**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4109610/2021**

**Held at Aberdeen on 23 November 2022**

**Employment Judge J M Hendry**
**Members N Richardson**
**F Parr**

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| **Mr W J G Mowatt** | **Claimant**<br>**In Person** |
| **Pegasus Express Limited** | **Respondent**<br>**Represented by**<br>**Mr G Millar,**<br>**Solicitor** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is that the respondent's application for expenses is well-founded and that the claimant shall pay to the respondent the sum of Six Thousand Five Hundred Pounds (£6,500) in expenses.

**REASONS**

1. The claimant in his ET1 sought a finding that he was unfairly dismissed from his employment as the Depot Supervisor by the respondent company. The case proceeded to a hearing in August and September 2022 following which a Judgment was issued on the 4 October 2022 dismissing the claimant's application for a finding of unfair dismissal. It was critical of the claimant's evidence which it found unbelievable.

2. The respondent's agents wrote to the Tribunal on 26 October 2022 seeking an award of expenses under Rule 76(1)(a) and 76(1)(b) of the Employment Tribunal Rules. They pointed to the fact that the claimant had initially made four claims for unfair dismissal, disability discrimination, a breach of the Public Interest Disclosures Act 1998 and breach of contract/unauthorised deduction of wages. They indicated that the whistleblowing claim was dismissed at the first preliminary hearing but only after the respondent had to investigate and address it in their ET3. The disability discrimination claims and breach of contract/deduction of wages claims were not withdrawn until the final day of the hearing after the respondent had presented all their evidence dealing with these points. The application pointed to paragraph 126 of the Tribunal's Judgment.

3. The solicitors pointed out that the Tribunal had observed in relation to the claimant's evidence: "*the claimant was at the hearing less than persuasive when trying to distance himself from these matters (the repeated contacting of the respondent's customers) the aim of damaging the respondent's reputation or business suggesting that unknown to him his wife or daughter or some other interested party such as an aggrieved former employee might have sent these e-mails or used his e-mail account to author some of the e-mails''* and later *''before the initial allegations could be dealt with there was this developing situation of repeated contacts being made to the respondent's customers. The claimant at the hearing for the first time gave an explanation that he was involved part-time in his own small family business that used some of these customers and that this was the reason for the contact. We found this explanation wholly implausible. He had not alerted the respondent about this as a difficulty with the instruction. He had not to contact customers and frankly we regard it as a pretext to do so."*

And at paragraph 128:

"*The claimant accepted no wrong doing and showed no remorse and insight into his conduct….. even if successful in demonstrating the dismissal is unfair the claimant would have had considerable difficulties given his conduct in persuading the Tribunal that it would be just and equitable for him to be entitled to compensation. We also noted that he had expressed the view at the appeal hearing but even if reinstated he would probably resign.*"

Paragraph 129:

"*As we have narrated the claimant had made repeated contact with customers contrary to the instructions given to him and with the purpose of damaging the respondent's business.*"

And paragraph 132:

"*In contacting those customers both before and after his dismissal there was an element of the claimant taunting the respondent's management and in lay terms sailing as close to the wind as he could.*"

4. The respondent's position was that the claimant had acted vexatiously, abusively, disruptively or otherwise unreasonably in terms of Rule 76(1)(a) and that the claims had no reasonable prospects of success (Rule 76(1)(b).

5. The respondent's letter was copied to the claimant for comment. No response was received. A reminder was sent for a response by close of business on Monday 14 November. There was no response. The e-mail from the Tribunal dated 8 November also asked the claimant whether or not he would give the Tribunal details of his financial position to allow the Tribunal to consider it if it decided to award expenses. No such information was provided.

6. The Tribunal reconvened on 23 November to consider the application.

**Judgment**

7. The Rule governing such applications is Rule 76:-

"*When a costs order or a preparation time order may or shall be made*

*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*."

8. Although there have been changes to what could be described as the expenses regime over the years an award is still the exception rather than the rule. There are good policy grounds for this around ensuring that litigants are not deterred from making claims for fear of incurring expenses if they lose.

9. The terms of Rule 14(1) of the earlier 2001 Rules used the same formulation as later versions of the rules namely that the trigger test was acting '*vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by a party has been misconceived*'.

10. In most cases the unsuccessful party will not be ordered to pay the successful party's costs; see ***McPherson v BNP Paribas (London Branch) [2004] IRLR 558*** per LJ Mummery at paragraphs 2 and 25:-

> "*Although Employment Tribunals are under a duty to consider making an order for costs in the circumstances specified in Rule 14(1), in practice they do not normally make orders for costs against unsuccessful applicants. Their power to make costs orders is more restricted than the power of the ordinary courts under the Civil Procedure Rules; it has also for long been generally accepted that the costs regime in ordinary litigation does not fit the particular function and special procedures of Employment Tribunals. It is, therefore, not surprising that the Employment Tribunal Rules of Procedure do not replicate the general rule laid down in CPR Part 38.6(1) that a claimant who discontinues proceedings is liable for the costs which a defendant has incurred before notice of discontinuance was served on him. By discontinuing the claimant is treated by the CPR as conceding defeat or likely defeat. The Tribunal rules of procedure make provision for withdrawal of claims in Rule 15(2)(a), but the costs consequences are governed by the general power in Rule 14*."

11. The then President of the EAT, Mr Justice Burton in ***Salinas v Bear Sterns International Holdings Inc UK/EAT/0596/04DM*** noted at paragraph 22.3 that "*something special or exceptional is required*" before a costs order would be made and, even if the necessary requirements of Rule 14 are established, there would still remain a discretion of the Tribunal to decide whether to award costs. The matter is one for the Tribunal's discretion. In ***Benyon & Others v Scadden [1999] IRLR 700*** it was made clear that the discretion given to Tribunals and courts is not to be fettered.

12. It should also be borne in mind that a litigant in person has to be judged less harshly than a professionally represented litigant. (See ***AQ Ltd v Holden [2012] IRLR 648***). The claimant here did not have representation.

13. The Tribunal considered that this was an exceptional case. The Judgment reflects the Tribunal's views in relation to the claimant's conduct and the self-serving and disingenuous nature of his evidence. It is also clear that there were signs in the way the case was conducted that gave rise to concerns. Judge Hosie recorded in his Note dated 31January 2022 that during the preliminary hearing the claimant made derogatory allegations about the respondent's solicitor ''of a personal nature'' requiring the Judge to admonish him. We fully acknowledge that the claimant suffered a serious mental health episode and may not have fully recovered from it. We take this fully into account. But the thread here appears to be that the motivation for the claimant's actions throughout both before and during the proceedings seemed to be a desire on his part to cause the respondent's business harm and in some way ''get his own back''.

14. We do not put any weight on the fact that the claimant raised whistleblowing allegations initially but dropped them at the first preliminary hearing. Having heard the facts of the case we can see how these might have arisen and become part of the claims made especially as viewed by someone not legally qualified. This does not meet the test of unreasonable behaviour in our view and in any event these matters would have been investigated by the

respondent as part of the general background. What was more serious/unreasonable was his persistence with claims for reasonable adjustments/disability discrimination and breach of contract which seemed to ‘‘fizzle out’’ after the respondent’s witnesses gave evidence and when, presumably, the respondent’s position was accepted.

15. What puts this case however in the category of being exceptional was as the respondent’s agents point out is the claimant’s evidence which we found misleading and self-serving. Even making allowances for the fact that the claimant was a party litigant and had gone through an upsetting and distressing time leading up to his dismissal the behaviour amounted to acting vexatiously and unreasonably. The claimant must have known that he had repeatedly and without good cause breached the instructions not to contact customers. This was certainly our finding. His claim for unfair dismissal was misconceived and had no realistic prospects of success.

16. We had due regard to all the circumstances including the claimant’s personal circumstances. We are told that the solicitors fees here amount to £18,838.25 excluding VAT and travel cots of £830.30. These seem from the Tribunal’s own experience to be wholly reasonable and in no way excessive. We have not been given the claimant’s financial position nor asked to take account of it. We regard the policy of making awards of expenses only in exceptional cases as being essential to ensure that employees are not deterred from exercising their rights. We bear in mind that the matter of the level of award is a matter for our discretion and in this case we will award £6500 being approximately one third of the expenses sought.

**Employment Judge: J M Hendry**
**Date of Judgement: 09 December 2022**
**Date sent to Parties: 09 December 2022**