

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100373/2016

5

Held in Glasgow on 23 March 2018

**Employment Judge: Lucy Wiseman
Member: Margaret Fisher**

10

Mr Gerard Doherty

**Claimant
Represented by:
Ms J Merchant -
Solicitor**

15

South Lanarkshire Council

**Respondent
Represented by:
Mr G Stewart -
Solicitor**

20

25

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal decided to refuse the respondent's application for expenses.

30

REASONS

35

1. The claimant presented a claim to the Employment Tribunal alleging he had been subjected to detriment on the grounds of having made a protected disclosure/s.

2. The respondent entered a response denying the claimant had made protected disclosure/s. The respondent acknowledged the claimant had not

E.T. Z4 (WR)

initially been returned to his substantive post following a work placement but denied this had been on the ground of having made a protected disclosure.

- 5 3. The Hearing took place over 14 days, and a Judgment dismissing the claim was sent to parties on 27 September 2017.
4. Mr Stewart, by email of 25th October 2017, made an application for expenses.
- 10 5. The Hearing today was to consider and determine the respondent's application for expenses.
6. We did not hear any evidence from the claimant in circumstances where his claim was being supported by the trade union.

15

Respondent's submissions

7. Mr Stewart referred to Rules 75 and 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules) and submitted the application for expenses was made because the claim had had no reasonable prospect of success. Further, the claim had been wholly unsuccessful and had had no prospect, given the evidence, of being successful.
- 20
- 25 8. Mr Stewart noted there was a two stage test for the Tribunal to adopt: firstly, did the claimant pursue a claim where there was no reasonable prospect of success, and secondly, if so, the Tribunal should consider making an order for expenses.
- 30 9. The respondent sought the sum of £20,000 in expenses. Mr Stewart (who is an in-house solicitor for the respondent) produced a list of expenses applicable in the Sheriff Court and explained this had been put forward to reflect the costs to the respondent of the in-house work.

10. The claim as presented was that the claimant had been subjected to detriment because he made protected disclosures. The claim had spanned a number of years and involved various grievances and appeals. Mr Stewart submitted the claimant had provided no evidence to the Tribunal other than his own oral evidence. The respondent had led evidence from each decision maker, whom the Tribunal had accepted as credible and reliable.
- 5
11. Mr Stewart submitted the claim had been based wholly on speculation and the claimant's belief why decisions were being made. In contrast the evidence of the respondent's witnesses had been consistent with what they had told the claimant at the time.
- 10
12. The Hearing had lasted 13 days and hundreds of documents had been produced, with nothing objective to support the claimant's claim. Mr Stewart noted he had put the claimant on notice that he considered the claim had no reasonable prospect of success and that he intended to seek expenses.
- 15
13. Mr Stewart invited the Tribunal to find the claimant acted unreasonably in pursuing a claim when there was no prospect of the claim succeeding, and to make an award of expenses in the sum of £20,000.
- 20

Claimant's submissions

14. Ms Merchant invited the Tribunal to reject the respondent's application for expenses. She submitted the claim did have, and always had, reasonable prospects of success. The claim had not been pursued unreasonably.
- 25
15. Ms Merchant reminded the Tribunal that the making of a costs order was the exception rather than the rule. Ms Merchant referred to rule 76 of the Rules and to the case of **Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78** where it was stated that:-
- 30

"the vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it has had."

5

16. Ms Merchant noted (***AQ Ltd v Holden [2012] IRLR 648***) that the Tribunal was entitled to take into account the absence of an application by the respondent to strike out the claim or seek payment of a deposit order if the respondent considered it to be truly unreasonable.

10

17. Ms Merchant invited the Tribunal to have regard to the circumstances of the claimant's case, which had involved complex circumstances over a lengthy period. The claimant had a lengthy period of service with the respondent. The Tribunal found the claimant had made protected disclosures and that he had been subjected to detriment.

15

18. It was submitted the claim brought by the claimant had more than reasonable prospects of success: it was a valid and legitimate claim capable of proof at the Tribunal. This was a case where the Tribunal had to look at the evidence and explanation of the respondent *"with a critical eye"*. The fact the claim was dismissed does not and should not lead to a conclusion that it lacked reasonable prospects of success.

20

19. Ms Merchant submitted there were legitimate issues of fact and law to be determined by the Tribunal. The Tribunal could, on the evidence it heard, have reasonably determined the claim in favour of the claimant. The claim was one therefore with reasonable prospects of success.

25

20. Ms Merchant referred to the fact the claimant had always understood Mr McAulay to be the decision-maker in respect of the move to Senior Practitioner. The respondent had not ever corrected that belief. If the Tribunal had found Mr McAulay was the decision maker, the respondent

30

would have been in great difficulty because Mr McAulay did not attend the Hearing to explain the reasoning for his decision. The respondent would not have been able to discharge the burden upon them.

5 21. Ms Merchant reminded the Tribunal that the respondent's position throughout was that the claimant made no protected disclosures and did not suffer a detriment. The respondent made no concessions prior to the Hearing and the claimant was left with no alternative but to give lengthy evidence regarding the disclosures and detriments.

10

22. The respondent's conduct and that of its witnesses was not free from criticism in the Judgment: for example, the Tribunal commented that a by-product of the way in which the respondent dealt with this matter was that no-one addressed the claimant's concern that decisions affecting him were made because he had blown the whistle. Further, the Tribunal had been split regarding Mr Swift needing pushed to answer certain questions.

15

23. Ms Merchant submitted the claimant had succeeded in showing he had made protected disclosures, and that he had been subjected to detriment. The causal link between the two was held not have been proven, but this could only be determined once the Tribunal had heard all of the evidence. It was submitted the claimant had not unreasonably pursued the claim. If however the Tribunal found there was ground for making a costs order, Ms Merchant invited the Tribunal not to exercise its discretion to do so because it would be unjust and disproportionate.

20

25

24. Ms Merchant noted the respondent had not provided any, or any sufficient, information as to the costs claimed, and the Tribunal was not in any position to properly assess the amount of costs. A schedule had today been provided, but there was no evidence regarding the actual costs of the respondent. Ms Merchant concluded her submission by reserving to the claimant the right to make further oral submissions relating to the sum of

30

costs to be awarded should the Tribunal exercise its discretion to make an order.

Discussion and Decision

5

25. We had regard firstly to the terms of Rules 75 and 76 of the Rules which provide as follows :-

10

75 (1) A costs order is an order that a party (the paying party) make a payment tot-

15

fa) another party (the receiving party) in respect of the costs that the receiving party has incurred while legally represented ...”

20

“76(1) A tribunal may make a costs 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 the way that the proceedings have been conducted or

25

(b) any claim had no reasonable prospect of success ..”

30

26. The application brought by the respondent was for an order for expenses to be made because the claimant pursued a claim which had no reasonable prospect of success on the strength of the evidence presented to the tribunal by the respective parties. The representatives agreed consideration of the application involved a two stage approach by the Tribunal to firstly determine whether the claimant did pursue a claim where there was no

reasonable prospect of success and if so, the Tribunal has a duty to consider making an order but a discretion whether to actually award costs.

5 27. The claim brought by the claimant was one where he alleged he had made a number of protected disclosures to different people and that he had suffered a number of detriments because of having made those disclosures. The case was heard over 13 days and involved hearing evidence from the claimant and six witnesses for the respondent.

10 28. Mr Stewart's submission that the claim had no reasonable prospect of success appeared to be premised on the claim being based wholly on speculation and the claimant's belief regarding the reason for decisions being made. Mr Stewart referred, during his submission, to the claimant not having called any witnesses to support his claim.

15 29. We accepted Ms Merchant's submission that it is the nature of cases involving whistle-blowing or discrimination that there are often no other witnesses to give evidence in support of the claimant.

20 30. We considered the material point in this case to be the fact that when determining the claim this Tribunal had to decide whether the claimant had made a protected disclosure (or disclosures); whether the claimant had been subjected to a detriment (or detriments) and if so, whether the detriments occurred because the claimant made a protected disclosure. The respondent's position was that the claimant had not made any protected disclosures and had not suffered any detriment/s.

25

30 31. The Tribunal decided, contrary to the respondent's position, that the claimant made two protected disclosures (one to Ms Dade on 20 January 2014 and one to Ms Potter on 27 July 2015). We also decided the claimant had been subjected to a detriment when (a) he was moved to a Senior Practitioner post; (ii) he returned to the team leader post and was allocated duties to manage the unpaid work; (iii) he was advised by Ms Potter that

disciplinary action could be considered if he continued to refuse to carry out the allocated duties and (iv) Mr Singh rejected his grievance relating to the allocation of duties.

5 32. The Tribunal next had to determine whether there was a causal link between the protected disclosures and the detriments suffered by the claimant. The Tribunal concluded there was no causal link and, for this reason, the claim failed. We however, accepted Ms Merchant's submission that the Tribunal could only determine whether there was a causal link once
10 it had heard all of the evidence and determined the credibility and reliability of the evidence of the respondent's witnesses.

33. This was not a case where matters were clear cut. Ms Merchant was correct in identifying that the claimant had always understood Mr McAulay made
15 the decision to move him to a Senior Practitioner post. It was only when Mr Swift gave evidence, that he confirmed it had been his decision albeit relayed via Mr McAulay. If the Tribunal had not accepted Mr Swift's evidence on this point, the respondent may have faced a difficulty in explaining to the Tribunal the reasoning for the move in circumstances
20 where Mr McAulay did not attend to give evidence.

34. We acknowledged Mr Stewart's submission that the explanations given by the respondent's witnesses to the claimant during the various stages of internal procedure were consistent with the evidence given at the Tribunal.
25 However, this does not detract from the fact that it is still for this tribunal to determine the credibility and reliability of that evidence. Further, the respondent must accept that notwithstanding all of the procedures they followed, no-one addressed the fundamental point of the claimant's concern, which was that things were happening to him because he had
30 made a protected disclosure.

35. We concluded, for the reasons set out above, that this was not a claim where it could be said there were no reasonable prospects of success. The

claim succeeded in two of the three issues to be determined by this Tribunal. The claim had a reasonable prospect of success, and the fact it was not ultimately successful does not mean it had no reasonable prospect of success.

5

36. We decided to refuse the respondent's application for expenses.

Employment Judge: Lucy Wiseman
Date of Judgment: 28 March 2018
Entered in register: 05 April 2018
and copied to parties

10

15

20

25

30

35