



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101886/2023

Held in Dundee by CVP on 25 October 2023

Employment Judge M Sutherland

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Mr Brett Ferguson

**Claimant
Represented by:
Mr D Ferguson**

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J&E Shepherd

**Respondent
Represented by:
Ms K Harvie**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the Claimant is ordered to pay to the
20 Respondent the sum of One Thousand Pounds (£1,000) in respect of their costs.

REASONS

Introduction

25 1. A hearing on expenses was arranged for today to determine the
Respondent's applications of 14 June and 31 July 2023 which were
opposed by the Claimant.

2. The applications for expenses were in summary as follows –

30 a. Fees of £1,500 for time spent attending the hearing on 12 May
2023 which was postponed less than 7 days before (Rule 76(2))

and

- b. Fees of £1,500 for time spent considering and responding to an unreasonable application to amend made 31 May 2023 which had no reasonable prospects (Rule 76(1)(a)) or
- 5 c. Fees of £7,250 for entire time spent (38.11 hours x £190.25) since commencement to dismissal judgment in respect of a claim which had no reasonable prospects (Rule 76(1)(b)) and which it was unreasonable to bring (Rule 76(1)(a)) or
- 10 d. Fees of £6,699 for time spent (35.21 hours x £190.25) since receipt of the Response which raised time bar and since the Claimant had professional representation such that he was aware the claim which had no reasonable prospects (Rule 76(1)(b)) and it was unreasonable to continue with the claim (Rule 76(1)(a)) or
- 15 e. (following discussion with the parties at the hearing) fees of £1,446 for time spent (7.6 hours x £190.25) since 14 June following the substantive response to the application to amend such that the Claimant was aware it had no reasonable prospects (Rule 76(1)(b)) and it was unreasonable to continue with it (Rule 76(1)(a)).
- 20 3. The Claimant was represented by his father. The Respondent had professional representation.
4. The Claimant did not attend the hearing and did not provide evidence of his ability to pay (although the need for this had been previously explained). At the hearing parties helpfully agreed relevant facts and
- 25 accordingly no evidence was led.
5. Both parties made oral submissions.

Findings in fact

6. The Claimant was employed by the Respondent as Chartered Surveyor
- 30 from 18 June 2018 until 31 October 2022.

7. He was initially employed as a Trainee Surveyor and completed his training in about May 2022. His salary was £30,000 and he was paid monthly. His contract of employment provided that he would be paid monthly in arrears on the last working day of each month. He was in practice paid on the 28th of each month.
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8. The Claimant resigned with notice on 25 October 2022 which was due to expire on 25 November 2022.
9. On or about 26 October the Respondent advised the Claimant that he was due to repay training costs amounting to £8,602.05.
- 10 10. On or about 28 October 2022 he received a pay slip stating he was due payment of gross wages in sum of £2,500 (£1,918.37 net) in respect of the month to 31 October. The Claimant did not receive payment of those wages. The Claimant was asked to enter an agreement to repay his training costs.
- 15 11. On either Friday 28 October or Monday 31 October 2022 the Claimant advised the Respondent that, because he had not been paid, his last day of employment would be 31 October.
12. On 7 November 2022, the Claimant commenced alternative employment with a starting salary of £37,000. He has continued in that employment.
- 20 13. On 2 February 2023 the Respondent noted that the Claimant had contributed £1,918.37 from his final salary and asked the Claimant to make a proposal to settle the balance of the training costs.
14. On 22 February 2023 the Claimant commenced ACAS Early Conciliation which ended on 24 February 2023.
- 25 15. On 1 March 2023 the Claimant lodged a tribunal claim against the Respondent raising a complaint of unlawful deduction from wages that “I would like paid for the full month I worked - ...Gross=£2,500 (and received a pay slip for)”. The Claimant did not have the benefit of professional representation when he submitted his claim.

16. On 3 March 2023 the Claimant was advised by the Tribunal that “We have noted that the claim appears to have been submitted out with the period within which claims of this type should normally be brought. Although the claim has been accepted, at the outset of the hearing the Tribunal will require to decide whether it can consider the claim as a preliminary issue”.
17. On 31 March 2023 the Respondent lodged their response in summary that there was no unlawful deduction because they were contractually entitled to deduct training costs on 31 October 2022 and in any event the claim is time barred because the Claimant ought to have presented his complaint by 29 January 2023 but he did not contact ACAS until 22 February 2023.
18. The Claimant has had the benefit of professional representation from 4 April 2023 until final judgment.
19. On 4 April 2023 the Claimant was advised by the Tribunal that his complaint was not dismissed on initial consideration. The Claimant was ordered to provide by 18 April the essence of his case on time limits (in response to the grounds of resistance) and on the contractual power to deduct training costs.
20. On 14 April 2023 the Claimant sought to provide further and better particulars of claim within 7 days.
21. On 24 April 2023 the Respondent noted that the Claimant had not complied with the order of 4 April and that the Respondent is prejudiced by the lack of notice of the claimant’s position particularly on time bar and that that they are therefore unable to take proper statements from witnesses. The Respondent applied for strike out the basis for failure to comply with a Tribunal order which was refused.
22. On 25 April 2023 the Claimant provided the following further and better particulars of his complaint namely his last day at work was 31 October; the time worked after 28 October was due to be paid on 28 November; he contacted ACAS within 3 months of the last of a series of deductions; the claim is therefore in time. The Claimant also gave further particulars regarding the deduction of his training costs including that the clause is an unenforceable penalty clause, the sums are not a genuine pre-estimate,

failure to pay wages or respond to his queries is a repudiatory breach entitling him to resign and prohibiting enforcement of the penalty clause.

5 23. A final hearing was listed to determine all issues on 12 May 2023. At the hearing the Claimant asserted that the last date on which wages were due to be paid was 30 November (that there were wages, bonus and holidays due to be paid on that date) and accordingly the claim was not time barred. The Respondent objected on the basis that this assertion did not reflect the Claimant's pleadings. The Claimant was given time during a break to consider whether to withdraw the claim (reserving his right to bring a claim for breach of contract in another forum which would not be affected by the same time limits but in which a counterclaim may be made by the Respondent) and/or to engage in discussions with the Respondent with a view to resolving their dispute by agreement. After the break parties advised that the dispute had not been resolved, and the Claimant advised that he would not be withdrawing his claim and that he sought to make an application to amend with a view to remedying time bar. The hearing was adjourned to allow the Claimant time to submit any application to amend to include all and any further particulars of the claim.

10 24. On 31 May 2023 the Claimant provided further particulars of his existing complaint and submitted an application to amend to include complaints for failure to pay holiday pay and failure to pay bonus namely that –

15 a. "the Claimant had accrued but untaken holiday entitlement amounting to approximately 1 full working week. The first date that sum would have been payable given the Claimant's termination of 31st October would have been the November payroll run. The Respondent is called upon to confirm exactly the number of working days accrued but untaken holiday entitlement had accrued to 31st October 2022".

20 b. "the Claimant was due to be paid an annual bonus which he was told by Mr Ferguson was circa £2k and told by Mr Jon Thomson was between £2k & £5k. That bonus would have been payable (albeit potentially pro-rated) in December prior to Christmas in the usual way".

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- c. "Given that further sums were due to the Claimant in November and December which were never paid, it is submitted that the claim [the original complaint] is in time".
25. On 9 June 2023 the Respondent's payroll providers confirmed that salary payments made on the last working day of each month were for the full calendar month. The Claimant accepted this.
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26. On 14 June 2023 the Respondent opposed the application to amend and submitted the first application for expenses. They also provided further particulars of response which stated that:
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- a. the Claimant had accrued 23.33 days (10/12 x 28 days) and had taken 24 days in the holiday year and accordingly there were no accrued but unused holidays at the termination date.
- b. The Christmas bonus is entirely discretionary and is paid to staff in employment in December following a review of the financial year end accounts.
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27. The Claimant did not provide a substantive response to those assertions either in writing or at the hearing.
28. On 20 June it was determined by the Tribunal that the final hearing listed for 27 June 2023 would be converted to an open preliminary hearing to determine the application to amend and the application for expenses.
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29. At the hearing on 27 June 2023 it was agreed that any applications for expenses would be determined following final judgment (because there was likely to be further applications for expenses dependent upon the outcome of application to amend, the Respondent had not attended with a breakdown of costs, and the Claimant had not attended with details of the Claimant's ability to pay).
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30. By judgment dated 5 July 2023 the application to amend was refused.
31. On 31 July 2023 the Respondent made a second application for expenses.

32. On 1 August 2023 the Claimant withdrew his claim which was then dismissed. The Claimant's representative ceased to act for him shortly thereafter.

The law

- 5 33. Under Rule 77 of the Employment Tribunal Rules of Procedure a party may apply for a costs order (i.e. an expenses order) at any stage up to 28 days after the date on which the judgment finally determining the proceedings was sent to the parties. Under Rule 5 the tribunal may extend or shorten anytime limit specified in these rules.
- 10 34. Under Rule 75, a costs order is an order that a party make a payment to the other party in respect of the cost incurred while legally represented.
35. Under Rule 74(1) costs includes fees incurred for the purpose of, or in connection with, attendance at a Tribunal hearing.
- 15 36. Under Rule 76 a tribunal may make a costs order, and shall consider whether to do so, in specified circumstances including where it considers that (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing or conducting of proceedings (or part thereof) or (b) the claim or response has no reasonable prospect of success or (c) a hearing has been
20 postponed or adjourned on the application of a party made less than 7 days before. A tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.
- 25 37. Where the grounds are established the tribunal has a duty to consider making a costs order but has discretion as to whether do so. First, a tribunal must consider whether the ground is established; if so, it must consider whether it is appropriate to exercise its discretion in favour of making a costs order; if so, it must consider the amount of the cost order.

30 *Stage 1 – Is the ground established?*

38. First the tribunal must consider whether the ground of unreasonable conduct, no reasonable prospects and/or hearing has been postponed is established.
39. In determining whether a party has acted unreasonably in the bringing or conducting of proceedings (or part thereof) allowance should be made for the lack of experience and objectivity of a litigant in person. In assessing whether there has been unreasonable conduct the tribunal should take into account the nature, gravity and effect of the conduct (*McPherson v BNP Paribas (London Branch) 2004 ICR 1398, Court of Appeal*).
40. When determining whether the claim had no reasonable prospects of success this should be judged on the basis of what the claimant knew or ought reasonably to have known at the relevant time.

Stage 2 – Should the discretion be exercised?

41. If the Tribunal considers that the ground is established, it must then consider whether it is appropriate to exercise its discretion in favour of making a costs order.
42. The following factors may be relevant but not solely determinative of that exercise of discretion: awarding a costs order is the exception – costs orders do not automatically follow the outcome and are not made in the substantial majority of tribunal cases; their purpose is to compensate the party who incurred the costs and not to punish the paying party; whether or not a party had professional representation; whether a costs warning has been issued; whether there has been unreasonable refusal of a settlement offer; and their ability to pay.
43. The vital point in exercising the discretion is to look at the whole picture of what happened in the case including consideration of the other party's conduct (*Yerrakalva v Barnsley Metropolitan Borough Council and nor 2012 ICR 420, CA*).

Stage 3 - The amount of the costs order?

44. If the ground is established, and if the tribunal consider it is appropriate to exercise its discretion in favour of making a costs order, the tribunal must consider the amount of the cost order. Under Rule 78 a tribunal may order payment of unassessed costs of up to £20,000; taxed (i.e. assessed) costs; or agreed costs.
45. Under Rule 84 in deciding whether to make a costs order, and if so, in what amount, the Tribunal may have regard to the paying party's ability to pay.
46. Costs should not exceed those reasonably and necessarily incurred having regard to ability to pay and having regard to the effect of any unreasonable conduct by considering broadly what costs are attributable to the conduct in all the circumstances (*Yerrakalva*).

Submissions

47. The Respondent's oral submissions were in summary as follows –
- a. The Claimant was fully aware time bar was in issue given the terms of the Response and the notice of hearing.
 - b. The Claimant knew, or ought reasonably to have been advised, that his application to amend to include claims of holiday and bonus pay had no reasonable prospects of success given the details provided in the response. The Claimant provided no substantive reply – he did not offer to prove facts in support of his claims. In any event payment for any accrued but unused holidays was due on termination and would not therefore resolve time bar.
 - c. The Claimant was legally represented until after judgment was issued. He knew, or ought reasonably to have been advised, that he was at risk of an award of expenses. In any event he was expressly warned of the risks of expenses by the Respondent's application of 14 June 2023.

- d. The time spent and the rate applied was reasonable but the tribunal should make its own assessment to avoid the cost of taxation.
- e. The Claimant earns higher than the national average wage, has no dependents and has a property share.

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48. The Claimant's oral submissions were in summary as follows –

- a. He is being pursued in the Sheriff Court for the balance of the training costs. He has endured threats and duress regarding repayment. All of this has had a significant impact on his mental health.
- b. The Claimant acted honorably by resigning rather than awaiting payment of his Christmas bonus.
- c. He has no savings, there is a cost of living crisis, and his parents met his legal fees for pursuing this claim (£4,400 at an hourly rate of £285). His parents purchased a flat for him of which he owns a share.
- d. He received advice from a number of quarters that his claim for repayment of the training costs had good prospects. His claim was not dismissed on initial consideration and was not struck out.
- e. If his wages from 28 to 31 October 2022 had been due to be paid on 28 November his claim would not have been time barred.
- f. He was not permitted to take all of his holidays and accordingly was due holiday pay.

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Discussion and decision

49. The application for costs was made within the time limits.

Stage 1 – Is the ground established?

50. When the Claimant presented his complaint for unlawful deduction from wages he was in possession of a pay slip but no pay, he did not have the benefit of legal advice and was not necessarily aware of the time limit for doing so. Accordingly it cannot be said that the claim had no reasonable prospects judged on the basis of what the claimant knew at that time. However shortly thereafter he was receipt of the Response and of legal advice which ought to have made it clear to him that time bar was an issue. This was confirmed by notice of the hearing and explicitly discussed at the hearing on 12 May 2023.
51. Both the Claim and the Response asserted that his employment had ended on 28 October 2022. On 25 April 2023 the Claimant asserted that his last working day was in fact 31 October; the time worked after 28 October was due to be paid on 28 November and accordingly his claim was in time. At the hearing on 12 May he was advised that the entire month's wages were due to be paid on 28 October 2022. This was confirmed on 9 June and he accepted this.
52. On 31 May the Claimant made an application to amend to include a claim for holiday pay due to be paid on 28 November 2022 and bonus due on 28 December 2022 which he asserted would render his claim in time. On 14 June the Respondent provided a substantive response in summary that he had taken all accrued holidays as at the termination date, and the Christmas bonus is only paid to staff still in employment. The Claimant made no substantive reply to those assertions either in writing or at the amendment hearing.
53. By 14 June the Claimant knew, or ought reasonably to have known, that his application to amend to include complaints of holiday pay and Christmas bonus had no reasonable prospects of success (having offered no facts in support of these complaints) and it was therefore unreasonable for him to proceed with that application. In turn he ought reasonably to have known that his complaint of unlawful deduction from wages had no reasonable prospects of success because it was dependent upon the application to amend curing the time bar defect.

54. Accordingly, by 14 June the Claimant was or ought reasonably to have been aware that his complaint had no reasonable prospects (Rule 76(1)(b)) and it was unreasonable for him to continue with the application to amend (Rule 76(1)(a)) and these grounds are established.

5 55. The hearing on 12 May was not postponed or adjourned by application of the Claimant but instead went part heard to allow the Claimant time to make an application to amend. Accordingly this ground (Rule 76(1)(c)) is not established.

Stage 2 – Should the discretion be exercised?

10 56. The Claimant had the benefit of professional representation shortly after the Response was lodged until after dismissal judgment was issued. The Claimant ought reasonably to have been aware of the risk of an award of costs particularly given the application for expenses made on 14 June, albeit it sought £3,000 and did not seek or warn of the entire costs and it
15 did not contain a detailed assessment of prospects.

57. Having regard to his income he does not labour under a complete inability to pay such that this should be determinative of whether the discretion should be exercised.

20 58. Considering the whole picture of what happened after the hearing on 12 May, and fully cognisant that awarding costs is the exception, it is considered on balance that the discretion should be exercised in favour of making an order for costs.

Stage 3 - The amount of the costs order?

25 59. From 14 June 2023 the Claimant knew or ought reasonably to have known that his complaint had no reasonable prospects by reason of time bar (Rule 76(1)(b)) and that it was unreasonable for him to continue with the application to amend (Rule 76(1)(a)). From 14 June 2023 until dismissal judgment was issued the Respondent incurred legal representation costs of £1,446. The time spent of 7.6 hours was not unreasonable give that it
30 entailed preparing for and attending a hearing on amendment. A reasonable commercial rate was applied albeit which was higher than the

taxed rate. Between dismissal judgment and judgment on expenses the Respondent incurred further legal costs of around £1,427 (time spent of around 7.5 hours) pursuing its application for expenses. The amount sought in the application for expenses was the entire expenses of £7,250 rather than expenses from 14 June only and the Claimant did not have the opportunity to pay the lesser amount and thereby avoid the further legal costs of £1,427 being incurred.

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60. Having regard to the costs reasonably and necessarily incurred by the Respondent in defending the complaint since 14 June 2023, the nature and effect of the Claimant's conduct in pursuing a complaint and amendment which had no reasonable prospects, having regard to the Respondent conduct in response, and the Claimant's ability to pay given his current earnings but noting his lack of qualifying service, it is considered appropriate in the circumstances to make an award of costs of £1,000.

Employment Judge: M Sutherland
Date of judgment: 27 October 2023
Date sent to parties: 27 October 2023