EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111486/2021

Held via Written Submissions on 23 May 2022

Employment Judge: Mrs M Keams

Mr M Allinson	**Claimant In Person**
Solway Transport Limited	**Respondent Represented by: Mr A Bryce - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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

REASONS

1. The claimant who is aged 50 years was employed by the respondent as a lorry driver until his summary dismissal for gross misconduct on 21 June 2021. On 24 September 2021, he presented an application to the Employment Tribunal in which he claimed that his dismissal was unfair. The respondent resisted the claim and a hearing was held by Cloud Video Platform on 8, 9 and 10 February 2022. Judgment was reserved, issued on 18 February and sent to the parties on 21 February 2022. By letter dated 2 March 2022, the respondent made an application for expenses in the sum of £5,760 or for such lesser sum as the Tribunal may consider appropriate in the circumstances. Both parties requested that the application be determined on their written submissions. This judgment is issued following consideration of the parties' submissions.

Issues

2. The Tribunal identified the following issues in relation to the respondent's application for expenses:-

   (i) whether the claimant had acted vexatiously or otherwise unreasonably in conducting the proceedings and particularly in requiring the conduct of the 3-day merits hearing; and

   (ii) if so, whether it is appropriate to make an expenses order against him; and

   (iii) if so whether the award should be in the sum of £5,760 as sought by the respondent or whether some other award would be appropriate.

Applicable Law

3. So far as relevant for present purposes, the rules applicable to expenses are in the following terms. (In Scotland, all references to "costs" are read as references to expenses):

4. Rule 76(1)(a) of the 2013 Rules sets out a general power to award expenses and is in the following terms:

"When a costs order or a preparation time order may or shall be made

76(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. "

5. Rule 78 provides:

"The amount of a costs order

78 (1) A costs order may —

(a) Order the paying party to pay to the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

6. Rule 84 states:

"Ability to pay

84 In deciding whether to make a costs.... order, and if so in what amount, the Tribunal may have regard to the paying party's .... ability to pay."

The relevant facts

7. The facts relevant to the issue of expenses do not appear to be in dispute. The claimant was employed by the respondent as a lorry driver from 11 September 2017 until 21 June 2021, when he was summarily dismissed for gross misconduct. No disciplinary procedure of any kind was followed by the respondent in dismissing him. On 24 September 2021 , having complied with the early conciliation requirements, the claimant presented an application to the Employment Tribunal in which he claimed that his dismissal was unfair. The respondent lodged an ET3 resisting the application and denied that the dismissal was unfair. A three day hearing was fixed to take place by Cloud Video Platform on Tuesday 8 February 2022 and the two ensuing days.

8. At 14:49 on Friday 4 February 2022, four days before the start of the hearing, the respondent's solicitor, Mr Bryce emailed the claimant in the following terms:

"/ have been through the terms of your schedule of loss with my client. They are, entirely without prejudice to their whole rights and pleas, and without admission of liability, prepared to offer payment of £2,500 in full and final settlement of your claim. That would be subject to acceptable COT3 terms being agreed through ACAS to implement settlement in those terms.

The offer is premised on my client's clear view that you have failed to mitigate your losses and that, where you had placed yourself on a zero hours contract on 18th June 2021, there was no certainty that you would have been offered or accepted work for the seven weeks you now claim for. In any event my

client is aware that you routinely choose not to work over the school summer holiday period. If you wished to do so then their position is that you could have found alternative work immediately given the chronic driver shortages that existed at that time.

For all of those reasons my client considers that the settlement proposal put is a good and fair one. In the event that it is rejected and you proceed to argue the claim and receive a lower award than what has now been offered to you I am instructed to make clear that this message will be founded upon in making an application for you to be found liable for my client's costs"

9. The claimant responded to Mr Bryce by email at 07:53 on Saturday 5 February 2022. In his response he stated:

"/ thank you for your settlement offer but have to refuse it on the following grounds

I will seek to prove (amongst other things) that I did not fail to mitigate my /osses

My work at Solway as a zero hours worker suited the way I choose to live, when they were busy I worked full time & when they were not I did my own thing, I did not work for anyone else during my time there & it was mutually understood that because of this & despite receiving no financial benefit, I was always effectively 'on call' for any work that came in. This suited us both very well & I was happy with this agreement.

After my dismissal, for the reasons stated above, I had specific requirements for any prospective new job, yes there was (& always has been) a driver shortage, but finding a job locally to suit my requirements proved difficult, most firms are looking for full time trampers, which I cannot do.

There is also without question, due to his continuing shortage of good, competent drivers, every certainty I would have been offered & happily accepted work during the 7 weeks I am claiming for & in relation to your client's claim that I routinely chose not to work during the school holidays, I should inform you that I have detailed diary's of all my time with Solway & can easily

show that every summer holiday period I took no more than the standard 2 weeks, & more often than not chose holidays around the requirements of the job. He can & maybe should cheque his own records regarding this.

As regards your settlement figure, should the tribunal found that I was *indeed unfairly dismissed, the basic award is £2448. To this may be added £500 for loss of statutory rights, any mitigation of loss award & a percentage for failure to follow his disciplinary procedures. As can be seen on my schedule of loss this comes to a potential sum circa £7500*

After discussion with my solicitor last week we agreed that £5000 was a fair & reasonable settlement, being in between the minimum & maximum of any sum that maybe awarded by the tribunal. As regards being liable for your clients costs in the event of my being found not to have been dismissed fairly, I have been told of this possibility by my solicitor & on his advice I am happy to proceed regardless.

On a personal note, this whole incident & subsequent tribunal was wholly avoidable & I will never understand Pauls logic in what he did, he lost one of his best drivers that day, (whether he cares to admit it or not) & I lost the job I literally felt I was bom to do

There will be no winners regardless of tribunal outcome, but as Paul knows, out of principal [sic], *I am ready, win or lose, to go all the way with this. However, the tribunal will be literally a waste of time for all concerned so if your client is willing to settle for £5000 we can all just walk away from this now"*

10. The hearing took place by Cloud Video Platform on 8, 9 and 10 February 2022. The Tribunal's judgment was issued to the parties on 21 February 2022. The Tribunal held that the claimant had been unfairly dismissed. At paragraph 36 of its judgment, the Tribunal said this:

"…even allowing for the size and administrative resources of the respondent, their failure to accord the claimant the usual features of a fair procedure (as set out in the ACAS Code of Practice on Disciplinary and Grievance Procedures

2015 ("the ACAS Code")) rendered the dismissal unfair under section 98(4) ERA. In particular, the claimant did not receive notice of a disciplinary meeting. He was not told that he was in danger of dismissal. He was not given an opportunity to prepare and state his case or to put forward any mitigating circumstances before the decision to terminate his employment was taken. He was not given a right of appeal. In these circumstances, it follows that the dismissal was *procedurally unfair."*

Discussion and Decision

11. In his expenses application dated 2 March 2022, Mr Bryce submits that: *"throughout proceedings and particularly in requiring the conduct of the 3-day merits hearing"* [the claimant had] *"acted vexatiously or otherwise unreasonably."*

12. I began consideration of this application by reminding myself that expenses are the exception and not the rule in the Employment Tribunal. The test I must apply in determining the application was set out by the EAT in the case of Dunedin Canmore Housing Association Limited v Donaldson UKEATS/00 14/09 (at paragraph 21) as follows:

"the task for the Tribunal is to determine firstly whether the party against whom the award is sought has, in any way, acted as described in Rule [7'6(1)] *and if he has, secondly, determine whether or not it is appropriate to make an award of expenses. The amount of any such award is then determined under Rule (78]....."*

13. Although this refers to the 2004 Rules and the 2013 Rules do not refer explicitly to the determination of whether it is appropriate to make an award, this step is clearly implied since the test involves the exercise of the Tribunal's discretion. I have therefore adopted a two stage approach.

Whether the claimant acted vexatiously

14. I considered first, whether the claimant had acted vexatiously in his conduct of the proceedings. It was Mr Bryce's submission that it was clear from the claimant's evidence and submissions in the course of the merits hearing that

he had no real interest in the financial aspects of his claim and that his whole purpose in bringing and pursuing the claim was to follows point of principle and to put the respondentto maximum inconvenience and cost. I accept that the claimant did say during the merits hearing that the money was not important to him and that it was a point of principle. However, he did not give the impression that his motivation was to put the respondentto maximum inconvenience and cost as such. He appeared to want to have his say in relation to the decision to dismiss him and the manner in which the dismissal was carried out. The respondent would have been on firmer ground in this application if it had held a disciplinary hearing and given the claimant an opportunity to state his case at the time. Dismissal for gross misconduct is a serious matter and employees accused of such have an interest in being heard before the decision is taken that they are guilty.

15. The term "vexatious" was defined by Lord Bingham in Attorney General v Barker 2000 1 FLR 759 : *"The hallmark of a vexatious proceeding is.... that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process"*

16. I did notconcludethatthistest had been met in this case. The claimant's case could notbe said to have been 'a use of the court process significantly different from the ordinary and proper use of that process'. Nor could it be said to have little or no discernible basis in law. It was a claimfor unfair dismissal and thus a challenge to the decision taken by the respondentto dismiss the claimant and indeed the claimant's case succeeded and was always likely to succeed given the lack of a fair procedure.

17. At the hearing on 8 and 9 February, the claimant did refer to his motivation for bringing the claim being based on a matter of principle and not being about the money. However, that is not necessarily vexatious. The fact was that the

claimant was dismissed for gross misconduct and that his dismissal was unfair and was held to be unfair. I did not conclude that the bringing or conduct of the case were vexatious.

Whether the claimant acted otherwise unreasonably

18. I next considered whether the claimants conduct of the case was unreasonable. The test for this is set out in the case of Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 713. It was held in that case that in exercising its discretion, the Tribunal should consider the whole picture of what happened in the case; identify any unreasonable conduct; explain what was unreasonable about it and what effect it had on the case as a whole. The Tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of its discretion. It is not necessary to establish a direct causal link between particular examples of unreasonable conduct and the costs incurred by the respondent Mr Bryce submits that in pursuing his claim to a final hearing stretching over 3 days, the claimant acted unreasonably in circumstances where immediately prior to the hearing, he had been offered settlement in the amount of £2,500, a figure almost double that which was ultimately awarded to him by the tribunal, having regard to Polkey and contributory fault reductions. Mr Bryce went on to say that *"Having enjoyed the very limited success which he did and having displayed an attitude towards proceedings which was at best frivolous, the claimant has acted entirely unreasonably and has put the respondent to significant and unnecessary expense."*

19. In response, the claimant submits that by going to tribunal and being successful with his claim, he now has it on record that he was unfairly dismissed. He states that settlement money would be of little use in future job applications. On this specific point, the courts have recognized that a claimant has the right to pursue a claim even if he is not seeking compensation at all: In Telephone Information Services Ltd v Wilkinson [1991] IRLR 148 (at paragraph 293) the EAT said this:

"In our judgment, the [claimant] *has a right under [s 94 of the ERA 1996] to have his claim decided by the [employment] tribunal. His claim is not simply for a monetary award; it is a claim that he was unfairly dismissed. He is entitled to have a finding on that matter, and to maintain his claim to the tribunal for that purpose."*

This passage was expressly approved by the Court of Appeal in Gibb v Maidstone and Tunbridge Wells NHS Trust [2010] EWCA Civ 678, [2010] IRLR 786 (at paragraphs 19 and 62).

20. Turning to the claimant's refusal of the respondent's settlement offer, expenses can be awarded if the tribunal considers that a party refusing a settlement offer has thereby acted unreasonably. However, the 'tender* rules applicable in personal injury cases do not apply as such to Employment Tribunal claims. Furthermore, the principle in the matrimonial case of Calderbankv Calderbank [1975] 3 Ail ER 333 CA that a party can protect himselfagainst expensesby making an offer, accompanied by a warning on expenses, with the result that a failure by the other side to beat the offer will normally mean that an award of expenses will be made against that party— does not apply as such to Employment Tribunal proceedings, and indeed, is not entirely consistent with the case law on rule 76 and its predecessors. In the Employment Tribunal, a failure by a party to beat a settlement offer will result in an award of expenses only if the refusal of the offer amounted to unreasonable conduct of the proceedings. I did not conclude that the claimant's refusal of the settlement offer amounted to unreasonable conduct of the proceedings in the circumstances of this case. The claimant won his case. The dismissal was clearly and obviously unfair. There had been no attempt by the respondent to follow even the most basic provisions of the ACAS Code of Practice on Disciplinary and Grievance Procedures. In such circumstances, a claimantmightwell haveanan interest in seeking a finding from the tribunal that his dismissal was unfair, for example, as the claimant asserted, in order to assist his search for alternative employment.

21. As I have concluded that rule 76(1) is not engaged in this case, it is not necessary to go on and consider whether an award of expenses would be appropriate. The respondent's application is refused.

Employment Judge: Mary Kearns
Date of Judgment: 23 May 2022
Entered in register: 24 May 2022
and copied to parties