EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102758/2020 (V)

Held in chambers by CVP on 25 January 2022

Employment Judge: I McFatridge
Tribunal Member: Ms Smellie
Tribunal Member: Mr Henderson

Ms L Beaton	**Claimant** **In Person -** **Written Representations**
Chemcem Scotland Limited	**Respondent** **Written Representations**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant shall pay to the respondent the sum of Seven Thousand Pounds (£7,000) towards the expenses incurred by the respondent in these proceedings.

REASONS

1. In this case the claimant claimed that the respondent had unlawfully discriminated against her on grounds of sex. She claimed that she was due holiday pay and that the respondents had unlawfully withheld wages from her in that they had paid her at less than the rate of the National Minimum Wage. A Hearing took place by CVP on 29 September 2021 following which the Tribunal issued a Judgment dated 13 October 2021 which confirmed that the

claimant's claim of unlawful deduction of wages did not succeed and was dismissed. The Judgment also noted that the claim for holiday pay was dismissed following withdrawal and that the claim of unlawful discrimination on grounds of sex/marital status was also dismissed following withdrawal. The Judgment is noted for its terms and deemed to be incorporated herein. Within the Judgment it was noted that the claimant had not in fact offered any evidence to support her claims for holiday pay or of discrimination. The respondent's representatives had not been aware of this in advance of the hearing.

2. In an email dated 2 November 2021 the respondent sent to the Tribunal an application for costs. This was lodged in terms of Rule 75(1)(a) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. Although dated 13 October 2021 the Judgment had not been delivered to the parties until 26 October 2021 and the application was in time. The parties were asked if they were happy for the application to be dealt with on the basis of written submissions. Both parties confirmed this. The claimant's response was initially set out in a letter dated 9 November 2021 and she confirmed by letter dated 10 November 2021 that she was happy for the matter to be dealt with in chambers. The respondents were happy for the application be dealt with in chambers on the basis of the papers already submitted by each party. They confirmed this by email of 10 November 2021.

3. The Tribunal was unable to meet until 27 January 2022. They met online using CVP. They considered the representations made by each party consisting of the respondent's application dated 2 November 2021 and the emails from the claimant dated 9 and 10 November 2021.

4. It is as well to summarise the position of each party.

Respondent's submission

5. The respondent referred to the terms of section 75(1)(a) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. It is their position that the circumstances met the threshold for an award of expenses

in two respects namely; (1) that the claimant acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing the proceedings and in the way that the proceedings were conducted and (2) that the claims which were pursued by the claimant had no reasonable prospect of success.

6. The respondent referred to the history of the matter in the Judgment. They referred to the final paragraph in the Judgment which made reference to the fact that the claimant had failed to comply with case management orders which would have enabled the Tribunal to a have a much clearer insight into any employment law issues which had arisen in her case. The Tribunal also noted that it agreed with the respondent that it was discourteous for the claimant not to advise the respondent and the Tribunal in advance that she no longer intended to proceed with her holiday pay and discrimination claims.

7. The respondent noted the claimant is a Director and Shareholder of the respondent and is the estranged wife of the respondent's Managing Director Mr Beaton. It was noted that the respondent really had little option but to defend the claim given the nature of the allegations and that it was entirely foreseeable that the respondent would require to incur significant costs in so doing. The respondent confirmed that to date legal fees of £14,465 excluding VAT had been incurred. They set out their position that the claimant caused the application to be served at her home address to which the respondent's management had no access and it was only when the Employment Tribunal issued a letter on 6 August 2020 that the respondent's management in the form of Mr Beaton became aware of the claim. It was noted that the ET1 as lodged was poorly framed. Reference was made to the terms of the respondent's original ET3 where they required additional specification. They noted that the claimant had in their view responded late to this. They referred to the timing of the lodging of the claimant's Agenda. They referred to the case management hearing and the claimant's email of 26 October 2021 which clarified that her discrimination claim was a claim of direct discrimination in terms of the Equality Act and where she detailed a number of incidences of alleged unfavourable treatment in support of the claim said to have occurred in 2016 and 2018. They pointed out that a further Preliminary Hearing had

been held following which Judge Meiklejohn had issued a Note on 30 November 2020 which he made various Orders. It is noted that the claimant had entirely failed to comply with any of these Orders. It is noted that during the Preliminary Hearing Judge Meiklejohn had explained to the claimant that her claim might be time barred. He also noted that she was to provide a detailed timeline of events. It was the respondents position that although the timeline was never produced it was clear that the events in which the claimant had originally sought to rely took place in 2016 and 2018 and would have been time barred and that accordingly the claim of sex discrimination had no reasonable prospect of success from the outset.

8. With regard to the claim in respect of a failure to pay the minimum wage the Employment Judge had made Orders for the claimant to provide a weekly/monthly breakdown of her hours of work and identify the tasks undertaken by her. The claimant did not do this. He also directed that the claimant should confirm the basis in which her claim for holiday pay was being made and the claimant did not comply with this. It was noted that the respondent had formally sought a further Preliminary Hearing to deal with strike out at this stage but the Employment Tribunal determined the matter should proceed to a full Hearing. The respondent indicated that the claimant had failed to answer two emails sent to her by the respondent's agents prior to the Hearing seeking clarification of her claim. It was noted that the Tribunal had ordered that witness statements be used but the claimant had failed to provide a witness statement. It was noted that the claimant's various heads of claim remained obscure when the full Hearing commenced. It was noted that the claimant only led evidence from herself relating to the allegations she was paid below the living wage. She made no reference to her other claims. It was the respondent's position that the claimant throughout the case acted in a wholly vexatious, abusive, disruptive and unreasonable manner in conducting her application. The respondent sought the sum of £14,465 being the legal fees which had been incurred.

9. The claimant's position was that her claim was in an attempt to secure proper payment for the work she carried out daily. She stated that she worked

holidays unpaid and said that discrimination on grounds of sex/marital status could not be proven as there were no other employees doing secretarial and accounting work. She confirmed that there was some animosity between Mr Beaton and herself but not between her and Chemcem Scotland, the respondent. She indicated that in paragraph 4 that:-

"/ naively sought the truth would prevail and I was well aware that Morgan Legal would represent Chemcem Scotland Limited as between June 2017 and 1 November 2021 Mr Beaton has also authorised payments of £270,635.17 to Morgan Legal. The majority of this ridiculous ,sum has been directed against me in spurious claims. "

She made the point that these fees were minimal in comparison with what she described as the extravagant fees Mr Beaton had incurred to the company. She denied Mr Beaton's assertion that he was denied access to paperwork as she said the paperwork was handed to him by someone called James Brogan and witnessed by someone else. She indicated that she did not disregard Tribunal rules and apologised if this was how it appeared. She indicated she had misunderstood the position regarding the witness statement. She denied that her behaviour was vexatious, abusive, disruptive or unreasonable. She stated:-

"Mr Beaton has lied consistently to the Tribunal and was advised in five emails that I was unhappy with my salary, in conversation with company accountants and in his communications with Ms Morgan and her subsequent response dated 11 February 2020 which is attached clearly shows this."

Discussion and Decision

10. Section 75 of the Employment Tribunals (Constitution and Rules of Procedure) Regulation 2013 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 bringing 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..."

It is clear that when considering an award of expenses a Tribunal requires to adopt a two stage process. The Tribunal must first of all consider whether the threshold set out in Rule 75 has been met and then if that is the case the Tribunal should go on to consider whether or not to exercise its discretion as to whether or not to award expenses in the case and if so how much.

11. In general terms the Tribunal noted that the timeline of events given by the respondent was correct in that it accorded with the Tribunal file and the records of the Preliminary Hearings which had taken place and indeed with the evidence at the Hearing. It is clear that initially the claimant did indeed arrange for the claim to be served on the company at her home address and whatever steps she took to bring the raising of the proceedings to the attention of the respondent it does not appear that the respondent became aware of the proceedings until the Tribunal wrote to them about the final Hearing as narrated by the respondent in their application.

12. Dealing first of all with the suggestion that the sex discrimination claim had no reasonable prospect of success we note the respondent's position to the effect that the incidents mentioned by the claimant would appear to be time barred. This is correct and there was no information provided at any stage so as to indicate why it would be appropriate for the Tribunal to exercise its discretion to decide to hear the claim in any event. The Tribunal also notes the claimant's own submission in her letter to the effect that such discrimination could not be proven as there were no other employees who could be comparators. Clearly the Tribunal has little more to go on given that whatever reason the claimant chose not to lead any evidence herself about the discrimination claim at the Hearing. The Tribunal's view is that on the

basis of the information which we do have the claim of sex discrimination would appear to have no reasonable prospect of success.

13. We also considered that the claimant's conduct of the case has been unreasonable. She has failed to comply with Tribunal Orders. It was clear from the terms of the notes issued following the various Preliminary Hearings that in each case the Judge had taken time to explain to the claimant what would be required in order for her to progress her claim and in each case this had been simply ignored.

14. We were prepared to accept the claimant's explanation that she had not realised that the Order for witness statements applied to her own statement. We accepted that this was a genuine mistake and if that had been the only issue we would certainly not have penalised the claimant for this. At the end of the day however we were in absolutely in no doubt that the threshold for making an award of expenses had been met both in terms of Section 75(1)(a) and Section 75(1)(b).

15. We then required to exercise our discretion as to whether or not this was a case where it was appropriate to award expenses. In doing so we relied substantially on the information we obtained about the case from the Hearing. We had little doubt that the respondent's representatives had been put to considerable expense as a result of the way that the claimant had raised the claim. We did accept that the claimant had written to the respondent on various occasions raising the minimum wage point and that the respondents had not engaged with the claimant. On the other hand having raised the proceedings it is clear that the claimant failed entirely to do what she should have done and complied with the Tribunal Orders which would then have allowed the respondent to engage with the matter and respond appropriately to the minimum wage point which at the end of the day seemed to be the only one which the claimant wished to pursue. The fact that right up until the date of the hearing the claimant was pursuing a sex discrimination claim which can potentially result in an award of unlimited compensation did mean that the respondents were required to considerable preparation work which at the end

of the day was completely wasted. If the claimant had clarified her minimum wage claim at any time then the respondents would have been able to deal with it. She did not in fact do so. We therefore consider that considerable blame does attach to the claimant for the fact that the respondent required to incur considerable costs. As mitigation we accept that the claimant may have felt frustrated that the respondent appeared to be ignoring her earlier letters on the minimum wage point. In addition to this we note that it was common ground between the parties that there was no written statement of terms of particulars employment in this case despite the fact that there is a legal requirement that this be provided in terms of Section 1 of the Employment Rights Act 1996.

16. We can entirely see that in the circumstances of this case where at the time of employment the claimant and her husband were both Directors of the company and working hard to establish the company the idea of issuing a statement of particulars of employment to each of them may well have been something which it was understandable to overlook. We also appreciate that at a later stage with Mr and Mrs Beaton's marriage break up there may have been practical difficulties in reaching agreement as to what the particulars were. That having been said we were concerned that no real attempt had been made by the respondent to issue the claimant with particulars of employment. Had such particulars been issued there is little doubt that it would have been much easier to determine whether or not the claimant was being paid the minimum wage.

17. Having taken all these matters into account the Tribunal considered that it was appropriate to make an award of expenses. The Tribunal required to take into account such information as we have regarding the means of the paying party. In this case the claimant is employed at a fairly modest wage £1,000 per month. She is however a Shareholder and Director of the respondent and given the information which the Tribunal were given during the course of the Hearing the respondent is in a good way of business and the claimant's shareholding must be worth a substantial sum. The Tribunal

considered that it was appropriate to take this into consideration when setting the claimant's means as well as the amount of her current salary.

18. The Tribunal accepted that the respondent had paid the sum of £14,700 in respect of this case. We did not consider this sum to be in any way excessive or exaggerated as claimed by the claimant. It appeared the sort of sum which an employer would incur in defending a case of this nature. Taking into account all matters we decided that it would not be appropriate to insist that the claimant pay the whole of this sum but that instead the claimant pay to the respondent the sum of £7,000 as a contribution towards these costs. This is just under half the sum expended by the respondent. An Order for this sum is therefore made.

Employment Judge: I McFatridge
Date of Judgment: 14 February 2022
Entered in register: 18 February 2022
and copied to parties