**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4104196/2023**

**Held in Glasgow on 11 and 12 January 2024**

**Employment Judge R King**

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| **Ms Nadine-Anne Harkness** | **Claimant**<br>**Represented by:**<br>**Mr G Bathgate - Solicitor** |
| **Falck Fire Services UK Limited** | **Respondent**<br>**Represented by:**<br>**Ms B Loughran - Solicitor** |

**DECISION ON RESPONDENT'S APPLICATIONS FOR COSTS, WASTED COSTS**

**AND STRIKEOUT FOLLOWING MEMBERS' DAY ON 16 FEBRUARY 2024**

**Summary**

1. These applications are made by the respondent further to the adjournment of the substantive hearing that commenced on 11 January 2024 and was part heard for the following reasons.

    - At an earlier case management preliminary hearing, the Tribunal had sought to identify three comparators who were representative of the 36 male aviation firefighters on "Tier 1" terms in relation to whom the claimant alleges she does "like work" but on less favourable "Tier 2" terms.

    - The claimant had in turn provided the names of three comparators.

    - As a result, the respondent attended the hearing having prepared a material factor defence in respect of only those three named comparators, believing they were truly representative of all male Tier 1

aviation firefighters and that this was all they required to do in order to answer the claim.

- At the hearing the claimant sought to advance a case that the three named comparators were not the only relevant comparators and that the entire group of 36 male aviation firefighters on Tier 1 terms and conditions were relevant comparators.

- The respondent was concerned that if that wider case was allowed to proceed it was unprepared to answer it because it did not have fair notice of it. As there were potentially numerous different reasons why the other 33 Tier 1 aviation firefighters were paid more favourably than the claimant it had not come prepared to advance material factor defences in respect of all of them.

- The parties agreed that the 3 named comparators were not truly representative of the entire group of Tier 1 aviation firefighters and that it was not possible to identify the full list of named comparators within the time allocated for the hearing.

2. In all the circumstances, the Tribunal concluded that it was in the interests of justice and in line with the overriding objective to adjourn the hearing and make directions for the continued date, in terms of which the claimant was directed to provide the respondent and the Tribunal with a full list of the named comparators she relied upon.

**Applications for costs and wasted costs**

3. The respondent makes an application for costs and wasted costs associated with the first day of the hearing. The respondent alleges that the day was wasted as a result of the conduct of the claimant and/or her representative, Mr Bathgate, because they failed in advance to name all relevant comparators in the claim. As a result, it prepared its defence only in relation to the three named comparators, which it believed it was reasonably entitled to do. In fact, those comparators were the only comparators she had named in her evidence. The respondent had therefore operated on a misconception that

the claim was limited to those three comparators when the claimant's position at the hearing was that all male Tier 1 aviation firefighters were to stand as comparators.

4. A further 3 days have had to be listed. If the claimant and/or Mr Bathgate had named all 36 comparators prior to the hearing it would now be completed in the two days originally fixed. The costs associated with the 11 January 2024 hearing had been incurred and rendered wasted only as a result of the conduct of the claimant and/or Mr Bathgate on her behalf.

*The claimant's response*

5. In response Mr Bathgate explains that he only received the hearing bundle on 8 January ahead of the hearing on 11 January. He only then became aware that the respondent had only included wage details of the three named comparators in the bundle. In any event the claimant did not consider that it mattered whether documents had only been disclosed in relation to the three named comparators because all Tier 1 aviation firefighters are paid the same and all Tier 2 aviation firefighters are paid the same. Consistent with that position, Mr Bathgate's examination in chief of the claimant had not been limited to the three comparators but had concentrated on the differences between Tier 1 and Tier 2 terms and conditions. Mr Bathgate was unaware that the respondent had misunderstood the claimant's position in relation to the comparators.

6. Mr Bathgate also relies on the *'unequivocal'* terms of the PH note following the case management preliminary hearing on 3 October 2023 in which the Employment Judge recorded the position in respect of male comparators for her 'like work' claim as follows.

*"The comparator/s were identified as being Tier 1 Aviation Firefighters. Mr Bathgate agreed to confirm the names of three of the comparators by 25 October 2023."*

7. Standing the terms of the PH note Mr Bathgate insists that he and the claimant acted reasonably in proceeding on the basis that the named comparators

were ‘three of the comparators’’ and not all of them. The application for costs is therefore opposed for all those reasons.

**The Tribunal’s deliberations**

*Costs*

8. Rule 76 provides that:

> *(1) The 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.”*

9. The Tribunal concludes that the course of the hearing on 11 January 2024 was materially affected by a genuine misunderstanding between the parties as to the extent of the case.

10. The Tribunal takes full account of the respondent’s concerns about the turn of events of 11 January 2024. It concludes that its belief that the claimant’s case was limited to the three named comparators was not unreasonably held.

11. However, the Tribunal also accepts that, standing the terms of the PH note, the claimant and Mr Bathgate were entitled to proceed, as they did, on the basis that they had provided the names of an illustrative, but not an exhaustive, group of comparators. In the circumstances their belief that they were entitled to rely on all of the 36 tier 1 aviation firefighters, and not only the three named comparators, was also not unreasonably held.

12. The Tribunal is also satisfied that while giving her evidence in chief she referred initially to the various pay disparities between herself and her Tier 1 colleagues without naming any individual comparators, and that it was only when referred to the named comparators’ pay information in the bundle of documents that she referred to them specifically. In the circumstances, it was

understandable that the claimant should be taken in her evidence to their pay information because that was all the pay information available.

13. The Tribunal was also satisfied that there was no indication that Mr Bathgate was aware of the respondent's misconception as to the extent of the case until that emerged during cross examination, and that the circumstances in which the hearing was adjourned were also not in the claimant's interest.

14. In all the circumstances the Tribunal does not conclude that either the claimant or her representative acted vexatiously, abusively, disruptively, or otherwise unreasonably in their conduct of the proceedings and therefore the respondent's application for costs is rejected.

*Wasted costs*

15. Rule 80 provides that:

> *"(1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs —*
>
> *(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or*
>
> *(b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay."*

16. Having made the findings set out above in relation to the application for costs, the Tribunal also concludes for some those same reasons that there was no improper and unreasonable or negligent act or omission on the part of Mr Bathgate and therefore the application for wasted costs is also rejected.

*Application for strikeout*

17. The respondent makes an application for strike out of the claim in terms of Rule 37. In support of that application, it submits that having been warned by the Tribunal judge not to discuss her evidence over the lunchbreak while she

was still on oath, the claimant then proceeded to discuss the case with her solicitor Mr Bathgate.

18. The respondent's application narrates that the respondent's counsel witnessed Mr Bathgate and the claimant sitting next to each other in the waiting room at lunchtime discussing the contents of the bundle which was before them. It is asserted that Mr Bathgate was *"in clear deep discussion with the claimant whilst she was under oath."*

19. In support of its application the respondent relies upon ***Chidzoy v British Broadcasting Corporation UKEAT/0097/17*** where the Employment Appeal Tribunal upheld the Employment Tribunal's decision to strike out a claim on the grounds of the claimant's unreasonable conduct when she was found to have discussed her case with a journalist during an adjournment while she was still on oath. In that case, the Employment Tribunal had found that a fair trial was no longer possible and that it had lost trust in the claimant who should have understood the clear instruction not to discuss the case whilst under oath and undergoing cross examination.

20. In the respondent's submission the claimant's conduct was on all fours with *Chidzoy* and her case should now be struck out because the conduct of Mr Bathgate and the claimant is irreversible, and a fair trial is now impossible.

*The claimant's response*

21. In response, Mr Bathgate admits that he *was* in discussion with the claimant whilst she was still on oath. However, he submits that having regard to the unexpected turn of events on the morning of 11 January he was taking instructions from the claimant only about the consequences of the Tribunal finding either that the claim should proceed on the basis of the three comparators named or, alternatively, adjourning the hearing.

22. In those circumstances he believed he was <u>required</u> to take the claimant's instructions, lest he fail in his duty towards her. In the circumstances, their conversation was in relation to what he believed was a *'procedural matter'* that was necessarily undertaken in order to take instructions. In Mr Bathgate's

submission the present case could be distinguished from ***Chidzoy*** and there was no reason for the case to be struck out.

**The Tribunal's deliberations**

23. Rule 37 provides that:

> *"(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*
>
> *(a) that it is scandalous or vexatious or has no reasonable prospect of success;*
>
> *(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*
>
> *(c) for non-compliance with any of these Rules or with an order of the Tribunal;*
>
> *(d) that it has not been actively pursued;*
>
> *(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)."*
>
> *(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing."*

*Proceeding without a hearing*

24. The claimant has not requested a hearing in respect of this application. As a general rule it is only the party against whom the application has been made who may insist upon a hearing as a matter of right. (***Duvenage v NSL Ltd UKEATS/0002/20***). Having considered matters fully, the Tribunal concluded that it was able to deal with the application on paper having regard to the parties' detailed submissions.

**The Tribunal's deliberations**

25. The Tribunal takes extremely seriously the implications of any witness discussing a case whilst on oath. However, it is not in dispute that the hearing had taken a highly unexpected turn by the end of the morning's evidence. Indeed, it had reached a pivotal moment at which the Tribunal had to determine over the lunch break whether the hearing should proceed on the basis of only the three named comparators or whether it would have to be adjourned, and what the consequences of either decision would be.

26. In those exceptional circumstances, the Tribunal concludes that it was reasonable for Mr Bathgate to take the claimant's instructions about the potential consequences for her claim depending on the Tribunal's decision reached over the lunch break. The Tribunal accepts Mr Bathgate's assurance that he spoke with the claimant only to that limited extent.

27. For that reason, the claimant and Mr Bathgate did not act unreasonably, and the Tribunal is satisfied there has been no breakdown in trust to the extent that a fair trial can no longer be conducted.

28. The respondent's application for strike out is refused.

R King

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**Employment Judge**
**17 March 2024**

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**Date**

**Date sent to parties** **19 March 2024**