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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103197/2022

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Held by CVP 13 December 2022

Employment Judge E Mannion

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Mrs A Lee

**Claimant
Represented by Heather
Hiram, lay representative**

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Scottish Ambulance Service Board

**Respondent
Represented by Greg
Fletcher, Solicitor
NHS Central Legal Office**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 The judgment of the tribunal is the respondent's application for wasted costs is unsuccessful and so dismissed.

REASONS

Introduction

35 1. The hearing considered the respondent's application for wasted costs in respect of the preliminary hearing scheduled for 24 October 2022. This application was made on 1 November 2022 in writing. The claimant objected

E.T. Z4 (WR)

to this application in writing and a hearing was scheduled to consider the application, the objection and further legal submissions from the parties.

2. In advance of the hearing, a joint bundle of productions was prepared by the respondent and sent to the tribunal office. The claimant provided additional documents and these were also sent to the tribunal and available to the respondent. Witnesses were not called and the matter proceeded by way of submissions.

Relevant law

3. Rule 80 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 provides as follows:

(1) A tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs -

(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or

(b) which in light of any such act or omission occurring after they were incurred, the tribunal considers it unreasonable to expect the receiving party to pay.

(2) Representative means a party's legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit.

Issues

4. The issues to consider are as follows:

9.1 Did the claimant's representative act in a way which was improper, unreasonable or negligent?

9.2 Did the respondent incur costs as a result of this conduct?

9.3 Is the claimant's representative a "representative" under Rule 80(2)?

5 **Findings in Fact**

5. At the time of the hearing on 24 October 2024, the claimant was represented by her husband, Mr Lee who is a lay representative.

6. The hearing on 24 October 2022 was a preliminary hearing. The purpose of this hearing was to discuss case management. The purpose of the hearing and the matters to be discussed were outlined to parties in the note from the preliminary hearing of 15 September 2022.

7. This was the third preliminary hearing in this case, the first taking place in August 2022 discussing case management, and the second taking place in September 2022 to consider amongst other things the claimant's application to amend to introduce discrimination as a head of claim. This latter application was denied.

8. Mr Lee conducted the preliminary hearings in August and September 2022 and drafted extensive specification of the claimant's case as requested as well as the application to amend.

9. On 17 October 2022 the tribunal refused Mr Lee's application that a second lay representative, albeit one with a legal background, act on behalf of the claimant alongside him. A second application on the same basis was made by Mr Lee and subsequently refused by the tribunal on 21 October 2022.

10. At the outset of the preliminary hearing on 24 October 2022, in response to questions from Mr Lee in respect of tribunal paperwork, it was explained that as the application to amend in September was unsuccessful, the issues of discrimination would not be considered at the final hearing and that only constructive unfair dismissal would be considered at that hearing.

11. During the course of the hearing, Mr Lee asked for an adjournment on the basis that a) he wished for another lay representative to represent the claimant and b) he was unwell due to stress, specifically that he had slept poorly the night before and had a migraine. This application was refused.
- 5 12. Mr Lee indicated that he intended to withdraw from acting for the claimant. The implications of this were explained to Mr Lee. Mr Fletcher representing the respondent stated that he was likely to apply for costs if that occurred. Mr Lee did not make an application to withdraw.
13. The hearing was adjourned after lunch on 24 October as Mr Lee was required
io to attend hospital over the lunchbreak and was unable to proceed.

Respondent's submissions

14. Mr Fletcher submitted that the claimant's representative, Mr Lee, acted unreasonably during the course of the preliminary hearing on 24 October 2022. It was the respondent's position that the claimant's representative knew
is what to expect from the hearing and also that he actively participated in the hearing on 24 October.
15. Mr Fletcher submitted that the unreasonable conduct which formed the basis of his application was Mr Lee's conduct during the course of the preliminary hearing on 24 October. He referred to the previous applications to have an
20 additional lay representative appointed alongside him, and noted that there was no meaningful disclosure of health issues from Mr Lee or a discussion that he was medically unfit to proceed with the hearing. He submitted that the claimant had an opportunity to appoint a different representative in advance of the hearing and also that Mr Lee participated fully in the hearing up to
25 lunch, making clear and cogent arguments.
16. Mr Fletcher further submitted that the approach of Mr Lee during the hearing was to immediately challenge every position, including decisions of the tribunal. He stated that it was only at the point when it was clear the case was not progressing with discrimination as a head of claim, that Mr Lee applied
so for an adjournment, then sought to withdraw from acting and then became

unwell and unable to participate. Mr Fletcher described this as Mr Lee downing tools and running away. He submitted that due to Mr Lee's conduct, the preliminary hearing was abandoned with no discussion on any of the matters, which the hearing was originally scheduled to consider. He considered the medical evidence provided at page 107 of the bundle and submitted that this does not assist Mr Lee as it does not provide evidence of any acute medical problem, only that the hospital carried out medical tests.

17. It was submitted that while expenses do not automatically follow, there is discretion for the tribunal to award expenses, in this case wasted costs. It was the respondent's position that Mr Lee's conduct was vexatious and an abuse of process, that he was in a position to move things forward and provide relevant information about the claim and he refused to do.

18. Mr Fletcher submitted that there has been considerable cost to the public purse, both in terms of tribunal time and the cost to the respondent, who is part of the NHS. It was his position that the award should reflect the preparation for and attendance at the hearing on 24 October 2022.

19. In terms of the fact that Mr Lee is a lay representative, Mr Fletcher noted that the costs application was not one made lightly but that as Mr Lee was the only person in the position to assist the tribunal on case management matters but that he had an agenda to pursue and when it became clear that the tribunal was not on board with that agenda, he walked away.

Claimant's submissions

20. Ms Hiram disputed the position as set forward by Mr Fletcher and stated that the application for costs was not "backed up" by an evidence. She submitted that Mr Lee was stressed and unwell on the 24 October and referred to panic attack like symptoms, sweating and a migraine. She also disputed Mr Fletcher's submission that it was open to the claimant to appoint another lay representative in advance of the preliminary hearing on 24 October 2022. She noted that she was not available to conduct the hearing on 24 October and

that Mr Lee did not understand the question of a second representative was decided until 21 October.

21. Ms Hiram submitted that Mr Lee's conduct was not unreasonable but instead he was someone who did not have an understanding of the process, that he did not understand what documentation was accepted and in her words "had no idea what was going on". She submitted it was not clear to him what had been accepted and what was not. Due to his total lack of understanding, he would not have been in a position to move the case forward on 24 October.
22. She submitted that the application for costs was very backward-looking and that everyone wanted to move forward and make progress but that no progress could be made by considering the costs application.
23. In terms of Mr Lee's health, she submitted that Mr Lee was panicking and attended the hospital with chest pains. This was a medical emergency and was significant.
24. In answering Mr Hiram's submissions, Mr Fletcher noted that Mr Lee was not called to give evidence on any of the matters put forward by Ms Hiram. He submitted that the tribunal works with litigants in person on a daily basis and was at lengths to explain the process to Mr Lee on 24 October. He questioned why Mr Lee, who had already participated in case management preliminary hearing with no adverse effects, was unable to participate or understand what was occurring on 24 October.

Decision

25. Firstly, I note the claimant's submissions that Mr Lee was not acting unreasonably, but instead was unwell. However, no evidence was led from Mr Lee by Ms Hiram on that point. Further, she made submissions as to Mr Lee's understanding or lack thereof but again did not lead any evidence from Mr Lee on these points. I therefore require to consider what if any weight can be placed on these submissions.

26. I find that Mr Lee's conduct during the course of the hearing on 24 October 2022 was challenging. I appreciate that Mr Lee found himself in a difficult and stressful position in terms of his representation. I note the submissions from Ms Hiram that rather than acting in an obstructive or unreasonable manner, Mr Lee had difficulties understanding the process. I do not accept this submission. Substantial time was spent discussing and explaining process to Mr Lee on 24 October 2022. The hearing began at approximately 10am and from that point until lunch, the time was spent explaining to Mr Lee the purpose of the hearing, the heads of claim that were progressing, the tribunal process, the potential for taking up recordings of previous hearing, the basis for his application to adjourn, the decision in respect of that application, the implications should Mr Lee withdraw from acting and the case management aspects I wanted the parties to focus on when we returned from lunch. I note that this was the third preliminary hearing which had taken place and the second such case management preliminary hearing, all of which Mr Lee conducted. Further, during the two or so hours of the hearing, Mr Lee was fully engaged and set out cogent arguments. Mr Lee asked questions, challenged both how matters were progressing and the decisions of the tribunal. Rather than a lack of understanding as to how the tribunal had made these decisions or how the case was progressing, I believe there was instead a lack of acceptance of or agreement with those decisions and the constraints within which the tribunal acts. An example of this was the application to adjourn, which was refused. The reasons for refusal were fully explained to Mr Lee, after which he continued to challenge the decision made and set out reasons why the case should not proceed on that day and why an adjournment should be granted. When, after lengthy discussion, I informed Mr Lee that the decision to adjourn stood, he stated that he was considering withdrawing from acting.

27. In respect of Mr Lee's health on 24 October 2022, it is accepted that he attended accident and emergency and as a result the hearing could not continue and was adjourned after lunch. However, in the absence of witness evidence from Mr Lee, I cannot make findings on the extent of Mr Lee's ill

health, the reasons for his attendance at accident and emergency and the impact on his conduct.

28. Rule 80 of the ET Rules of Procedure is the basis for this application for wasted costs. This allows the tribunal to award costs against a party's representative due to their behaviour and conduct. A representative is defined at Rule 80(2). Representatives who are not acting in pursuit of profit in terms of the proceedings are excluded from a wasted costs application.
29. While Ms Hiram did not directly address me on Rule 80(2), she referred to the fact that Mr Lee is a lay representative. The crux of her submission, albeit as reasoning as to why his behaviour did not amount to unreasonable behaviour rather than the fact that he may not come within the definition of "representative" under Rule 80(2), was that he did not understand process and his involvement was due to a desire to help his wife.
30. In his original application, Mr Fletcher indicated that as Mr Lee would benefit from any award for compensation which might result from a successful claim, *•* it could be said that he was acting in pursuit of profit. This was not expanded upon at the hearing and when I asked if there were further submissions on the fact that Mr Lee was a lay representative, this focused on the alleged unreasonable behaviour.
31. I do not accept the contention in the original application that Mr Lee could be said to be acting in pursuit of profit as he may benefit as a spouse from any compensation award granted in favour of the claimant, his wife. The employment tribunal has a long tradition of representatives acting on a pro-bono basis for parties, whether said representation arises via a trade union, a law centre/citizen's advice bureau, pro-bono clinics or via family and friends who assist and represent parties in tribunal litigation. The exception in Rule 80(2) takes into account this long tradition and ensures that those who seek to represent parties on this basis are not at risk of an order to pay the costs of the other party. I am mindful of caselaw in particular *Henry v London General Transport Services Limited ET2301 782/201 5*, which is persuasive rather than binding, that found that a trade union representative subject to a

5 wasted costs application could not be said to be acting in pursuit of profit. I have not been provided with any evidence or any submissions that allows me to consider that Mr Lee was in fact acting in pursuit of profit in his representation of his wife rather than on a pro-bono basis given the proximity of their marriage.

32. As such, I find that Mr Lee is not a representative under Rule 80(2) and so an order of wasted costs cannot be made on the basis of his conduct or behaviour. The application is dismissed.

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Employment Judge: E Mannion
Date of Judgment: 26 January 2023
Entered in register: 27 January 2023
and copied to parties

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