EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100206/2016

Held in Dumfries on 22 September 2017

Employment Judge: Ms M Robison

Ms Tania Maxwell	**Claimant** **Represented by** **Mr A Bryce - Solicitor**
Wheeler Groves Limited	**Respondent** **Represented by:** **Mr C Hiller - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the respondent's application for expenses is refused.

REASONS

Introduction

1. The claimant in this case made an application to the employment tribunal which was submitted on 1 February 201 6 which related to a short period of employment as an accounts assistant. She alleged sexual harassment and unfair dismissal, related in particular to the conduct of Mr Martyn Wheeler.

2. The respondent submitted a response, on 26 February 2016, denying the claim, and stating that the claimant was not employed by the respondent, which was a limited company. Nevertheless the contact name given was Mr Martyn Wheeler, and it was stated in the response that the assertions about his conduct towards the claimant where wholly and completely denied.

3. While a case management preliminary hearing was set down for 1 April 2016 in the usual way, the Tribunal was advised that criminal charges had been made against Mr Wheeler and the claim was sisted on 10 March 2016 pending the outcome of the criminal proceedings. The claim remained sisted until the outcome of the trial was known on 27 May 2017. Mr Wheeler was acquitted. In the meantime, three progress reports had been sought of the parties on 5 August 2016, 17 November 2016 and 27 March 2017. On 18 April 2017, the claimant advised that she intended to withdraw the claim and the claim was dismissed in the usual way on 27 April 2017.

4. That is the full extent of the procedural background to this case. Nevertheless, the respondent made an application for expenses, setting out their position in writing by letter dated 11 May 2017. The claimant's solicitor responded by letter dated 15 May 2017, setting out his response. Although Mr Bryce suggested that the matter could be dealt with on the basis of written submissions, a hearing was nevertheless set down to determine the matter.

5. At the outset of the hearing I invited the representatives to submit what procedure should be adopted. Mr Bryce said that he understood that the matter could be dealt with on submissions alone. He explained that the claimant was not in attendance and that he did not intend to call her to give evidence.

6. Mr Hiller said that both Mr and Mrs Wheeler were in attendance, and that he had anticipated that evidence would be led, given the legal test to be determined by the tribunal which was whether the claimant had acted

vexatiously in pursuing the claim. He submitted that could only be determined by hearing evidence. He appreciated that care would require to be taken to ensure that evidence was focused on the relevant issues and did not result in going over the ground which had been considered at the criminal trial.

7. It seemed to me, and as I understood it Mr Hiller agreed, that the core claim of Mr Wheeler was that the accusations made were wholly and utterly untrue and this is essentially what Mr Wheeler would say in evidence. Mr Bryce accepted that Mr Hiller could call the claimant to give evidence, and that he could request a witness order for the claimant to appear at a future hearing.

8. This was an unusual case, to the extent that the claim has been withdrawn and no evidence has been heard relating to the substantive claim and therefore and there are no findings in fact or findings on credibility. In any event, I was conscious that in the employment tribunal the fact that a claimant was found to have been untruthful would not necessarily result in a finding of expenses. In assessing whether the claimant should be found liable for expenses, I require to take account all of the circumstances of the case, the context of which is the procedure set out above.

9. Given that background, and particularly bearing in mind the overriding objective which includes the requirement to deal with cases in a way which is proportionate to the complexity and importance of the issues, avoiding delay and saving expense, I decided that it was appropriate to determine matters based on oral submissions, and not to hear evidence from the respondent or adjourn to consider whether the claimant would be required to give evidence.

Submissions

10. In submissions for the respondent, Mr Hiller essentially relied on the written submissions set out in his letter dated 11 May 2017, which he supplemented with oral submissions in response to questions which I raised. The essence

of his argument was that he was seeking an award of expenses because the accusations made by the claimant were wholly and utterly untrue and were known by the claimant to be so. He confirmed that Mr Wheeler was acquitted following a summary trial. While he accepted that the verdict was not proven, he said that there was no inference to be drawn from a verdict of not proven the outcome of which was the same as a not guilty verdict. Although there was no written judgment of the sheriff following summary trials, he said that the claimant's evidence was not believed. The respondent relied in addition on the fact that they were now alleging that there was a conspiracy to obtain money from Mr Wheeler, the claimant having been aware of a previous claim by a previous employee of a similar nature. Further, Mr Wheeler had been contacted by a third party who said that he had knowledge that the allegations had been fabricated, and Mr Wheeler now intended to bring that to the attention of the police. This, Mr Hiller submitted, supported his contention that the claimant had raised the claim for illegitimate reasons, out of spite or to obtain compensation.

11. Mr Hiller submitted that in any event Mr Wheeler had required to instruct a solicitor who had to prepare the claim on the basis that the claim would proceed. The actions have not been without consequence and Mr Wheeler has suffered reputational harm and disruption to his business. He submitted a copy fee note which Mr Wheeler had required to pay for their services, together with a breakdown of costs, which he submitted was reasonable.

12. For the claimant, Mr Bryce also relied on the submissions set out in the letter dated 15 May 2017, supplemented with oral submissions. Dealing first with the costs figure, while he said that it was a matter for the Tribunal to assess whether these were reasonable, he noted that the figure related to the period from 24 February to 17 November 2016, during most of which time the case was sisted.

13. He submitted that the respondent's description of events was disputed and in particular the charges were found to be not proven and that at no time was it

ever indicated that the evidence of the claimant was in any way disbelieved. In any event, the burden of proof was the higher criminal standard. He submitted that the reference to the other employee who had brought a previous similar claim was irrelevant to these proceedings, and in any event that claim was compromised.

14. The test is a two stage test, and the Tribunal must first conclude that the claimant had acted veraciously, abusively, disruptively or otherwise unreasonably in bringing or conducting proceedings. Only if the Tribunal concludes there has been such conduct, does the Tribunal decide whether or not to make an award of costs.

15. Relying on the cases of *Marler v Robertson* [1974] ICR 72 and *AQ Limited v Holden* [2012] IRLR 648, as well as *Attorney General v Barker* [2000] 1 FLR 759, he submitted that for the conduct to be vexatious, there must be some evidence of spite or a desire to harass the other party or clear evidence of the existence of some improper motive, and there was no evidence to suggest that in this case. In particular, the Procurator Fiscal had concluded that there was sufficient evidence for criminal proceedings to be brought.

16. Having been subjected to lengthy cross-examination during the criminal trial, the claimant could not face the prospect of further cross-examination and it was for that reason she made the decision to withdraw. Although she would have been entitled to, particularly given the lower standard of proof, she did not seek a "second bite at the cherry". Mr Bryce submitted that on the contrary this was reasonable conduct on the part of the claimant in withdrawing her claim at the stage that she did. He accepted that had she withdrawn the claim after a hearing of the evidence which did not find in her favour, he would be in a weaker position.

17. With regard to the fact that the claimant had legal aid funding (ABWOR) in respect of these proceedings, there was no mechanism for seeking a modification of expenses, and the claimant herself would require to pay any

award made. Further, although consideration can be given to the claimant's ability to pay, he made no submissions in that regard. With regard to the issues of collusion and the third party allegation, these are disputed by the claimant and in any event matters for the police.

Relevant law

18. Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, sets out when an expenses order or preparation time order may or shall be made. Rule 74 states that in Scotland all references to costs should be read as references to expenses.

19. Rule 76(1) states that a Tribunal may make an expenses order and must consider whether to do so, where it considers that a party (or that party's representative) has acted 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.

20. Rule 78 sets out the provisions regarding the amount of the expenses order and Rule 84 states that a tribunal may have regard to the paying party's ability to pay.

21. The courts have emphasised when considering costs or expenses generally, that awards of costs or expenses are the exception and not the rule *(Gee v Shell (UK) Ltd* [2003] IRLR 82 CA). Further, the aim in making an order is to compensate the party which has incurred the expense in winning the case and not punishment of the losing party *(McPherson v BNP Paribas* [2004] IRLR 558).

22. In *Kapoor v Barnhill Community School* UKEAT/0352/13 the tribunal was held to have misdirected itself when exercising its discretion, in that it proceeded erroneously on the basis that "without more, to conduct a case by not telling the truth is to conduct a case unreasonably, it is as simple as that".

The EAT held that the position was not as simple as that and that the Tribunal should have considered all the circumstances of the case, including the procedural history and the extent to which the claimant's lies had a material impact on its actual findings.

Tribunal's deliberations and decision

23. While in this case, unusually, I have heard no evidence, I considered that it would be wholly disproportionate to postpone this hearing and to consider any request for a witness order to hear evidence from the claimant.

24. In any event, the central point was that the respondent stated that the claimant's claim was wholly fabricated and the claimant disputed that. The respondent said that subsequent events meant that they were all the more convinced of that. I was conscious of the fact that even if I were to accept that the claimant was not telling the truth having heard evidence (and I can obviously make no conclusion to that effect), that was not determinative of the outcome. Further even if I had heard evidence which might have convinced me that the claimant had acted vexatiously, that simply means that I require to consider whether or not to make an award of expenses, and it does not necessarily follow that I would.

25. In coming to my conclusion, I must take into account all of this circumstances of the case. In this case, I was particularly influenced by the fact that the procedural history to this case was very limited indeed. The claim was in fact at a very early stage it its progression in this Tribunal. Mr Bryce said that the claimant could not face further cross examination and it was for that reason that she had withdrawn the claim. He submitted that in doing so she had in fact acted reasonably.

26. I accepted Mr Bryce's submission that that regard. Certainly, the claimant's decision to withdraw could not be said in itself to be unreasonable conduct. Indeed, the Court in *McPherson v BNP Paribas* stated that tribunals would

fall into error if they took the line that it was unreasonable conduct for employment tribunal claimants simply to withdraw claims and thereby become liable for an order for costs on withdrawal.

27. Despite changes to the rules in recent years regarding expenses in employment tribunals, the central principle, that expenses awards are the exception and not the rule, still pertains. I did not find there to be any reason in all the circumstances of this particular case, and particularly bearing in mind the very limited procedure, to depart from that rule.

28. I conclude that the claimant did not act vexatiously or otherwise unreasonably in bringing proceedings, or in the conducting of those proceedings. I do not therefore require to consider whether or not an award of expenses should be made.

29. The respondent's application for expenses is therefore refused.

Employment Judge: **M Robison**
Date of Judgment: **27 September 2017**
Entered in register: **27 September 2017**
and copied to parties