EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100970/2020 (V) Expenses Judgment per Written Submissions: Members' Meeting on 9 August 2021
Employment Judge: M A Macleod
Tribunal Member: P McColl
Tribunal Member: A Grant

Robert O'Neill — **Claimant**
Represented by
Ms A Bennie
Advocate
Instructed by
Ms R Thomson
Solicitor

William Thompson & Son (Dumbarton) Limited
Birch Road — **Respondent**
Represented by
Mr C Asbury
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the respondent's application for expenses under Rule 76(1) of the Employment Tribunals Rules of Procedure 2013 is refused.

REASONS

1 . The Employment Tribunal heard the claimant's complaint of automatically unfair dismissal on 2 and 3 November 2020, and issued its Judgment dismissing the claims on 24 December 2020.

2. The respondent made an application for expenses against the claimant in terms of Rule 75(1)(a) of the Employment Tribunals Rules of Procedure 2013, on the basis that the claimant or his representative had acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings or the way in which the proceedings had been conducted, or that the claim had no reasonable prospect of success.

3. The claimant opposed the application.

4. It was agreed by parties that the Tribunal would deal with the application by way of written submissions alone. Those submissions were presented to the Tribunal, and the Tribunal convened a meeting of Employment Judge and Tribunal Members on 9 August 2021 by video conference in order to consider this application.

5. The Tribunal will set out the submissions presented by the respective parties, and then our decision, with reasons, below.

Submissions

6. For the respondent, Mr Asbury referred to the unreasonable conduct of the proceedings. He pointed the Tribunal to the case of Dyer v **Secretary of State for Employment EAT 183/83,** in which it was held that "unreasonable" had its ordinary meaning in English, and has not to be interpreted as if it meant something similar to "vexatious". He argued that the claimant conducted the proceedings unreasonably by:
• Failing to specify or particularise properly the nature and extent of the claims which the claimant intended to pursue at the final hearing;
• Failing to notify the respondent or the Tribunal of the fact that the claimant did not intend to pursue a claim under section 100(1)(c) of the Employment Rights Act 1996 (ERA); and
• Failing to withdraw the claims having been invited to do so by the respondent in its costs warning letter dated 23 October 2020.

7. Mr Asbury went on to deal with these three points.

8. He argued that the claimant failed properly to specify or particularise the claims he intended to pursue at the final hearing, and also failed to respond to the respondent's invitation that he should do so at paragraphs 5 and 6 of the Grounds of Resistance. He also failed to provide the respondent with the agenda prior to the Preliminary Hearing.

9. Employment Judge Hoey noted, in his Note following Preliminary Hearing, that the claimant's complaint was that he had been dismissed because he had made a protected disclosure, which was that he disclosed to Mr Carr and Mr Thompson on 22 October 2019 that he was being required to work in an area that was unsafe; that he was dismissed for reasons relating to health and safety under section 1 00(1)(c) of ERA. Mr Asbury submitted that this amounted to an accurate reflection of what was said at the Preliminary Hearing.

10. He argued that at this point, the claimant and his representative should have known what the respondent's understanding of the claims being advanced were. In particular, the respondent understood that there was a single disclosure being relied upon, which did not include the sharing of the video footage taken by the claimant. Had the claimant been concerned that the Note did not accurately reflect the terms of the discussion, there were procedural steps which he could have taken (such as reconsideration). In particular, if the claimant wished to abandon any part of the claim, or expand upon the disclosure or disclosures being relied upon, he could have taken steps to address these points at that stage.

1 1 . This amounted to a failure to comply with the overriding objective of the Tribunal Rules, set out in Rule 2, in the duty of a representative or party to assist the Tribunal.

12. He went on to submit that the claimant was presented with another "golden opportunity" to clarify his position in response to the Costs Warning Letter. However, the claimant's representative did not engage at all with the respondent in response to that letter. The claimant's representative was under a duty to address this matter, and their failure to do so amounted to unreasonable conduct on the part of t ie claimant or his representative.

13. This left the respondent's representatives in the position of preparing its defence of the claims based on an understanding which was not shared by the claimant, something of which the respondent was unaware until the claimant's submissions were provided during the course of the Tribunal hearing.

14. In all the circumstances, Mr Asbury submitted, the claimant or his representatives failed to conduct proceedings in a reasonable manner.

15. Secondly, he argued that the claimant or his representative failed to notify the respondent or the Tribunal of the fact that the claimant did not intend to pursue a claim under section 100(1)(c) of ERA. The claimant or his representative should have known that it was understood by the respondent and by the Tribunal that he was pursuing such a claim.

16. On 30 October 2020, Mr Asbury said, he emailed the claimant's representative to set out the respondent's position in relation to a jurisdictional point being taken about the claim under section 100(1)(c), and asked the claimant for his position on this point. The claimant's representative did not engage with the respondent on this matter.

17. At no stage during the proceedings did the claimant indicate that he was not intending to pursue a claim under this sub-section. When skeleton submissions were exchanged, after the evidence had concluded in the Hearing on the merits, the respondent's representative noted that no submissions were made by the claimant on this point. W hen it was raised with the Tribunal, counsel for the claimant advised that the claimant was not pursuing such a claim under section 100(1)(c). Mr Asbury suggested that there were two possible explanations: either the claimant never intended to pursue such a claim but failed to notify the Tribunal or the respondent that he took such a view; or that he did intend to make such a claim but during the proceedings changed his mind but failed to tell the Tribunal or the respondent that he had done so.

1 8. This amounted to unreasonable conduct, in Mr Asbury's submission.

19. Thirdly, Mr Asbury submitted that the claimant or his representative acted unreasonably by failing to withdraw the claims having been invited to do so by the respondent in its Costs Warning Letter.

20. Having read this letter, the claimant would have, with advice, been aware that his claims had no reasonable prospect of success, and would have known that the reason for his dismissal was that he had shared video

footage in such a way as to breach the respondent's policies on confidentiality, that there was no basis upon which he could satisfy the criteria in section 43B of ERA and that his argument that sharing the video footage was an appropriate step taken to protect himself or others from harm was bound to fail.

21. In addition, Mr Asbury argued that the claimant made a number of concessions in the course of his oral evidence which made his decision not to withdraw his claims following receipt of the Costs Warning Letter even more unreasonable, such as that he was aware that he had been guilty of wrongdoing in the sharing of the video (for which he would have accepted a final written warning), that he did not have any concern that the respondent would cover up the incident involving the rockfall and that he was satisfied that at the point when he took the video there was no imminent or serious danger to which he was exposed.

22. He submitted that the claimant made the concessions openly and without difficulty, and he must have known that they represented his position. He must have told his legal representatives about these points in order to help them assess the strength of his position in advance of the claim being presented to the Tribunal. He must have known that such concessions would make it impossible to succeed in his claim to the Tribunal, and if he did not, then his solicitors must have made him so aware.

23. The reasonable course of action for the claimant to have taken in response to the Costs Warning Letter would have been to withdraw the claim, and thereby save cost and inconvenience to the respondent by bringing the matter to an end.

24. Mr Asbury then turned to his argument that the claimant's claims had no reasonable prospect of success.

25. The respondent's position was that the claimant simply felt that the decision to dismiss him was too harsh, and that he never truly believed that he had been dismissed because he made health and safety or protected disclosures. Facts were reconstructed in order to bring proceedings in circumstances where the claimant would otherwise have been unable to raise a Tribunal claim due to the lack of sufficient qualifying service.

26. The respondent has been significantly prejudiced by having to defend whistleblowing and health and safety claims against them, which claims ultimately lacked any substance or legal merit. The respondent's reputation is built on health and safety, and accordingly they acted reasonably when they dismissed the claimant.

27. Mr Asbury therefore invited the Tribunal to award to the respondent the expenses of the entire proceedings, which failing the expenses following the Costs Warning Letter. He referred to the Schedule of Expenses provided by the respondent.

28. For the claimant, Ms Bennie, advocate, who appeared in the Tribunal proceedings, made a written submission opposing the application for expenses.

29. In that submission, she set out a number of observations in a tabular form, seeking to summarise the actions of counsel and agent on behalf of the claimant in this case.

30. Counsel gave advice to the claimant's agents that, based on current information, his prospects of success were greater than 51%, on 2 February 2020, of bringing himself within the terms of section 43G and/or 43H of ERA, and thereby with a section 103A claim; and/or section 100(1)(e) of ERA; and a claim under section 13 of ERA in relation to unpaid holiday pay.

31 . She went on to set out a detailed timetable of events, up to the point where, in the week prior to the hearing, she conducted a consultation with the claimant, and following that consultation expressed the opinion that the claim should and could proceed. She accepted, then, that in his cross-examination the claimant's evidence differed in some respects from his witness statement. She reflected on this matter overnight before making the submission which made to the Tribunal at the conclusion of the hearing.

32. In light of the above, Ms Bennie disputed that the claimant and his representatives acted vexatiously, abusively, disruptively or otherwise unreasonably. Her explanation for the divergences in the claimant's evidence under cross-examination and in the witness statement can be explained by skilful cross-examination.

33. She accepted that her note to her agents following the Preliminary Hearing before Employment Judge Hoey was less detailed than the Employment Judge's Note, but if that is an error, that does not amount to conduct which is abusive, disruptive or otherwise unreasonable.

34. She also observed that while she was aware that the Note was contained within the Productions before the Tribunal, it was only after the respondent made comment to the Tribunal about it that she consider it necessary to have regard to the Note.

35. The claimant therefore invited the Tribunal to refuse the respondent's application for expenses.

Discussion and Decision

36. In this case, the application is made under Rule 76(1) of the Employment Tribunals Rules of Procedure 2013, which provides:
"A Tribunal shall make a costs order..., and shall consider whether or 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; or
(c) 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. "

37. The Tribunal takes note of the authorities to which we were referred.

38. We recognise that the making of an Order for Expenses under Rule 76(1) is regarded as the exception rather than the rule, but note that it is necessary for us to consider whether or not the claimant or his representative has acted unreasonably in bringing or conducting the proceedings, or if this claim had no reasonable prospect of success.

39. Mr Asbury has provided a very helpful submission in which he has laid before the Tribunal the different reasons why he argues that the claimant or his representative has acted unreasonably in this case, and also that the claims had no reasonable prospect of success.

40. The claimant's position, in relation to the application for expenses, is slightly unclear. What we have been provided with is a Note by Counsel for the claimant, setting out a timeline of her involvement and to some extent the advice which she gave to the claimant, and defending her actions and decisions. While we appreciate that the application is directed at the actions not only of the claimant but also of his representative, which clearly includes Ms Bennie, there is a sense in which there is no detailed submission provided to us defending the actions of the claimant.

41. Mr Asbury helpfully delineated his submissions on the basis of his application into three specific allegations:
• Failing to specify or particularise properly the nature and extent of the claims which the claimant intended to pursue at the final hearing;
• Failing to notify the respondent or the Tribunal of the fact that the claimant did not intend to pursue a claim under section 100(1)(c) of the Employment Rights Act 1996 (ERA); and
• Failing to withdraw the claims having been invited to do so by the respondent in its costs warning letter dated 23 October 2020.

42. We understand that the first two of these points are, in effect, different aspects of the same criticism of the claimant, namely that on the one hand he failed to provide clear and full specification of his claim to include the assertion that the taking and sharing of the video footage amounted to a protected disclosure under ERA, and on the other hand, he persisted with a claim under section 100(1)(c) until very late in the proceedings when his representative departed from it.

43. With regard to the claimant's failure to specify the claim that the taking and sharing of the video footage amounted to a protected disclosure, we note that this was a matter which was raised during submissions in the hearing on the merits, and we addressed it in paragraphs 132 to 136. It is perhaps useful to extract those paragraphs here:
132. In submissions, the claimant argued that that the report of the first rockfall and the video footage, either individually or as cumulative communications, were protected disclosures.
133. The respondent objects strongly to the inclusion of the video footage as a protected disclosure on the basis that there is no pleaded case for this assertion.
134. On that point, the Tribunal concluded that the pleadings were very general in their terms, and mentioned the claimant's report to Mr Thompson of the first rockfall and the fact that he took video footage of the consequences of the second rockfall, but did not clearly set out which reports were said to be the protected

disclosures. We understand and to some extent sympathise with the respondent's concerns, which were highlighted in their ET3, and matters were not clarified by the presentation of any further particulars by the claimant.
135. The matter was canvassed at the Preliminary Hearing before Employment Judge Hoey, and as included in the list of issues he noted that the "claimant says he made the disclosure on 22 October 2019 when he disclosed to Mr Carr and Mr Thompson that he was being required to work in an area that was unsafe." There was nothing said at that stage by the claimant or on his behalf that he wished the disclosure of the video footage to be taken into consideration as a protected disclosure.
136. We have decided that in all the circumstances it is appropriate to consider both disclosures, since the terms of the claimant's pleadings were broad enough to encompass the possibility that he intended to rely upon both as disclosures. This was not particularly helpful, in the way in which it was pled, but we have not found that there was any prejudice to the respondent in requiring to meet such a claim, and that the evidence which they led allowed them to defend the allegation that both amounted to disclosures.

44. We have made clear that we did not regard the pleading of this case in this regard to have been particularly helpful, but concluded that the disclosure should be considered as part of a claim which was framed broadly enough to encompass the possibility that the claimant intended to rely upon the video footage as a disclosure. We have also been influenced, in reaching that conclusion, by the fact that the respondent was able to lead evidence which allowed them to defend the claim on that basis.

45. In light of that conclusion, we do not consider that there was the stark failure by the claimant suggested here by the respondent in providing the necessary specification to allow them to defend the claim. The claim was sufficiently well specified to enable the respondent, as they did, to present the witnesses and evidence necessary to defend the allegations successfully.

46. We are not therefore of the view that this failure to provide further specification amounted to unreasonable conduct by the claimant.

47. The second aspect of the application for expenses is that by waiting until submissions before confirming that the claim under section 100(1)(c) was not being insisted upon amounted to unreasonable conduct.

48. This is rather a finely balanced matter, and difficult to penetrate for the Tribunal. Essentially, Ms Bennie, who appeared as counsel for the claimant and had given supportive advice throughout the proceedings leading to the hearing, said that having heard the evidence of the claimant, she was only proceeding with the section 100(1)(e) claim. She did so, she says, on the basis that having heard the claimant's evidence, and in particular the concessions made under cross-examination, she required to make a decision on his behalf as to whether or not that aspect of the claim could be sustained. She decided, overnight prior to the day of submissions in the case, that it could not, and did not pursue it in submissions.

49. The Tribunal must determine whether or not this amounted to unreasonable conduct, either on her part or on the part of the claimant. It is for this reason that we say that this is a difficult matter to penetrate for the Tribunal. We are not persuaded that the claimant's representative, an experienced advocate with an established reputation before this Tribunal, acted unreasonably in reviewing the evidence given by the claimant in the hearing against what he had been recorded as saying in his witness statement, and thereby deciding that the evidence was different to what she had anticipated. It is our judgment that this is something which can occur in many cases, and to blame a representative for a client or a witness diverging from their precognition or witness statement is to fail to take into account the impact which an appearance before a Tribunal, and being subjected to close scrutiny as well as cross-examination, can have upon a lay individual unused to such proceedings.

50. We have no basis for finding that the legal representatives for the claimant knew that he would make the concessions which he undoubtedly did make in evidence. What is clear is that those concessions altered his representative's view of the case, such that she abandoned that part of the case which she felt could not longer be sustained. We do not consider that to be unreasonable conduct on the part of counsel: indeed, the Tribunal relies upon the professional assistance of legal representatives in acting as officers of the court in such circumstances and candidly withdrawing such claims as can no longer be supported on the evidence which has been heard.

51 . That leaves, of course, the criticism directed at the claimant, that he must have known that when he was challenged he would make the concessions which he did.

52. While we understand the respondent's representative's frustration that this sequence of events took place, we cannot sustain his submission that either the claimant must have known how his evidence would emerge or that it was inevitable that he would concede important points. He may not have understood the potential implications for him of making such concessions.

53. We have concluded that the claimant's concessions, which then led his representative to withdraw part of the claim at the last possible moment in the case, did not amount to unreasonable conduct on his part. He had received advice from legal representatives estimating the strength of his case. That he was unable to maintain his position before the Tribunal as he had represented it to his solicitors does not, of itself, amount to unreasonable conduct. It is a very fair point made by Ms Bennie that the responsibility for these concessions lies with Mr Asbury himself, in the manner in which he carefully and skilfully cross-examined the claimant in the witness box.

54. As a result, we are not persuaded that the claimant's withdrawal of that claim amounted to unreasonable conduct either on his part or on the part of his representative.

55. Finally, then, we require to consider whether the claimant's claim had no reasonable prospect of success. We are asked to take into account the Costs Warning Letter, which advised the claimant that he was likely to

lose, and that if he did not withdraw an application for expenses would follow. However, it is quite clear that such a letter cannot be taken to amount to objective advice freely given to a claimant in Employment Tribunal proceedings. It is not tendered objectively, but by a partial representative acting properly but robustly to advance only the interests of his client; and the respondent was not proffering legal advice as a representative would, but making the strongest criticisms of the claimant's case in order to persuade the claimant to withdraw prior to hearing, and thus avert the cost and inconvenience of a public hearing before the Tribunal.

56. In other words, a Costs Warning Letter is a tactical intervention which of itself amounts simply to a warning to the claimant that if he proceeds and fails, he may face unpleasant consequences. Such a tactic is entirely legitimate, but it does not and cannot usurp the function of the Tribunal in making an objective assessment as to whether or not the claim had any reasonable prospect of success.

57. It is important, too, to recognise that in this case the claimant was being advised by an employment law specialist, who gave him encouragement, in the face of the Costs Warning, to believe that he could and probably would succeed with his claim.

58. Leaving aside the impact of the Costs Warning Letter, however, the more fundamental question is whether or not this claim had no reasonable prospect of success. In our judgment, it did not. The claim here was essentially that having experienced what was clearly a very close and alarming escape from harm while working in the quarry, the claimant was dismissed for a reason which was closely related to that event, and expressly based upon his reaction to it. What the claimant failed to do was prove to the Tribunal that there was a direct link such as to demonstrate that the reason for his dismissal was that he had made protected disclosures, or was based on health and safety reasons.

59. We are not persuaded that the claimant's determination to challenge the decision to dismiss him on this basis amounted to pursuing a case which had no reasonable prospect of success, nor that he should clearly have been aware of that.

60. As a result, we are not prepared to find that the claimant's claim had no reasonable prospect of success, and therefore it is our conclusion that the respondent's application for expenses in this case should be refused.

Employment Judge: Murdo Macleod
Date of Judgment: 17 September 2021
Entered in register: 23 September 2021
and copied to parties