EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4101080/2015

Hearing Held on 19 February 2019

Employment Judge: I McFatridge
Members: Ms Ward
Mr Calderwood

Ms Jennifer Ann Meenan	**Claimant** **Written Representations**
Highland Fuels Ltd	**First Respondent** **Written Representations**
James MacPhee **c/o Highland Fuels Ltd**	**Second Respondent** **Written Representations**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The respondents' application for an award of expenses is refused.

REASONS

1. A written judgment in this case was issued on 10 November 201 5 following a hearing which lasted 12 days concluding on 29 July 2015 and a day where the tribunal considered matters in private on 30 September 2015. The claims were dismissed. The respondents thereafter lodged an application for an award of expenses. Subsequently the claimant submitted an appeal to the Employment Appeal Tribunal which was unsuccessful. The appeal related to the conduct of one of the lay members of the original tribunal namely Mr Mackie. Since the circumstances are well known to the parties they are not rehearsed here. On the completion of the appeal process the respondents renewed their application for an award of expenses. By this time Mr Mackie was no longer a member of the panel of lay members and in any event the President of Tribunals considered that it would be inappropriate for him to sit on the tribunal panel dealing with the application for expenses. The President appointed Mr Calderwood to be the third member of the tribunal. It was agreed that the issue would be determined by way of written representations. Following written representations received from both parties the tribunal met in private on 19 February 2019. The tribunal considered written material before it and concluded that it was not appropriate for an award of expenses to be made in this case. The reasons are as follows.

2. The tribunal's ability to make an award of expenses in Rules 74-84 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1. Section 76 states

> "(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".

3. In this case it was the respondents* position that the claimant had behaved in a vexatious or otherwise unreasonable manner throughout the pursuance df the claim and abused the tribunal process. It was their position that the claimant had behaved unreasonably (i) when raising the claim and (ii) whilst conducting her case including when giving and leading evidence and conducting cross examination. The claimant did not accept that the threshold for making an order as set out in Rule 75 had been met and her fallback position was that even if the threshold had been met the tribunal should not exercise its discretion in favour of making such an award.

Submissions

4. The respondents' submissions were that the claimant's decision to raise a claim which in their view contained serious but false allegations amounted to unreasonable conduct and abuse of the tribunal process. They point to the fact that in a statement of claim the claimant made a number of allegations in relation to conduct of the second respondent. In particular the principal complaint was of a serious sexual assault by the second respondent on 11 September 2014. They point out that the tribunal found the claimant's allegations to be false. They point to the serious consequences on both the first and second respondents arising from the fact that such allegations were made. It was their view that the tribunal's finding that the allegations were false meant that the claimant had lied in her statement of claim.

5. The respondents also relied on the claimant's conduct at tribunal. In particular it was their position that the claimant's conduct in pursuing her claim before the tribunal despite knowing this to be false was self evidently unreasonable. It was the respondents* position that the claimant deliberately sought to mislead the tribunal when giving evidence and that she had colluded with her mother in an attempt to mislead. The respondents set out eight specific points which were raised in the judgment where the judgment comments unfavourably on the claimant's credibility. They also set out a total of 13 specific points where the claimant is said to have deliberately tried to mislead the tribunal by giving untrue evidence. The respondents considered

that the threshold had been met and that it was appropriate to make an order. They noted the claimant had provided very little in the way of evidence of her financial position. They sought a payment of £20,000.

Claimants Submissions

6. The claimant's updated submissions were forwarded in an e-mail dated 4 January 201 9. It was their position that the threshold for making a costs order had not been met in this case. They reminded the tribunal that an award of costs or preparation time in the Employment Tribunal remained the exception rather than the rule. It was their view that the respondents have characterised the claimant's behaviour in a simplistic way. They point out that the tribunal made a finding that despite the various decisions made of the claimant and her mother in relation to credibility the tribunal went on to say

> "That is not to say that the claimant and her mother were deliberately lying".

They also pointed to the case of ***HCA International Limited v May-Bheemul UKEAT0477/10.*** The case was also referred to by the respondents. The claimants point out that it was specifically stated in that case that

> "A lie on its own will not necessarily be sufficient to found an award of costs."

The claimants distinguished the situation in the present case from that in the case of ***Daleside Nursing Home Limited v Matthew UKEAT/0519/08*** which was referred to by the respondents.

The claimant's representative went on to point to the fact that this was a split decision and that one of the members had accepted the claimant's evidence in full.

7. With regard to the suggestion that the claimant had behaved improperly by cross examining the respondents' witnesses regarding what was said to be their poor handling of the claimant's initial complaints the claimant's representative pointed out that the tribunal themselves were critical of the way the respondents had handled matters. The claimant's representatives then went on to challenge various aspects of the tribunal's decision making on credibility. They maintain a number of criticisms of the respondents' processes which they considered were themselves discriminatory. They point to the fact that this aspect of the case caused the majority of the tribunal members considerable disquiet and referred to paragraph 144 where the tribunal set out their view that the burden of proof had shifted to the respondents and appeared to give careful considerable to the explanation provided before eventually deciding (in the majority) not to make a finding of discrimination. They also pointed to paragraph 145 where it was noted that the majority believed that there were primary facts on which it could be inferred that the first respondents' conduct of the investigation had the effect of (but not the purpose of) creating a hostile environment for the claimant during the investigation process. The majority had therefore considered that the Burden of Proof had therefore passed to the Respondents to provide a non discriminatory reason for their treatment of the Claimant.

8. The claimant's representative lodged a note of the claimant's outlays which exceeded her current monthly income. It was noted that the claimant had debts of around £2500.

Discussion and Decision

9. This was an unusual case in that, for the reasons set out above the panel considering the issue of expenses was not the same panel as had heard the original claim. That having been said the two original members of the panel considered that Mr Calderwood's contribution to the discussion was extremely helpful in that it was based on the written Judgment which was issued to the parties.

10. Both parties were in basic agreement as to the law to be applied and the leading cases on the subject. On balance, the tribunal considered that the claimant's interpretation of the applicability of these cases to the present circumstances was to be preferred. The tribunal agreed that the starting point is indeed that an award of costs or preparation time in the Employment Tribunal remains the exception rather than the rule. Our view of the case law in relation to the first part of the respondents' case which was based on the fact that the central pillar of the claimant's allegations were found to be untrue to be as set out in the case of ***HCA International.***

> "A lie on its own will not necessarily be sufficient to found an award of costs. It will always be necessary for the tribunal to examine the context and to look at the nature, gravity and effect of the lie in determining the unreasonableness of the alleged conduct."

We also accepted that the case of ***Daleside Nursing Home v Mathew*** correctly states that in a case where the nature, gravity and effect of the lies told by the claimant are severe it might well be totally perverse for a tribunal to make a finding that costs should not be awarded.

11. The majority of the tribunal in this case made a finding that the central allegation made by the claimant that she had been sexually assaulted by the second respondent either did not happen at all or did not happen in any way similar to that which was suggested by the claimant. That was the factual finding of the tribunal. The fact that it was a split decision was in the view of the present tribunal irrelevant. Judicial decision making is binary. Once a decision has been made on a particular averment of fact then that decision forms the factual basis on which the tribunal makes its decision.

12. The present tribunal however considered that we required to look at all of the evidence in the round as to what the claimant had said or done. It was clear to members of the original tribunal that both the claimant and her mother had rehearsed matters in their head in advance of the hearing. This does not necessarily mean that they deliberately planned to give false evidence. It is

entirely possible that having gone over matters in their mind and being faced with what appeared to them to be confusing, illogical and shambolic investigation by the respondents that they began to see matters as a type of conspiracy. This caused the Claimant to frame her claim as she did. On the Tribunals' findings this meant that what she said happened on 11 September 2014 did not happen. Furthermore, in her evidence and in her conduct of the case regrettably the claimant went beyond giving a factual statement of events but instead embellished and added to whatever happened. It was clear to the original tribunal that for reasons stated in the Judgment, much of her evidence was quite frankly incredible. Many aspects of the claimant's case made no sense whatsoever. This is not indicative of a cynical decision to put forward an untruthful case. The tribunal's view was that by the time of the tribunal hearing the claimant had lost sight of the true purpose of giving evidence but was prepared to say whatever she thought would benefit her case. The view of the two original tribunal members based on their observation of the claimant was that by this time the claimant had probably lost sight herself of what, if anything had actually happened in the case. It was the view of the two original members that the claimant probably did not realise fully what she was doing.

13. The claimant is not legally qualified and our understanding was that this was the first time she had been involved in tribunal proceedings. It appeared to the tribunal that the claimant became carried away with herself to some extent. Matters which clearly had an innocent explanation (such as the similarity of phone numbers) grew in her eyes to have sinister connotations. It appeared to the tribunal that this was genuinely how the claimant felt. She certainly allowed herself to be carried away to the extent of giving evidence about what had happened which the tribunal considered incredible and did not accept. The tribunal's view was that the central allegation was untrue. Where we differ from the respondents is that we did not accept that this was a planned cynical attempt to mislead the tribunal and obtain compensation to which she was not entitled. Our view was that the claimant had simply become carried away with the process. It was also our view based on the various matters referred to in the original Judgment that the respondents had

themselves contributed in some way to the way the claimant approached matters by their complete failure to deal with the Claimant's grievance in a reasonable way. Both lay members when considering the facts of the way the respondent dealt with matters as set out in the Judgment characterised the respondents' behaviour as shambolic. The tribunal decided on the balance of probabilities that it was shambolic rather than discriminatory but it appeared to us likely that the claimant subjectively felt that she had been subject to discrimination.

14. The respondents were critical of the fact that the claimant had subjected the respondents' witnesses to lengthy and aggressive cross examination. The tribunal's view was that this would have been much less of an ordeal for the respondents' witnesses had they dealt with the issues raised by the claimant properly in the first place. As was mentioned in the original Judgment, had this been an unfair dismissal claim then the respondents' procedures would have been found sadly lacking. There was very little in the way of relevant contemporaneous written evidence and what there was, often created more questions than it resolved. It must be clear to the respondents' management that to present as a contemporary note of the meeting something which has been cobbled together at a later date from various sources and incorporating things that might/should have happened is not the best way to conduct one's business. It is also not unlikely that if one behaves in this way with an employee who, even with inadequate reason, suspects the company of discrimination then this is likely to compound the problem.

15. It is clear that the tribunal's decision making in terms of Rule 76 is a two stage process. The tribunal first of all has to decide that the claimant's behaviour has met the threshold. In this case our view was that whilst the claimant did not tell the truth to the tribunal about the original allegation of sexual assault, the nature and effect of this were not such as to reach the threshold of unreasonableness which is required. So far as the effect goes it appears to us that even if the claimant had at some point accepted that her version of what had happened between her and the second respondent was mistaken or based on adding up two and two to make five, there may well have still

been a case to be tried as to whether the way in which the respondents had dealt with the investigation was discriminatory.

16. The claimant's representative was right to point out that with regard to this second aspect of the claim the tribunal's findings were much less clear cut. As the parties will be aware they know much more about the tribunal's internal decision making process in this case than would normally be the case. They will be aware that at one stage in the tribunal's deliberations there was a majority view that the way the respondents had handled the allegation was discriminatory. Indeed the Judgment itself notes that this was an issue which required very careful consideration by the tribunal.

17. At the end of the day the tribunal's view was that this was not a case where the threshold was met. The application for expenses therefore falls. We should say that had the tribunal formed the view that the threshold was met then in all the circumstances it would not be appropriate for us to exercise our discretion to make any award of expenses in this case. This is on the basis that we would have given great weight to the failure of the respondents to deal with the allegations properly. We did not accept the claimant's evidence about what had actually happened in this case but it did appear to us that at some point the respondents had been made aware that the claimant had some sort of concern about being harassed by the second respondent. Had the respondents' managers been properly trained and/or applied standard HR procedures then it is entirely possible that the Employment Tribunal case would have been avoided.

Employment Judge: Ian McFatridge
Date of Judgment: 22 March 2019
Entered in register: 26 March 2019
and copied to parties

JO