EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4104997/2022

Application for Expenses

Employment Judge P McMahon

Mr. D McCann	**Claimant** **In Person [via Written Representations]**
Redpath Construction Limited	**Respondent** **Represented by:** **Mr A Sloan – Director [via Written Representations]**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

(i) The Tribunal directs that the claimant's expenses application as set out in claimant's Grounds for Expenses Application (hereinafter defined) be determined on the basis of both parties' written representations rather than at a hearing.

(ii) No award of expenses shall be made against the respondent in terms of Rules 75 and 76 of the Employment Tribunals Rules of Procedure 2013 as set out in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the "Rules").

REASONS

Background

1. This decision follows on the Judgment of the Employment Tribunal in respect of these parties dated 7 March 2023 which was issued to the parties and entered into the Register on 10 March 2023 ('the March 2023 Judgment'). In summary, the decision of the Tribunal in the March 2023 Judgment was that the claimant's claim for unlawful deduction from wages under section 13 of

the Employment Rights Act 1996 was successful and the claimant's claim for breach of contract under the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994, Art.3 was unsuccessful on the basis that the Tribunal did not have jurisdiction to consider it. The respondent was ordered to pay the claimant the gross sum of £3,306 (THREE THOUSAND THREE HUNDRED AND SIX POUNDS) in accordance with section 24(1) of the ERA.

2. The claimant made an application for expenses/costs against the respondent in terms of Rules 75 and 76 of the Rules and the basis on which the claimant seeks expenses/costs was set out in the claimant's email to the Tribunal, with attachments, dated 2 May 2023 (the "Grounds for Expenses Application").

3. The claimant requested that the application for expenses/costs be determined on the basis of the written representations only, rather than at a hearing. The respondent advised that the respondent was content with this and took up the opportunity to make its own representations in writing and set out the basis on which the respondent resisted the claimant's application for expenses/costs in the respondent's email to the Tribunal, with attachments, dated 10 May 2023 (the "Expenses Application Response").

4. In the Grounds for Expenses Application the claimant sought expenses/costs on the grounds of the respondent's alleged unreasonable conduct by defending a case that had no reasonable prospects of success and the claimant sought an award of expenses/costs both in respect of the solicitor's fees he had incurred while legally represented in the case, and in relation to his own time spent working on the case. The claimant's and the respondent's relative positions and submissions in respect of these grounds on which the claimant sought expenses/costs were set out in the claimant's Grounds for Expenses Application and the respondent's Expenses Application Response respectively.

Issues for Determination

5. The issues before the Tribunal for determination were whether or not the claimant's application for expenses/costs against the respondent as set out in claimant's Grounds for Expenses Application was well-founded and, if so,

whether or not to make an award of expenses against the respondent, and, if so, on what basis and in what amount, having regard to the information available to the Tribunal.

Relevant Law

6. The relevant statutory provisions, relating to Expenses/Costs Orders, are set out in the Rules. These are:-

Rule 2: -

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly…

Rule 74:-

(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.

(2) "Legally represented" means having the assistance of a person (including where that person is the receiving party's employee) who—

(b) is an advocate or solicitor in Scotland; or…

Rule 75:-

(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;…

(2) A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

Rule 76:-

(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 that the proceedings (or part) have been conducted; or

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

7. The grounds for making an expenses order under Rule 75(1)(a) of the Rules and a preparation time order (PTO) under Rule 75(2) of the Rules are the same.

8. The Rules generally present a high hurdle to the awarding of expenses/costs. As the Court of Appeal reiterated in **Yerrakalva v Barnsley Metropolitan Borough Council 2012 ICR 420, CA**, costs in the Employment Tribunal are still the exception rather than the rule. It commented that the Tribunal's power to order costs is more sparingly exercised and is more circumscribed than that

of the ordinary courts. In most cases the Employment Tribunal does not make any order for costs against the unsuccessful party. In **Salinas v Bear Stearns International Holdings Inc 2005 ICR 1117, EAT,** Mr Justice Burton, then President of the EAT, expressed the view that the reason why costs orders are not made in the substantial majority of Tribunal cases is that the Rules of Procedure contain a high hurdle to be surmounted before such an order will be considered.

9. In determining whether to make an expenses/costs order under Rule 75(1)(a) of the Rules or a PTO under Rule 75(2) of the Rules, either in accordance with Rule 76(1)(a) of the Rules (conduct) or Rule 76(1)(b) of the Rules (no reasonable prospects), a Tribunal must apply a two stage test; first it must ask itself whether a party's conduct falls within Rule 76(1)(a) (or as the case may be, whether the claim or response had no reasonable prospect of success as per Rule 76(1)(b) of the Rules); and if so, second it must go on to ask itself whether it is appropriate to exercise its discretion in favour of actually awarding expenses/costs against the party concerned. This two-stage test is illustrated in the case of **Monaghan v Close Thornton Solicitors EAT 0003/01**.

10. When determining whether or not a party's conduct should be considered 'unreasonable', the word should be given its ordinary English meaning and is not to be interpreted as if it means something similar to 'vexatious' - see **Dyer v Secretary of State for Employment EAT 183/83**.

11. Reasonableness is a matter of fact for the Employment Tribunal, and whether conduct could be characterised as unreasonable requires an exercise of judgment about which there could be reasonable scope for disagreement among Tribunals, properly directing themselves - see **Khan v Heywood and Middleton Primary Care Trust 2006 ICR 543, EAT**. Employment Tribunals must be careful not to penalise parties unnecessarily by labelling conduct 'unreasonable'.

12. Proceeding with the defence of a case where there are no reasonable prospects could be unreasonable, but only if the respondent knew, or ought

to have known, that was the case - see **Opalkova v Acquire Care Ltd EAT 0056/21**.

13. Furthermore, when considering whether a claim or response had "no reasonable prospect of success", a Tribunal should separate out the heads of claim and in determining whether the claim or response had no reasonable prospect of success, the Tribunal should not look at the claim or response overall but, rather, each separate cause of action and response to it should be considered separately. However, in relation to Rule 76(1)(a) of the Rules, whether not a respondent was successful in defending part of a claimant's claim could be relevant to whether or not a respondent's conduct was unreasonable by defending or maintain its defence to another part of a claimant's claim in respect of which there was no reasonable prospect of success. In addition, in relation to Rule 76(1)(b) of the Rules, whether or not a respondent was successful in defending part of a claimant's claim could also be relevant to whether or not a Tribunal should exercise its discretion to make an expenses/costs order or PTO in circumstances where a respondent's defence to another part of a claimant's claim had no reasonable prospect of success - see **Opalkova v Acquire Care Ltd EAT 0056/21**.

14. With reference to Rule 76(1)(a) of the Rules, guidance has been given by the courts on the meaning of 'vexatious'. For conduct of a party to be considered vexatious there should be some improper motive e.g. if a claimant brings (or a respondent defends) a hopeless case, not with any expectation of success but out of spite to harass the other party - see **Marler Ltd v Robertson 1974 ICR 72, NIRC**, or at least, irrespective of the motive, where the effect of the party's conduct*…"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"* - per Lord Bingham in **Attorney General v Barker 2000 1 FLR 759, QBD (DivCt)** at paragraph 19. Simply being 'misguided' is not sufficient to establish vexatious conduct - see **AQ Ltd v Holden 2012 IRLR 648, EAT.**

15. With further reference to Rule 76(1)(a) of the Rules, a Tribunal may also make an expenses/costs order or PTO against a party who has acted

abusively or disruptively in bringing or conducting proceedings - see, for example, **Garnes v London Borough of Lambeth EAT 1237/97**. This was a case which concerned a complaint of race discrimination in which the Tribunal had made four attempts to fix a hearing, but had adjourned on the first three occasions at the request of the claimant (the party against whom costs were awarded in this case), the claimant had failed to attend two interlocutory hearings and at the fourth hearing, which was fixed for 15 days, the claimant again said he could not proceed. The Tribunal offered to adjourn for five days but the claimant said he would not attend at any time during the 15-day period. The Tribunal then adjourned for an hour to allow the claimant to consider his position, and having warned the claimant that if he did not attend after the hour the case might be struck out and costs awarded against him the claimant did not attend. The EAT referred to the claimant's conduct as "a blatant show of contempt and indifference".

16. A Tribunal's discretion to make an expenses/costs order or PTO under Rule 76(1)(a) of the Rules arises where a party has acted unreasonably in either the bringing or conducting of proceedings. This means that a party's conduct prior to proceedings cannot found a costs order or PTO – see ***Health Development Agency v Parish 2004 IRLR 550, EAT***,

17. As noted at paragraph 9 above, the second stage of the two-stage test to be applied by a Tribunal when considering an expenses/costs application is, even where the first stage of the test is met, whether the Tribunal considers it is appropriate to exercise discretion in favour of actually awarding expenses/costs against the party concerned. The Tribunal's discretion will be exercised having regard to all the circumstances.

18. The fact that a party is unrepresented can be a relevant consideration in relation to this second stage of the test (as well as in relation to the first stage of the test in respect of an expenses/costs order or PTO under Rule 76(1)(a) of the Rules). In **AQ Ltd v Holden 2012 IRLR 648, EAT**, the EAT stated that the threshold tests governing the award of costs or a preparation time order in what is now Rule 76(1) of the Rules are the same whether a litigant is or is not professionally represented, but that the application of those tests should

take this factor into account and stressed that Tribunals must bear this in mind when assessing the threshold tests (first stage of the test) in the then equivalent to Rule 76(1) of the Rules, and went on to state that this point was also relevant to the exercise of the Tribunal's discretion (at the second stage of the test). An Employment Tribunal cannot and should not judge a litigant in person by the standards of a professional representative and they are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. That is not to say that lay people are immune from orders for costs. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity.

19. The fact that an expenses/costs warning has been given is a factor that may also be taken into account by a Tribunal when considering whether to exercise its discretion to make an expenses/costs order. However, this is more likely to be a factor taken into account where the warning has been given by the Tribunal, rather than the other side, as parties frequently make threats of costs applications against the other party prior to Hearings - see, for example, **Oko-Jaja v London Borough of Lewisham EAT 417/00** and **Lake v Arco Grating (UK) Ltd EAT 0511/04.**

20. An Employment Tribunal, when deciding whether or not to award expenses/costs against an un-represented party, is entitled to take into account the fact that no application had been made on behalf of party seeking expenses/costs for a Pre-Hearing Review (now Preliminary Hearing) to determine the prospects of success of the claim. If the claim had truly been misconceived or vexatious, there could have been an application to strike out or for a deposit order to be made. This should not in any sense be decisive of the application for costs, but it is not irrelevant – *see* ***AQ Ltd v Holden 2012 IRLR 648, EAT****.*

Decision

21. The issues before the Tribunal for determination were whether or not the Claimant's application for expenses/costs against the respondent as set out

in Claimant's Grounds for Expenses Application was well-founded and, if so, whether or not to make an award of expenses against the respondent, and, if so, on what basis and in what amount, having regard to the information available to the Tribunal.

22. Generally, in coming to its conclusions the Tribunal was mindful of overriding objective to deal with cases fairly and justly contained within Rule 2 of the Rules. The Tribunal was also mindful that, as the Court of Appeal reiterated in the **Yerrakalva v Barnsley Metropolitan Borough Council** case referred to in the Relevant Law section above, expenses/costs in the Employment Tribunal are still the exception rather than the rule and the view expressed by Mr Justice Burton, then President of the EAT, in the **Salinas v Bear Stearns International Holdings** case referred to in the Relevant Law section above, that the reason why costs orders are not made in the substantial majority of Tribunal cases is that the Rules of Procedure contain a high hurdle to be surmounted before such an order will be considered.

23. It appeared from the Claimant's Grounds for Expenses Application that the Claimant sought expenses/costs both under Rule 75(1)(a) of the Rules (legal expenses in respect of the solicitor's fees he had incurred while legally represented in the case) and under Rule 75(2) of the Rules (preparation time order (PTO) in respect of the time the claimant himself spent working on the case). It was noted by the Tribunal that whether the claimant sought expenses/costs under either Rule 75(1)(a) or Rule 75(2) of the Rules, or both, the grounds for making such an order under both Rule 75(1)(a) and Rule 75(2) of the Rules are the same.

24. The claimant sought expenses/costs on the grounds of the alleged unreasonable conduct of the respondent by defending a case that had no reasonable prospects of success. With reference to the Relevant Law section above, the Tribunal accepted that this was a ground on which the Tribunal could make an expenses order or PTO under Rule 76(1)(a) of the Rules.

25. However, the Tribunal did not consider that the respondent's conduct met the threshold for unreasonable conduct by defending a case that had no reasonable prospects of success for the following reasons:

26. Firstly the Tribunal considered whether the respondent's defence had no reasonable prospects of success. In doing so, and with reference to the case of **Opalkova v Acquire Care Ltd** referred to under the Relevant Law section above, the Tribunal did not accept that simply because the one of the two heads of the claimant's claim was unsuccessful (i.e. the claimant's claim for breach of contract under the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994, Art.3 which was unsuccessful on the basis that the Tribunal did not have jurisdiction to consider it), it followed that it could not be found that the respondent's defence did not have reasonable prospects of success;

27. The Tribunal accepted that the respondent's defence to the head of the claimant's claim that was not successful did not lack reasonable prospects of success but then went on to consider whether it should be determined that the respondent's defence to the part of the claimant's claim that was successful, i.e. the claimant's claim for unlawful deduction from wages under section 13 of the Employment Rights Act 1996, had no reasonable prospect of success. Whilst the respondent's defence of this element of the claimant's claim was unsuccessful, on balance the Tribunal did not consider that it met the threshold of having no reasonable prospect of success;

28. Some areas of the defence to the claimant's claim for unlawful deduction from wages were clearly wrong (such as whether the relevant bonus scheme was contractual in the first place) but the case did not turn on that part of the claim and defence alone: there remained the question of the terms on which the bonus (which was declared and was payable as per the case of **Farrell Matthews and Weir v Hansen 2005 ICR 509, EAT**, referred to in the March 2023 Judgment) was in fact payable, and it was arguable that that turned on the terms of the bonus scheme (including whether and to what extent those terms had been varied and the interpretation of what those terms meant when applied to particular facts in the case). Accordingly, the ultimate decision in

the case which was in favour of the claimant, i.e. the claimant's claim for unlawful deduction from wages, was not entirely straightforward and the Tribunal did not consider that this was a case which met the threshold that there was no reasonable prospect of finding in favour of the respondent; and

29. The Tribunal went on to consider, if it was wrong about the respondent's defence to the claim not having no reasonable prospects of success, was the respondent's conduct in defending or maintaining its defence to the claimant's claim unreasonable. Again, even if it could be concluded objectively that the respondent's defence to the claimant's claim had no reasonable prospect of success, the Tribunal did not consider that the respondent's conduct was sufficiently unreasonable to meet this threshold, for the following reasons:

30. The Tribunal noted the guidance in the **Opalkova** case referred to under the Relevant Law section above that for a respondent's conduct to be considered to be unreasonable by proceeding with a defence to a claim where there were no reasonable prospects of success, the respondent would have to know, or ought to have known, that was the case. The Tribunal was satisfied that the respondent did not consider that its defence had no reasonable prospects of success; there was no suggestion of that at any time at the Hearing. The Tribunal also then considered (if it had found that the respondent's defence to the claim did not have reasonable prospects of success) whether the respondent ought to have known that. The Tribunal took into account the claimant's costs warning and information that had been provided by the claimant to the respondent as part of the proceedings, including in relation to the terms of the claimant's contract and the relevance of the **Farrell Matthews and Weir** case referred to above, but as noted above, that was not the end of the matter, it was more complex than that, and the Tribunal also took into account the fact that one of the two heads of the claimant's claim (i.e. the claimant's claim for breach of contract, the consideration of which took up a significant part of the hearing) was unsuccessful on the basis that the Tribunal did not have jurisdiction to consider it and that the respondent was not legally represented and concluded that (even if it had found that the respondent's

defence to the claimant's unlawful deduction claim did not have reasonable prospects of success), in the circumstances it was not sufficiently clear that the respondent ought to have known that.

31. The ground on which the claimant sought expenses/costs was the alleged unreasonable conduct of the respondent by defending a case that had no reasonable prospects of success, not on the basis that the respondent acted vexatiously, abusively, disruptively or otherwise unreasonably. However, in his Grounds for Expenses Application the claimant did make general reference to the respondent's correspondence stating that this was protracted, unfocussed, irrelevant, lengthy and frequent and as part of its deliberations the Tribunal considered this. The Tribunal noted that the claimant did not refer to any specific correspondence in this respect in the Grounds for Expenses Application and from the correspondence that the Tribunal was referred to at the Hearing itself, and taking into account that the respondent was unrepresented, that one of the two parts of the claimant's claim was not successful and the adversarial nature of the proceedings, the Tribunal did not consider that the nature of this correspondence was sufficient to meet the threshold for finding that the respondent acted vexatiously, abusively, disruptively or otherwise unreasonably.

32. The claimant made general reference to the respondent rebuffing strenuous attempts to resolve the dispute pre-litigation, however, mindful of the guidance in the **Heath Development Agency** case referred to under the Relevant Law section above, the Tribunal did not consider that the respondent's alleged conduct pre-litigation could found an expenses/costs order. The Tribunal did not, in any event, consider that simply rebuffing attempts to resolve or settle a dispute by either party would be sufficient to meet the threshold for finding that they had acted vexatiously, abusively, disruptively or otherwise unreasonably. The Tribunal did also note the reference in the Grounds for Expenses Application to the claimant having issued a costs warning to the respondent prior to the hearing and considered that this could be a factor that could weigh in favour of finding that the respondent had acted vexatiously, abusively, disruptively or otherwise unreasonably in proceeding with its

defence but, noting that this was a costs warning from the other party (when parties frequently make threats of costs applications against the other party prior to hearings), not the Tribunal, and mindful of the guidance in the **Oko-Jaja** and **Lake** cases referred to under the Relevant Law section above, the Tribunal considered this to be relevant but not a particular strong factor and it was not sufficient to reach a conclusion that the respondent had acted vexatiously, abusively, disruptively or otherwise unreasonably.

33. In the Grounds for Expenses Application the claimant also made reference to the respondent's approach to the calling of witnesses in the case and asserted that this led to considerable time and costs being wasted due to the claimant and his solicitor preparing a cross-examination strategy for witnesses who were not then called and the Tribunal considered whether this amounted to the respondent having acted vexatiously, abusively, disruptively or otherwise unreasonably and decided it did not for the following reasons:

34. There was no evidence of a deliberate strategy on the part of the respondent to indicate that it would be calling certain witnesses when it had no intention of calling them, and the respondent's explanation in this respect in the Expenses Application Response appeared credible;

35. The respondent indicated that it would call three witnesses in addition to the respondent's representative and that their evidence in chief would take approximately 10 minutes each (so 30 minutes in total);

36. The claimant made reference to the respondent being requested by the Tribunal to provide 5 days' notice for witnesses but the respondent only provided 3 full days' notice. However, the Tribunal noted that the respondent responded within just over 48 hours of the Tribunal sending an email requesting this and that this was on the 16th of November, which was on the 6th calendar day, and 4th working day, before the Hearing; and

37. This was a request of the Tribunal (not an order) and what the Tribunal requested was that the respondent (as well as the claimant) provide a provisional timetable of witnesses including names to the Tribunal and this request was made for the purposes of providing a safe environment for those

attending the Tribunal (not for the purpose of giving each party notice of the witnesses the other party intended to call).

38. As noted above, the ground on which the claimant sought expenses/costs was the alleged unreasonable conduct of the respondent by defending a case that had no reasonable prospects of success and the Tribunal treated this as an application for an expenses order or PTO under Rule 76(1)(a), not Rule 76(1)(b). However, even if the claimant had made an application for an expenses/costs order or PTO under Rule 76(1)(b) this would not have been successful in any event on the basis that the Tribunal concluded that this was not a case in which the threshold was met for there being no reasonable prospect of the respondent's defence being successful for the reasons set out at paragraphs 26, 27 and 28 above.

39. The Tribunal noted the two stage test approach that must be applied in determining whether to make an expenses order under Rule 75(1)(a) of the Rules or a PTO under Rule 75(2) of the Rules as set out in the **Monaghan** case referred to under the Relevant Law section above and observed that, even if it had concluded that the respondent's defence to the claimant's claim had no reasonable prospect of success and the respondent's conduct in defending or maintaining its defence to the claimant's claim was unreasonable (or the respondent had acted vexatiously, abusively, disruptively or otherwise unreasonably in some other way) under Rule 76(1)(a), or that the respondent's defence had no reasonable prospect of success under Rule 76(1)(b), that would only address the first stage of the test and the Tribunal would then have to ask itself whether it is appropriate to exercise its discretion in favour of actually awarding expenses against the respondent.

40. In this respect, in applying the second stage of the test, the Tribunal considered that this was not a case in which it would be appropriate to exercise its discretion to award expenses against the respondent taking into account the circumstances and factors referred to at paragraphs 30 to 37 above.

41. The claimant's application for an order for expenses/costs under Rule 75(1)(a) of the Rules (legal expenses in respect of the solicitor's fees he had incurred while legally represented in the case) and under Rule 75(2) of the Rules (preparation time order (PTO) in respect of the time the claimant himself spent working on the case) having been unsuccessful, the Tribunal did not then require to go on to consider how much any such award should be. However, the Tribunal did note that, in accordance with Rule 75(3) of the Rules, had the Tribunal been prepared to make an award, it would not have been possible to make both an expenses order and a PTO in favour of the claimant in these proceedings.

Employment Judge: **P McMahon**
Date of Judgment: **08 August 2023**
Entered in register: **10 August 2023**
and copied to parties