EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104661/2013

Held in Chambers in Glasgow on 9 November 2022

Employment Judge D Hoey

Ms C McMahon **Claimant**

AXA ICAS Ltd **Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's application for expenses is refused. In terms of rule 76, the response did not have no reasonable prospects of success and the respondent acted reasonably in bringing and proceeding with the response in defending the claim.

REASONS

1. By judgment dated 28 July 2022 the Tribunal found that the claimant's claim succeeded and found that the respondent had made an unauthorised deduction from the claimant's contract of employment. That followed a 5 day hearing with 3 days of deliberation.

2. By email dated 26 August 2022 the claimant's agent made an application in terms of rule 77 for expenses. The application was resisted. Both parties made written submissions and consented to the matter being determined in chambers without further submissions being required.

Factual background

3. By ET1 presented on 25 June 2013 the claimant sought payment of wages or salary from 28 May 2011 to the date of the claim. In its ET3 dated 26 July

2013 the respondent disputed the claims arguing, that the claimant was not entitled to the sums claimed.

4. The case has a significant procedural history evidenced by the dates of the acts in question. At the Hearing the claimant presented her position in light of what she understood it to be (and in light of the documents she said she had received) and the respondent presented its response, seeking to challenge the claimant where appropriate, setting out its position.

5. The Tribunal carefully analysed the evidence that had been presented, considered the applicable law (noting that one of the key decisions relied upon by the parties had been heard by the Court of Appeal albeit with no decision issued at the time) and made its determination.

6. The Tribunal did not find the legal position to be straightforward evidenced by the time required to consider the legal position, with the legal position having been recently upheld by the Court of Appeal.

7. References in this judgment are to paragraph numbers of the Tribunal's decision.

Claimant's application

8. The claimant's agent made the application in terms of rule 76(1)(b) and rule 76(1)(a), arguing that the response had no reasonable prospect of success and the conduct of the proceedings by the respondent had been unreasonable. It was argued that throughout the proceedings, from the point of the submission of the ET3 onwards, the respondent failed to engage with the claim which had been brought. The respondent failed to refer to the documents relied upon by the claimant and dropped one of two defences as the case proceeded. It was argued that the respondent relied upon a different basis to that which had been raised (referring to a different scheme). The respondent relied upon implied terms which was not referred to in the ET3.

9. It was said that the Tribunal found there was no requirement for the claimant to agree to inferior terms, which were offered to her many years after her employment commenced, after her absence commenced and after she was

already entitled to payments under her contract and therefore the response had no reasonable prospect of being successful, and by continuing to defend the claim the respondent acted unreasonably.

10. The claimant's agent argued that the response had no reasonable prospects of success when it was submitted, and that either the respondent must have known that was the case or ought to have known. This was because the respondent did not engage with what the claimant said and made no reference to her contractual documents in its response and there was well established case law which supported the claimant's position. The respondent has been legally represented and ought to have known the position.

The respondent's defence (and claimant's response)

11. The respondent disputed the application arguing that parties had agreed the issues to be determined by the Tribunal, which involved an intricate interpretation of the contractual matrix at play (evidenced by the lengthy judgment). The outcome was not a fait accompli. On the contrary, there were a number of arguments advanced by the respondent which were not only statable but were indeed supported by relevant case law. The fact the Tribunal's analysis of the contractual position was, ultimately, favourable to the claimant, it was argued is not indicative of the respondent's case having no prospects of success and at no stage during the judgment is there anything to support such a categorisation.

12. The claimant's agent maintains that the respondent had not engaged with the claimant's case, which had been set out in her ET1 which expressly referred to her contractual entitlement under the ICAS Scheme. The claimant's agent noted that at paragraph 211 of the judgment it is noted that the respondent did not fully engage with the claimant with regard to what her contract said. This was reiterated at the last sentence of paragraph 223 and the first sentence of paragraph 226. The respondent did not engage with the claimant's case, even after she had submitted her claim.

13. The claimant's agent noted that the Tribunal noted the claimant did not provide the benefits document to the respondent (and fully set out what she

believed her position to be), but the ET1 referred to the position and the respondent did not engage with this. Had the respondent done so, it was argued the respondent would have recognised by reading their own contractual documents given to the claimant that, in fact, the claimant had a "clear and unambiguous entitlement" (paragraph 218 of the judgment).

14. It was argued that the fact the respondent was relying upon implied terms was indicative of the fact that the defence in the ET3 could not reasonably be supported (given the ET3 was primarily framed around the application of the AXA Scheme).

15. The claimant's agent argued the comments by the Tribunal and the length of the judgment are of no relevance to the issue to be determined now, which is whether the response had no reasonable prospect of being successful and whether it was unreasonable to maintain the defence throughout the proceedings. He submitted this issue should be considered primarily with reference to the terms of the ET3, and the lack of engagement with the claimant's case as set out in the ET1.

16. The respondent's agent argued case law referred to was relevant and the case was arguable. Costs do not follow success in the Tribunal except in exceptional circumstances. These are not exceptional circumstances. These are circumstances where some 20 years after a contract being entered into, the respondent produced the best evidence it had to support its defence and, in keeping with the overriding objective, made comprehensive and reasoned submissions to the Tribunal on what it considered to be the correct legal analysis. The onus was on the claimant, not the respondent.

17. The claimant's agent argued that the relevant case law was not referred to by the respondent in its written submissions and the respondent did not have regard to case law which is directly relevant to the issues which the Tribunal had to determine, which, it was submitted, supported the underlying point that the respondent simply did not engage with the claimant's case. The respondent's defence essentially relied upon the claimant not having agreed to apply to join the AXA Scheme (which she had no requirement to do and

which was an inferior scheme). The claimant's case was straightforward: she had a contractual entitlement and the respondent failed to provide the sums to which the claimant was entitled. The respondent's witness, Mrs McGlone, confirmed that she had never seen the relevant contractual document, i.e. terms of the ICAS Scheme, and yet the respondent's defence relied heavily on the correspondence between Mrs McGlone and the claimant in terms of which the claimant was being invited to apply to join the AXA Scheme.

18. The claimant's agent submitted that had the respondent considered the claimant's contractual documents at any point after the claim was raised, it would have been apparent that she was entitled by contract to be paid the wages sought and there was no contractual requirement that she accept any other PHI scheme, including the inferior one argued for in the respondent's defence.

19. The respondent's agent argued that the case law was complex, seen by the fact one of the cases was subject to a Court of Appeal hearing during the proceedings. There was a statable point of law to be determined at appellate level which supports the fact that the respondent was entitled to defend the case on the basis that it did and put the claimant to proof. It may be that the Court of Appeal's decision in Amdocs is appealed further. Additionally, on the day of submissions, the case of Pelter was reported. This supported the respondent's analysis, and further evidenced the fact that the law is far from settled. The respondent's agent also noted that the claimant's case was different to the cases relied on by the claimant's representative given that in all of those cases a right to payment had crystalised at the point of the dispute (that not being the case here).

20. The claimant's agent argued the cases are fact specific and the respondent's approach again underlined the essence of the expenses application which was that the respondent did not engage with the claimant's case, being that the respondent had provided the claimant with a written contractual entitlement for which the respondent itself was liable (not an insurer). While cases are always fact specific, that in itself does not mean that a response will always have reasonable prospects of being successful. It is important to

consider the terms of the ET1 and the ET3 and consider, having regard to the facts, whether the response had no reasonable prospects of being successful. In this case, the respondent was relying on the AXA Scheme, and there was no reasonable prospect of the response being successful based on that line of argument.

21. The respondent's agent argued it was clear the respondent resisted the claim advanced. It was denied that there had been an unlawful deduction from wages. The ET3 includes pleadings that the wages sought were not properly payable. Case law is clear that the Tribunal will, where appropriate, need to undertake an analysis of the applicable contractual entitlements in such claims. The claimant had fair notice that the respondent disputed she had any entitlement to the payments she sought, and it is a matter for the respondent to decide what evidence it adduces to present its case. The respondent's agent also argued they were entitled to refer to implied terms, absent any pleadings, given such terms form part of the contract.

22. The claimant's agent argued the ET3 failed to make any specific reference to the ICAS Scheme which was expressly referred to in the ET1, albeit the ET3 did refer to "the Canada Life Scheme, AXA Scheme or any other PHI scheme". The ET3 defence was based on either an insurer being liable (a defence which was dropped), or wages not being "properly payable" on the basis that the respondent offered access to an alternative scheme with conditions not having being met by the claimant, but with no mention in the ET3 of the ICAS Scheme or the need for contractual interpretation. It was not until the point of submissions that the respondent proposed a number of implied terms. None of these terms had been mentioned previously and there was no notice given to the claimant of the intention to rely upon any of those implied terms.

23. The claimant's agent noted that the respondent's witness had never even seen the ICAS Scheme document until the hearing and argued that had the respondent (and their witness) considered its own contract with the claimant, the need for a hearing, and all that it involved, may have been avoided. The enquiry should be into what was known when the ET3 was prepared, or what

ought to have been known. It must have been known that the ET3 was not responding to the actual claim brought by the claimant.

24. The respondent's agent argued that the hurdle for establishing unreasonable conduct is, rightly so, extremely high and is not met in this case.

25. The claimant's argent argued the defence had no reasonable prospect of success from the outset, as it did not engage with the claim being put forward by the claimant and specifically did not address the contractual ICAS Scheme document which was expressly referred to in the ET1. Reliance was placed on the non-contractual AXA Scheme, in circumstances in which there was no reasonable basis to do so. The respondent entirely overlooked the claimant's actual contractual position, notwithstanding that having been set out in the ET1. It is self-evident that the respondent either knew or ought to have known that was the case, by virtue of the fact that no mention was made in the ET3 of the terms of the ICAS Scheme.

26. The claimant's agent noted the Tribunal does not need to take an "all or nothing" approach. In the claimant's case, the only defences put forward were those which were set out in the ET3. One of the defences was dropped, leaving the "central plank", i.e. that the wages were not properly payable due to the conditions of the AXA Scheme (or the Canada Life Scheme or any other PHI Scheme) not being met. Nothing in this recognised even the existence of the ICAS scheme, being the one referred to in the ET1. This is the defence which the respondent continued to rely upon throughout the case, without having regard to their own contractual documents. Then, at the point of submissions, a new defence was introduced that specific terms should be implied into the contract. It was argued that the respondent acted unreasonably by maintaining the defence, notwithstanding the established case law, and only putting forward the proposed implied terms at the point of submissions.

Respondent's agent's further comments

27. The respondent subsequently responded noting the claimant's representative acknowledged a key issue for the Tribunal to determine was whether the

sums sought were properly payable. It was for the claimant to make her case out and the ET3 clearly gave the Tribunal and the claimant notice that her complaint was resisted. It was disputed it would have been obvious that the claimant would be successful if the ICAS scheme had been identified. The respondent's agent noted there were a number of arguments relating to construction and interpretation of the ICAS scheme which were statable and supported by the case law to which the Tribunal was referred.

28. The Tribunal had to conduct a careful analysis of the relevant contractual terms in light of the applicable law. While the ET3 does not use the words "implied terms", it clearly sets out terms which the respondent says would need to be met before any entitlement crystalised. Furthermore (as acknowledged by the claimant), the ET3 makes it clear that the respondent denied that the payments sought were properly payable. The claimant was therefore on notice of the respondent's position and that she was being put to proof on her complaint. It was entirely proper and reasonable that the respondent's submissions included its position on all of the aspects of the contractual analysis the Tribunal would need to undertake. Having been put to proof, the claimant did not incur any additional expenses beyond those which she would have done so in the ordinary course of litigating her claim.

Relevant law

29. Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, sets out when an expenses order may or shall be made.

30. Rule 76(1) states that a Tribunal may make an expenses order and must consider whether to do so, where (a) it considers that 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; or (b) any claim or response had no reasonable prospects of success.

31. Rule 74 states that in Scotland all references to costs should be read as references to expenses.

32. 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.

33. 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).

34. The Tribunal in exercising its discretion must have regard to the nature, gravity and effect of any unreasonable conduct. That does not require the respondent to prove that specific unreasonable conduct by the claimant caused particular costs to be incurred (**McPherson v BNP Parabis 2004** IRLR 558 CA) but any award of costs must, at least broadly, reflect the effect of the conduct in question (**Barnsley Metropolitan Borough Council v Yerrakalva 2012** IRLR 78 CA).

35. In **Radia v Jeffries International Ltd 2020** IRLR 431 HHJ Auerbach issued the following guidance at [61] – [64]: *"It is well-established that the first question for a Tribunal considering a costs application is whether the costs threshold is crossed, in the sense that at least one of rule 76(1)(a) or (b) is made out. If so, it does not automatically follow that a costs order will be made. Rather, this means that the Tribunal may make a costs order, and shall consider whether to do so. That is the second stage, and it involves the exercise by the Tribunal of a judicial discretion. If it decides in principle to make a costs order, the Tribunal must consider the amount in accordance with rule 78. Rule 84 provides that, in deciding both whether to make a costs order, and if so, in what amount, the Tribunal may have regard to ability to pay."*

36. At the first stage, accordingly, it is sufficient if either rule 76(1)(a) (through at least one subroute) or rule 76(1)(b) is found to be fulfilled. There is an element of potential overlap between (a) and (b). The Tribunal may consider, in a given

case, under (a), that a complainant acted unreasonably, in bringing, or continuing the proceedings, because they had no reasonable prospect of success, and that was something which they knew; but it may also conclude that the case crosses the threshold under (b) simply because the claims, in fact, in the Tribunal's view, had no reasonable prospect of success, even though the complainant did not realise it at the time. The test is an objective one, and therefore turns not on whether they thought they had a good case, but whether they actually did.

37. In **Barnsley v Yerravalva 2012** IRLR 78 Mummery LJ at paragraph 41 stated that: *"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and ask whether there has been unreasonable conduct by the [party].. and in so doing identify the conduct, what was unreasonable about it and what effects it had."*

This means that, in practice, where costs are sought both through the rule 76(1)(a) and the rule 76(1)(b) route, and the conduct said to be unreasonable under (a) is the bringing, or continuation, of claims which had no reasonable prospect of success, the key issues for overall consideration by the Tribunal will, in either case, likely be the same (though there may be other considerations, of course, in particular at the second stage). Did the complaints, in fact, have no reasonable prospect of success? If so, did the complainant in fact know or appreciate that? If not, ought they, reasonably, to have known or appreciated that?"

Discussion and decision

38. The Tribunal considered the submissions of both parties in light of the facts in this case, looking at the whole picture as to what happened.

39. The claimant's agent argued that the respondent's defence had no reasonable prospects of success. It is argued that the respondent in proceeding with its defence of the claim acted unreasonably, essentially because, says the claimant's agent, the response had no reasonable prospects of success. It is said that the respondent failed to engage with the

claimant's case and had they done so, it would have been clear that the claimant would succeed.

40. The key question in this case which the Tribunal had to determine was whether or not the claimant was entitled to sums directly from the respondent or to be given access to an insurance benefit. While there is some uncertainty in both the ET1 and the ET3 as to the position, it is clear that the claimant argued she was entitled under her contract to sums from the respondent (by way of PHI entitlement) while the respondent disputes the claimant is entitled to the sums sought. In other words the key issue is what is properly payable in terms of the claimant's contract. The central question was whether, upon a fair reading of the contractual matrix, there was no stateable defence to the assertion that the claimant was entitled to the sums sought from the respondent (as opposed to the right to be provided with an insurance benefit from the respondent).

41. The Tribunal does not find that upon a fair analysis of the contractual matrix there was no reasonable prospect of successfully establishing that the claimant was not entitled to sums from the respondent but rather to the benefit of an insurance policy. There was a stateable defence and it was not a certainty that the claimant would succeed with her claim. The case law demonstrates each case is fact sensitive (and the present case differed from the established authorities – see paragraph 191).

42. As submitted by the respondent there were a number of factors in this case which supported the interpretation relied upon by the respondent. The claimant herself enquired as to the position in respect of the insurance position (recognising that there was a policy of insurance in place – see paragraph 158). Of more relevance, however, was the fact that the contractual documentation referred to the "Sun Alliance Scheme" which itself paid the relevant sums. This could, in context, have referred to the Sun Alliance PHI scheme. In other words there was a stateable argument that from the words used by the parties, the claimant's contractual entitlement was to an insurance policy (not to a sum from the respondent). There was some authority which potentially supported the respondent's position in light of some of the words

used. (see **Anite Systems** 2001 UKEAT 898 (paragraph 95) and **Pelter** 2022 EAT 105 (paragraph 122). This was not a case where the contractual matrix was such that the respondent's defence was bound to fail. It was arguable.

43. There clearly was an insurance policy in place (at some point) and the terms used in the contractual documentation were not unambiguous and clear. There was a degree of ambiguity which rendered the respondent's argument stateable. While there was no direct reference to the terms and conditions of an insurance policy being relevant, (as now required by the authorities), the position was not free from doubt and the documentation referred to "Scheme salary" and there being some form of "eligibility" for entry to the scheme. In other words some of the language used by the respondent in creating the contract was redolent of (or at least suggestive of) an entitlement to an insurance policy or scheme rather than entitlement to a sum of money directly from the respondent.

44. This was not a case where it ought properly to have been recognised (given the respondent had specialist legal advice) that the claim had merit and there was no reasonable defence, on the claimant's case as pled. It was a matter that was legitimately resisted, requiring the matter to be determined judicially in light of the facts as found and applicable law. It was not so obvious such as to be unreasonable to defend the claim.

Consideration of points made by the claimant's agent

45. The Tribunal considered each of the submissions relied upon in support of the application and did not uphold them. The claimant's agent's argument was essentially that the respondent had failed to properly engage with the claim as set out by the claimant. The claimant argues in her ET1 that in terms of her contractual position she is entitled to be paid sums directly from her employer. At the time of the ET1 being lodged there were a number of disputes, including the identity of the employer (and her ET1 was directed against a number of entities and included a number of averments around this issue and TUPE).

The ET3 set out the background stating that (at paragraph 2.8) the claimant was entitled to benefit from permanent health insurance under the terms of

her contract of employment. It was accepted that the claimant had a right to permanent health insurance but the dispute was what the terms of her contract were, and the precise basis for the benefit.

46. The ET3 stated that the respondent understood the contractual basis for her claim to be that the permanent health insurance was provided by Canada Life and then via another provider (upon similar terms). The respondent defended the claim on the basis that the sums claimed were not properly payable as there was no legal entitlement to the sums. In addition there were other contingent events that had not occurred. Reference was made to "the Canada Life Scheme, AXA Scheme or any other PHI Scheme".

47. The respondent in its pleadings therefore disputed that the claimant was entitled to the sums claimed and she was put to proof on that issue. Upon a fair reading of the respondent's position they were disputing the claimant was entitled to be paid the sums she said she was due. They were saying that under whatever scheme the claimant relied upon (which included the scheme referred to by the claimant, namely (and impliedly) the ICAS scheme) the sums claimed were not due.

48. The parties had focussed the issues by the time of the Hearing and it was clear that, as set out above, the key issue was whether the claimant's entitlement was to sums directly from the respondent or to an insurance benefit. This was an arguable position and not so obvious that a reasonable litigant, advised by specialist employment lawyers, ought to have conceded.

49. There is no doubt that the terms of the response could have been clearer. It is also true that the respondent also defended the claim on the basis that sums payable by an insurer were not wages, a position that was not progressed at the Hearing. But it cannot be said that the defence to the claim, that the sums sought by the claimant were not properly payable (because the conditions in the relevant scheme had not been met) was unreasonable to advance whether at the time of lodging the ET3 or subsequently. It was not unreasonable to require the claimant to establish her contractual entitlement given the prevailing circumstances, including the fact the claimant asserted

the ICAS benefit was the applicable scheme (and the respondent's belief, at the time, that the contractual benefit had developed).

50. In an Employment Tribunal claim expenses are only awarded where the rules relating to expenses have been satisfied. Expenses are not automatically awarded to the successful party. This is not a Sheriff Court application. The Tribunal requires to apply the rules as set out above in light of the authorities and the surrounding facts looking at matters as a whole.

51. There was no requirement for the claimant to agree to inferior terms, which were offered to her many years after her employment commenced, after her absence commenced and after she was already entitled to payments under her contract but that did not mean the defence to the claim, that the sums sought were not properly payable had no reasonable prospect of being successful, or that by continuing to defend the claim the respondent acted unreasonably. The central issue became whether the sums claimed were properly payable given the contractual matrix. That issue was not obvious or so certain. It is not uncommon for disputed issues in litigation to become acutely focussed (and often narrowed to singular issues) as matters progress. The key question, known to both parties prior to the Hearing, was what the claimant's contractual entitlement was – as foreshadowed in the ET1 and ET3.

52. The ET3 made it clear that it was disputed that the sums claimed were contractually due. Although the respondent failed in their defence, there was a reasonable argument that the sums claimed by the claimant were not properly payable as it was arguable for the reasons set out above that the claimant's entitlement was to an insurance policy rather than sums from the respondent. The Tribunal does not consider that it was unreasonable to defend the claim or to continue to defend the claim, even once the position had become crystal clear as the case progressed.

53. In other words even if the respondent had focused upon the ICAS scheme only (and not set out what their understanding was, namely that the claimant had been offered an alternative which they believed to be of not detriment to

her) it could not be said that there was no reasonable prospects of defending the claim either when the response was lodged or upon progress of the litigation. There was a point that had to be tested and determined judicially, namely whether the claimant's entitlement in terms of her contract was to a sum of money or to an insurance benefit. It was reasonable for the respondent to test that assertion on the basis of the evidence and applicable law.

54. The ET3 made it clear the respondent did not accept the sum was due under her contract and therefore the claimant was put on notice she would be required to establish her contractual entitlement (subject to the usual rules of contractual interpretation). The fact such a significant period of time had elapsed and the fact the respondent's witness had not seen the document relied upon by the claimant did not thereby result in there being no reasonable prospects of success of arguing the sums claimed were not properly payable (the central plank of the respondent's case). It was not unreasonable for the respondent to have put the claimant to the expense of establishing her claim given the factual matrix in this case.

55. The fact the Tribunal found that the claimant's entitlement was "clear and unambiguous" did not mean the respondent's defence was unreasonable since that arose from the Tribunal's analysis of the contract. The respondent's analysis of the contract differed and was not unreasonable on the facts in light of the legal framework, even if it was not ultimately a position the Tribunal preferred. The respondent's defence failed but was not unreasonable. Even if a narrow interpretation of the ET3 was taken, the Tribunal would not have considered that it should award expenses in this case given the factual matrix and the uncertainty. It was not obvious that the claimant would succeed even if her case was taken at the highest given the nature of the contract.

56. The Tribunal makes its assessment primarily with reference to the terms of the ET3 and looking at this case as a whole. The Tribunal did not accept the claimant's agent's argument that had the respondent considered the claimant's contractual documents at any point after the claim was raised, it would have been apparent that she was entitled by contract to be paid the wages sought and there was no contractual requirement that she accept any

other PHI scheme, including the inferior one argued for in the respondent's defence. That was the conclusion of the Tribunal following its analysis of the facts applying the law but the respondent's defence was arguable and one carefully considered by the Tribunal, but rejected.

57. The Tribunal considered the terms of the ET1 and the ET3 and all the facts in assessing whether the response had no reasonable prospects of being successful. In this case, the respondent was relying on the argument the claimant's contract did not support what she claimed.

58. The Tribunal considered whether it was fair to interpret the respondent's defence as being solely upon the AXA Scheme rather than more generally upon contractual entitlement. Given the passage of time and intervening events the respondent had focused upon the alternative schemes the claimant had been offered. That was their belief. That differed from the claimant's position, whose focus was upon the ICAS scheme only. Even if the ET3 could only be read as arguing the AXA scheme was relevant and applicable to the claimant, that was not an unreasonable position to adopt. That represented what the respondent believed the contractual position to be. The respondent understood the claimant's contractual position had moved on from the ICAS scheme. That argument failed on the facts but it represented what the respondent believed the contractual position to be. It was not unreasonable for them to have asserted that.

59. A fair interpretation of the ET3 was that the respondent disputed the sums were due in terms of the claimant's contract (as understood by the respondent). The claimant was on notice that she required to establish her contractual entitlement. Even with the benefit of legal advice, it was not unreasonable for the respondent to defend the claim on that basis given the facts. The Tribunal would require to assess the factual matrix and make a determination on the balance of probabilities. That assessment took place and favoured the claimant. The Tribunal does not consider the respondent's approach in its defence to have been unreasonable.

60. The Tribunal took into account that the ET3 failed to make any specific reference to the ICAS Scheme which was expressly referred to in the ET1, although as noted by the claimant's agent the ET3 did refer to "the Canada Life Scheme, AXA Scheme or any other PHI scheme" (emphasis added). It was clear, from paragraph 2.8 of the ET3 that the issue was what the claimant's contractual entitlement was. At paragraph 3.1 the respondent argued the deduction was not unlawful because an insurer was liable (a defence which was not progressed), or that wages were not "properly payable". That passage made it clear that the respondent disputed there was a legal entitlement to the sums sought. That became the focus of the case and was a point that was arguable for both claimant and respondent. The parties understood the key issue in this case and what required to be established. The ET3 did respond to the claim the claimant raised and set out what the respondent understood their position to be and required the claimant to establish her claim.

61. The Tribunal did not consider it axiomatic that had the respondent (and their witness) considered its own contract with the claimant, the need for a hearing, and all that it involved, may have been avoided. Looking at matters when the ET3 was prepared, or what ought to have been known, the respondent did not accept the sums claimed by the claimant were properly payable in light of the contractual matrix and that was arguable.

62. The Tribunal does not accept that the defence had no reasonable prospect of success from the outset. The respondent focused upon its understanding of the factual position. While not specifically referring to the ICAS Scheme as set out by the claimant, the respondent disputed the sums claimed were due to be paid to the claimant by the respondent. There was a reasonable basis for their position. While their reliance on the AXA Scheme was found to be misplaced, it was not unreasonable for the respondent, even with the benefit of specialist legal advice, to do so. The position set out by the claimant was considered and the respondent provided their response.

63. The Tribunal recognised that it does not need to take an "all or nothing" approach and it was open to award expenses for less than 100%. The

Tribunal took into account the terms of the ET3, the defences set out and the approach that was taken to the hearing. It is not fair to suggest the respondent ignored the claimant's case. The respondent denied the sums were due and argued its case, that the wages were not properly payable due to the conditions of the AXA Scheme, the Canada Life Scheme or any other PHI Scheme not being met. Reference to "any other PHI Scheme" could reasonably be understood as meaning the Scheme relied upon by the claimant, the self administered scheme. The respondent disputed the claimant was entitled to the sums directly from the respondent and the claimant required to set out why such sums were due. The respondent disputed this and set out its position. The Tribunal considered the competing positions and found in favour of the claimant. The position advanced by the respondent was not unreasonable. It was not unreasonable to raise or to conduct the defence as the respondent did, setting out its belief as to the position and arguing the sums sought were not properly payable.

64. The Tribunal considered the claimant's agent's submission that "a new defence was introduced that specific terms should be implied into the contract" and that the respondent acted unreasonably by maintaining the defence, notwithstanding the established case law, and only putting forward the proposed implied terms at the point of submissions. The respondent's reliance upon implied terms was part of its argument as to the contractual matrix (which comprises express and implied terms). The Tribunal did not uphold the respondent's submissions in that regard. The Tribunal did not consider, however, the approach taken in this regard to have been unreasonable or without reasonable prospects. The argument failed but was not unreasonable in the context of this case where the Tribunal required to consider the contractual position as a whole within the context of the facts.

65. This was a challenging case and one which was not easy to determine. It was not the fault of either party that the issues to be determined stemmed from matters that had occurred some years ago given the contract was created in 2012/2013. The Tribunal deals with the challenges this presented in its observations at paragraphs 64 and 65. As indicated at paragraph 66 due to

how matters progressed at the time, the parties had focused upon different issues with regard to the claimant's contractual entitlement. That was not the fault of either party but how matters transpired. It was not unreasonable for the respondent to focus upon (and plead) the position as then understood in light of what the claimant was arguing. There was no suggestion the respondent was not genuine in its belief as to the position. While (as noted at paragraph 68) the position may have been different had both parties been clearer at the time the issue arose, the way in which both parties pled and ran their respective cases was not unreasonable since it reflected their respective positions. Rather than not engaging with the claimant's case, the respondent believed the sums due to the claimant were not properly payable and so the claimant was required to establish her entitlement. That was a reasonable position to adopt.

Looking at the whole picture

66. The Tribunal took a step back and looked at the whole picture - the claim raised, the respondent's approach to the claim and its defence and how matters progressed generally and specifically at the Hearing in light of the applicable law and the position with regard to expenses in the Employment Tribunal. The claim raised by the claimant was resisted, the respondent making it clear that the legal basis for the claim (the sums being properly payable by the respondent) was the central issue to be determined. The Tribunal assessed matters objectively and was satisfied there was no unreasonable conduct by the respondent, either in its defence or conduct of its defence.

67. The Tribunal recognised that just because there are disputed facts does not, by itself, mean a respondent acts reasonably in defending a claim. This was considered carefully. In this case there were disputed facts, namely the construction of the claimant's contract. Even on the claimant's own case, the terms of the ICAS scheme were not to obvious as to guarantee her an entitlement to a sum of money from the respondent (as opposed to an insurance benefit). There was a case to be made that the entitlement was to a Scheme benefit, a policy of insurance, even if that case was nit successful.

The Tribunal required to conduct a careful analysis of the facts and law. It was reasonable for the respondent to defend the claim and to do so in the way it did, even if their position was not upheld.

Conclusion

68. On the facts of this case the approach taken by the respondent, namely to require the claimant to establish her claim, was not unreasonable. The response did not have no reasonable prospects of success.

69. The Tribunal did find that it was unnecessary to rely upon implied terms and that the approach other providers take to these matters was not relevant but ultimately the key question before the Tribunal, the construction of the contract, was not so obvious and clear as the claimant's agent alleges in the application. The approach of the respondent in arguing the matter was not unreasonable. They provided their legal analysis of the contract as they understood it, in light of the law as then understood.

70. The Tribunal is therefore satisfied that the respondent did not act unreasonably in defending the claim (nor in the way in which the claim was defended). The Tribunal is also satisfied that the response did have reasonable prospects of success, looking at matters objectively.

71. The application for expenses is accordingly dismissed.

Employment Judge: David Hoey
Date of Judgment: 11 November 2022
Entered in register: 14 November 2022
and copied to parties