EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104091/2020

Held via Cloud Video Platform (CVP) in Glasgow on 12 December 2022

Employment Judge Russell Bradley
Tribunal Member Ms G Eckersley
Tribunal Member S Singh

Ms Aishah Zaman	**Claimant** **Attendance not required**
Knightsbridge Furnishing Limited	**First Respondent** **Not present and** **Not represented**
Shahzad Younas	**Second Respondent** **Not present and** **Not represented**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that the claimant's application for expenses is refused.

REASONS

Introduction

1. On 27 July 2020 the claimant presented an ET1 form. She named two respondents. The first was her former employer. The second was at the time of her employment a director of the first. She made claims of discrimination. The protected characteristic was sex. The claims were of victimisation, harassment and direct discrimination. All followed the termination of the claimant's contract of employment. The claimant's case was that she had been summarily dismissed on 16 April 2020.

2. On 26 August 2020 both respondents, separately, lodged ET3s. On 24 February 2021 both respondents (again separately) lodged Particulars of their responses. On 17 March 2021 the first respondent lodged amended Particulars. The respondents denied that the claimant had been dismissed on 16 April.

3. By judgment and reasons copied to parties on 4 October 2022 the claims of harassment and victimisation succeeded. The claim of direct discrimination did not succeed. That claim was that she had been dismissed in breach of section 13 of the Equality Act 2010..

4. By letter dated 12 October the claimant's solicitor made an application for expenses. By letters dated 3 November, parties were advised of the date of this hearing and that they need not attend.

The application for expenses

5. The letter of 12 October seeks an order for payment of expenses on a joint and several basis against both respondents. It seeks expenses incurred while legally represented. Reference was made to Rule 75(1)(a). It seeks expenses of £10,521.90. That sum is *"broken down"* into 7 periods of time. The first is April to May 2020. The last is to October 2022. It is said to include *"conducting the claim, preparing for hearing, conducting hearing."*

6. The basis of the application is an assertion that the respondents acted unreasonably in the conduct of part of the proceedings. Reference was made to Rule 76(1)(a). The rule read short for present purposes is set out below. We have commented on the factual basis for the assertion in deciding the application. In short it was to deny the existence of various elements of evidence which, it is said, clearly did exist.

7. The claimant asked for her application to be dealt with on the basis of written representations. We agreed to do so. No written representations were received from either respondent.

The issues

8. It appeared that the issues for us to decide were:-

    a. In denying the existence of or manufacturing elements of evidence relied on, did the respondents act unreasonably in the conduct of part of the proceedings?

    b. If so, should we make an order for payment of expenses in the sum of £10,521.90?

Law

9. Rule 76(1)(a) read short for present purposes provides, *"A Tribunal may make an expenses order and shall consider whether to do so, where it considers that—(a) a party (or that party's representative) has acted … otherwise unreasonably in the way that the proceedings (or part) have been conducted".*

10. While the claimant did not rely on any previously reported decisions we took account of a number of appellate decisions which are noted below.

Discussion and decision

11. The application was set out using numbering, sub lettering and sub numbering. The grounds alleged unreasonable conduct in the way part of the proceedings had been conducted by the respondents. Item 1 was that the respondents had *"denied the existence of evidence which clearly did exist."* The sub lettering then argued that the respondents had:-

    a. Denied forwarding certain photographs to the claimant

    b. Denied sending a number of WhatsApp messages to the claimant

    c. Denied that the Second Respondent had grabbed the claimant with both hands on her arm and pulled her forcibly towards an office

    d. Manufactured various allegations against the claimant in the period after 16 April (her effective date of termination) those allegations purporting to justify dismissing her.

12. There was no principal numbering beyond 1.

13. The claimant asserts that the respondents knew or ought to have known that parts of their defence were based on false denials and false allegations. This, she says, amounts to acting unreasonably.

14. We have considered whether an order for expenses in the sum sought should be made. We have first considered whether the terms of the rule, as relied on by the claimant, were met. In our view, even though false denials and false allegations were made by the respondents, that is not, in the circumstances of this case, unreasonable conduct. *"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct …. in …. conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had"* (***Yerrakalva v Barnsley Metropolitan Borough Council and another*** [2012] I.C.R. 420, Mummery LJ at paragraph 41). The claimant did not refer to any previous cases in which false denials and false allegations were found to be unreasonable conduct. We had regard to two unreported decisions of the EAT. In ***Kapoor v Governing Body of Barnhill Community High Schoo***l EAT 0352/13 the court confirmed that costs should not automatically be awarded simply because a party has knowingly given false evidence. In ***Topic v Hollyland Pitta Bakery and ors*** EAT 0523/11 it confirmed that the fact that T had not lied (but had had an unreliable and damaged perception of reality) did not prevent the tribunal from finding that the claim had been misconceived and unreasonable. In our view and by analogy, expenses should not be awarded in this case "simply because" of the denials and manufacturing perpetrated by the respondents. In our view, an important question where what is sought is expenses for the whole period of the litigation is; what effect did that conduct have? Two points are important. First, it cannot be assumed that the claimant would necessarily have succeeded in her claims of harassment and victimisation if the respondents had not so acted. Second, other issues required to be considered. The claim of direct discrimination (dismissal) did not succeed. We required to consider (in relation to all claims) the question of illegality of the contract between the parties. Irrespective of the conduct of the respondents, those issues required to be decided. Logically therefore the

hearing was necessary. We took account of what was said by Mummery LJ at paragraph 40 in ***McPherson v BNP Paribas*** [2004] I.C.R. 1398 when considering rule 14(1) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001. *"In my judgment, rule 14(1) does not impose any such causal requirement in the exercise of the discretion. The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring BNP Paribas to prove that specific unreasonable conduct by the applicant caused particular costs to be incurred."* That reasoning is as good when considering the 2013 Rules (see ***Sunuva Limited v Martin*** UKEAT/0174/17/JOJ, The Honourable Mr Justice Kerr at paragraph 22). In this case the conduct complained of had no *"effect"* on the need for the case to go on to a concluded hearing.

15. Two other related points occurred to us. First, the expenses claimed included at least one and possibly two fees prior to the presentation of the ET1. They cover the period April to July 2020 albeit no dates are included. The ET1 was presented on 27 July 2020. A party's conduct prior to proceedings cannot found an order for expenses (***Health Development Agency v Parish*** 2004 IRLR 550). No award for the period prior to 27 July could have been made. Second, the claimant quoted paragraph 47 or our reasons in support of her claim which we have summarised at 11 d above. The suggestion is that the claimant is entitled to expenses in the period in which she was subjected to a disciplinary process which relied on manufactured allegations made in bad faith. That period began on or about 16 April 2020. It ended on 5 August. With the ET1 having been presented on 27 July, any expenses could only have been limited to that short *"overlap period"* between those dates. No expenses could have been awarded prior to 27 July.

16. In the circumstances we have refused the application for an award of expenses in the sum sought.

Employment Judge: Russell Bradley
Date of Judgment: 15 December 2022
Entered in register: 16 December 2022
and copied to parties