



EMPLOYMENT TRIBUNALS (SCOTLAND)

5 **Case Nos: 4109714/2021 and 4111220/2021**

**Hearing on Expenses
12 May 2023**

10 **Employment Judge A Jones
Tribunal Member Ms Z Zwanenberg
Tribunal Member Mr R Martin**

15 **Ms C McCluskie** **Claimant
Represented by
Mr S Smith, solicitor**

20 **Armadale Group Practice** **Respondent
Represented by:
Mr J Boyd, of Counsel
Instructed by Gately
25 legal, solicitors**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 It is the unanimous judgment of the Tribunal that the respondent's conduct in these proceedings was unreasonable and is ordered to pay the sum of £11,176.05 in expenses to the claimant.

Reasons

Introduction

35 1. The Tribunal issued a judgment dated 9 December 2022 that the claimant had been unfairly dismissed by the respondent and that her claims of disability discrimination and victimisation did not succeed. An award of £38,020 was made in favour of the claimant.

2. An application for expenses was made on behalf of the claimant on 10 January 2023. The respondent submitted grounds of opposition in relation to the application and requested that the application be sisted pending the determination of an appeal which had been instituted to the Employment Appeal Tribunal in relation to the Tribunal's judgment. The appeal having been determined, parties were asked to provide any additional submissions they wished to have taken into account by the Tribunal in determining the application. Additional comments were provided on behalf of the claimant outwith the time period set down by the Tribunal. These were not taken into account by the Tribunal. Neither party had requested a hearing and therefore the Tribunal determined the matter on the basis of the written submissions of the parties.
3. The application for expenses was in the amount of £12,417.83 including vat and outlays. The outlay related to a report which had been required as the respondent did not accept that the claimant was a disabled person until shortly before the final hearing.

Issues to determine

4. In considering the application of the claimant, it was first necessary to determine whether the respondent's conduct had been unreasonable. If the Tribunal was of the view that the conduct was unreasonable, it was necessary to determine whether the Tribunal should exercise its discretion to make an award of expenses against it, and if so in what amount.
5. The claimant relied on a number of findings of the Tribunal in relation to the evidence given by the respondent's witnesses, both in terms of the manner in which the evidence had been given and the extent to which the Tribunal found that evidence credible or reliable. The claimant also relied on the findings by the Tribunal that the claimant's dismissal had been predetermined and that the respondent had been looking for issues regarding the claimant which might give it an opportunity to dismiss her.

Discussion and decision

6. In the first instance, the Tribunal was mindful that an award of expenses should be the exception and not the rule. It is not appropriate to make an award of expenses simply because one party lost. In addition, any award which is made should be compensatory and not punitive. Further, it is not enough for an award to be made for a Tribunal to have simply found that a witness for one party had lied.
7. As the question of expenses is to a large extent a matter of discretion for a Tribunal, case law can be of limited assistance. However, it has been held that it was appropriate to make an award where there was a clear-cut finding that the central allegation was a lie (**Daleside Nursing Home Ltd v Mathew UKEAT/0159/08**).
8. The Tribunal first considered whether the respondent's conduct had been unreasonable. It concluded that the conduct was unreasonable in the common definition of the word for the following reasons:
- i. The Tribunal made a clear-cut finding that Dr Ali had lied in her evidence to the Tribunal. However, the Tribunal's findings went further than simply finding that Dr Ali gave untruthful evidence before it. The suggestion that Dr Ali had warned the claimant not to make use of the practice's stock of glucogel was at the heart of the case and the claimant's dismissal. The Tribunal was not entirely clear whether Dr Ali had not told the truth during the investigation into the allegations against the claimant, or whether she had colluded with others during the investigation to allow others to believe that she had warned the claimant. Either scenario would constitute unreasonable conduct in the view of the Tribunal.
 - ii. The investigation into the claimant was so one-sided and pre-determined that the Tribunal was of the view that the respondent ought to have been aware that it was entirely likely that the claimant would be found to have been unfairly dismissed.

iii. It was not only the evidence of Dr Ali which was of concern to the Tribunal. Other than Dr Barr-Hamilton, the Tribunal found the evidence of all the respondent's witnesses to be problematic. In particular, the Tribunal found the evidence of Dr Dalglish, Dr McRitchie and Nurse McGuire to be unsatisfactory. Nurse McGuire was thought to be making the evidence up as she went along, Dr McRitchie was focusing on whether his evidence would be of benefit to the respondent and the evidence of Dr Dalglish was entirely unsatisfactory.

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10 9. The Tribunal was therefore satisfied that the respondent's conduct was unreasonable.

10. It therefore considered whether it ought to exercise its discretion to make an award of expenses against it. It decided to exercise its discretion to make an award for the following reasons:

15 i. The approach of the respondent to the proceedings was of concern to the Tribunal. As set out in its judgment, one doctor appeared bemused as to why she should be required to attend a hearing and answer questions.

20 ii. Most of the respondent's witnesses did not approach their duty to tell the truth under oath with the seriousness which is expected of witnesses. The Tribunal found this particularly surprising given the witnesses were all medical professionals who would be aware of the importance of integrity.

25 iii. Although the claimant's legal expenses were funded through the legal aid scheme, if an award of expenses is not made, a significant proportion of the compensation awarded to the claimant will require to be repaid to the legal aid scheme. The dismissal of a person who is subject to a regulatory body can have a more significant impact on a claimant and their career, which is a fact which must have been known to the respondent. The Tribunal found that the claimant's dismissal was predetermined and therefore manifestly unfair.

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11. In all of these exceptional circumstances, the Tribunal was of the view that it should exercise its discretion to make an award of expenses. The Tribunal then went on to consider the extent of any award.

5 12. The respondent's position was that only part of the claimant's claim had succeeded and therefore any award should be substantially reduced. The Tribunal was of the view that while the claimant's claims of disability discrimination and victimisation did not succeed, there had been very little focus on those aspects of her claim during the hearing. There was very little evidence which related only to those aspects of her claim.

10 13. However in the circumstances, the Tribunal was of the view that it would be appropriate to make some reduction in the award and therefore determined to award the claimant 90% of the expenses sought. Therefore, the Tribunal orders the respondent to pay to the claimant the sum of £11,176.05 in respect of the expenses incurred by her in bringing these proceedings.

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Employment Judge: A Jones
Date of Judgment: 16 May 2023
Entered in register: 19 May 2023
and copied to parties

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