EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101816/2023

Held by written representations on 12 October 2023

Employment Judge McFatridge

Mr B Yakap	**Claimant** **Written representations**
D A Baillie Limited	**Respondent** **Written representations** **Ms J McLaughlin, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The respondent's application for costs in respect of the case from 30 June 2023 is refused.

REASONS

1. On 14 August 2023 a judgment was issued in this case following a hearing which had taken place over two days on 4 July and 26 July 2023. The claimant was awarded £818.40 in respect of annual leave accrued but untaken at the date of termination of employment. His remaining claim in respect of a further alleged unlawful deduction from wages was refused. Rather than repeat the terms of this judgment those terms can be taken to be incorporated herein.

2. On 11 September 2023 the respondent wrote to the Tribunal seeking costs of the hearing from 30 June 2023 onwards. The claimant was invited to respond to this application but did not do so and on 19 September the parties were advised that the application would be dealt with on the papers. The claimant subsequently sent in representations dated 29 September as did the respondent. The claimant then sent a further letter to the Tribunal dated 5 October. Although this was dated outwith the time allowed in correspondence for making representations I decided that I would take its contents into consideration albeit at the end of the day I did not consider they advanced matters much further. Rather than repeat the parties' submissions at length I will deal with these in the discussion below.

3. Within the Employment Tribunal Rules the matter of expenses is dealt with in Rules 74-79. A costs order is defined in Rule 75 and in this case I was satisfied that the respondent were legally represented in terms of Rule 75(1)(a).

4. Rule 76 sets out the circumstances in which a costs order may be made. I shall set this out in full.

> "(1) A tribunal may make a costs order or a preparation time order and shall consider whether to do so where it considers that
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> (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
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> (b) any claim or response had 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 the date on which the relevant hearing begins.
>
> …."

5. Although the respondent in their application do not make reference to Rule 75 (1) (b) I understood their application to be based on two matters.

1. The claimant's claim for overtime payments at the rate of double time on Saturdays and Sundays had no reasonable prospect of success; and

2. that the claimant had acted vexatiously, abusively, disruptively or otherwise unreasonably in the way that the proceedings had been conducted in that he had refused a "Calderwood" offer of more than he was eventually awarded.

6. With regard to the first point I consider that the respondent's contention is correct in that as set out in the judgment the claimant's claim in relation to being paid overtime at the rate of double time had no reasonable prospect of success. Accordingly, this means that the threshold for me deciding whether or not to exercise my discretion to award costs has been met in this regard. I shall set out in the judgment below my reason for deciding not to exercise my discretion to award costs in this regard.

7. With regard to the second strand of the respondent's argument based on Rule 75(1)(a) the respondent have set out their position quite clearly in their written submission sent in on 29 September.

8. They rely on the case of ***Calderbank v Calderbank*** [1975] 3 All ER 333. The offer was sent on 30 June 2023 on a without prejudice save as to costs basis but given that this is a costs judgment there is no question but that I am allowed to take it into account. From the correspondence of both parties it would appear that the respondent's position was that they considered the claimant's claim in respect of overtime had no reasonable prospect of success but there were concerns relating to the holiday pay claim. The employer had paid rolled up holiday pay and, as I found in my judgment, they had not done so in a way which extinguished the claimant's right to claim arrears. Whilst the respondent had a time bar argument it could not be certain that this would succeed given the general controversy in the area. The law at the time of the hearing in July 2023 was based on the case of ***Bear Scotland Ltd and others v Fulton*** (UKEAT/0047/13) but had the case been considered a few months later there is at least the possibility that the Tribunal would have applied the recent Supreme Court judgment in the case of ***Chief Constable of the Police Service of***

Northern Ireland and another v Agnew and others, Supreme Court case ID 2019/0204. A different result may have ensued. On this basis the respondent offered £4500 in full and final settlement. The parties are agreed that what happened was that the claimant initially said that this figure was acceptable but then refused to sign a COT3 agreement bringing this settlement into force.

9. I have not seen the terms of the COT3. The respondent's position is that the COT3 was on standard terms. The claimant's position is that certain of the terms of the COT3 provided were entirely unacceptable to him. I understand that this was in the context where there is an ongoing claim by his partner Ms Dzhoykeva and that the claimant wished to give evidence in that claim. His position in correspondence with the Tribunal prior to the hearing was that he was concerned that the terms of the COT3 provided would prevent him from doing so.

10. The question which I had to consider was whether the claimant's behaviour met the test set out in Rule 76(1)(a).

11. In correspondence it is clear that the claimant has been offended by the use of the words vexatiously, abusively, disruptively. I would reassure the claimant that it does not appear to me that the respondent were intending any disrespect by using these words but they were simply repeating the words in the statute. In any event, my view is that given the circumstances of this case I do not consider that the claimant was behaving unreasonably in refusing the Calderbank offer. It is clear that the Calderbank offer contained additional terms over and above the financial settlement. Whilst the respondent may refer to these as standard terms the fact of the matter is that these were terms which were unacceptable to the claimant and I do not consider that I can make any finding that his refusal to accept these terms was unreasonable.

12. My finding therefore is that looking at the whole terms of the Calderbank offer the claimant's refusal to accept this was not in itself unreasonable in all the circumstances. I appreciate that at the end of the day the claimant was awarded less than the amount of the offer but in my view the Calderbank rule is not a hard and fast matter of simple arithmetic similar

to the rules which may exist in other civil procedure rules relating to, for example, judicial tenders. The Calderbank rule is simply a specialty of and application of Rule 76(1)(a). A claimant who refuses an offer of what their claim is likely to be worth on a full recovery basis thereby putting the respondent to unnecessary expense may well be acting unreasonably in most circumstances. In the circumstances of this case however my view is that the claimant was not acting unreasonably and that the terms of Rule 76(1)(a) have no application.

13. As noted above although it is not clearly pled I understood the respondent were also seeking costs under Rule 76(1)(b) on the basis that the claimant's claim in relation to overtime payments had no reasonable prospect of success.

14. The situation here from the evidence at the hearing was that the claimant himself had only included this claim after taking legal advice from the CAB who he considered to be qualified advisers in the matter. I accept that the claimant was urged to take legal advice at the preliminary hearing on 5 May however I note that by that point the claimant was in Bulgaria.

15. I considered that the opportunities for the claimant taking further legal advice on UK employment law at that point was extremely limited. The claimant's position was that he had taken legal advice. I also record that at the hearing the claimant did not seek to obfuscate matters in any way. He honestly stated that he had included this claim because he had been told to do so by CAB. I was satisfied that this was an honest position which he had put forward because of a genuine mistake.

16. It is clear from the authorities that the decision on whether or not to award costs is a two stage process. Once the threshold contained in Rule 76 is met it is for me to decide whether or not it is appropriate to exercise my discretion to award costs. In this case my view is that, for the reasons stated above, it is not. For that reason the respondent's application is refused.

Employment Judge: **I McFatridge**
Date of Judgment: **12 October 2023**
Date sent to parties: **13 October 2023**