EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100220/2024

Final Hearing Held at Edinburgh by Cloud Video Platform on 3 June 2024

Employment Judge A Kemp

Mr Naeem Fakher	**Claimant** **In person**
Social Care Alba Ltd	**Respondent** **Represented by:** **Ms K Howard** **Solicitor**

JUDGMENT

The application for expenses by the respondent is refused.

REASONS

Introduction

1. A Judgment dated 4 April 2024 was issued to the parties in this case on 5 April 2024 which held that there had not been a contract between the parties, and dismissed the Claim.

2. After the Judgment was issued, the claimant made an application for expenses under Rule 76 by email sent on 1 May 2024. It referred to what was described as a costs warning letter sent to the claimant on 26 March 2024. It stated that the claim was "misconceived" and referred to it as "spurious". It offered the claimant £250 subject to a COT3 and if not accepted it stated that the respondent reserved the right to bring it to the

Tribunal's attention and to seek costs (expenses) from the expiry of the offer being at 5pm on 27 March 2024.

3. The respondent also provided with the email applying for expenses what it termed a Schedule of Costs for the expense of defending the claim, part of which is for the period after 27 March 2024.

4. The claimant replied on 8 May 2024 stating his position, which included that he had not seen the email of 26 March 2024. It was taken as opposition to the application. The present hearing was fixed so that both parties could set out their respective positions.

Submission for respondent

5. The following is a very brief summary of the submission made, which was based on the terms of the email making the application. The claim put forward had no prospect of success. An email had been sent to the claimant warning as to expenses on 26 March 2024 and making an offer to settle the claim, but the claim proceeded in the face of that. The reference at the heart of the case had been provided in the Bundle of Documents sent on 26 March 2024. The claimant had been aware of its terms, and that the respondent considered the reference not to be satisfactory. The Response Form had made clear that there was no jurisdiction for parts of the claims made, and that there had been a conditional contract where the condition, in relation to the reference being satisfactory in the opinion of the respondent, was not fulfilled. An award of expenses should be made.

Submission by claimant

6. Again the following is a very brief summary of the submission. The claimant argued that he had not been unreasonable. He explained his position in relation to the offer, which he thought was one he had accepted, and that he had a job to go to with the respondent. He had resigned from his last position, had communicated with HR of the respondent (emails as to which he had provided to the Tribunal), and had completed a blank form. He had not seen the email offer. On receiving the Bundle, which he accepted included the reference and was sent to him on 26 March 2024,

he had little time before the Final Hearing. He suffers from PTSD and anxiety, and finds taking decisions quickly difficult. He provided details of his financial circumstances as I had asked of him, as that was required under Rule 84 if an award was made.

Law

7. Rule 2 of the Rules found in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules") provides as follows;-

> "**2 Overriding objective**
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> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
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> (a) ensuring that the parties are on an equal footing;
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> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
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> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
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> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

8. Rules 74 - 77 provide, so far as relevant to this case, as follows:

> "**Definitions**
>
> **74**
>
> (1) 'Costs' means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to

costs (except when used in the expression ‘wasted costs’) shall be read as references to expenses.

(2) ‘Legally represented’ means having the assistance of a person (including where that person is the receiving party's employee) who—

(a) has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates' courts;

(b) is an advocate or solicitor in Scotland; or

(c) is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland.

(3) ‘Represented by a lay representative’ means having the assistance of a person who does not satisfy any of the criteria in paragraph (2) and who charges for representation in the proceedings.

Costs orders and preparation time orders

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(1) A costs order is an order that a party (‘the paying party’) make a payment to—

(a) another party (‘the receiving party’) in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;

(b) the receiving party in respect of a Tribunal fee paid by the receiving party; or

(c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal……

When a costs order or a preparation time order may or shall be made

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(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 ……..

Procedure

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A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application."

9. The basic position on expenses is summarised in ***Employment Tribunal Practice in Scotland*** paragraph 12.01 as follows:

> "The concept underlying expenses in the employment tribunal has always been that a person who, in good faith, considers that they have a good claim or defence, should not be inhibited from taking or defending proceedings for fear of liability for expenses and, therefore, that tribunals should not normally award expenses."

10. That expenses are not normally awarded in the Employment Tribunal has been addressed in a number of cases including ***Gee v Shell UK Ltd [2003] IRLR 82***. Expenses may however be awarded if to do so falls within the terms of the Rules. It is an exercise of discretion which includes taking into account the overriding objective in Rule 2. In ***Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78,*** the Court of Appeal stated, in the context of conduct of the case:

> "The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had".

11. Costs is the term for expenses used in England. That the Tribunal has a wide discretion was confirmed in ***FDA v Bhardwaf [2022] EAT 97.*** An award of expenses made by a Tribunal in Scotland was upheld by the EAT in ***Burns v Carrie EATS/0085/04*** on the basis that the claim was wholly misconceived and never had any reasonable prospects of success. The fact that a party acts for him or herself, a party litigant in Scotland and a litigant in person in England, is a factor that may be taken into account - ***AQ Ltd v Holden [2012] IRLR 648*** but will not necessarily prevent the award being made ***Vaughan v London Borough of Lewisham [2013] IRLR 713*.**

Discussion

12. I considered that it was not in accordance with the overriding objective to make an award of expenses. Whilst the respondent's solicitors sent an offer to the claimant that was in the circumstances entirely reasonable, it did not seem to me that the fact of such an offer made making an award necessary. All the circumstances require to be considered. Separately whilst I have found for the respondent, essentially for the reasons that they gave, that does not mean that pursuing the claim was unreasonable in the sense used in the Rule.

13. Firstly the claimant said that he had not seen the email offer. Whilst I did not hear evidence on oath, I had stated that the claimant was giving genuine honest evidence in the Final Hearing within the Judgment, and it did not appear to me that there was a basis to form a different conclusion in this respect. I accept that the respondent sent the email, and that it was to the correct email address, but there was no read receipt or similar evidence put before me. There was no response rejecting the offer. There was no evidence of the matter being followed up with him, by a form of reminder for example, or confirmation that the offer had been not accepted timeously and that expenses were therefore being sought.

14. But that was not the only basis on which the respondent put its case. It argued that from the Response Form, as well as the documents in the Bundle sent to the claimant on 26 March 2024, that it was obvious that the claim would not succeed. They argued that it was misconceived, in part

outwith the jurisdiction of the Tribunal, and that it was unreasonable to pursue it. They noted that the claimant had been provided with the reference that the respondent had considered not satisfactory or suitable with that Bundle, and the terms of his email of 8 May 2024. I address that further below.

15. Secondly the claimant is a party litigant. What is obvious to a solicitor is not so obvious to someone not legally qualified. He thought that from matters such as being given at least a notional start date, and what he said was a blank document to complete with information such as bank details, as well as emails sent to him by HR of the respondent (not all of which were before me for the Final Hearing but which he sent to the Tribunal for this hearing), and that he had resigned from his last position believing that he had a new contract with the respondent, that he did have a contract. That was not correct, for the reasons found in the Judgment, but it appears to me that the claimant's position was not so unreasonable that an award of expenses is appropriate on the basis that the claim was, and always was, misconceived.

16. If the position was as clear and obvious as is being proposed, one wonders why the respondent called the witness they did. That they did so (for entirely appropriate and understandable reasons) indicates to me that the matter was contentious to a degree at least, and required that evidence to be heard. The questions included whether the reference had been regarded as satisfactory, and whether that was permissible. If, as discussed during the hearing, the reference had been glowing and unconditional in its support, that would not have been a basis not to proceed with the offer. The claimant cross-examined Ms Senna, again entirely appropriately, on her reasons for not proceeding, and I found after his having done so that her evidence was to be preferred, but that is a finding after hearing all the evidence. In my view that is the answer to the point that the reference was provided to the claimant on 26 March 2024. It was, but issues that the claimant could and did raise about it remained.

17. Thirdly English is not his first language. Whilst he has a reasonable command of English, it is not perfect. Indeed it was the part of the reference in relation to communication that was important in the decision

of the respondent not to proceed with employing him. Whilst the claimant did not believe that the reference was correct and fair, the importance of communication to the role was a matter on which I accepted the witness's evidence for the respondent.

18. Fourthly he genuinely believed that he had been made an offer (as the Judgment itself referred to) and whilst I considered that he was wrong in that, it did not appear to me that that was itself a basis for holding his pursuit of the claim unreasonable. Whilst some of the claims were indeed outwith jurisdiction, such as that in relation to a subject access request, it is not always obvious to a party litigant, particularly someone with English not the first language, that that will be the case. I accept that the claimant sought to remedy a matter that had caused him loss as he had resigned his former post, and did what he could when framing the Claim. The hearing in effect proceeded on the basis of a claim of breach of contract, that being the issue on which the Tribunal did have jurisdiction. In that, one issue was the eLearning that the claimant carried out as part of the process of his application for the role. He said in evidence that that had been paid in other situations, but he accepted that no specific agreement to do so had been made with the respondent. That he accepted that was to his credit, and confirmed my impression that he was seeking to give honest evidence, and whilst his understanding of what may constitute a legal obligation is incomplete, that is in the context of the partly litigant and circumstances I have described. It does not follow that it is unreasonable given all the circumstances.

19. Finally, whilst he said in his 8 May 2024 email that if he had been provided with the reference prior to the claim he would not have proceeded with it, or words to that effect, and he had seen the reference in the Bundle sent on 26 March 2024, such that he had about a week to consider it, his view was that the reference was not so obviously unsatisfactory that it was the basis to withdraw the offer, and he cross examined on that general basis. He said that he suffered from PTSD and anxiety and found taking decisions quickly difficult. It was not beyond argument that the reference was not one that would lead to the offer being withdrawn. It had some aspects supportive of the claimant, and others that were at least partly not so. I held, as indicated above, that his position about the reference was

not the one to uphold, and I preferred the evidence of the witness on that, but his position was not one that I consider, overall and in all the circumstances of the case, amounts to what is unreasonable under the terms of the Rule.

20. For these reasons, whilst I understand the respondent's sense of frustration that they set out their position clearly in the Response Form, and sought to resolve matters with an offer, all of which was reasonable, that is not the test. It is whether or not the claimant had acted unreasonably in bringing and pursuing the claim. The circumstances of the present case are very far away from those in which awards of expenses have been made. Whilst each case depends on its circumstances I considered that this case was not one which was appropriate for such an award.

21. I refused the application for expenses accordingly.

Employment Judge: **A Kemp**
Date of Judgment: **06 June 2024**
Entered in register: **06 June 2024**
and copied to parties 06/06/2024