

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101678/2017 Hearing at Glasgow on 10 May 2018

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Employment Judge: M A Macleod (sitting alone)

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Ben Pierson

Claimant
Represented by
Ms J Barnett

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Saltire Facilities Management Limited

Respondent
Represented by
Ms A Mulholland

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the respondent's application for expenses under Rule 76 of the Employment Tribunals Rules of Procedure 2013 is refused; and that the respondent's application for a wasted costs order under Rule
30 80 is also refused.

REASONS

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1. In this case, the claim was dismissed on 13 February 2018 by the Employment Tribunal, and confirmed in a Judgment dated 16 February 2018.

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2. The reason for dismissal of the claim, as set out in the Judgment, was the non-attendance of the claimant or his representative at the continued Preliminary Hearing dated 13 February 2018. That Judgment elaborates upon the background to that hearing.

3. Following dismissal of the claim, the respondent's solicitor made an application for expenses and a wasted costs order. A hearing was therefore fixed in order to allow the parties to make submissions on this application, to take place on 10 May 2018.
- 5 4. The claimant did not attend but was represented by Ms Barnett, and the respondent was represented by Ms Mulholland.
5. No evidence was led but submissions were heard.

The Application

- 10 6. On 6 March 2018, the respondent emailed the Tribunal to make an application under 3 separate headings.
- 15 7. Firstly, the respondent made application under Rule 76(1)(a) of the Employment Tribunals Rules of Procedure 2013, for all expenses in the claim. It was submitted that the claimant and his representative had acted vexatiously and disruptively in bringing the claim to the Tribunal in the first instance, and in their conduct of the proceedings. The respondent, it was said, is of the opinion that the proceedings were brought to waste time and incur unnecessary expense, demonstrated by the lengthy adjournment taken for instructions, delays in responding to Tribunal correspondence and the non-appearance at both hearings referred to below by the claimant and his representative.
- 20 8. They attached a schedule of the expenses, which I address below.
- 25 9. Secondly and in the alternative, the respondent made an application for all expenses incurred in the non-attendance of the claimant and his representative at the preliminary hearings on 6 and 13 February 2018, under Rule 76(1)(a) and (b), and (2).

40. It was submitted that no good reason was given for the claimant's failure to attend the telephone conference call PH on 6 February. It was acknowledged, however, that the claimant's representative did seek a postponement of the continued hearing on 13 February 2018 because she

had a conflicting hearing on the same day, recognising that they had been aware of the continued dates since December. The application was rejected on 8 February and no further attempt was made to inform the Tribunal or the respondent that the claimant and his representative would not be in attendance.

11. Thirdly and again in the alternative, the respondent sought a wasted costs order against the claimant's representative under Rule 80(1).

12. Ms Mulholland submitted that the claimant's representative acted negligently in failing to notify the Tribunal sooner about the conflicting hearings, particularly as she was aware of the conflict for some time before making an application to postpone the hearing in this case. She also argued that the claimant's representative acted negligently by failing to notify the Tribunal that neither the claimant nor his representative would be in attendance in the event that the hearing were not postponed.

13. The schedule of expenses set out the sums sought by the respondent, to include all the costs associated with the defence of the claim.

14. Ms Mulholland confirmed that she did not wish to add to the application by way of submission, but reserved the right to reply to anything said by Ms Barnett for the claimant.

The Claimants Submission

15. Ms Barnett, for the claimant, confirmed that the applications are opposed.

16. She explained that the claimant raised a claim of unfair dismissal, on the basis that he had been unfairly treated by the respondent owing to circumstances arising from the divorce of his mother from one of the directors of the respondent.

17. She reminded the Tribunal that the claimant had sought an adjournment of the PH in order to carry out further investigations into evidence which had been led by the respondent at that hearing, but which had not been anticipated. On 30 November, she sought a witness order in respect of Ms

Keohane, the claimant's mother, in order to address this evidence, but that application was refused.

18. On 26 January 2018, the respondent's representative made an application for postponement of the telephone conference PH which had been fixed. On 27 January, Ms Barnett emailed the Tribunal to confirm that she had no objection to that application and submitted a postponement request in respect of the continued hearing fixed to recommence on 13 February 2018. She explained that it was not until she attended the Tribunal office in Glasgow on that date that she recalled that no response had been received to that request. She had attended the Tribunal office in order to appear in a case which had commenced on the previous day, in which she was already instructed, *Ouchacha v Serkan Aydin and Hakan Dumen & Others* (4102136/2017).

19. She spoke to the clerk responsible for this case, and informed him of the position. The hearing took place in this case, and lasted a very short time, of which she was aware because she remained in the corridor outside the waiting room throughout, and was able to see the respondent's agent leave the Tribunal room.

20. Ms Barnett argued that the claimant had acted throughout this case in good faith. He did not attend at the continued hearing on 13 February 2018 because she had advised him that it was unlikely that he would be required (following the postponement application which she had made). The claimant was by then (and is still) living in Russia. She accepted that her conduct in this regard was "sub-standard", and understood the ramifications of this. She said that she made no attempt to argue that her behaviour was not negligent, as it clearly was.

21. She reminded the Tribunal that the purpose of any costs award is compensatory, and not punitive.

22. It is necessary, she said, to look at the conduct itself. The respondent brought the proceedings upon itself, she said, and would have incurred costs in any event in defending the claim. The claimant was entitled to raise

proceedings in this case. The Preliminary Hearing was only necessary because the respondent opposed the claimant's assertion that he was an employee, and that matter was not decided at the point when the claim was dismissed.

5 23. Essentially, she said, the respondent is seeking costs which they would have incurred regardless of the conduct of which they complain. In any event, the claimant was not to blame for his non-appearance at the continued hearing.

10 24. She referred to the EAT decision of **Beat v Devon County Council & Another** **UKEAT/0534/05/LA**, and in particular to paragraphs 6, 23 to 25 and 30 of that Judgment, a copy of which she helpfully provided to the Tribunal. The Tribunal must look not only at whether the conduct was unreasonable but also at whether any costs were actually incurred as a result, and then determine the appropriate award.

15 25. With regard to the application for a wasted costs order, Ms Barnett stated that she had not charged the claimant any fee for her representation in this case. She said that she does, from time to time, represent claimants whom she feels have been the victim of injustice free of charge. In this case, she was further willing to act on behalf of the claimant because of the way in which the respondent had terminated her service agreement with them, and
20 she did so while not acting in pursuit of profit. As a result, she submitted, the Tribunal cannot make a wasted costs order against her.

25 26.1 raised with Ms Barnett, at the end of the hearing, the claimant's current income with a view to establishing his means to pay any award made against him. She said that she is still in contact with him, and she understands that he is not currently receiving monetary payment, but that he is working on a consultancy basis for his board. She has no further information on that matter at this stage.

The Respondents Further Submission

27. Having heard the claimant's submission, Ms Mulholland requested a short right of reply, which was granted.

28. She did not accept that Ms Barnett had received neither her email dated February 2018 nor the Tribunal's letter refusing the application to postpone the hearing of 13 February 2018, as this was highly unlikely. She maintained her criticism of the claimant's representative for not having taken further steps to deal with the matter in the absence of confirmation from the Tribunal that the hearing was to be postponed.

29. She reiterated that the respondent had to attend because of the actions of the claimant's representative, and that costs were incurred as a result. A fixed fee was charged for the day of 13 February on the basis that once a hearing is entered into her diary, she has to refuse any other work for that day on the assumption that the hearing will proceed. The fact that this was a short hearing is irrelevant since the cost incurred was a fixed fee, because she had had to commit herself to being in attendance at the Tribunal for the whole day.

30. When pressed by me whether the respondent accepted, or did not dispute, Ms Barnett's assertion that she had not worked for profit nor charged a fee to the claimant for the work in this case, Ms Mulholland was unwilling to commit herself without instructions.

Discussion and Decision

31. Rule 76(1) of the Employment Tribunals Rules of Procedure 2013 provides:

"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~~ for 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. ”*

5 32. Rule 80(1) provides:

“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 -

10 (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 as described as ‘wasted costs’. ”

15 33. Rule 80(2) goes on:

20 *“‘Representative’ means a party’s legal or other representative or any employee or 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. ”*

25 34. In the case of **Beat v Devon County Council & Another** **UKEAT/0534/05/LA**, the EAT provided guidance as to the making of expenses awards. At paragraph 25, the EAT (His Honour Judge Altman) said: *“Having found the areas of unreasonableness and misconception, a Tribunal, it seems to us, is bound to pause; to stand back and to look at all the factors that are to be taken into account when assessing the appropriate level of compensation. This involves balancing the amount of costs incurred by the unreasonableness, or the misconceived part of the claim against*

other parts of the claim and by taking account of the need, if the Tribunal considers there is a need for some compensation and costs.”

35. It is necessary, then, to consider the three separate heads of application under which the respondent seeks an award of expenses in this case.

5 36. Firstly, the application seeks recovery of all expenses in the proceedings on behalf of the respondent on the basis that the claimant brought the claim “to waste time and incur unnecessary expense”, and thus has acted vexatiously and disruptively in bringing the proceedings in the first instance, and in their conduct during the proceedings.

10 37. The respondent makes no detailed submission, nor provides any support, for the assertion that the claimant brought the claim to waste time and incur expense. That appears to suggest that the very raising of the claim amounted to vexatious behaviour. No further information is presented to the Tribunal in support of this argument. It is not clear to the Tribunal why this
15 submission is made, nor on what basis. Examination of the ET3 submitted on behalf of the respondent reveals that no such submission was made at that time, nor was any subsequent application made to the Tribunal to have the claim struck out on the basis that it was misconceived.

20 38. On the face of it, there was a clear factual dispute between the parties as to the circumstances in which his relationship with the respondent was terminated, but that was not explored at any stage before the Tribunal on the basis that the Preliminary Hearing issue was that of employment status. No decision was reached on that issue as the claim was dismissed before the conclusion of the hearing.

25 39. In my judgment, there is no basis for any assertion that the claimant brought these proceedings to waste time and cause the respondent to incur expense. He was supported by a representative who clearly stated to the
30 Tribunal that she considered that he had been unfairly treated, and wished to advance his case before the Tribunal on his behalf. There was an ongoing dispute between the parties as to the reason for dismissal but that could not have been resolved without the hearing of evidence.

40. Accordingly, the primary application made by the respondent is refused.

41. It is recognised that, to some extent, there is overlap between the primary application made and the first alternative application, as both relate to the conduct of the proceedings, and I now deal with these aspects of the application.

42. The application specifically focuses on the failure of the claimant or his representative to attend both the telephone conference PH on 6 February and the continued hearing on 13 February.

43. Rule 76 does refer to the conduct of both the claimant and his representative, for which the claimant may be held responsible, but clearly the Tribunal must consider the claimant's conduct in the wider context of the claim before requiring him to make any payment of the respondent's expenses.

44. It is quite clear, in my judgment, that the claimant himself was not responsible for his non-appearance at either the hearing on 6 February or the hearing on 13 February. He was assured by his representative – wrongly, as it turned out - that he did not need to attend, and thus to travel from Russia to Scotland, as she had applied for a postponement of the hearing of 13 February.

45. The non-appearance of the claimant at both hearings is thus explained by the advice he received from Ms Barnett.

46. The reason for the non-appearance of Ms Barnett is less clear. She says that she did not receive any information notifying her of the change of date of the telephone conference call, nor of the refusal of the postponement request. This is clearly an unsatisfactory state of affairs, since as his representative she can reasonably be expected to have contacted the Tribunal in check whether or not the first hearing was being moved, or her application in relation to the second hearing had been granted, but for no apparent reason she did neither.

47. It is important, as we have seen, to ensure that the actions complained of having caused the respondent to incur unnecessary expense.

48. With regard to the hearing on 6 February, the respondent attended, in the person of Ms Mulholland, and there was a short discussion which took place in the absence of Ms Barnett. That attendance would have been required whether or not Ms Barnett called in to the hearing. I am not persuaded that the respondent incurred additional cost as a result of the default of Ms Barnett on that occasion.

49. With regard to the hearing of 13 February, there is no doubt that the respondent incurred costs as a result of having to attend at the hearing. Had Ms Barnett attended, the hearing would have proceeded, and may well have taken two rather than one additional day, two having been allocated to the continued hearing as a precaution. As it turned out, because Ms Barnett did not appear at the continued hearing, the respondent's attendance was rendered unnecessary, but otherwise expense would have followed had she appeared.

50. On balance, it is not in the interests of justice to find that the claimant should be held responsible for his, and his representative's, non-attendance at these two hearings. He himself was blameless, as I am quite prepared to accept that his only reason for not attending was that he had been told not to come, wrongly, by his representative. He did not know that that was not correct at the time. Expecting him to find alternative representation, or to appear on his own behalf, would be quite unfair to him. He did not need to seek another representative, nor to appear on his own behalf, because he already had a representative who was assuring him that matters were in hand.

51. The claimant has suffered the loss of the right to pursue his claim, through no fault of his own. In my judgment, it would be quite unjust to insist that he be penalised by having to meet the respondent's expenses for either of those hearings, in all the circumstances before me.

52. Thirdly, the respondent sought a wasted costs order against Ms Barnett.

53. In this regard, Ms Barnett, who has not covered herself in glory in this case, is to be commended for her candour and acceptance of responsibility before me. She made no effort to argue that her conduct in failing to attend at the hearing on 13 February was not negligent. Her explanation appears to have been that she simply overlooked the fact that the postponement request was outstanding.

54. However, she also submitted to the Tribunal that she did not charge the claimant a fee. She made it clear that she did not intend to charge him a fee in respect of her representation at the hearing. As a result, given the terms of Rule 80(2), it is outwith the power of the Tribunal to make a wasted costs order against her, because she did not carry out the representation of the claimant for profit. She charged him no fee. As a result, no wasted costs order may be made.

55. I am prepared to accept, notwithstanding Ms Mulholland's reluctance to do so, that Ms Barnett was representing the truth to the Tribunal in saying this. There is no evidence to suggest that she received a fee, or would receive a fee at the conclusion of the proceedings, nor that she had made a contingency fee arrangement with the claimant. The information I have, uncontradicted by any other evidence, is that she was not, and was not going to be, paid for her representation of the claimant.

56. In these circumstances, Rule 80(2) does not permit the Tribunal to make a wasted costs order against Ms Barnett in this case, and accordingly, this application is refused.

57. It follows, then, that the respondent's application of 6 March 2018 for recovery of expenses either from the claimant or from Ms Barnett is refused in total.

Employment Judge: M Macleod
Date of Judgment: 14 May 2018
Entered in register: 16 May 2018
and copied to parties