claim the claimant would have to show that the Tribunal had jurisdiction to hear the claim despite her lack of qualifying service, and that there was some form of repudiatory breach by the respondent, which was denied.

17. The respondent attacked the evidence presented by the claimant which was to show that she was a disabled person within the meaning of the Equality Act 2010. He made the distinction, of which he said that Tribunal was well aware, that *“the question of whether or not the Claimant is a disabled person for the purposes of section 6 of the Equality Act is not the same as whether the Claimant currently suffers from depression and anxiety or has*

*done in the past. The specific test to be applied by the Tribunal, set out in section 6 of the Equality Act, is whether or not the Claimant suffers from a physical or mental impairment and that impairment has a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities.”*

18. Mr Morton observed that the claimant had fallen far short of doing that, and set out the basis upon which he interpreted the evidence in this way.

19. He also made reference to the claimant’s absence record over a period of years, and suggested that the evidence did not justify a finding that she was a disabled person at the time.

20. Mr Morton then dealt with the late withdrawal of the claim. He pointed out that the respondent had no record of the claimant or her solicitor at the time having attempted to have the hearing postponed due to the claimant being unfit to attend that hearing. Mr Stillie did, he said, make telephone contact with Mr Morton on the afternoon of 17 August 2018, after he had already written to the Tribunal withdrawing the claim, advising that the claimant would be willing to settle her claim on a commercial basis, but mentioned nothing about the claimant being unwell when he made that call.

21. He said that there was no evidence ever provided to the Tribunal of the claimant’s ill health around 20 and 21 August 2018. The claimant’s withdrawal was only formally communicated to Mr Morton at 09.58 on 20 August after an exchange of correspondence over the previous weekend. He insisted that the respondent maintained that the claimant’s conduct in withdrawing the claim had been vexatious, disruptive and otherwise unreasonable.

### **Additional Correspondence**

22. On 17 August 2018, the claimant emailed the Tribunal at 1342 hours, without copying her email either to the respondent or to her solicitor. In that email, she said:

*“As discussed by telephone today, I am seeking a postponement of the Preliminary Hearing set to take place on Monday 2<sup>nd</sup> August and Tuesday 21<sup>st</sup> August 2018 for the following reasons:-*

- 1. I am seeking new representation as I have lost confidence in my Solicitor and I cannot afford the fees suggested by him; and*
  - 2. I am attending an emergency appointment with my GP today due to being unable to cope with the pressure at the present time; and*
  - 3. I feel that if I am to represent myself on Monday and Tuesday I am not well enough to do so and will therefore be at an unfair advantage.*
- I will email a copy of the Medical Certificate from my GP this afternoon. ”*

23. That day, a reply was sent by email to the claimant by the Tribunal (which does not appear to have been copied to the respondent) in the following terms:

*“Employment Judge Mary Kearns has considered the claimant’s application dated 17 August 2018 to postpone the hearing listed on 20 and 21 August 2018 and has refused it.*

*The Judge’s reasons for refusing the request are that it has not been copied to the respondent’s representative and is made too late to consider. It may be renewed at the start of the hearing, or if a soul and conscience certificate from your GP is received by 4pm today, 17 August 2018 stating that you are*

*unfit to attend. However, any such application would require to be copied to the respondent's representative. . . ”*

24. Mr Stillie then emailed the Tribunal at 1606 on 17 August 2018 to enclose a withdrawal of claim letter, and asking the Tribunal to note that the hearing to be vacated was due to commence on 20 August. In his letter, Mr Stillie said:

*'We act for the Claimant in the above referenced claim.*

*Due to a deterioration of the Claimant's mental health she has instructed us to withdraw her claim. She does not feel that she is capable of giving evidence and taking the claim forward.*

*Please accept this letter as formal intimation of the Claimant's withdrawal of her claim."*

25. A Judgment dismissing the claim was signed by Employment Judge Kearns on 17 August 2018. It was sent to both parties by letter dated 17 August 2018.

## **Submissions**

26. Mr Morton made an oral submission, which is summarised here.

27. He referred to the emails of 14 September 2018 (32) and 26 October 2018 as being, in effect, his written submissions to this hearing.

28. Mr Morton then spoke to the exchanges which he had had with Mr Stillie, and pointed to some of the emails which they had sent at that time before withdrawal. On 18 August 2018, at 9.19am, Mr Stillie emailed Mr Morton to confirm that his client had decided to withdraw her claim, and said that he had notified the Tribunal of this (46). Mr Morton said that he had called the Tribunal but "did not get an affirmative answer".

29. In his submissions, I drew to Mr Morton's attention correspondence which was available to me on the Tribunal file, of which he was unaware, and to which I refer below.

30. He pointed out that it was curious that the claimant's representative was trying to settle a case which had already been withdrawn. However, he said that he did not attend the Tribunal office on the morning of the hearing, as he took the view that if the claimant's representative had turned up, he could rely upon the email confirming that the claim had been withdrawn. The respondent had prepared a bundle with precognitions for the PH. The costs which the respondent sought to recover were for professional services fees of £1,440. The respondent had already had to pay fees of up to approximately £2,000 prior to the file being passed to Mr Morton's office, demonstrating that they had incurred considerable expense in defending the claim.

31. Mr Morton reiterated his written submission about the lack of reasonable prospects of success of both constructive unfair dismissal claim and of the disability claim. In particular he stressed that it was very unlikely that the claimant would have persuaded the Tribunal that she met the definition of disability.

32. He asserted that the claimant's decision to resign was brought about by the hint of disciplinary proceedings being raised against her. When she raised

matters with ACAS she did not, tellingly, mention a disability discrimination claim being contemplated.

33. The real reason why the claimant withdrew her claim was that this was an opportunistic claim without any reasonable prospects of success. The claimant simply did not want to come to the hearing, he said.

34. For the claimant Ms Shirkie made a brief oral submission.

35. She explained some of the background to the claim, and then went on to say that the claimant had lost confidence in her solicitor, Mr Stillie, because she had not found out about the dates of the Preliminary Hearing until the week before it was due to take place. She started to look for another solicitor to represent her. She met with the new solicitor on the Wednesday but was unable to contemplate proceeding with the hearing at such short notice. She applied for a postponement on the Friday after telephoning the Tribunal office, though she was unaware she had to copy all correspondence to the other side in the case.

36. When the postponement request was refused, she had "a meltdown", according to Ms Shirkie, and decided not to go ahead with the hearing. As a result, she did instruct Mr Stillie to withdraw the claim, though it was Ms Shirkie who made the telephone call to pass on this instruction. The claimant was unaware, she said, of any settlement discussions taking place after the withdrawal, or indeed at all.

37. Ms Shirkie said that the claimant "categorically" did not withdraw the claim because she was of the view that she was not going to succeed. At no point did ACAS advise her that she did not have a case. Mr Stillie never advised her that she did not have a case. When the relationship with her legal representative broke down, she did not know where to turn.

38. Ms Shirkie stressed that the claimant has obtained fresh employment but can only work 2 to 3 days a week due to her very fragile mental health. She maintained that Mr Stillie advised her that she would not be facing an award of expenses. She said that if the solicitor had told her that she had no prospects of success she would not have taken the case on. She felt that ACAS were not backing her.

39. If an award were made against her, it would have to be paid over a period of time. She is currently earning £220 per week, and recently moved in with a partner, so shares half the household bills. She does not pay rent but does pay for shopping. She has a credit card with a balance of approximately £1,900, and makes monthly payments of £200 in respect of her car.

40. Ms Shirkie asked the Tribunal to decline the respondent's application for expenses.

## **Discussion and Decision**

41. Rule 76 of the Employment Tribunals Rules of Procedure 2013 provides:  
*"(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.*

42. The application made by the respondent in this case has two parts: firstly, the respondent submits that the claimant should pay expenses incurred by the respondent because she raised and pursued a claim which had no reasonable prospect of success; and secondly, the late withdrawal of the claim amounted to vexatious, disruptive or otherwise unreasonable conduct.

43. Dealing with the first aspect of the application first, this is a case in which there are two heads of claim, namely constructive unfair dismissal and disability discrimination.

44. Mr Morton has submitted that the constructive dismissal claim has no reasonable prospect of success as she was not employed continuously by them for a period of two years.

45. In the ET1, the claimant stated, under "Additional Information", that *"This is a claim for Constructive Dismissal therefore I understand that the statutory 2 years employment does not count as my employer breached my Statutory Legal Rights."*

46. It is not entirely clear what this sentence was intended to mean. However, a Preliminary Hearing took place on 15 June 2018 before Employment Judge Laura Doherty for the purposes of case management, and it is clear that the further specification required of the claimant was not to be provided until after the Preliminary Hearing on disability status had taken place and a Judgment been issued (paragraph 21 of the Note following PH).

47. It is quite correct to say, as Mr Morton does, that the claimant's employment with the respondent did not last for two years. According to the claimant's ET1, she was employed from 20 October 2016 until 23 January 2018. However, at the stage when the claim was withdrawn, the claimant was subject to a direction by the Tribunal to provide further specification of the basis of that claim. Nothing was raised on behalf of the respondent about the jurisdictional point at that PH, so far as can be discerned from the terms of the Note, and accordingly it is tolerably clear that the Tribunal intended this matter to be deferred until after the PH on disability status.

48. The claimant can hardly be faulted, in those circumstances, for not having taken steps to establish the position more clearly prior to the open PH on disability status. All that can be said is that she had not addressed this issue **yet**.

49. It is possible to envisage circumstances in which the length of service requirement might not be an obstacle for the claimant - for example, if the constructive dismissal were said to arise as a result of a discriminatory act - and in the absence of further particularisation of that claim, I am not prepared to conclude that it had no reasonable prospect of success.

50. With regard to the discrimination claim, Mr Morton's submission appears to amount to an argument that the claimant would simply be unable to persuade the Tribunal that she was a disabled person, had she attended at the PH. He points to the terms of the medical records which were provided

by the claimant.

51. The difficulty with this submission is that the medical records, and the written correspondence provided in advance of the PH, would not comprise the entirety of the evidence to be put forward on this point by the claimant. The claimant herself would have given evidence, which would (it is hoped) address the definition of disability within section 6 of the Equality Act 2010, and without knowing what that evidence was to be, it would be, in my judgment, entirely unjust to condemn the discrimination claim as having no reasonable prospect of success. In any discrimination claim, the Tribunal must give very considerable weight to the need to hear evidence before drawing any firm conclusions as to the merits of the case. In this case, it is my judgment that no firm conclusion as to the strength of the claimant's case can be drawn from the written information provided, as it would be necessary to hear the claimant's evidence in order to draw together the entire factual picture upon which a decision could be taken.

52. As a result, I am not persuaded that it can be said that the claimant's claim lacked any reasonable prospect of success.

53. Turning then to the second aspect of the application, the respondent argues that the claimant acted vexatiously, disruptively or otherwise unreasonably by the late withdrawal of the claim.

54. As is apparent from the sequence of events set out above, the claimant experienced some difficulties with her legal representatives in the week before the PH. She said that she had not been made aware of the date of the hearing, and lost confidence in them in midweek. It appears that she started to seek alternative representation, but did not dismiss Mr Stillie as her legal representation at any stage up to the date of the hearing.

55. It is not for this Tribunal to make any criticism of Mr Stillie, who has no opportunity to explain his position in this sequence of events, but I am quite prepared to accept that the claimant, who has - at least - a history of anxiety and mental health difficulties, was confused and anxious about the forthcoming hearing, and felt that she was not being well supported by her legal representative. In those circumstances, and given that she was feeling unwell, she took steps to seek a postponement of the hearing on the Friday before it was due to take place. Having had the Tribunal's refusal of that application confirmed, she then decided that she was simply unable to proceed with the PH, and instructed her solicitor to withdraw the claim, which he did, on the last working day before the hearing.

56. There are some odd aspects to this. It is not clear why Mr Stillie was never told that the claimant did not wish to have him as her representative at the PH; and Mr Stillie's actions in apparently seeking to persuade the respondent to settle a claim which had been withdrawn are, on the face of it, inexplicable.

57. However, the issue for this Tribunal is to decide whether or not the claimant's actions were such as to attract the description of vexatious, disruptive or unreasonable. In my judgment, they fell short of that description. The claimant sought, in my view, to take a responsible course of action when, at the last minute, it became clear to her that her solicitor was not dealing with the matter in the way she had hoped or believed he



would. She was suffering from an illness at that point, and in fairly short compass decided to seek alternative representation and took the bold step of writing, in very cogent terms, to the Tribunal to apply for a postponement of the hearing. She did not intimate that application, presumably because she had not dealt with the Tribunal herself prior to that, leaving it to her solicitor, but that had no impact as the Tribunal immediately refused the application as having arrived too late. The door to renewing the application was left open, if the claimant could have obtained medical support, but she decided not to take that course, but to withdraw the claim.

58. In my judgment, the claimant's actions were far from vexatious, disruptive or unreasonable. On the contrary, the claimant took the view, when she was able to, that since the hearing had not been postponed, and since she was unhappy with her representative, and since she was unwell, it was appropriate and necessary for her to withdraw the proceedings. Had she pressed on with the hearing, or not withdrawn the proceedings but simply not attended the hearing, there may have been a different view available to me, but in my judgment, the claimant has behaved quite responsibly. A finding of vexatious, disruptive or otherwise unreasonable conduct requires a level of behaviour which the claimant has not approached in this case, and it would be grossly unjust to make such a finding in her case.

59. I accept, of course, that the late withdrawal of the claim has caused the respondent to incur expense, and I consider that Mr Morton's application and his conduct of this hearing were reasonable and responsible. However, the question is centred on the nature of the claimant's conduct, and in my judgment, she did not behave in a way, in these proceedings, which was vexatious, disruptive or otherwise unreasonable.

60. Accordingly, for these reasons, the respondent's application for expenses is refused.

**Employment Judge: Murdo Macleod**  
**Date of Judgment: 30 May 2019**  
**Entered in register: 03 June 2019**  
**and copied to parties**