



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101091/2022

**Preliminary hearing
Held in Edinburgh
On 5 September 2023**

Employment Judge A Jones

Mr C Oliveira

No appearance

Claimant

The City of Edinburgh Council and others

**Respondents
Represented by
Ms Sutherland,
Solicitor**

Judgment

The claimant is ordered to pay to the first respondent expenses in the sum of £5523.

Reasons

Background

1. The claimant presented a claim to the Tribunal on 17 February 2022 alleging that he had been discriminated against on various grounds and had been subjected to detriments for having made a protected disclosure. There were two preliminary hearings for the purpose of case management at which the claimant was ordered to provide further specification of his claims and various orders made. A further preliminary hearing was listed to consider the respondent's application for strike out of the claimant's claims or that the claimant be required to lodge a deposit to continue with his claims.
2. While the hearing on the respondent's application had been due to take place on 2 December, it was postponed on the application of the claimant who said he did not feel fit enough to continue with the hearing.

3. That hearing was then rescheduled to take place on 31 January 2023. Prior to that hearing commencing the claimant refused to accept documents from the clerk which had been provided by the respondent. At the commencement of the hearing, the claimant sought to raise matters not relevant to the issues to be determined by the Tribunal at the hearing. Prior to the Tribunal being able to address the various matters for determination, the claimant announced to the Tribunal that he was leaving. Despite efforts to encourage the claimant to remain and participate in the hearing, the claimant left. I had informed the claimant that if he left the hearing then I would determine the issues before me on the information available.
4. Having considered the information available, a judgment was promulgated on 2 February 2023 and sent to parties on 6 February striking out the claimant's claims. This was on the basis that the claims were hopeless and alternatively that his conduct at the hearing was such that justified the striking out of his claims. The claimant appealed that decision, but his appeal was dismissed at the sift stage.
5. The respondent had made an application for expenses incurred in defending the claims which was not dealt with until the claimant's appeal had been determined. The application was made only on behalf of the first respondent as the other respondents to the claim did not incur any expense in addition to that of the first respondent. The claimant did not respond either to the application for expenses, nor correspondence from the Tribunal in relation to whether the application should be determined following a hearing in person. As the claimant has been unrepresented throughout the proceedings, a hearing was listed to consider the respondent's application. The claimant did not attend the hearing and did not provide any reason why he was unable to do so. The clerk sought to contact the claimant by email on the morning of the hearing but did not receive a response. Therefore, the application was considered on the information available. The respondent had provided written submissions and vouching in relation to the expenses sought which were in the sum of £5,523.

Discussion and decision

6. The respondent's application was made in terms of Rule 76(1)(a) and/or (b) on the alternative bases that the claimant had acted vexatiously or unreasonably in submitting his claim and the way it was conducted, and/or that his claim had no reasonable prospect of success.
7. In determining whether an award of expenses should be made against a party, the Tribunal should adopt a two-stage approach. In the first instance, it should determine whether a party's conduct has been such as to come within the ambit of Rule 76, and if so, whether it should exercise its discretion to make an award against that party. It is not enough that the conduct complained of comes within the terms of Rule 76, the Tribunal must consider even if that is established, whether it would be appropriate to exercise its discretion to make an award of expenses. If the Tribunal decides to exercise its discretion to make such an award, it should then go on to consider the extent of any award. The ability of a party to pay any award may be taken into account in that regard.
8. The Tribunal found in its judgment of 3 February 2023 that the claimant's claims had no reasonable prospect of success in terms of Rule 37(1)(a). The Tribunal is satisfied that for the reasons set out in that judgment, the claimant's claims also had no reasonable prospects of success in terms of Rule 76. Briefly put, the case put forward by the claimant even at its highest, had no reasonable prospect of success. He had not offered to prove any facts which if established might allow a Tribunal to find that he had established the claims he advanced. The claimant's claims were incoherent and wide-ranging. Despite efforts by the Tribunal to focus the claims being made, the claimant simply appeared to keep repeating the same set of facts and attaching different labels to those facts alleging that they amounted to unlawful treatment on various grounds without specifying on what basis he was making such allegations.
9. The Tribunal also found in its judgment of 3 February that the claimant's conduct in refusing to continue to participate in the hearing of 31 January and his conduct towards the Tribunal at that hearing amounted to unreasonable

conduct. As set out in that judgment, the Tribunal concluded that his conduct was contumelious.

- 5 10. However, as set out above, even in such circumstances where the terms of Rule 76 are engaged in such a manner, the Tribunal must also consider whether to exercise its discretion to make an award of expenses. The Tribunal notes that the claimant has not put forward any submissions in this regard. Indeed, he has failed to communicate with the Tribunal whatsoever in relation to arrangements for this hearing on expenses or the respondent's application.
- 10 11. The Tribunal is mindful that an award of expenses should be compensatory and not punitive (see **Lodwick v Southwark London Borough council 2004 ICR 884, CA**).
- 15 12. The Tribunal is also conscious that in terms of Rule 84 it may have regard to the paying party's ability to pay when deciding whether to make an award. The only information the Tribunal has in that regard is that during the claimant's attendance at the hearing on 31 January, he had indicated that he had come willing to give evidence on his means to pay a deposit order and was able to do so if necessary.
- 20 13. The Tribunal was also informed that the claimant is no longer in the employment of the first respondent and it has no knowledge as to whether he is in employment or indeed if he is in the UK. The claimant had made a comment during the hearing on 31 January that he was going to Brazil to deal with family issues. It may therefore be the case that the claimant is not in the country at present. The Tribunal simply has no information in that regard.
- 25 Communications with the claimant have been sent by email and the Tribunal is not aware of any reason why the claimant would not have been able to deal with such email correspondence even if he is not presently in the country.
- 30 14. An award of expenses is an exceptional step for a Tribunal to make. Careful consideration should be given to whether an award is appropriate and to ensure that an award is simply being made to compensate the other party. Prior to exercising its discretion as to whether to make an award, a Tribunal must be satisfied that the conduct of the paying party has been established to be within the ambit of Rule 76.

15. In the present case, the Tribunal is mindful that the claimant had been put on notice by the respondent that it was of the view that his claims had no reasonable prospects of success. He was aware of this at an early stage and the respondent had sent its written submissions on the matter to the claimant prior to the hearing which had been due to take place in December 2022. The claimant appeared to be an intelligent individual and it appeared to the Tribunal that the wide-ranging nature of his claims, which appeared to be made with no evidence to substantiate them demonstrated that the claimant had lost all sense of proportion of any difficulties he may have perceived that he had encountered during his employment with the first respondent. The Tribunal appreciates that evidence of discrimination is often difficult to find and may only become apparent during the substantive hearing itself. However, the claimant's claims were so vague in their nature, for instance alleging that he had been subjected to discriminatory conduct because of his religion (in that an interview was not rearranged for him) without putting forward any basis on which it could be said that the respondent knew what his religion was or how it was in any way relevant to making arrangements for an interview. He also alleged that he was harassed on grounds of disability, age, religion, sex and race without in any way seeking to specify why he thought any of these protected characteristics were at all relevant to any unfavourable treatment he may have been able to establish had taken place.
16. The claimant's conduct throughout the proceedings has been such that the respondent has had to attempt to defend allegations of discrimination which were vague, wide-ranging and largely incoherent. Various hearings have taken place and the claimant's conduct at the hearing on 31 January demonstrated a disregard for the Tribunal process and certainly gave no indication that he was pursuing his claims in good faith.
17. For all these reasons, the Tribunal has determined that it should exercise its discretion to make an award of expenses. The Tribunal went on to consider the extent of the award which should be made. The respondent had provided vouching for the award being sought and the Tribunal could see no reason why the respondent should not be compensated in full for the expenses

incurred by it in defending these proceedings. In these circumstances, and on the basis that the Tribunal can only speculate as to the claimant's ability to pay any award, the respondent is entitled to be compensation for the entire amount of expenses incurred in defending the claimant's claims. An award of £5523 is therefore appropriate.

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Employment Judge:	Jones
Date of Judgment:	14 September 2023
Entered in register:	15 September 2023
and copied to parties	

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