EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107643/2021

Held at Aberdeen on 13 October 2022

Employment Judge J M Hendry
Members N M Richardson
D Massie

Mr Ikemefuna G M Onyia	**Claimant** **In Person**
Maryfield West Care Home	**Respondent** **Represented by** **Mr J Arnold,** **Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the respondent's application for expenses is refused.

REASONS

1. The claimant raised proceedings against the respondents, his former employers, in February 2021. The case proceeded to a hearing in February

and March 2022. Following that hearing the various claims principally for unfair dismissal were dismissed as not being well-founded. The claimant subsequently appealed to the Employment Appeal Tribunal and was unsuccessful.

2. The respondents by letter dated 28 April 2022 made an application for expenses on the grounds that the claims had no reasonable prospects of success and the claimant had acted unreasonably in bringing what they regarded as being an unmeritorious case. They pointed to the claimant refusing an offer of settlement and proceeding with the case in the face of their warnings. They referred to their earlier letter of 27 January and attendant correspondence.

3. It appears from correspondence that the claimant was initially offered £1,000 in full and final settlement of his claim. The letter of 27 January warned the claimant about the likely expenses and that they included the instruction of Counsel. No doubt in light of the possible expense of the hearing they increased their offer to £4,000 in full and final settlement of the claim. This they did on a without prejudice basis and for the commercial reasons narrated. Attached to their application for expenses was a Cost Schedule showing that the respondent's legal expenses amounted to £13,987.50.

4. Following receipt of the application for expenses the claimant was asked to respond. He did so. He indicated that the detriment claim had been withdrawn in the course of the hearing. The claimant wrote once more on 17 May but did not directly address the issue of expenses rather he sought to re-argue the validity of his claim. He did not give financial details but the Tribunal had noted that at the hearing he had been due to embark on a grant-funded course at Aberdeen University.

5. Parties agreed that the expenses application should be dealt with without the necessity of a hearing. Regrettably because of a difficulty in arranging suitable dates the matter could not be dealt with until 13 October 2022.

Discussion and Decision

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

> "*When a costs order or a preparation time order may or shall be made*
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> *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. 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. It is a matter for the Tribunal's discretion. 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.

8. 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*'.

9. 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."

10. 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. 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.

11. 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 has a law degree but with all due respect to him he is not a practicing lawyer nor did he appear particularly conversant in employment tribunal practice or procedure.

12. The four claims that the Tribunal dealt with were:

1. Constructive unfair dismissal;
2. Automatically unfair dismissal under Section 103A of the Employment Rights Act 1996;
3. A claim for detriment under Section 47B of the Employment Rights Act 1996 and
4. A claim for arrears of wages not being well founded is dismissed.

13. We do not intend rehearsing the findings of the original Judgment but the background was that the claimant supported himself working for the respondents on a 'bank' of Care Assistants. He was on a 'zero hours 'contract. The disciplinary policy was not contractual. He emailed the respondents in August with concerns about the safety of staff and patients in relation to ventilation on the top floor. This email was received and we found

that it had then been passed to the Manager Mr Culley who did not acknowledge it or speak to the claimant about it. This formed a basis for the claimant's later suspicion that he was being unfairly treated because of a Protected Disclosure. We formed the view that this was not the case and any failure to deal with the matter was more likely because of pressure of work and the fact that the home suffered a serious outbreak of Covid. There was at least some basis for the claim for detriment. In any event there was some dubiety if this claim was withdrawn during the hearing.

14. The principal claim was for constructive dismissal. The respondents could not be said to have well handled the disciplinary issue the claimant faced. The incident which led to a disciplinary hearing took place in August 2020 and the claimant was suspended. The matter was left for some months during which time the claimant was unable to work. He had a point that there appeared to be no progress in bringing the matter to a head and that the respondents had produced no statements or any evidence of a formal investigation. The claimant was very concerned at the long delay and the lack, as he saw it of ''due process'' being unaware of the considerable discretion afforded to employers in this area.

15. The claimant was only told on the 14 December 2020 that the matter, deemed earlier as being so important as to warrant his suspension, was not being pursued. The claim that the respondents had breached the implied term of trust and confidence was arguable given the delay and lack of any substantial investigation in accordance with the disciplinary policy. The claimant, however, being suspended was probably unaware of the outbreak of Covid and the impact this would have on Mr Culley's ability to deal with the outstanding disciplinary matter. The claim for unpaid wages was not well founded in law given the nature of the zero hours contract but that did not detain the Tribunal long. The respondents had not sought strike out or a deposit order in relation to that claim or the others.

16. We also considered whether the claimant acted unreasonable in pursuing the claim in the light of the financial offer made. The claimant was not in a position as a party litigant to assess his chances of success. What may appear to an experienced lawyer as being unreasonable may not appear so to a claimant who is aggrieved at the way he has been treated and who wants to vindicate his right to have a finding of unfair dismissal to in some way clear his name and to attempt to get compensation for the loss of wages he had suffered.

17. Considering the matter in the round we do not regard this case as being in any way exceptional and that accordingly the award of expenses is rejected.

Employment Judge: J M Hendry
Date of Judgement: 2 November 2022
Date sent to Parties: 2 November 2022