



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110465/2021

Held in Glasgow by private deliberations in chambers on 16 December 2022

5 Employment Judge R McPherson

Ms L Gorrie

Claimant
Represented by:
Mr G Woolfson -
Solicitor

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Mrs P Chuwen and Mr I Chuwen
t/a Beauty World

Respondent
Represented by:
Mr S Smith -
Solicitor

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JUDGMENT FOLLOWING RECONSIDERATION AND APPLICATION FOR EXPENSES

1. The unanimous decision of the Employment Tribunal in respect of the
20 claimant's application for reconsideration and the respondent's application for
expenses is as follows -

a. **The Judgment** dated **24 October 2022** (the "Judgment") is varied by
deletion at paragraph 10 of the phrase "ONE THOUSAND, FOUR
25 HUNDRED AND NINETY-TWO POUNDS (£1,492.00) and
substitution therefore the phrase "ONE THOUSAND, EIGHT
HUNDRED AND NINETY-TWO POUNDS (£1,892.00); and

b. The Reasons section of the Judgment is varied as follows -

i. **Paragraph 89 (g)** is varied by deletion of "*I am receiving
30 medical help for issues resulting from this direct discrimination*",
and

ii. **Paragraph 221** is varied by deletion of the figure of "£1492.00"
and substitution, therefore the figure "£1,892.00" and further

deletion of the words and figures at 10 of the Judgment, “ONE THOUSAND, FOUR HUNDRED AND NINETY-TWO POUNDS (£1,492.00)” and substitution therefore with “ONE THOUSAND, EIGHT HUNDRED AND NINETY-TWO POUNDS (£1,892.00)”.

- 5 c. The respondent’s application for expenses is refused.
- d. While we have varied our original Judgment, it being in the interests of justice to do as above, that Judgment is otherwise confirmed.

REASONS

- 10 1. Following a hearing which took place on 21, 22, 29 June and 12 August 2022 (with members meeting on 30 September 2022) we handed down the Judgment dated 24 October issued to the parties on 28 October 2022 in terms of which we unanimously dismissed complaints brought by the claimant in terms of s15, s19, s20 &21 and s27 of the Equality Act 2010 and claim for unfair dismissal and holiday pay. Claims in respect of breach of contract/notice pay and failure to provide written statement were upheld. On 15 application by the claimant for expenses in connection with a previous postponed Final Hearing on 25 and 26 May the Tribunal Ordered payment of expenses reasonably and necessarily incurred.
- 20 2. On **6 September 2021** the claimant's representative applied for reconsideration of elements of the Judgment dealing with a restricted award of expenses in favour of the claimant following an earlier postponement of the Final Hearing.
- 25 3. The claimant's application for reconsideration was submitted timeously in terms of **Rule 71** of the Employment Tribunal Rules of Procedure 2013 (the 2013 Rules).
4. The application was referred to the Employment Judge who decided that it should not be refused on the basis there was no reasonable prospect of the original decision being varied or revoked. No provisional view was expressed on the application.

5. The respondent made an application for expenses following the Judgment on **24 November 2022** in terms of **Rule 76 of the 2013 Rules** (timeously in terms of **Rule 77** of the 2013 Rules) arguing that none of the 4 Disability Discrimination claims ever had reasonable prospects of success, and the claimant acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing of the proceedings and the way that the proceedings in relation to these four claims had been conducted. The respondent highlighted sections of the Judgment where findings were made, including that no panic attack had occurred and/or the claimant's evidence was not accepted. The respondent set out 9 grounds relating to the pursuance of the disability discrimination element of the claims which are narrated below. It was argued that the effect was to increase the number of documents which the Tribunal had to consider; add the evidence of three witnesses who would not have otherwise been required, Ms Graham, Dr Livingstone and Ms McFadyen; extend the evidence of the other witnesses, extended the scope and extend of preparations and of final submissions, it being argued that the Tribunal heard evidence over 4 1/2 days with it being argued the respondent had prepared for 3 1/2 day and the submission preparation took 2 14 days equating to 10 days with it being estimated that the Disability Discrimination claims extended the time by 4 14 days which was calculated at a total of £7,5250.
6. The claimant's representative was directed to set out representations in response in writing in response, including setting out the claimant's position on matters which the claimant considers would be relevant to the Tribunal to take into account, including if the claimant considers means ought to be considered, the claimant's position on same.
7. The Tribunal intimated it was minded to deal with matters on written submissions without a hearing and invited parties' views, and confirmed that any response to the applications should be copied to the other parties. Neither party proposed that a hearing was necessary.
8. The panel was reconvened for a member meeting on Friday 16 December 2022, to consider the claimant's application for reconsideration and the

respondent's application for expenses. Parties were advised accordingly of the hearing and parties provided further comments:

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- a. By email at **23.49 pm** on **12 December 2022**, the claimant representative provided embedded responses to the grounds relied upon for the respondent opposing the application for expenses, which for sake of brevity the Tribunal does not consider it necessary to set out, beyond noting that it was argued that:
- i. the Tribunal had not concluded the claimant was seeking to be untruthful;
 - 10 ii. it was accepted that the claimant had a severe mental health impairment prior to the proceedings;
 - iii. there was overlap between the unfair dismissal and disability claims; that essentially the same evidence was required for both claims,
 - 15 iv. it was not accepted that the disability discrimination claim had extended the time by 4 >2 days;
 - v. in respect of the claimant's means it was indicated that any award against the claimant should be borne by the claimant's insurer; and
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- b. By email at **3.49 pm 15 December 2022** the respondent agent provided its response to the claimant's embedded responses to the grounds (again for sake of brevity the Tribunal does not consider it necessary to set out, beyond noting that in *Donohue v. Follett* that reliance was placed relied upon Note following Preliminary Hearing on
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- 21 February 2022 where it was said that a medical report was being obtained to address the impairment. The Tribunal notes that the Preliminary Hearing Note sent to parties on 25 February 2022, paragraph 8 noted that the claimant agent had just been instructed, discussion focussed on the issue of disability status, noting "*The claimant had previously provided some medical evidence...*" the
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5 Tribunal suggested that clarification should be provided whether only a mental impairment was relied upon, paragraph 8 concludes “*We discussed the extent to which it was necessary to have further medical evidence*”. At that stage, the Tribunal had been persuaded that there should be a Preliminary Hearing on Disability Status which was then fixed for 7 April 2022.

10 i. Further, the respondent argued the claimant had not disclosed her own means; the Tribunal had no power to make an award against an insurer; the respondent who was intimated not to have insurance funding concluded that on the information provided that the claimant had effectively no such financial consequence to date.

15 ii. In addition, documentation was provided including Tribunal correspondence to the respondent dated 2 September 2021 with amended (handwritten by the claimant) ET1.

c. The claimant’s agent by email at **9.13 am 16 December 2022** set out further representations and which the Tribunal does not consider necessary to set out here for sake of brevity and having regard to the Tribunal’s conclusions.

20 d. The respondent’s agent by email at **10.14 am 16 December 2022** set out further comment which the Tribunal does not consider necessary to set out here for sake of brevity and having regard to the Tribunal’s conclusions.

25 9. This judgment sets out the Tribunal’s conclusions at the member’s meeting on **Friday 16 December 2022**, in relation to both the claimant’s application for reconsideration and the respondent’s applications for expenses.

Tribunal Rules

10. **Rule 70** of the 2013 Rules, sets out the principles to be applied when dealing with an application for reconsideration -

11. "A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again."

Claimant's application for reconsideration.

12. The claimant's application was focused on elements of their application for expenses following the discharge of an earlier Final Hearing, which is set out more fully in the Judgment at paragraph 7. In particular, the claimant argues that the Tribunal should not have disallowed/restricted specific elements of the expenses sought following the earlier postponement.

Discussion and decision

13. The claimant argues while it was accepted that the claimant was in attendance on 25 and 26 May 2022 that the additional sums which had sought by the claimant, in the original submissions, should be awarded (cumulatively being £1,9484.80, rather than the restricted sum of £1,492.00 awarded) in respect of what had been argued /narrated as:

- a. (b) attendance at a hearing on 26 May 2022 including to and from the office which the claimant representative sought £330 plus VAT [**£396**]; where the Tribunal had awarded £342 inclusive of VAT; and
- b. (c) reviewing the Note issued by the Tribunal following the postponement: telephone call with client to advise regarding the re-scheduled hearing and further CMPH; emails to witnesses re postponement £154 plus VAT (£184.20); where no award was made
- c. (e) attendance at the further CMPH on 13 June 2022 being £220 plus VAT (£264).

14. The Tribunal concludes on reconsideration that the award of expenses should be varied, in respect that expenses which had been sought and which the Tribunal accepts were necessarily incurred were not fully addressed in

respect of sums sought (b) and (e) and those sums sought should be awarded.

15. The Tribunal notes there is no breakdown of (c) above. It is not disputed that the claimant was in attendance, in these circumstances, while it is accepted that an expense would be incurred to notify witnesses of the re-scheduled hearing and further CMPH the Tribunal, in the specific circumstances of this case, does not accept that there was a cost necessarily incurred in what is narrated as a telephone call with the claimant to advise regarding the rescheduled hearing, the Note of the hearing identifies that the date was identified to those present, further the Note was in effect a summary recording what was discussed and would have been known to those present, including the claimant. In those circumstances, the Tribunal restricts the sum awarded in respect of (c) to 1/4 of the sum sought being £92.00 as being necessarily incurred.
16. The cumulative sum of expenses necessarily incurred is £1892 (being (a) £660+ (b) £396 +(c) £480+ (d) £92+ (e) £264).'

Respondent's application for expenses.

17. The respondent's application was in summary that in pursuing disability discrimination elements of the claimant's claim, her conduct was unreasonable, and that unreasonable conduct had the effect of extending the duration of the Final Hearing.
18. The Tribunal has already set out at 151 to 169 of the Judgment applicable law. In the respondent's application reference was made to *Brooks v Nottingham NHS Trust* [2019] UKEAT/0246/18 (*Brooks*) in which the EAT upheld a (cost) expenses award noting the Tribunal had found that while that claimant was not being deliberately untruthful or dishonest, the claimant, in that case, had a distorted perception about what in fact happened when no reasonable and objective person looking at the evidence would have considered there to be an arguable case.

19. In *Brooks* the claimant asserted that he had made 18 protected disclosures within the meaning of the Employment Rights Act 1996 and what were insisted upon as 37 consequential detriments. *Brooks* confirmed that there was no rule of law that the Tribunal would only use its discretion to award costs where the claimant had been dishonest, as the test is not one of dishonest conduct but rather unreasonable conduct (in the bringing of proceedings) and that may include an unreasonably distorted perception of matters.
20. *Brooks*, confirmed that a decision on expenses involves the exercise of discretion by the Tribunal, referred to the decision of the Court of Appeal in England in *Barnsley Metropolitan Borough Council v Yerrakalva* [2012] ICR 420 (*Yerrakalva*) in which Mummery LJ, said (at paragraph 41) - "*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 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...*"

Discussion and decision

21. The Tribunal recognises that consideration of expenses is fact dependent and is a fact-sensitive exercise. The Tribunal has applied the 3-stage test, firstly asking whether the precondition for making an expenses Order has been established, secondly, the Tribunal considers whether to exercise its discretion to make such an award, whether it would be appropriate to make such an Order, and thirdly (if it is appropriate) to assess the quantum of that award.
22. The Tribunal approached matters on the basis set out in *Yerrakalva*;
- a. What was the conduct of the claimant said by the respondent to have been unreasonable?
 - b. What was unreasonable about it?
 - c. What effect did it have?

23. The conduct of the claimant was set out by the respondent on 9 grounds relating to the pursuance of what can be summarised as the disability discrimination element of the claim and supplemented in their embedded responses as narrated above.

5 24. The Tribunal has considered each of the grounds individually and subsequently cumulatively:

a. **Lodging a claim which referred to a “panic attack” at work which had not taken place.** The respondent subsequently expanded their position including commenting that *“It is submitted that the proximity of the diagnoses and the lodging of the Claim should have meant the former was uppermost in the mind of the Claimant. For her to go back in time in seven months in an attempt to found liability in terms of the Equality Act under the Equality Act was unreasonable”*

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i. Such an assertion in a claim could be unreasonable. However, the Tribunal does not accept the respondent’s position.

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ii. The Tribunal had considered the claimant’s position and set out its assessment in paragraph 111. It is not considered necessary to repeat the terms of paragraph 111 beyond noting that the Tribunal accepts that currently and since June 2021, the claimant has suffered from a severe mental health impairment. While the claimant was a consistently unreliable historian, the Tribunal does not consider the claimant was seeking to be untruthful and concluded that the claimant was mistaken when she describes a panic attack had occurred in the course of her employment. The Tribunal does not conclude that the claimant’s belief, albeit mistaken, expressed in the July 2021 presented claim and subsequently all while suffering from a severe mental health impairment, amounted to unreasonable conduct. The absence of supporting contemporaneous records of having reported such panic attacks the claimant’s decision to redact elements of the GP records did not reflect an

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unreasonably distorted perception of the facts having regard to the claimant's severe mental health impairment which predated the presentation of the claim.

- 5 iii. Having regard to conclusions on the evidence of Dr Livingstone set out in paragraph 113 of the Judgment, it is not accepted that no reasonable and objective person looking at the evidence would have considered there to be an objective case. The claimant was not unreasonable in her conduct in this regard.

10 **b. Amending her claim to include reference to an impairment which had never been discussed with her GP while she was employed by the Respondents.** The respondent subsequently clarified that the claimant had, while self-represented provided a handwritten addition to the ET1 presented.

- 15 i. The Tribunal repeats its assessment in relation to the 1st ground.

- 20 ii. In relation to the conduct, the respondent does not argue that the ET1 in which the claimant had ticked box 8.1 asserting that she was discriminated on grounds of disability, had not asserted disability discrimination in her presented claim. What is identified ¹as the handwritten amendment made by the claimant while unrepresented forwarded to the respondents on 2 September 2021 introduced the phrase "*/ am receiving medical help for issues resulting from this direct discrimination*" to 8.2 of the ET1 and further handwritten narrative at 9.2 of the ET1, were not put to the claimant in the Final Hearing as being out with the jurisdiction of this Tribunal; those amendments not challenged in submissions. They had not been challenged. The Tribunal does not conclude that the claimant in adding the handwritten amendments was unreasonable. This matter having now been identified the Tribunal has addressed by reconsideration of paragraph 89 (g) of the Judgment deleting
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that phrase. The claimant was not unreasonable in her conduct in this regard.

c. Amending the claim by adding various claims under the Equality Act in the knowledge they were contradicted by her own documentary medical evidence.

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i. The Tribunal repeats its assessment in relation to the 1st and 2nd ground.

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ii. The claimant via her agent's further steps clarifying the statutory heads of claims insisted upon, and which were not in any event challenged and which culminated in discrimination claims prior to the dismissal being withdrawn was not unreasonable.

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iii. As above there was an absence of supporting contemporaneous records. The Tribunal did not conclude that the claimant's position was actively contradicted by the available medical evidence. The Tribunal repeats its assessment in relation to the 1st ground. The claimant was not unreasonable in her conduct in this regard.

d. Redacting her GP records prior to providing these to the Tribunal.

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i. In relation to the conduct, while the Tribunal considers the provision by the claimant of GP medical records on 4 November 2021 which the claimant had elected to redact as potentially unreasonable, the Tribunal did not make a finding that these were provided under Order, there was no subsequent request for unredacted records, and the claimant was challenged during her evidence on the redactions.

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ii. The Tribunal concludes however that the effect of the claimant's actions was to undermine her credibility and not to extend the hearing.

e. Providing false information about the history of this impairment to an expert witness.

5 i. While the respondent seeks to characterise, the information provided by the claimant as false, the Tribunal repeats its assessment in relation to the 1st ground. The claimant while mistaken provided information while suffering from an impairment. The claimant was not unreasonable in her conduct in this regard.

10 **f. Withholding from or failing to provide to the expert witness the contemporaneous GP records.**

i. The Tribunal set out its findings in relation to the claimant's attendance with Dr Livingstone and the subsequent preparation of the report at paragraphs 102 to 105 including noting that at the time of the report the claimant had severe physiological distress. The Tribunal does not conclude that the non-provision of contemporaneous GP records was on the facts unreasonable. The effect was in any event to undermine the supporting conclusions of Dr Livingstone undermining the credibility of the claimant's claim. The Tribunal repeats its assessment in relation to the 1st ground. The claimant was not unreasonable in her conduct in this regard.

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g. Providing a schedule of loss which valued these claims at £16,500.

-25 i. The Tribunal repeats its assessment in relation to the 1st ground. The provision of a schedule of loss which reflected the claimant's mistaken position was, in the circumstances of this case, not unreasonable.

h. Giving evidence under oath that she had told the respondents about the impairment when these events did not occur.

i. The Tribunal repeats its assessment in relation to the 1st ground. The claimant was not unreasonable in her conduct in this regard.

i. Updating her schedule of loss to seek a figure of £30,000 in respect of these claims after the evidence had been completed.

i. The Tribunal repeats its assessment in relation to the 1st ground. The claimant was not unreasonable in her conduct in this regard.

25. The Tribunal has considered each ground individually as above and summarises that the respondent's specific criticisms of the claimant's conduct and the effect of that conduct on the hearing were not such as, on the specific factual matrix in this case, as to give rise to the Tribunal exercising its discretion to award expenses against the claimant.

26. The Tribunal has considered the grounds cumulatively and has come to the same conclusion.

27. In all the circumstances the Tribunal does not require to consider the claimant's means.

Reconsideration on Tribunal's initiative.

Discussion and decision

28. Further and on its own initiative the Tribunal notes, in submissions via the respondent that the copy ET1 provided to the Tribunal in the Bundle contained a handwritten addition. The Tribunal having noted the same, on its own initiative concludes that Paragraph 89 (g) should be varied in the interests of justice, by deletion of the phrase "*/ am receiving medical help for issues resulting from this direct discrimination*" for clarity.

Conclusions

29. The Judgment including consequential Order and paragraph (Conclusions) 221 is varied accordingly by deletion of the figure of "£1492.00" and

substitution, therefore the figure “£1 ,892.00” and further deletion of the words and figures at 10 of the judgment, “ONE THOUSAND, FOUR HUNDRED AND NINETY-TWO POUNDS (£1,492.00)” and substitution therefore with “ONE THOUSAND, EIGHT HUNDRED AND NINETY-TWO POUNDS (£1,892.00)”.

5 The Order contained within that judgment is varied in respect that the respondents are jointly and severally Ordered to pay this varied sum to the claimant’s representative within 21 days of this judgment.

30. While the Tribunal has varied its original Judgment, it being in the interests of justice to do so, that Judgment is otherwise confirmed.

10 31 . The respondent’s application for expenses is refused.

Employment Judge: Rory McPherson
Date of Judgment: 13 January 2023
Entered in register: 17 January 2023
and copied to parties

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