5 **EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: 4103838/2022

Held at Dundee on 3 March 2023

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Employment Judge W A Meiklejohn

Miss Paula Connelly **Claimant**

15 **In person**

20 **Dr Karen McConnach t/a Maid in Dundee** **Respondent**
Represented by:
Ms J McLaughlan –
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the respondent's application
30 for an expenses order under Rule 76 of the Employment Tribunal Rules of
Procedure 2013 is refused.

REASONS

1. This case came before me for a final hearing on 1 and 2 March 2013 (and
35 briefly on 3 March 2023 when I announced my provisional view as to the
outcome). Prior to this hearing, the respondent had submitted an
application for an expenses order. As the final hearing had originally been
listed for three days, it was convenient to deal with the respondent's

application on 3 March 2023. As at the final hearing, the claimant appeared in person and the respondent was represented by Ms McLaughlan.

Application

2. The respondent's application for expenses was contained in the letter to the Tribunal from her solicitors dated 1 December 2022. It related to the preliminary hearing on 8 November 2022 (before Employment Judge Jones) following which the claimant's claims of direct discrimination and harassment (related to the protected characteristic of religion or belief) had been struck out as having no reasonable prospect of success. EJ Jones' Order to that effect was sent to the parties on 18 November 2022.

3. On 11 October 2022, following an earlier preliminary hearing for the purpose of case management on 9 September 2022 (also before EJ Jones), the respondent's solicitors sent a costs warning letter to the claimant. That letter referenced what EJ Jones had said to the claimant at the earlier preliminary hearing. In her Note sent to the parties on 13 September 2022, EJ Jones set out the requirements identified in the case of ***Grainger plc and others v Nicholson 2010 IRLR 4*** for a philosophical belief to come within section 10 of the Equality Act 2010 ("EqA"), and continued –

> *"11. I indicated to the claimant that it was not clear that a belief simply that there was no requirement to [be] vaccinated against a particular virus came within the scope of these requirements. I suggested that the claimant take advice on this matter. I expressed some surprise at the suggestion by the claimant that ACAS had advised her that this was a philosophical belief for the purposes of section 10. The claimant indicated that she was taking advice from a solicitor and I urged her to consider this matter with that solicitor."*

4. In their letter of 1 December 2022 the respondent's solicitors referred to a document entitled "*Belief Statement"* which the claimant had submitted to the Tribunal in advance of the hearing on 8 November 2022. Within that document, the claimant stated *"After seeking Legal advice as advised I have been informed that proving a philosophical belief is hard".* The respondent's solicitors contended that, by continuing with her claim, the claimant had a complete disregard for the prospects of success of her claim,

and had continued with it despite the claim having no prospects and without regard to the costs to which the respondent was put.

5. The respondent's solicitors argued that the claimant had acted vexatiously and unreasonably by continuing with her discrimination/harassment claim despite being advised that it would be difficult for that claim to succeed. At the preliminary hearing on 8 November 2022, she had referred to her pursuing this claim as being "*worth a shot".* This showed disregard for the prospects of success and the cost to the respondent.

Submissions for the respondent

6. Ms McLaughlan referred to the letter of 1 December 2022. The claimant had been advised to take advice about her religion or belief claim. She admitted that she had done so, and was told it would be difficult. During the hearing on 8 November 2022, the claimant made no attempt to reference section 10 EqA. This indicated a blatant disregard for prospects of success and cost.

7. Ms McLaughlan referred to what EJ Jones said at paragraph 12 of her decision –

> "*Having considered the document lodged by the claimant (together with her claim form) and the submissions made by both parties, I am of the view that there are no reasonable prospects of success in the claimant establishing that she held a protected belief for the purposes of section 10 Equality Act."*

8. Ms McLaughlan referred to the email sent by the claimant to the Tribunal on 5 December 2022 responding to the application for expenses. She observed that the claimant did not make reference to her discrimination claim within that email.

Submissions by the claimant

9. The claimant confirmed that, as stated in her said email of 5 December 2022, she had sought legal advice. She accepted that she had been told that her discrimination/harassment claim based on religion or belief would be "*difficult to prove"*. However, she had not been told she had *"no chance".*

If she had been told that, she would not have continued with that part of her claim.

10. The claimant said that she had been *"anxious"* at the hearing on 8 November 2022. The hearing was conducted remotely by video. The claimant indicated she was aware that the respondent was *"in the background"* and said *"that got to me".* She said that she had let herself down and that *"it all went wrong".* Her feelings were better expressed in her Belief Statement.

Response for the respondent

11. Ms McLaughlan questioned whether the claimant had a genuine belief. She (the claimant) had been directed at the earlier preliminary hearing to the applicable legal test, but made no attempt to satisfy this at the hearing on 8 November 2022. Ms McLaughlan contended that the claimant had no underpinning belief, and her circumstances were far removed from the cases where a genuine philosophical belief had been established.

Applicable rules

12. The Employment Tribunal Rules of Procedure 2013 refer to "*costs"* but include (at Rule 74) provision that *"In Scotland all references to costs (except when used in the expression 'wasted costs') shall be read as references to expenses".*

13. Rule 75 (**Costs orders and preparation time orders**) provides, so far as relevant, as follows –

> *(1) A costs order is an order that a party ("the paying party") make a payment to –*
>
> *(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative….*

14. Rule 76 (**When a costs order or a preparation time order may or shall be made**) provides, so far as relevant, 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 part) or the way in which the proceedings (or part) have been conducted; or

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

15. Rule 77 (**Procedure**) provides as follows –

A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

16. Rule 84 (**Ability to pay**) provides as follows –

In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

Discussion

17. I reminded myself that the claimant, as a litigant in person, should be judged less harshly in terms of her conduct than a litigant who is legally represented. In ***AQ Ltd v Holden 2012 IRLR 648*** the Employment Appeal Tribunal ("EAT") (per Richardson HHJ at paragraph 32) said this –

"Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life….even if the threshold tests for an order for costs are met, the Tribunal has discretion as to whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice."

18. This quotation also serves to highlight that there is a two stage approach required under Rule 76(1). Firstly, is the relevant provision under Rule 76(1) engaged? Secondly, how should the Tribunal exercise its discretion in deciding whether or not to make an order?

5 19. Before embarking on this, I considered the extent to which the claimant had taken advice about her religion or belief claim. I noted that –

(a) The claimant had advice from ACAS, as referenced by EJ Jones in her Note following the preliminary hearing on 9 September 2022 (see paragraph 3 above).

10 (b) She had taken legal advice, as she was encouraged by EJ Jones to do. She referred to this in her Belief Statement, albeit in the terms quoted at paragraph 4 above.

(c) In her email to the Tribunal of 5 December 2022, the claimant said this about the advice she had taken –

15 "*After I was made redundant I continued seeking advice from ACAS although I have since found out that not all advice I was given was correct, and also contacted a solicitor. I have since sought legal advice from another solicitor whose advice I trust 100% and who would not tell me to continue if they did not think there was a chance of success. I* 20 *have shown the solicitor all communications and paperwork and under their advice, I have continued with my claim as they felt I have been constant with the information I have provided, I also sought their advice before submitting my statement they advised that they were impressed with the statement and to continue with the Preliminary Hearing in* 25 *regards to Discrimination and Harassment as although belief is hard to prove as no one has yet set the precedence [sic] in regards to my claim, it was not impossible.*"

20. I looked at whether there had been conduct on the part of the claimant which was vexatious, abusive, disruptive or otherwise unreasonable, in terms of 30 Rule 76(1)(a). I discounted *"abusive"* and "*disruptive"* as they clearly did not apply in this case. In relation to *"vexatious"* I reminded myself of what Lord Bingham said in ***Attorney General v Barker 2000 1 FLR 759, QBD*** –

"the hallmark of a vexatious proceeding is….that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process."

21. In relation to *"unreasonable"* I reminded myself that this should be given its ordinary English meaning and was not to be interpreted as if it meant something similar to *"vexatious"* – ***Dyer v Secretary of State for Employment EAT 183/83***.

22. I considered that as the respondent sought expenses also on the basis that the claimant's religion or belief claim had no reasonable prospect of success, and was in effect asserting that her continuing with that claim until after the second preliminary hearing was vexatious and unreasonable for that reason, I should at this stage look at the question of prospects of success. EJ Jones had flagged up for the claimant the requirements for an alleged belief to come within section 10 EqA – see paragraph 3 above.

23. The claimant's position prior to and at the preliminary hearing on 8 November 2022 was that her philosophical belief (as articulated by EJ Jones), that she was not required to be vaccinated against the Covid-19 virus, came within section 10 EqA and entitled her to protection from discrimination and harassment. She accepted that she did not do herself justice at the preliminary hearing due, she said, to her anxiety. She did not put forward arguments as to why her belief should qualify for protection.

24. In ***Hosie and others v North Ayrshire Leisure Ltd EAT 0013/03*** the Employment Appeal Tribunal (per Lord Johnston at paragraph 9) said this –

"The proper test….must be, looking at the matter objectively, did the applicant's case have any reasonable prospects of success, either at the time of conception or during the course of its currency."

25. Accordingly, the issue is not whether the claim had no prospect of success, but whether it had no reasonable prospect of success. I found some assistance in what the EAT said (albeit in a different context) in ***Tesco Stores Ltd v Element and others UKEAT/0228/20*** (per Choudhury P at paragraph 76) –

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> *"c. Third, in my judgment, the term 'prima facie case' was being used in* ***Leverton*** *in the sense of the claim having some reasonable prospect of success. Indeed, Mr Epstein accepted in the course of oral submissions that a prima facie case could be equated with one that had reasonable prospects of success. Clearly a claim based on a comparison with a predominantly female group of workers might be said to be doomed to failure based on the pleaded case alone (assuming that the employer's document was not pleaded). However, Mrs Leverton was able to show that there was some basis for her claim for equal pay, however weak, that demonstrated it had some reasonable prospects of success…."*

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26. What this seemed to me to indicate was a distinction between a claim which was hopeless and one which was weak. The former could be said to have no reasonable prospect of success, but the latter could not. In my view, the claimant's discrimination and harassment claims, based on her belief in relation to vaccination, was weak but not hopeless. It did not clearly and obviously fall short of the requirements set out in ***Grainger plc and others v Nicholson***.

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27. Looking at those requirements, and taking the claimant's case at its highest, I considered that –

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(a) It could be argued that the claimant's view on vaccination was genuinely held.

(b) It could be argued that it was a belief and not a mere opinion.

(c) It could be argued that the issue of vaccination, in the context of a global pandemic, did relate to a weighty and substantial aspect of human life and behaviour.

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(d) It could, perhaps at a stretch, be said to attain a certain level of cogency, seriousness, cohesion and importance.

(e) It could be argued to be worthy of respect in a democratic society, to be not incompatible with human dignity and not to conflict with the fundamental rights of others.

28. With the benefit of advocacy skills which the claimant, with all due respect to her, does not possess, it seemed to me that the philosophical belief asserted by the claimant could have been argued for in a way which would have made EJ Jones' task more difficult than it was in the absence of such argument. It would not in my view be right to penalise the claimant as a litigant in person for finding herself, on the day, unable to articulate her case.

29. Looking at matters in the round, I came to the view that neither Rule 76(1)(a) nor Rule 76(1)(b) was engaged here. I did not believe that the claimant had acted vexatiously or unreasonably. She had not abused the Tribunal process. She had not subjected the respondent to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to her in the event that her discrimination/harassment claim had been allowed to proceed. She had taken advice about this and while she had been told it would be difficult, she was not told it would be impossible.

30. I also did not believe it could be said that her discrimination/harassment claim had no reasonable prospect of success. The claimant believed that she had been treated unfavourably by the respondent because of her views on vaccination. While I did not find that there had been any such treatment, what the claimant was alleging was that the respondent had engaged in unwanted conduct related to a relevant protected characteristic, which had created a hostile environment for her. That amounted to a prima facie claim of harassment.

31. Accordingly, having found that neither of the applicable Rules was engaged, I did not require to move on to the second stage of the process, ie deciding whether an award of expenses should be made. The application for an award of expenses is refused.

32. For the sake of completeness I should add that I sought from the claimant, and she provided, information about her ability to pay. In light of my decision to refuse the respondent's application, I did not require to consider that information.

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Employment Judge: **W A Meiklejohn**
Date of Judgment: **9 March 2023**
Date sent to parties: **10 March 2023**