5 **EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: 4100336/2023

10 **Hearing held in Chambers by CVP on 13 May 2024**

Employment Judge McFatridge
Tribunal Member E Hossack
Tribunal Member P Fallow

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Mr G Vasile	**Claimant** **Not Present or represented -no written representations**
Springfield Properties plc	**Respondent** **Represented by:** **Ms Grant,** **Solicitor -**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 The respondent's application for costs dated 14 December 2023 is granted. The claimant shall pay to the respondent the sum of Twelve Thousand, Five Hundred Pounds (£12,500) towards the respondent's costs in the proceedings.

35 **REASONS**

1. The claimant raised claims of unfair dismissal and race discrimination. As is set down in our previous judgment dated 29 November 2023, the

hearing was set down for five days in June 2023 but was not completed. The case was continued to 27 November 2023 however on that date the claimant did not appear. His representative advised that he had been unable to obtain instructions and withdrew from acting. In these circumstances the claim was dismissed. Further details of the background are contained in the Tribunal's judgment dated 29 November 2023.

2. At the hearing on 27 November the respondent's representative had indicated that they intended to make an application for costs. The application for costs was duly made on 14 December. Following this the Tribunal wrote to both parties seeking their views as to the appropriate procedure to deal with the costs' application. The respondent's representative indicated they were happy for this to be dealt with on the basis of written representations. There was no response from the claimant. Subsequently various orders were made with a view to obtaining the parties' written representations. Written representations were eventually received from the respondent on 21 March 2024. The respondent had previously sent a note of their costs to the Tribunal along with their original application in December 2023. They sought costs of £39,900 plus VAT (£47,880 inclusive of VAT). They also sought recovery of outlays amounting to £954.33 plus VAT (£1145.19). No representations were received from the claimant.

3. The panel met in private on 13 May 2024 to deal with the application. Our decision was as set out above and the reasons are as follows.

4. We first of all required to decide whether we were in a position to deal with the application for expenses at all. The claimant had not provided the Tribunal with an updated address and the information we had received from the claimant's representative was that he had been entirely unable to contact the claimant at this address or any other address and did not have a forwarding address either. He believed the claimant may have returned to Romania. All correspondence to the claimant from the respondent and the tribunal had perforce been sent to this address as there was no other address on file. In those circumstances we could not be at all certain that the claimant had received any of the correspondence. That having been said, our view was that the claimant had raised his claim

and that he was under a duty to the Tribunal to allow justice to be done and that included providing the Tribunal with his updated address details. He could not complain if having failed to update the Tribunal of his new address the Tribunal took actions in his absence. To decide otherwise would mean the Tribunal was effectively rewarding the claimant for his failure to keep the Tribunal advised of his correspondence address and his total failure to engage with his agent or the Tribunal.

5. Having considered the respondent's submissions we were in agreement that the claimant's conduct of the case met the threshold of unreasonableness set out in paragraph 76(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1. The Tribunal's view was that there were two aspects to this. The first was that the claimant had behaved entirely unreasonably in that he had simply failed to attend the Tribunal at the reconvened hearing in November 2023. He had entirely failed to engage with his agent during the period from June to November. The claimant was in the Tribunal hearing room when the date in November was fixed. He was well aware that he was required to attend or at least make arrangements for his agent to attend. He did not do so. We had little hesitation in finding that this was extremely unreasonable behaviour.

6. The second aspect was that we agreed with the respondent that the claimant's conduct of the claim was unreasonable in the way that he had dealt with the whole matter. We noted that the respondent had sent the claimant a costs warning prior to the date the hearing commenced in June. It was their view that the claim had no reasonable prospect of success. The respondent's representative then goes on to note that during cross examination the claimant frequently contradicted and/or departed from the terms of his ET1 and his further and better particulars and his witness statement. The Tribunal would agree that the claimant was not a credible witness. He sought to obfuscate rather than answer the questions put to him. The Tribunal also agreed with the respondent that the evidence of the claimant's own witness did not in any way corroborate his claim of race discrimination. He gave clear evidence that he had never witnessed racism by the respondent towards the claimant or anyone else.

7. The Tribunal's view was that on the basis of the evidence heard over the first five days there was very little prospect of the claimant's claim succeeding.

8. It was clear to us that whilst the claimant felt he had suffered a detriment by being moved to another job, the respondent's reasons for this were extremely clear and had absolutely nothing to do with his race or nationality.

9. The Tribunal's view was that we were not being asked here to make a finding that the case had no reasonable prospect of success. What we are being asked to do is make a finding that the claimant's conduct of the case, viewed overall, even excluding the failure to turn up in November, was unreasonable. In the Tribunal's view it was.

10. What we have here is an extremely weak case where frankly there was no evidence presented to us which showed any link between the claimant's treatment and the claimant's nationality. On the contrary, the evidence we heard, even from the claimant's witness, showed that the respondent had good reason for carrying out the actions which they did and that these reasons had absolutely nothing to do with the claimant's race or nationality. Our view is that in lodging and persisting such a weak claim and further compounding matters by prevaricating and contradicting himself in cross examination the claimant's conduct of the case was unreasonable in this respect also.

11. Having decided that the claimant's conduct met the test of unreasonableness in terms of Rule 76(1)(a) the Tribunal then required to go on to consider whether or not to exercise our discretion to award expenses at all and if so, how much should be awarded.

12. The Tribunal's view was that the claimant's conduct had been fairly egregious. The respondent had been placed to considerable expense in defending a claim which appeared to have little or no merit. The claimant's conduct of the case had meant the case lasted longer than it should have done and the respondent had been put to considerable additional time and trouble by the way the claimant had simply failed to turn up for the second hearing diet in November without giving any warning or explanation. The

respondent was seeking their whole expenses. We had no particular difficulty with the number of hours which the respondent's representative indicated she spent on the case. We accepted the figure of 114 hours was likely to be correct. The respondent's representative indicated that she had charged her time at £350 per hour being a comparable charging rate to that of an independent firm of solicitors within the Dundee area.

13. Whilst we have little doubt that it would have cost the respondent £350 per hour or so in order to obtain the services of a representative of comparable quality we did not consider that this was a relevant consideration. The fact of the matter is that the respondent's representative was an in-house solicitor and the respondent will presumably have paid her far less than this. We do not have any detail as to exactly how much but would consider that in those circumstances a figure closer to £100 per hour was appropriate.

14. The Tribunal also did not consider that it would be appropriate to add VAT to any costs order given that if the representative was an in-house solicitor there would usually be no question of VAT being charged for her services and secondly if VAT was charged then presumably this would be recoverable by the respondent. The same point in respect of the VAT for the outlays applies since if VAT was payable this would be recoverable.

15. We did consider whether it would be appropriate to simply remit the respondent's account to the Sheriff Clerk for taxation but decided that in terms of the overriding objective this would not be appropriate. It would simply prolong the proceedings and there was no guarantee that the claimant would in fact participate in any such taxation.

16. It was also our view that we required to take into account ability to pay so far as we had any information regarding this. In this connection the Tribunal had very little information other than that following his dismissal the claimant had not immediately obtained other work in the UK. We did however consider that it very likely that he was working in Romania and we took on board the respondent's comments regarding his skills. We considered that we were entitled to take into account the fact that the claimant is a skilled builder's labourer who ought to be able to command

a reasonable rate of pay virtually anywhere. We are entitled to take this future earning capacity into account and have done so.

17. Taking a global approach to all of the above matters including ability to pay so far as we knew it, we considered that it would be appropriate to award the respondent costs in the sum of £12,500. The claimant is ordered to pay the respondent this sum.

Employment Judge: I McFatridge
Date of Judgment: 15 May 2024
Entered in register: 22 May 2024
and copied to parties