EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102190/2022

Hearing held in chambers via CVP on 14 June 2023

Employment Judge McFatridge
Tribunal Member N Taylor
Tribunal Member T Lithgow

Miss T Nogueira	**Claimant** **Represented by:** **Mr Swan,** **Solicitor (Written representations)**
Carfraemill Ltd	**Respondent** **Represented by:** **Mr Reeley,** **Director (Written representations)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that (1) the claimant's conduct of the case was unreasonable and (2) the claim of race discrimination had no reasonable prospect of success and that the claimant shall pay a preparation time order in the amount of Two Thousand, Eight Hundred and Twenty Pounds (£2820) as a contribution towards the respondent's costs.

REASONS

1. The claimant submitted a claim to the Tribunal in which she claimed race discrimination and that she was due sums following the termination of her employment in respect of holiday pay and unpaid wages. She previously made claims of sex discrimination and unfair dismissal which were withdrawn. A hearing took place over a total of eight days in November, December 2022 and March 2023. In a judgment signed on 31 March all of the claims were dismissed. Reference is made to the detailed reasons signed on that date. Following the promulgation of the judgment on 3 April 2023 the respondent's representative wrote to the Tribunal on 20 April seeking an award of what were described as "expenses and punitive costs" but which the Tribunal took to be an application for a preparation time order and out of pocket expenses. The parties agreed that the matter could be dealt with on the basis of written submissions. The respondent's submissions are set out in their initial letter of 20 April 2023 and the claimant's final written submissions were sent to the Tribunal on 23 May 2023. The respondent sent out a further letter responding to this but as it was received outwith the time for making submissions we did not take account of it. A members' meeting was convened and took place on 14 June 2023.

2. The Tribunal decided to make the award set out above. They took into account the representations made by both sides including the substantial list of authorities referred to by the claimant's representative. Rather than simply repeat these submissions we shall refer to them where appropriate in the discussion below.

Relevant law

3. The relevant rules are set out in rules 74-84 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1. The Tribunal considered that the application had been properly made in terms of rule 77. Mr Reeley who is a director of the respondent and represented them at the hearing is not legally qualified and the Tribunal's view was that the respondent had not been legally represented as this is defined in rule 74 (2). It follows therefore that whilst the Tribunal may make a costs

order to cover expenses incurred by another party or witness for the purpose of or in connection with the individual's attendance as a witness at the Tribunal, the Tribunal cannot make a costs order in respect of any other costs incurred by the respondent. The Tribunal can however make a preparation time order in terms of rule 75 (2).

4. The circumstances under which a costs order or preparation time order may be made are set out in rule 76.

5. It is clear from the authorities that the Tribunal must adopt a two-stage process. Our first task is to identify whether the terms of rule 76 are engaged or not. If the rule is not engaged then that is the end of the matter. If however the Tribunal finds that the terms of rule 76 are met in any respect then the Tribunal then has a discretion as to whether or not to award costs or a preparation time order and a discretion as to how much to award.

6. In this case the Tribunal's understanding was that the application was being made under rule 76 (1) (a) and 76 (1) (b). We shall deal with each in turn.

7. Rule 76 (1) (a) states it applies where:

> *"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 that the proceedings (or part) have been conducted."*

8. In this case it was the respondent's position that the claim was wholly vexatious. It was the respondent's position expressed several times during the hearing that the claimant did not have any genuine belief that her treatment had been on the basis of race but that she had simply ticked the box once she discovered that she did not have sufficient qualifying service to bring a claim of ordinary unfair dismissal. The claimant's position was that the claim was not vexatious. They referred to the definition contained in the case of ***E T Marler Ltd v Robertson [1974] ICR 72.*** Conduct would be vexatious if *"an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite*

to harass his employers or for some other improper motive." In the alternative it was the respondent's position that the claimant's behaviour had been unreasonable. We noted that the claimant in this case referred to the case of ***Dyer v Secretary of State for Employment UKEAT 183/83*** as suggesting that unreasonable should be given its ordinary English meaning.

9. The claimant's representative makes the point that the claimant believed strongly in the justice of her claim. The claimant's representative referred to the exchange recorded to have taken place during the preliminary hearing in front of Employment Judge Macleod where the claimant had expressed some misgivings about her claim being categorised as racism. It is recorded that Employment Judge Macleod confirmed to her that her claim that she had been treated less favourably because she was a foreigner would come under that category.

10. With regard to the way the proceedings had been conducted the respondent's position was that the claim had been incoherent and that throughout the claimant had been urged to provide some evidence showing, even in the slightest degree, a connection between the poor treatment she alleged and her nationality and the claimant had singularly failed to come up with this. The respondent's representative spoke of the claimant repeatedly asking the same questions over and over again and simply being not prepared to accept answers which she did not agree with.

11. The claimant's representative pointed to the claimant's inexperience and confirmed that she did have a very genuine belief in the justice of her claim.

12. The Tribunal's view of the matter was that the claimant's behaviour throughout the hearing certainly met the standard of being unreasonable. Many of our findings relating to this are set out in our judgment. The claimant would ask the same questions over and over again. She would ask questions about entirely irrelevant matters. On many occasions she seemed more inclined to force witnesses to agree that she had been a good employee rather than deal with any of the substantive matters which were alleged in her claim. With regard to the two versions of the progress

of the hearing presented by the parties the Tribunal has no hesitation in considering that the respondent has more accurately described what took place.

13. Whilst the Tribunal accepted that the claimant may have honestly believed that she had been treated badly the objective facts of the matter suggested that this was simply not the case. Much of what the claimant complained of; having to come in to work to cover staff absences, not having control of the rotas of other staff were simply features of the job of assistant manager.

14. On a number of matters the Tribunal found that the claimant's evidence was entirely disingenuous and that she was quite happy to try to bend the truth where she felt this would assist her case. An example of this was in relation to her eventually admitting that she had herself approved her holidays in January for dates which management would never have allowed.

15. The Tribunal spent a considerable amount of time analysing the fire alarm incident. It was absolutely clear from the evidence and the contemporary documentation and indeed the bare recital of the facts of what had occurred that the claimant was to blame for the fact the Fire Officer was unable to find a list of people in the building. The Fire Officer may also have been concerned about other matters but he was entitled to be concerned regarding the non-availability of the list and this was entirely down to the claimant. It appeared to the Tribunal that the respondent had dealt with this fairly leniently. It had nothing whatsoever to do with the claimant's claim of discrimination. Despite this the claimant appeared to be determined to spend hours of Tribunal time trying to show that she had not been in the wrong. The tribunal's findings regarding the background to this incident where the claimant had repeatedly questioned the instruction to print the list because of her desire to save paper is illustrative of what appeared to be a common picture where the claimant point blank refused to accept any point of view that did not accord with her own, no matter how many times the matter was explained to her.

16. Whilst not wishing to downplay the difficulty faced by an unrepresented party the situation in this case was that both parties were unrepresented. The respondent managed to conduct themselves appropriately throughout and took on board the Tribunal's instructions. The claimant did not. She consistently failed to accept the instructions from the Employment Judge to concentrate on the claim she had actually made rather than simply run through her points of grievance.

17. The Tribunal noted with interest the claimant's view that the Tribunal had been empathic towards her and that had the Tribunal expressed its frustration in a more direct way then she may not have proceeded with the final three days of the case. This entirely misunderstands the Tribunal's role. The Tribunal would naturally wish to behave politely to all those who appear before it but it is somewhat disconcerting that the claimant has taken this as somehow detracting from the actual words spoken by the Employment Judge on numerous occasions. It is correct that on numerous occasions the claimant was reminded what the case she was making was about and she was asked to proceed to lead evidence in relation to that claim rather than every other work grievance she had during the fairly short time she had worked for the respondent. Generally speaking the claimant failed to follow this instruction.

18. The Tribunal's view was that the threshold set in rule 37 (1) (a) had been met.

S37 (1) (b)

19. S37 (1) (b) states that the tribunal consider making a costs order or a preparation time order where the claim or response had no reasonable prospect of success. The Tribunal also considered that the threshold in rule 76 (1) (b) had been met. The Tribunal is well aware that in order to make this finding we must go beyond simply finding that on the basis of the evidence at the hearing the claimant lost. The situation must be that the claim had no reasonable prospect of success from the outset.

20. As noted above the respondent's position is that the claim was vexatious and that the claimant simply ticked the box to allege race discrimination because this was the only way she could have her grievances heard

before the Tribunal. The claimant's position was that she genuinely believed in her claim and suggested that she had received prior advice relating to this. There are two difficulties with this argument for the claimant. The first is that when the claimant initially contacted CAB and they wrote to the respondent the claim made was an entirely different one from that being made at the hearing. The CAB letter which was sent to the respondent claimed that the claimant was due money on the basis that she had not received notice that take holidays during the period of hotel closure. This claim was not proceeded with at the hearing because the claimant was forced to accept that she had actually been well aware that the hotel was to be closed in January and that she was to be taking part of her holiday during this period. In addition, we refer to our findings in fact relating to the way the claimant herself approved additional holiday around the same time.

21. With regard to the meat and bones of her race discrimination claim the Tribunal found absolutely no scintilla of evidence that any of the claimant's treatment was in any way discriminatory. Furthermore this was not simply one of these cases where the Tribunal found that there had been unfavourable treatment but were not in a position to find any evidence to say the claimant had been singled out for poor treatment. The position here was that on the basis of what we heard during the eight-day hearing the employers were entirely decent employers who had behaved reasonably in a difficult post-Covid situation. Much of what the claimant complained of was simply part of normal working life in the catering industry. With regard to the specific points she raised she complained that she had not received SSP. It was clear from the correspondence that the reason for this had been explained to the claimant time after time but that the claimant had simply refused to accept this. It is also noteworthy that having looked at the matter the respondent decided that although the matter had not been raised by the claimant she was entitled to contractual sick pay for at least part of this time which was much more than the statutory sick pay and they paid her this. With regard to the issue of difference in pay the claimant's claim was entirely based on the fact that she was of a different nationality from someone else who was being paid more. There was absolutely no evidence that her race or nationality had

anything to do with the reason for this and she point blank refused to accept the premise that within the private sector employers can and do choose to pay different employees different amounts without this being *ipso facto* discrimination. As the higher courts have pointed out time and time again a discrimination claim requires more than simply a difference in treatment coupled with a difference in protected characteristic. There must be some causal link. There was none and it would have been obvious to the claimant at the outset that there was no such link.

22. With regard to the claim of unlawful deduction of wages relating to holiday pay the Tribunal was in no doubt that this claim had no reasonable prospect of success from the start. The claimant had gone to CAB and given them incorrect information which had led to them putting together a claim which was simply unstateable given the claimant's admission that she had been well aware that she would have to take time off when the hotel was closed. With regard to her claim of unlawful deduction of wages relating to SSP the Tribunal's view was that this claim also had no reasonable prospect of success. The claimant had been given the explanation for this on numerous occasions and simply refused to accept it.

23. With regard to the claim of discrimination the Tribunal's view was that this also had no reasonable prospect of success from the outset. There was absolutely no evidence linking the claimant's treatment to her race or nationality. The high point of her claim was that some other members of staff had referred to her as the Portuguese girl and that Mrs Reeley had said to someone else that she is the one who is always wearing a jumper. With regard to the various specific incidents absolutely none of them had anything to do with the claimant's race. The Tribunal's view was that the job was probably not one that the claimant felt was suitable for her. As an Assistant Manager on a salary she would be expected to work flexibly and make herself available to meet the needs of the business. This was due to the post she occupied rather than anything to do with her race.

24. The Tribunal has left consideration to the end as to whether the claimant's conduct was indeed vexatious. The Tribunal's view was that taking everything into account it was not. The main issue was that whilst

objectively it is clear the claimant had absolutely no evidence to support her race discrimination claim and whilst this had no reasonable prospect of success from the outset the Tribunal was satisfied that the claimant genuinely believed in it. This genuine belief was mistaken and indeed one of the claimant's character traits appeared to become absolutely fixed in her view that she had been wronged and to ignore any evidence to the contrary. It is no doubt that it was this viewpoint which also led to her spending an inordinate amount of Tribunal time trying to ask the same questions over and over again in the hope that she would receive an answer which accorded with her world view.

25. Having decided that the threshold contained in rule 37 (1) (a) (in respect of unreasonableness only) and in respect of rule 37 (1) (b) had been met the Tribunal then required to go on to decide whether or not we should exercise our discretion to make an award.

26. For the reasons given above we decided that it was appropriate to make an award. The respondent have been put to considerable trouble and expense as a result of the claim being made and the way the claim was conducted. We are in no doubt that it would also have been a cause of worry and concern to them. They are employers of a large number of employees of foreign origin and it would be a concern to them to be accused of race discrimination despite there being no evidence to support such a claim. The claimant was clearly told at various stages during the hearing that she should concentrate on the claim before the tribunal and not raise every point of grievance she had with her former employer. She failed to heed these warnings.

27. Rule 79 sets out how the Tribunal should calculate the amount of a preparation time order. The sums sought by the respondent include a charge for preparing for the hearing of 110 hours. The Tribunal considered this a reasonable figure for the time to be taken to prepare for such a hearing. If anything, it is on the conservative side. They have charged this at £25 per hour but the statutory figure for 2022 was in fact £42 per hour as per rule 79. They referred to having spent a total of 72 hours attending the Tribunal and preparing in the evenings. Preparation time can only be awarded for time spent preparing for the hearing, not time

spent attending the hearing. Taking into account the correct figure then the total preparation time for the 110 hours spent preparing for the Tribunal would come to £4620.

28. With regard to costs under rule 75 (1) (c) The respondent also incurred witness salary costs for Bella Reeley and Erica Lupocz of £290. The respondent also sought their physical expenditure attending the Tribunal amounting to £100 per day or £800. The tribunal accepted these figures as accurate. We note that in terms of rule 75 (1) (c) a costs order where the receiving party is not represented can only be made in respect of costs incurred by another party or a witness. We note the respondent in this case is Carfraemill Hotel Ltd and therefore Mr and Mrs Reeley as directors would qualify as "another party". Our view therefore is that the total amount which the respondent could properly claim under rule 75 (1) (c) amounts to £1090. This gives a total figure of £5710 (4620+1090). This is on the basis that the respondent is not entitled to claim for preparation time spent actually attending the Tribunal which they have claimed 72 hours.

29. The Tribunal's view were that the relevant matters which required to be taken into account in exercising our discretion as to the amount were:

(1) the claimant's means. We have taken on board the information provided by the claimant's representative. The claimant is in reasonably paid remunerative employment. She has the normal expenses. We have no doubt that paying any sum will cause her some difficulty however the Tribunal's view was that this should not preclude the claimant having to pay something in situations where as here she has been found to have instituted proceedings which had no reasonable prospect of success and conducted these proceedings unreasonably.

(2) The Tribunal's view that the claimant was not consciously behaving unreasonably but did have a genuine although totally mistaken belief that she had been treated badly by the respondent.

30. Given the above the Tribunal felt that it would be appropriate to award the claimant approximately one half of the sum which could properly be

awarded. Given that the respondent restricted their application to a total of £5640 we felt it appropriate to base our 50% on that. The claimant shall therefore pay £2820 to the respondent. We shall award this entirely on the basis that it is a preparation time order.

Employment Judge: **I McFatridge**
Date of Judgment: **29 June 2023**
Entered in register: **03 July 2023**
and copied to parties