EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102358/2020 (V)

Final Hearing (Expenses) Held in Chambers on 19 January 2023 at 10.00am

Employment Judge: Russell Bradley

Mr J Anderson	**Claimant** **Attendance not required**
Gareloch Support Services (Plant) Limited	**Respondent** **Attendance not required**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgement of the Tribunal is that:-

1. The claimant's application for expenses dated 18 November 2022 is refused.
2. The respondent's application for expenses dated 23 November 2022 is refused.

REASONS

Introduction

1. This case concerned a claim for holiday pay brought by a seafarer employed by the respondent on the vessel/workboat the *Lesley M*. The claim was for an entitlement to holiday pay spanning the period of his employment, almost nine years. It was first made after his contract of employment ended on 18 December 2019.

2. On 30 April 2020 the ET1 was presented. In the attached statement the claimant made various alternative bases for the claim. In a judgment and reasons copied to parties on 18 March 2022 the claimant succeeded in one basis of claim, for "*December 2019*". Following a remedy hearing on 23 August 2022 the judgment of the tribunal was to order payment of the net version of £383.04. The claimant's schedule of loss sought £387.34. Between March and August 2022 the claims were the subject of various management orders. In that period, the respondent sought to strike out (which failing deposit orders) all of the extant claims. I summarised those claims in the reasons of 18 March 2022.

3. In a 6 page document dated 18 November 2022 the claimant sought an order for payment of expenses in the sum of £2250 plus VAT or alternatively taxed by the auditor of the sheriff court (in terms of Rule 78(1)(b)). The document was accompanied by emails between the parties' solicitors in the period 16 to 22 August. By email dated 23 November the application was opposed.

4. By email dated 21 November 2022 the respondent sought an order for payment of expenses (either) a specified part of the expenses relating to such parts of the claim as the tribunal found had no reasonable prospect of success and/or as it was unreasonable to pursue with the amount paid to be determined be detailed assessment in accordance with Rule 78(1)(b); (or) for the specified amount of £20,000 of such lesser sum as the tribunal considered appropriate. On 25 November, the claimant set out his basis for opposing the application.

5. I directed that if either party wished an oral hearing on their claims they should make written application. Neither did. I decided the issues on the basis of the paper submissions.

The issues

6. The issues for me were:-

    1. Was the respondent's rejection of a settlement offer of £250 unreasonable conduct?

    2. Did the respondent's resistance at the stage of the remedy hearing have no reasonable prospect of success?

    3. In either event is it appropriate to make an award of expenses in favour of the claimant?

    4. If so, should that award be as sought by the claimant?

    5. Did the claimant's claim of breach of contract have no reasonable prospect of success?

    6. Alternatively, were its prospects of success so slim that it was unreasonable for the Claimant to pursue it?

    7. Separately, was the claimant's failure to (a) review each and every other extant claim on its merits; (b) on each of them individually take an objective view of its chances of success; and (c) then withdraw all or any of them unreasonable?

Claimant's application

7. The claimant set out his application under 6 headings. I mean no disservice in recording a brief summary of the bases on which the application is made.

8. His first basis was that the respondent's rejection of a settlement proposal of £250 which was in an email from Mr Lawson dated 16 August (therefore a week before the remedy hearing) was unreasonable. He referred to the decision of the EAT in the case of ***Kopel v Safeway Stores plc*** [2003] IRLR 753. He said that; the sum awarded was 98% of what was sought in his schedule; it was 50% higher than the sum he was prepared to settle for; he was willing to consider an offer lower than £250; and he had set out in emails

between 16 and 19 August in detail an argument that the respondent's position was not well-founded.

9. His second basis was that the response had no reasonable prospect of success and did so relying on what he had said in his two August emails noted above. Put shortly, he said that unless the tribunal accepted one particular argument at the remedy hearing an award was inevitable.

10. He then set out various arguments as to the appropriateness of the order. He sought an order for the period from 16 to 23 August.

11. In reply the respondent enumerated 12 points. I have considered them and to the extent relevant have taken them into account. Those of particular relevance are noted below.

Respondent's application

12. The email of 21 November made two distinct arguments. Each focussed on different bases of claim.

13. The claimant provided a 3 page opposition.

Law

14. The parties referred to Rules 76, 77 and 78 of the Employment Tribunal Rules of Procedure 2013. The relevant abbreviated version of Rule 76(1) for present purposes is:-

> *"(1) A Tribunal may make a costs 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 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 prospect of success*."

15. To the extent relevant I have taken account of and referred to below the authorities cited on both sides.

Discussion and decision; the claimant's application

16. The claimant relies on ***Kopel*** as authority for the proposition that where a party makes an offer to settle a case, which is refused by the other side, expenses can be awarded if the tribunal considers that the party refusing the offer has thereby acted unreasonably. The respondent does not appear to take issue with either the proposition or that ***Kopel*** vouches it. In my view that is not a controversial point. The relevant proposition which can be taken from ***Kopel*** is that it does not follow that a failure by one party to "*beat*" a settlement offer should, by itself, lead to an order for costs being made. A tribunal must first conclude that the conduct of the other party in rejecting the offer was unreasonable before the rejection becomes a relevant factor in the exercise of its discretion (paragraph 18). I agree in large measure with what is said by the respondent at paragraph 9 of its opposition which I summarise thus; it cannot be correct that a respondent acts unreasonably if it declines a settlement proposal when it believes that no further payment is legally due, but the potential cost of arguing the issue before the Tribunal is more than the sum in dispute. The only caveat I have is that the claimant in this case argues that the respondent's belief was obviously (my word) ill-founded. Having reconsidered my rationale at paragraphs19 to 25 of the remedy reasons, I do not agree that the respondent's various arguments were obviously ill-founded. There appeared to me then (and now) that they were at least triable issues. In my view therefore the respondent's rejection of the settlement offer in this case was not unreasonable.

17. Separately I do not accept the claimant's contention that the various arguments noted at paragraphs 19 to 25 of my reasons had no reasonable prospect of success. The claimant argued that unless one particular argument relied on by the respondent was successful "*there would of necessity be a financial award made to the claimant.*" I agree insofar as that argument goes. But a purpose behind the remedy hearing was to determine the amount of that award. Logically, the hearing was necessary at least for that purpose.

The vast majority (95%) of what was sought by the claimant as expenses related to preparation for and attendance at the remedy hearing. That expense was necessary for the remedy hearing in any event.

Discussion and decision; the respondent's application

18. It is convenient to decide the respondent's application by considering the two discrete bases in turn. Each focussed on different elements or grounds on which the claimant maintained his claim.

19. First, so says the respondent, the claim relying on the discrete question of an alleged breach of contract decided in my judgment and reasons issued on 30 March 2021 "*never had any reasonable prospect of success. Alternatively, if it is not considered so hopeless as to have no reasonable prospect of success, its prospects of success were so slim that it was unreasonable for the Claimant to pursue it*." There are (obviously) two grounds relied on for expenses. First, I do not agree that the "*breach of contract*" claim "*never*" had any reasonable prospect of success. I have re-considered paragraphs 29 to 38 of my reasons in the March 2021 judgment. While the issue to be decided was concise, "*whether the respondent was in breach of contract in respect of the claimant's entitlement to be paid annual leave in the period 23 January 2019 to 18 December 2019*", taking account of the arguments and my record of the decision in March 2021 it cannot be said that this claim never had a reasonable prospect of success. There was reference to a number of authorities from the higher courts, including on the question of the interpretation of contracts. I noted (at paragraph 36) that "*it was necessary to refer to three sources to understand the matrix of contractual provisions*." These factors (at least) meant in my view that there was a triable issue. Nor do I agree that its prospects were so slim that it was unreasonable to have pursued it. I rely again on paragraphs 29 to 38 of the March 2021 reasons.

20. The second claim "*relates to all the other elements of the Claimant's claims, other than those for 'additional payments' for pay due for December 2019*." In a judgment with reasons copied to parties on 17 September 2021 EJ Murphy refused to strike out "*all extant claims*." She made deposit orders in respect

of two bases of claim. When the case came back before me at the hearing in November 2021 those two bases were struck out as the deposit orders had not been paid. I recorded then that there remained 6 bases of claim. It will be obvious that the claimant succeeded in only one of them. The respondent's second claim thus relates to the other 5. It says that after March 2021 the claimant has acted unreasonably in the way that that part of the proceedings was conducted. The respondent's primary contention is that the claimant's failure to (a) review each and every other extant claim on its merits; (b) on each of them individually take an objective view of its chances of success; and (c) then withdraw it was unreasonable. The respondent does not say that any of these bases had "*no reasonable prospect of success*." In my view a relevant factor in deciding this question is that in September 2021 EJ Murphy decided that 6 bases of claim should not be struck out as having no reasonable prospect of success, nor should deposit orders be made for them. That being so, it is difficult to see how the claimant failed at all in the way relied on by the respondent. The inference is that the "*reasonable*" step to have taken at (c) was to withdraw all (eight) bases sometime after March 2021 and certainly by the time the strike out applications were made (9 July 2021). The suggestion seems to be that at least by July the claimant should have concluded that none of the eight claims had reasonable prospects of success. But faced with that very question in September, the tribunal did not agree on six of them. In my view the claimant did not "*fail*" as alleged. Thus his conduct was not unreasonable. The subsidiary argument is that "*Should the conclusion of the Tribunal however be that there was unreasonableness in respect of some (but not all) of such contentions advanced, then it is submitted that costs should be awarded in respect of such contentions as were unreasonably advanced*." Two short points occur. First, my conclusion is that there was no "*unreasonableness*" in respect of any of the claimant's contentions. Rule 76(1)(a) is thus not met. Strictly, that is an end of the matter. But as an aside, this argument appears to suggest that if I decided that, say two of the claimant's contentions were "*unreasonably advanced*", I should award expenses limited to them. That appears to me to be an artificial and

complicated (if not impossible) dissection exercise for which the respondent provided no assistance.

Employment Judge: **R Bradley**
Date of Judgment: **19 January 2023**
Entered in register: **24 January 2023**
and copied to parties