



## EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case No: 4108155/2021

Held in Edinburgh on 21 February and 13 March 2023

10

Employment Judge Sutherland

**Kirsty Thin**

**Claimant**

**No representations**

15

**Scottish Water**

**Respondent**

**Written Representations  
by Mr R Turnbull, Solicitor**

20

### JUDGMENT

The Judgment of the Tribunal is that the Claimant is ordered to pay to the Respondent the sum of £2,000 in respect of expenses incurred by them in defending this claim.

25

### REASONS

#### Introduction

30

1. A hearing on expenses was held in chambers to determine the Respondent's application for a expenses.
2. Neither party was in attendance and the matter was to be determined with reference to any written submissions prepared by the parties.

35

**Background**

3. On 14 October 2022 the Respondent made an application for expenses on the grounds that: (1) the claims had no reasonable prospects of success, (2) the Claimant has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing of the proceedings and the way that the proceedings have been conducted; and/or (3) the Claimant has been in breach of an order or practice direction and the hearing has been postponed or adjourned on the application of a party.

**Findings in fact**

4. On 10 March 2021 the Claimant has presented a complaint of unfair dismissal.
5. On 27 April 2021 the Respondent issued an expenses warning that costs would be pursued in the event that there was a late withdrawal or the claim was unsuccessful on the basis that the Respondent had reasonable grounds to believe the Claimant had committed gross misconduct following a reasonable investigation which she admitted on appeal.
6. The Claimant had the benefit of professional representation during the period 29 June 2021 to 14 October 2021 and was thereafter a litigant in person.
7. On 20 September 2021 a final hearing was listed to take place on 8,9, and 10 December 2021 having regard to parties' availability.
8. In October 2021 the Respondent sought to obtain a substantive response from the Claimant to the outstanding information, statement of facts and list of issues on a voluntary basis without success.
9. In October 2021 the Claimant failed to provide any documents for the joint bundle or confirmation that none were to be included as required by Order of 20 August 2021.
10. On 6 December 2021 the Claimant advised that she was unable to attend the final hearing "as I have been admitted to hospital and will be kept in for at least another week as a result of a serious car accident".
11. On 7 December 2021 the Claimant's application for a postponement was granted and the Claimant was ordered to provide written medical evidence

from her GP or other treating physician certifying that she was admitted to hospital as a result of a car accident which rendered her unfit to attend the hearing and providing a prognosis of when she will be fit to attend. The Claimant did not respond and a reminder was issued on 14 January 2022.

- 5 12. On 19 January 2022 the Claimant advised that her GP has been absent from work due to COVID but would be back tomorrow and she would send the letter as soon as possible. No such letter was received and a reminder was issued on 9 February 22. A strike out warning was then issued on 24 February 2022 on grounds of non-compliance with the Order of 7 December
- 10 2021.
13. On 2 March 2022 the Claimant provided to the Tribunal what she described as a “confirmation letter from my GP” confirming the reason for her absence. The confirmation letter stated “On the weekend prior to the 8<sup>th</sup> of December Mrs Thin was involved in a serious car accident which resulted in her having
- 15 to undergo surgery and she was therefore hospitalized for 10 days thereafter”. On 3 March 2022 the Tribunal explained that the letter was not a valid medical certificate because was not on headed paper and was not signed. A further reminder was issued on 21 March 2022.
14. On 6 April 2022 the Respondent applied for strike out on the basis of
- 20 unreasonable conduct and a failure to actively pursue.
15. On 13 April 2022 the Claimant sought and was granted an additional week to respond. On 20 April 2022 the Claimant advised having accidentally deleted all related correspondence and seeking additional time to respond. The Claimant was granted a further week to respond. On 3 May 2022 the
- 25 Claimant sought a further week to respond because of personal circumstances which was granted.
16. On 7 June 2022 a preliminary hearing was listed for 23 September 2022, having regard to parties’ availability, to determine the Respondent’s application for strike out.
- 30 17. On 20 September 2022 the Claimant emailed the Tribunal to advise “I will not be able to attend the hearing on Thursday as I have tested positive for covid”. The Claimant did not advise that she was unwell. The Claimant was directed to provide by return evidence of her positive Covid-19 test result. On 20 September 2022 the Claimant provided a picture of a lateral flow test

result showing one red line and one black line. On 21 September 2022 the Tribunal wrote to the Claimant advising that according to UK Government guidance a positive lateral flow test result would show two black lines and that on the face of it she had not provided a positive test result. She was asked to explain as a matter of urgency what the photograph discloses and the basis on which she asserts that it is a valid test result.

5

10

15

20

25

30

18. By written reply, on 21 September 2022, the Claimant stated “I have just carried out another lateral test taken just after your correspondence. Please see attached photograph of my positive test clearly showing two red lines in line with the details set out your most recent correspondence. I tested positive yesterday which was the first day I tested positive as my test was negative. This test is a legitimate test...” The Claimant did not advise that she was unwell.

19. On 21 September 2022 the Tribunal wrote to the Claimant to advise:

*“the accompanying photograph showed a left hand holding to camera a lateral flow test displaying 2 red lines at C and T. This is noted to be a positive lateral flow covid test. The serial number is LWD21118413. The photograph is attached. The photograph appeared to be professionally taken. An Internet search of “positive covid test picture” immediately brings up a photograph which is identical to that produced by the claimant. On close inspection, the test result carries a serial number of LWD21118413. The link is attached: Look familiar? How rapid tests changed the pandemic - BBC News. It is plain that the photograph produced by the claimant is not a lateral flow test result taken today, nor even a test taken by her, but a photograph downloaded from the Internet and sent to the tribunal to support the application for postponement. The claimants application for postponement is refused. On the face of it, the claimant has attempted to deceive the tribunal, and the respondent. She is invited to explain her actions by return. This matter will be considered at the strike out hearing due to take place on 23 September 2022”*

20. On 21 September 2022 the Claimant replied stating: “I refute your last correspondence please see three photos attached showing a positive covid lateral test”.

21. On 22 September 2022 the Tribunal wrote to the Claimant stating: “Once

more, there is nothing to identify the test as relating to her, nor is there any date on it or the photograph. Given the claimant's correspondence of 21 September, she has continued to fail to provide convincing evidence that she has had a positive covid test. The hearing will proceed on 23 September at 10:00 am".

5

22. On 26 September 2022 the claim was struck out in its entirety under Rule 37(1)(b),(c) and (d) on grounds of failure to comply with orders of the Tribunal and that it had not been actively pursued in an appropriate manner.

23. On 14 October 2022 the Respondent made an application for expenses on stated grounds.

10

24. On 26 October 2022 the Tribunal wrote to the Claimant inviting her to give reasons why an order for expenses should not be made either in writing or verbally at a hearing. The Claimant did not respond.

25. On 2 December the tribunal asked the parties to advise within 7 days whether they sought the hearing on the application for expenses to be heard in chambers (without the parties) or in person.

15

26. On 2 December 2022 the Respondent advised that they sought a hearing in chambers.

27. On 15 December 2022 the tribunal reminded the Claimant of the need to reply to the Tribunal letter of 26 October 2022.

20

28. On 16 December 2022 the tribunal asked the Claimant to advise whether the hearing on expenses should be in person or in chambers and asked her to provide within 2 weeks details of her financial circumstances (including her income, savings, assets, and liabilities) and to provide copies of any relevant vouching to enable the tribunal to have regard to her ability to pay when determining the application for expenses. On 9 January 2023 the tribunal reminded the Claimant of the need to reply.

25

29. On 3 February 2023 the Claimant advised that she was still awaiting paperwork from her employer and this would be sent early next week.

30

30. On 17 January 2023 the Claimant advised that she was awaiting paper copies from her employer and will forward them this week.

31. On 13 February 2023 the parties were advised that any written submissions and/or evidence to be relied upon must be lodged by 14 February 2023.

32. The Claimant did not provide any written submissions and/or evidence for

this hearing on expenses.

### **Observations on the evidence**

- 5 33. The Respondent sought to rely upon a pattern of behaviour since the start of the disciplinary process but no evidence was led beyond assertions made in their in submissions.

### **The law**

- 10 34. Under Rule 77 of the Employment Tribunal Rules of Procedure a party may apply for a costs order (i.e. an expenses order) at any stage up to 28 days after the date on which the judgement finally determining the proceedings was sent to the parties. Under Rule 5 the tribunal may extend or shorten anytime limit specified in these rules.

- 15 35. Under Rule 75, a costs order is an order that a party make a payment to the other party in respect of the cost incurred while legally represented.

36. Under Rule 74(1) costs includes fees incurred for the purpose of, or in connection with, attendance at a Tribunal hearing.

- 20 37. Under Rule 76 a tribunal may make a costs order, and shall consider whether to do so, in specified circumstances including where it considers that (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing or conducting of proceedings (or part thereof) or (b) the claim or response has no reasonable prospect of success or (c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before. A tribunal may also  
25 make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

- 30 38. Where the grounds are established the tribunal has a duty to consider making a costs order but has discretion as to whether do so. First, a tribunal must consider whether the ground is established; if so, it must consider

whether it is appropriate to exercise its discretion in favour of making a costs order; if so, it must consider the amount of the cost order.

**Stage 1. Is the ground established?**

- 5 39. First the tribunal must consider whether the ground of unreasonable conduct, no reasonable prospects and/or hearing has been postponed is established.
40. In determining whether a party has acted unreasonably in the bringing or conducting of proceedings (or part thereof) allowance should be made for the lack of experience and objectivity of a litigant in person. In assessing whether  
10 there has been unreasonable conduct the tribunal should take into account the nature, gravity and effect of the conduct (*McPherson v BNP Paribas (London Branch) 2004 ICR 1398, Court of Appeal*).
41. When determining whether the claim had no reasonable prospects of success this should be judged on the basis of what the claimant knew or  
15 ought reasonably to have known at the time the claim was raised.

**Stage 2 – Should the discretion be exercised?**

42. If the Tribunal considers that the ground is established, it must then consider whether it is appropriate to exercise its discretion in favour of making a costs order.
- 20 43. The following factors may be relevant but not solely determinative of that exercise of discretion: awarding a costs order is the exception – costs orders do not automatically follow the outcome and are not made in the substantial majority of tribunal cases; their purpose is to compensate the party who incurred the costs and not to punish the paying party; whether or not a party  
25 had professional representation; whether a costs warning has been issued; whether there has been unreasonable refusal of a settlement offer; and their ability to pay.
44. The vital point in exercising the discretion is to look at the whole picture of what happened in the case including consideration of the other party's

conduct (*Yerrakalva v Barnsley Metropolitan Borough Council and nor 2012 ICR 420, CA*).

### **Stage 3 - The amount of the costs order?**

- 5 45. If the ground is established, and if the tribunal consider it is appropriate to exercise its discretion in favour of making a costs order, the tribunal must consider the amount of the cost order. Under Rule 78 a tribunal may order payment of unassessed costs of up to £20,000; taxed (i.e. assessed) costs; or agreed costs.
- 10 46. Under Rule 84 in deciding whether to make a costs order, and if so, in what amount, the Tribunal may have regard to the paying party's ability to pay.
- 15 47. Costs should not exceed those reasonably and necessarily incurred having regard to ability to pay and having regard to the effect of any unreasonable conduct by considering broadly what costs are attributable to the conduct in all the circumstances (*Yerrakalva*).

### **Submissions**

- 15 48. The Respondent's submissions were in summary as follows –
- 20 a. The Claimant has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing of the proceedings and the way that the proceedings have been conducted by -
- 25 i. engaging in a pattern of behaviour since the start of the disciplinary process and continuing throughout the tribunal process of either failing to engage or engaging disruptively.
- 30 ii. Failing to comply with numerous orders of the Tribunal to provide a medical certificate in respect of the alleged car accident which resulted in a postponement of the final hearing despite multiple reminders. The Respondent incurred the cost of preparing for that hearing.
- iii. Failing to comply with orders of the Tribunal to provide her response to the application for strike out despite reminders.



- iv. Attempting to mislead the Tribunal by providing a letter stated to be from her GP with no letterhead or signature and separately providing a picture of a lateral flow test not undertaken by her
- 5 v. Bringing proceedings which had no reasonable prospects of success
- b. The claims had no reasonable prospects of success –
- i. The Tribunal should consider, first whether, objectively, the claim had no reasonable prospects from the outset and second whether the Claimant ought reasonably to have known this (*Radia v Jefferies International UKEAT/0007/18/JOJ*)
- 10 ii. There was sufficient evidence that the Claimant did commit the allegations of fraud as set out in the investigation report; in an email the Claimant fully admitted to all the misdemeanors; and that her representative had accepted that there was nothing in her statement which could show she had not committed gross misconduct.
- 15 iii. The Claimant was fully aware of the facts relied upon by the Respondent.
- 20 c. The Claimant has been in breach of an order and a hearing has been postponed as set out above.
- d. The Respondent incurred costs of preparing its response, preparing for the postponed hearing, and in chasing the Claimant for compliance with the Tribunal orders. The Respondent seeks the total costs incurred (excluding the application for expenses) in sum of
- 25 £17,600 plus VAT.

49. Although she was invited to do so the Claimant did not make any submissions.

30

## Discussion and decision

50. The application for costs was made within the time limit.

***Stage 1. Is the ground established?***

5 51. The Respondent's submit: that the claim had no reasonable prospects of success; that the Claimant acted unreasonably, etc. in the bringing and conduct of proceedings; and that she was in breach of orders and the final hearing was postponed.

*No reasonable prospects of success*

10 52. The Respondent did not make an application for strike out on the basis of no reasonable prospects of success and the claim was not struck out on that basis. Unlike the case of *Radia* there has been no decision on liability and accordingly there have been no detailed findings of fact and there is no evidence available to the Tribunal as to what the Claimant knew or ought  
15 reasonably to have known. The Tribunal cannot draw on the evidence heard and the findings made to inform its view of prospects at the outset. As noted in *Radia* in respect of an application for strike out, it is necessary for the tribunal to consider prospects on the basis of the case asserted, taken at its highest, taking into account any key documents that may be before it.

20 53. The claim was for unfair dismissal. It was made timeously. It was accepted that the Claimant had over 2 years service. The Claimant asserted that her dismissal was unfair because she had indicated she wished to pursue a grievance against her manager who conducted a fact finding investigation against her which resulted in her dismissal. The Respondent had prepared a  
25 draft statement of facts to which the Claimant failed to respond. The Claimant is a litigant in person and her agreement to those facts cannot reasonably be inferred from her failure to respond. The Claimant has made a stateable claim for unfair dismissal and without hearing evidence it is not possible to conclude that her claim had no reasonable prospects of success.

30

*Acted unreasonably, etc in the bringing or conducting of proceedings*

54. Having regard to the above findings in fact and the comments on prospects, there is no basis upon which to conclude that the Claimant acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing of proceedings. There is however a reasonable basis for concluding that the Claimant acted in that manner in her conduct of the proceedings.
55. In December 2021 the Claimant secured a postponement of the final hearing on medical grounds. The Claimant was repeatedly ordered to provide that medical evidence but failed to do so. The relisting of that hearing was substantially delayed pending provision of medical evidence which was never forthcoming. The Claimant instead sought to rely upon evidence of highly dubious origin being an unsigned GP letter on unheaded paper.
56. In June 2022 a preliminary hearing on strike out was listed for September 2022, having regard to parties' availability. In September 2022 the Claimant sought a postponement of the hearing on strike out on the basis that she would be unable to attend because had tested positive for Covid. She was directed to provide evidence of her positive test result. She then proceeded to provide evidence of a highly dubious origin. She initially provided a photograph of a lateral flow test result showing one red line and one black line. When asked to explain the evidence she had provided she advised carrying out another lateral flow test and enclosed a photograph of it. This photograph was downloaded from the internet and was not therefore a lateral flow test taken by her. When asked to explain the Claimant simply provided further photographs of other tests whose provenance is unknown. Her claim was then struck out on the basis that she had behaved unreasonably and scandalously in the conduct of her claim.

*Failure to comply with orders/ Postponement of final hearing*

57. The final hearing listed to start on 8 December 2021 was postponed on application made by the Claimant on 6 December 2021. The Claimant failed to comply with numerous orders to provide reliable medical evidence in support of her applications for postponement.

**Stage 2 – Should the discretion be exercised?**

58. If the Tribunal considers that the ground is established, it must then consider whether it is appropriate to exercise its discretion in favour of making a costs order.

59. Awarding costs is the exception and awards are not made in the substantial majority of tribunal cases. The Claimant did not have the benefit of professional representation after October 2021. However, having regard to the whole picture of the Claimant's conduct of the proceedings and the effect that had on the process including repeated and protracted correspondence, unnecessary postponements, substantial delays and an additional hearing, it is nevertheless considered appropriate to make an award of costs. The Claimant is by profession an asset planner and the consequences of her actions should have been readily apparent to her.

***Stage 3 - The amount of the costs order?***

60. In deciding whether to make a costs order regard may be had to the Claimant's ability to pay. The Claimant was repeatedly asked to provide details of her financial circumstances but she declined to do so. It is understood from her claim form that she had a professional career as an asset planner and that she had worked for the Respondent for nearly 23 years with a final year salary of £37k. It is therefore reasonably assumed she has access to some savings and/or income.

61. It is considered that the costs incurred by the Respondent prior to the postponement of the final hearing were attributable to preparation for that hearing and that the costs which were incurred by them after the postponement were largely attributable to the Claimant's unreasonable conduct.

62. The Respondent had not initially provided a breakdown of their costs and was asked to do so. Having regard to the breakdown of costs provided by them (which did not contain a running total) it is very roughly estimated that the total costs incurred by the Respondent after the postponement and before the application for expenses were around £3.5k. It appeared that these costs were properly incurred and the hourly rate applied of around £100 is considered broadly appropriate. Although the time spent of around 35 hours is considered to be on the high side, it does not appear to be wholly

unreasonable. It is however not possible to make a proper assessment without undertaking taxation which is considered unnecessary given the likely amount of the award.

- 5 63. On balance, taking into account all the circumstances including the nature, gravity and effect of the Claimant's conduct as a litigant in person on costs reasonably and necessarily incurred by the Respondent, it is considered appropriate to make a costs order in sum of £2,000.

10 Employment Judge: Michelle Sutherland  
Date of Judgment: 14 March 2023  
Entered in register: 15 March 2023  
and copied to parties