



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107696/2019
Employment Judge: M A Macleod
Tribunal Member: J Anderson
Tribunal Member; A Grant

Mrs P Devine

Claimant
Represented by
Mr W McPariand
Solicitor

Ferrari Packaging Limited

Respondent
Represented by
Ms F Gorry
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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

REASONS

1. In this case, the Tribunal issued a Judgment on 25 January 2021 in which the claimant's claims were dismissed following a Hearing which took place by CVP on 12 to 14 October 2020.
2. On 17 February 2021 , the respondent's agent wrote to the Tribunal making an application for expenses under Rule 77 of the Employment Tribunals Rules of Procedure 2013. That application was opposed by the claimant. Following correspondence with the Tribunal, the parties agreed that the application should be dealt with by way of written submissions.
3. The Tribunal will therefore set out the application, the claimant's objections, a summary of the relevant law and its decision on the application.

The Application

4. The application was based on the Tribunal's findings in fact in its Judgment, and the respondent submitted that the claim had no reasonable prospect of success. An expenses order would therefore be competent under Rule 76(1)(b).

5. Alternatively, the respondent submitted that an expenses order against the claimant would be competent under Rule 76(1)(a) on the grounds that the claimant acted vexatiously and/or unreasonably in bringing her claims.

6. The respondent asserted that they had incurred legal fees of £12,232.26 plus VAT (£2,446.46) in defending the claim. They submitted that those costs were reasonable and proportionate to the matters under dispute.

7. The application went on to refer to a significant proportion of the Judgment, highlighting the Tribunal's findings at paragraphs 48, 50, 52, 57, 63, 66, 81, 96, 119, 121, 122, 123, 129, 133, 135, 137, 143 and 153. We address the extracts from the Judgment in our decision below.

8. They submitted that these passages, and the parts which they highlighted in the application, supported a finding that the claimant acted unreasonably and vexatiously in bringing her claims. The evidence put forward by the claimant did not support her claims, a point confirmed by the Tribunal in its judgment.

9. They advised that Ms Gorry, the respondent's solicitor, sent a "costs warning" to the claimant's representative in October 2020, but despite this the claimant elected to continue with her claims. She was given fair notice that an application for expenses would be made should her claims fail.

The Claimants Objections

10. In Mr McFarland's letter to the Tribunal on 24 February 2021, he set forth the claimant's opposition to the application for expenses.

11. He pointed out that the claimant raised claims in this case for (1) discrimination by association, and (2) automatically unfair dismissal. The claim and response were accepted by the Tribunal, and the case proceeded to two Preliminary Hearings, on 1 November 2019 and 15 July 2020, with the Hearing on the Merits taking place on 12 to 14 October 2020. The claimant accepts that by its Judgment the Tribunal dismissed her claims, but said that it does not follow that expenses should be awarded against her. The making of such awards is the exception and not the rule.

12. Mr McParland pointed out that the respondent made no application for strike-out or deposit order at any earlier stage of the proceedings, and that this was instructive. He maintained that no issue was raised at either Preliminary Hearing by the respondent that the claims had no reasonable prospect of success or that the claimant was acting vexatiously or unreasonably.

13. Instead, he pointed out, the respondent provided a list of issues, which suggested that they believed that there were issues to be investigated. He accepted that the respondent did issue a warning letter as to expenses in October 2020, though asserted that that was generated by a letter from the claimant to them exploring the possibility of settlement. The warning, he said, was vague and general in nature, making an allegation that the evidence supported the contention that the claimant resigned at a meeting of 2 May 2019, relative to the dismissal claim. There was, however, a discrimination claim as well, which was denied, and which overlapped with the dismissal claim. Costs would be properly incurred by the respondent as

the discrimination claim would still require to proceed.

14. He submitted that the Tribunal's findings do not indicate that the claim had no reasonable prospect of success and/or that the claimant acted vexatiously or unreasonably. He argued that the claimant was unsuccessful because the Tribunal preferred the evidence of the respondent's witnesses, with which he took no issue. The fact that the Tribunal found the claimant's evidence "less convincing" does not mean that the claim was without reasonable prospect of success or that the claimant acted in a vexatious or unreasonable way. He said that it is not unusual for a witness to give evidence which is "disappointing and/or not in line with a witness statement or claim form", nor that the evidence elicited under cross examination will not be on all fours with the allegations made. A finding that there was no evidence in support of the claimant's assertion that she had been ostracised and excluded by other staff after diagnosis became apparent is not the same as finding that the claim had no reasonable prospect of success or that the claimant acted vexatiously or unreasonably.

15. He also submitted that the fact that a submission was not accepted by the Tribunal does not mean that this was unreasonable conduct.

16. The claim was advanced in good faith, and the respondent did not suggest in submissions that it was otherwise. The claimant is entitled to access justice, and the Tribunal is allowed to claimants without the risk of adverse costs which would arise in ordinary civil litigation. This was, he submitted, a case with factual disputes which could have been decided either way and the evidence needed to be tested at a Hearing.

17. Mr McParland suggested that even if the threshold for unreasonable conduct were passed in this case, the respondent's own conduct of the proceedings would require to be considered, as unreasonable in its own right. He cited a number of examples, and said that the respondent could not now profit from their own unreasonable conduct.

18. He concluded by submitting that if the Tribunal were minded to make an Order for Expenses, the claimant has no ability to pay any award. She was in employment but resigned on 29 December 2020 to care for her mother, who sadly passed away on 16 January 2021. The claimant is currently in receipt of Universal Credit of £832.42 per month, and child benefit of £140 per month. She lives with her partner and three daughters, aged 14, 16 and

18, all in full time education. She relies on her partner paying the bills, and she herself is still grieving the loss of her mother. She has been unable to secure new employment, and has no savings. An award of Expenses would have a devastating effect upon her, her family, and her future.

The Relevant Law

19. 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.

20. The Tribunal had reference 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”.

Discussion and Decision

21. The substance of the application made by the respondent for an award of expenses in this case is based upon findings made by the Tribunal in issuing its Judgment in this case.

22. That Judgment, issued to the parties on 25 January 2021, unanimously found that the claimant's claims failed, and should be dismissed.

23. The Tribunal did make a number of findings about the claimant's evidence, particularly in comparison to that of the respondent's witnesses, and confirmed that it was not possible to find in her favour based on the findings in fact which the Tribunal was prepared to make on the evidence.

24. The respondent relies upon the Tribunal's Judgment to the extent that findings were made which were inconsistent with the complaints set forth by the claimant in her claim form and in her witness statement lodged with the Tribunal.

25. The respondent argues, based upon these findings, that the claimant's conduct of the proceedings was vexatious and unreasonable.

26. They point to a number of the findings in the Judgment. They place reliance upon, for example, paragraph 121 of that Judgment, in which the Tribunal found that the claimant's evidence was “less convincing” - meaning that it was less convincing than the different evidence given by the respondent's witness Mrs Morrison - and that her claim and witness statement contained strong assertions of wrongdoing which could not be supported and which her evidence in cross-examination did not support. The Tribunal went on, in that paragraph, to observe that the evidence demonstrated that Ms Morrison's text messages had continued to be supportive after the point when the claimant suggested they were not, but also that the claimant conceded that point before us. We went on to say that while it was creditable for the claimant to have made the concession, we were troubled by the fact that she only did so at that stage, having set out in the claim form and her witness statement “with such insistence” that Ms Morrison changed her attitude to her at a certain point.

27. The Tribunal must consider whether, firstly, the claimant's conduct amounted to vexatious and unreasonable conduct, and secondly, if so, whether an award is appropriate.

26. Essentially, the application asserts that the claimant's conduct in giving evidence which was not found to be credible by the Tribunal amounted to vexatious and unreasonable conduct, particularly in light of the strength of her allegations in her pleadings and her witness statement, from some of which she departed in the hearing.

29. We must consider whether these findings support an allegation that her conduct was vexatious and unreasonable.

30. It is appropriate to note that in many cases which come before the Employment Tribunal a decision requires to be made between competing versions of events presented by different witnesses in the hearing. It was known in advance of this hearing that there was a clear divergence in the evidence to be given by the claimant as against that to be given on behalf of the respondent.

31. It is also appropriate to note that an award of expenses does not automatically follow success in the Employment Tribunal.

32. The Tribunal notes that the claimant did make certain concessions in her evidence, related to her allegation that the manner in which she was treated by her colleagues and by Ms Morrison in particular changed when it became clear that her daughter had received a diagnosis which would require her, and thereby the claimant, to attend a large number of medical appointments.

33. However, in our judgment the major complaint in this case was that the claimant was dismissed by the respondent in light of that knowledge. We did not find that the claimant gave to the respondent a letter on 16 April, based on the evidence which we preferred, given by the respondent's witnesses, though the claimant continued to assert that she had passed it to them on that date; and nor did we find that the claimant was dismissed, but concluded that she had in fact resigned. The claimant did not depart from that assertion in the hearing before us.

34. We considered whether the claimant's conduct amounted to vexatious conduct before us. In doing so, we took into account not only the points made by the respondent, and the findings to which they pointed us in our own Judgment, but also:

- the fact that the claimant was throughout represented by an experienced solicitor well-versed in employment law, who robustly pursued his client's case before us;
- that she gave her evidence with conviction in her own position, notwithstanding that the Tribunal was not convinced by her evidence;
- that the Tribunal did not specifically find that her evidence was not credible at all, but that it was less credible than the evidence given by the respondent's witnesses;
- that the Tribunal nowhere found that the claimant had lied or deliberately sought to mislead us, albeit that we did find, at paragraph 123, that we were led to question the veracity of her evidence, some of which was without foundation, and at paragraph 135 that she was prepared to exaggerate her evidence in order to create a negative impression of Ms Morrison; and
- that it was our clear impression that the claimant strongly believed that she was giving an accurate version of events.

35. The claimant's agents' position was that it does unfortunately occur from time to time that a witness gives evidence which is a disappointment to the solicitor calling that witness, but that that does not amount to vexatious or unreasonable behaviour.

36. We have considered this matter carefully, but have concluded that in a case such as this where much turns on disputed evidence between the witnesses called by each party, it would not be in the interests of justice to find that the claimant's conduct of the proceedings was sufficient to amount to vexatious or unreasonable conduct. It is quite true, as the claimant's agents have pointed out, that in many cases before the Tribunal where facts are disputed, the Tribunal is forced to decide which version of events is believed. It does not follow that the party whose evidence is not accepted is necessarily therefore guilty of vexatious or unreasonable conduct. In this case, it was our view that the claimant believed that she had been dismissed, and the circumstances which surrounded her departure from employment were quite complex. We had to decide, with some care, whether or not the different facts presented to us supported the claimant's position or the respondent's. We did not find that a straightforward task. For example, we concluded that the claimant's failure to call in sick on the Friday after her leaving the office was a significant admixture of evidence supporting the respondent's argument that she resigned; but it was also true that the claimant's actions, albeit somewhat delayed, may have been regarded as consistent with her being dismissed, or her remaining in employment.

37. As a result, we have concluded that this was a case which required to be heard by the Tribunal, and for the evidence to be fully tested, before the Tribunal could reach the conclusions which we did. That we had to give careful consideration to that matter means, in our Judgment, that the claimant's actions in bringing the proceedings and her conduct of the proceedings fell short of vexatious or unreasonable conduct. Her concessions were of importance but did not go to the heart of the case before us.

38. We are not prepared, therefore, to find that the claimant acted in a manner which was vexatious or unreasonable in these proceedings.

39. The other point made by the respondent was that the claimant's claim had no reasonable prospect of success. We do not agree. The claimant's claim required to be heard in evidence, and it took some time and careful deliberation to determine the facts of the case and thereby the legal implications of those facts as expressed in the list of issues. The claimant was entitled to have her case heard, in our view, and it is correct to say that the respondent did not seek strikeout or a deposit order at any stage in advance of the hearing.

40. Claimants have a right to have access to justice, and to put forward their claims before the Tribunal so long as they do not act vexatiously or unreasonably in doing so, and so long as their claim has a reasonable prospect of success. The claimant was sustained in advancing her claim by an experienced employment lawyer. The Judgment reached in this case was not a simple one, and required very careful consideration.

41. Accordingly, we have concluded that it cannot be said that the claimant's claim had no reasonable prospect of success.

42. It is our judgment, therefore, that the respondent's application for an award of expenses in this case should be refused.

Employment Judge: Murdo Macleod
Date of Judgment: 28 October 2021
Entered in register: 29 October 2021
and copied to parties