EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107374/2020

Held via Cloud Video Platform on 25 November 2022

Employment Judge M Brewer

Mr M Bentley	**Claimant** **Represented by:** **Mr M Briggs -** **Counsel**
No Ordinary Designer Label Ltd	**Respondent** **Represented by:** **Mr R Bhatt –** **Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:

1. the respondent's claim for expenses in the sum of £20,000 succeeds,

2. payment shall be made within 21 days of this judgment having been sent to the parties unless otherwise agreed between the parties.

REASONS

Introduction

1. This case was heard over five days between 1 and 5 August 2022. Day one was a reading day. Submissions were heard on day five and I reserved my judgment. Judgment was in favour of the respondent after which the respondent made an application for expenses.

2. That application was heard today and was dealt with by way of written and oral submissions. I was provided with a bundle of relevant documents. The claimant did not provide any documentary evidence of means and he declined to give oral evidence as was his right.

3. I am grateful to both representatives for their thoughtful submissions.

4. I delivered an oral judgment and Mr Bhatt asked for written reasons which I set out below.

Issue

5. The issue was whether to award expenses against the claimant under Rule 76(1)(a) and/or (b) of the Employment Tribunal Rules 2013 (the Rules).

Relevant Law

6. Rule 76(1)(a) and (b) of the Rules, states as follows:

   (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 party) or the way that the proceedings (or part) have been conducted.

   (b) any claim or response had no reasonable prospect of success.

7. The parties agreed that Tribunals are required to take a two-stage approach when considering whether to make an expenses order:

   a. first, consider whether the paying party's conduct falls within one of the grounds set out in Rule 76(1) of the Rules,

   b. second, if so, ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party.

8. The following principles emerge from the key cases.

9. First, in general, expenses are compensatory and any expenses order ought to be limited to expenses that were "*reasonably and necessarily incurred*" in the case.

10. In Rule 76(1(a), "unreasonable" has its ordinary English meaning and is not to be interpreted as if it means something similar to vexatious: (**Dyer v Secretary of State for Employment** EAT 183/83).

11. When exercising its discretion, the Tribunal should look at the whole picture of what happened in the case and ask itself whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The Tribunal is not required to determine whether there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed: (**Yerrakalva** above).

12. In relation to Rule 76(1)(b) the approach to an application for expenses in which the receiving party claims that the paying party brought and/or continued claims which had no reasonable prospects of success a 3-stage process should be adopted as follows:

    a. did the complaints in fact have no reasonable prospects of success?

    b. if so, did the complainant in fact know or appreciate that?

    c. if not, ought they, reasonably, to have known or appreciated that?

    (see **Radia v Jefferies International Ltd** EAT 0007/18)

7. The EAT went on to state in **Radia** that the question as to whether the claim had no reasonable prospects of success is judged based on information that was known or reasonably available at the start and considering how at that point the prospects of success would have looked. Where a party is legally represented, in the absence of evidence to the contrary, the Tribunal will assume that the represented party had been properly advised as to the risks and weaknesses of his case and the potential for an adverse costs order: (**Brooks v Nottingham University NHSFT EAT** 0246/18).

Submissions of the parties

13. There is no need for me to repeat the detailed written and oral submissions of the parties here. In brief, the respondent says that based on the findings and

conclusions in my judgment, it ought to have been clear to the claimant that, having received competent legal advice, his claim had no reasonable prospect of success from the outset and that his commencement of the proceedings was unreasonable.

14. That submission was founded upon three key criticisms of the claimant and/or his case as follows:

    a. the claimant was not a credible witness and was evasive,

    b. the claimant's case was built on 'shifting sands' – he raised new matters which were not pleaded,

    c. the claimant withdrew a number of allegations in his oral evidence.

15. For the claimant, Mr Briggs submitted that:

    a. the claimant was not found to be dishonest,

    b. concessions during cross-examination are, on occasion, appropriate,

    c. the 'conspiracy' allegation was implicit in the way the claim was pleaded,

    d. the fact that the claim failed is not evidence that it was unreasonably brought nor that it had no reasonable prospects of success,

    e. the claimant believed his claim to have reasonable prospects,

    f. the respondent failed to seek strike out or a deposit order implying that they did not consider that the claim had no reasonable prospects of success.

Decision

16. As I am required to do, I have considered the claimant's claim as it was presented in the paper apart to the ET1.

17. The first allegation in the paper apart, and which was discussed at length at the hearing, is that the respondent sought to run two consultation processes together being a consultation in respect of a bonus scheme to which the claimant had access and the redundancy process. There was a criticism of the

respondent that the bonus consultation had not been concluded and this in some way meant that the claimant had no confidence in the redundancy process.

18. At the time the claim was presented, indeed at the time the redundancy consultation commenced in this case, the claimant had received the full amount of the bonus which was the subject of the first consultation. That consultation had nothing whatsoever to do with the subsequent redundancies which had everything to do with the financial situation in which the respondent found itself for reasons which I do not need to reiterate in this decision.

19. The second allegation in the paper apart is that collective consultation was not minuted "to the claimant's knowledge" and he received no minutes after collective consultation meetings. Those meetings were minuted and the minutes were placed on the respondent's landing page where it deposited significant amounts of information about the ongoing redundancy/restructuring process. In any event even if those meetings were not properly minuted, that would not render an individual redundancy dismissal unfair. The fact is that the claimant had access to the landing page throughout the entire period of the redundancy process and he knew or ought reasonably to have known that the collective consultation meetings did have minutes and that he had access to them.

20. The third allegation in the paper apart is that the respondent did not handle the consultation efficiently. It is not an allegation that consultation was not sufficient or reasonable. The fact is that at the date the claim was presented, the claimant was aware that he had received information from Mr. Clark about the restructure plans, he knew what the new organisation was to look like structurally, he was made particularly aware of details of the new position of Retail Director, and he received a detailed job description for that role. Consultation was to take place across two formal consultation meetings and the minutes of the first consultation meeting show that there was reasonable consultation with the claimant. For reasons which I will set out below the second and final consultation meeting is less relevant to the question of fairness.

21. The fourth allegation is that because consultation was “insufficient” the claimant was not notified of potentially suitable alternative roles which he would have applied for. The paper apart says that these included a Deputy Head of Retail role and International Sales Manager.

22. However, at the date the claimant presented his claim he knew that he had been told about the Deputy Head of Retail role because he had expressly turned it down on the basis that it was “too junior”. There was an e-mail to that effect in the bundle. As to the position of International Sales Manager, the paper apart states that “*this role was a new title for the Deputy Head of European Retail role*”. At the time that the claim was presented the claimant knew that this role was not new and was not vacant, and therefore could not possibly be suitable alternative employment.

23. The fifth allegation, in contradiction to the fourth allegation is that although the claimant had the option to apply for the role of Retail Director, he had to wait three weeks before receiving a job description and was then given two days to apply for the role. This was not correct. The contemporaneous documents show quite clearly that the claimant had a job description for the role weeks before he decided not to apply for it and given that there was no date set for interviews for the new role it is difficult to see how he concludes that he was only given two days to apply for it. It is presumed that the reference to only being given “two days” once he received the job description is a reference to the second version of the job description, but the fact remains that the role of Retail Director as described to the claimant by Mr Clark never changed even though the structure and some of the wording in the first and second job descriptions were different. In the event it is quite clear in contemporaneous emails from the claimant that his reason for not applying for the role was that it did not meet his career aspirations and had nothing to do with the date that any particular job description was sent to him or how long he had it. Clearly this was known to the claimant at the date he presented his claim.

24. The sixth allegation also relates to the Retail Director position. the claimant says he was unclear what the job entailed because of the two different job descriptions but as I have set out above, that was clearly not correct. Mr Clark

had made it clear that in effect the role was to be head of the retail division and to implement the respondent's retail strategy whatever that was. The claimant had been told that there were no plans to close outlets and no plans to open new ones. He was aware of international developments because he had seen what the changes were to the International Sales Manager role and he had been in the business for around 26 years at this point and therefore to suggest that he did not apply because he lacked some detail simply does not accord with all of the contemporaneous evidence most importantly his own e-mail which says not that he was not going to apply for the role because he was unclear about what it required, but rather because the role did not meet his career aspirations. Again, all of these matters were known to the claimant at the point he presented the claim.

25. The seventh allegation is that the second consultation meeting with Mr. Clark which was essentially to confirm the claimant's redundancy meant that, as he puts it in the paper apart, he was left "in no doubt that redundancy was a formality, and that the respondent did not intend to consider any other alternatives". That of course is entirely correct. However, the way the matter is expressed in the paper apart is a suggestion that the second and final consultation meeting was not proper consultation, and by implication not reasonable or fair, because dismissal was inevitable. The reason dismissal was inevitable was because prior to the second consultation meeting the claimant stated that he was going to leave the respondent, he says so in an e-mail in those terms. In effect what had happened was that in and around the first consultation meeting the claimant had considered the two potential roles that were available to him and had declined the first for the reasons set out above and the second, the deputy position because it was too junior. Given those factors, the claimant was clear that he was going to leave and that meant that the second consultation meeting was left with nothing to discuss in terms of redundancy consultation, and it is hardly a criticism of the respondent that they did not do something which was not available for them to do. In other words, the criticism of the respondent that the invitation letter to the second consultation meeting meant that it "did not intend to consider any other alternatives" is at best disingenuous. The reason the respondent did not intend to consider any

other alternatives to redundancy is it the claimant had made it clear that he did not want to stay. That is not a basis to make a finding of unfair dismissal.

26. The final matter dealt with in the paper apart is the so-called appeal hearing. For reasons which I have dealt with in detail in my judgment, this was not an appeal hearing. The claimant made it perfectly clear when he “appealed” that he was not appealing to get his job back and therefore not appealing against his dismissal, he was merely complaining about some aspects of the process. Notwithstanding that, there was an appeal hearing held by the chief executive officer, Ms Osborne. She said that she would listen to what the claimant had to say, ask any questions she might have by way of clarification and then adjourn to investigate his complaints and then respond to him in writing, which is exactly what she did. The only issue the claimant had was to suggest that the notes of the appeal hearing which were produced by the respondent were not full and thus not ‘correct’. They were of course notes and not intended to be verbatim but in any event the respondent accepted some of the changes which the claimant made to the notes, but in terms of an unfair dismissal claim, nothing can possibly turn on what took place at that hearing and subsequently because, as I have set out above, the claimant did not wish to appeal against his dismissal and so there was no appeal. I should add for the sake of completeness that, even if the claimant had appealed, the appeal hearing, and outcome were reasonable.

27. All of the matters above are very well documented and were well within the scope of the claimant's knowledge at the date he left the respondent’s employment and certainly before he presented his claim. This became entirely clear during both his examination in chief and cross examination.

28. I should just deal with one or two other matters.

29. There was much discussion about the so-called conspiracy theory which emerged during the claimant’s examination in chief and which took up a significant period of cross examination of the respondent’s witnesses. There was literally no evidence of any conspiracy to get rid of the claimant. The fact is that the claimant was offered the opportunity to stay within the business, but he declined for the reasons I have set out above. The claimant alleged that his

relationship with Mr. Clark had soured over the bonus consultation but there is no documentary evidence of that, and it is perfectly plain from the documentation that Mr Clark was very keen to try to obtain for the claimant and indeed Mr Tennant, who were both very long serving employees, an enhanced redundancy package but he was told in no uncertain terms that that was not available. This suggests to me that there was no breakdown in the relationship between the claimant and Mr. Clark.

30. Returning to Mr Briggs' submissions, nothing turns on the fact that the respondent did not apply for a strike out of the claim or for a deposit order. I have to look at the claimant's behaviour and specifically what he knew at the time he presented the claim. It is not a criticism of the application for expenses that the respondent might have saved expenses by having the claim struck out sooner. This amounts to no more than saying that the respondent should have speculatively spent further money making an application which may not have succeeded.

31. Finally, there was a good deal of discussion both at the final hearing and today about the recording of the appeal hearing which the claimant covertly made. The criticism of the claimant is that instead of wasting time, and therefore expenses, criticising and cross examining the respondent about various versions of the minutes of that hearing, the matter could easily have been resolved if he had disclosed his recording and the parties may have agreed that there either there was, or was not a particular issue to put before me in relation to that. I note that the respondent asked the claimant whether he made a recording and received no response. Mr Briggs says that the respondent could have sought an order for disclosure but that begs the question why would a respondent expend legal fees making an application for something which they did not know existed? That could simply have been a waste of money. On the other hand, it is up to the claimant what he chose to disclose. There is a valid criticism of the claimant that expenses may have been saved had the matter of the disputed appeal hearing minutes been resolved prior to the final hearing but in my judgment, for the reasons I have set out above, in relation to the fairness of the dismissal, nothing turned on what was or was not in those minutes and the more valid criticism of the claimant is the time wasted discussing that

hearing given that it was not in any meaningful sense an appeal and therefore not in fact part of the redundancy process. Given the legal advisors involved in this case I presume that the claimant received such advice but nevertheless chose to continue discussing what took place at the appeal and afterwards as a matter of dispute when in fact it was entirely irrelevant.

32. For those reasons I find that the claim had no reasonable prospect of success at the outset and that therefore the claimant has behaved unreasonably and Rules 76(1)(a) and (b) are made out.

33. In relation to whether I should exercise my discretion I am in no doubt that I should. There was not a single matter put to the respondent, as giving rise to unfairness, which was a justifiable criticism of the redundancy process it adopted. All of the allegations of unfairness dealt with matters which were within the knowledge of the claimant, were by and large well documented, and about which he took legal advice, but he nevertheless presented and prosecuted the claim for unfair dismissal as set out in the paper apart which on any reasonable analysis had no reasonable prospect of success. This caused the respondent to incur legal fees of just under £70,000, it tied up the CEO for a week in the hearing and no doubt diverted a significant amount of management time in preparation for that hearing.

34. The claimant had advice form reputable lawyers and I assume he was properly advised of the risk of pursuing a claim such as that presented before me at the final hearing.

35. In terms of quantum, given that the application is limited to £20,000 which is less than one-third of the expenses incurred, and, in the circumstances, the quantum sought seems to me to be entirely reasonable.

Employment Judge: **M Brewer**
Date of Judgment: **25 November 2022**
Entered in register: **29 November 2022**
and copied to parties