EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103448/2023

Held in Glasgow via Cloud Video Platform (CVP) on 20 June 2024

Employment Judge Cowen
Members Mr J McCaig & Mrs J Lindsay

Mrs S Hastings	**Claimant** **Represented by:** **Miss A O'Donnell – Solicitor**
Commissioners for HM Revenue and Customs	**Respondent** **Represented by:** **Mr R Ashmore - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Respondent shall pay the Claimant expenses in the sum of £15,141.

REASONS

Background

1. Following a judgment of the Tribunal dated 1 March 2024 upholding the Claimant's claim for disability discrimination and awarding compensation; By way of a written application dated 28 March 2024, the Claimant made a claim under r.76 Employment Tribunal Rules, for expenses.

2. The Tribunal received a response to the expenses application from the Respondent dated 4 April 2024, setting out their grounds of objection to the application and giving their consent for the matter to be dealt with on the papers. The Claimant also agreed to a paper consideration on 12 April 2024. The Tribunal therefore met by CVP on 20 June 2024 to consider the application and give the following judgment;

3.

Claimant's submission

4. The Claimant submitted that the Respondent's defence had shown no reasonable prospect of success, but had been pursued and that in doing so, the Respondent had acted unreasonably in two specific ways – by failure to bring a key witness and by failure to agree the Claimant's expert evidence.

5. The Claimant set out that she had been successful in each of her four claims and that the Respondent had not put forward a feasible defence to any of her points. She submitted in relation to the failure to make reasonable adjustments (PCP) that the Respondents had relied on documentary evidence which had been disclosed in advance of the hearing and that their own witness had confirmed that adjustments which the Claimant needed could have been made as they were made for other employees or that the relevant space or people to assist were available. Therefore the Respondent stood no prospect of defending these points and knew that to be the case in advance of the hearing.

6. With regard to failing to provide an auxiliary aid; the Claimant asserted that the Respondent had disclosed emails which showed that the Respondent knew that there was hardware which was compatible which could be used to assist the Claimant. The Respondent therefore ought to have known that it had no reasonable prospect of defending this point. Further, that the Claimant had commissioned an expert report which the Respondent did not accept, but produced no evidence to counter.

7. In respect of the delay in responding to the Claimant's application, the Respondent had accepted that the delay was caused by something arising in consequence of the Claimant's disability, but offered no legitimate aim for this conduct.

8. Similarly the decision to withdraw the offer of a job was also conceded as something arising from the Claimant's disability. Although the Respondent had asserted that the legitimate aim was providing a service, the Tribunal found that few steps to try to accommodate the Claimant had been taken and therefore it was not a proportionate means of achieving that aim. The

Respondent knew this from their documentary evidence and therefore knew that it did not have a reasonable prospect of success.

9. The Claimant also asserted that the Respondent had been unreasonable in their conduct of the claim by not calling Christine Kilmartin or any witness with technical knowledge of the adjustments which they said had been considered.

10. Whilst the Respondent indicated a week prior to the hearing that they would not be bringing Ms Kilmartin to the hearing, it was not until Day 3 of the hearing that they explained that she was unfit and had been for 2-3 weeks. This was unreasonable conduct.

11. Finally the Claimant asserted that it should not have been necessary for them to commission an expert report, as the Respondent was aware that technical solutions were available and compatible to the Respondent's systems. The Respondent's failure to agree this evidence and the requirement to call the expert to give evidence was also unreasonable, particularly when no serious challenge to the evidence was made in cross examination.

Respondent's submission

12. In response, the Respondent set out its pleaded defence to each of the claims made by the Claimant, despite the fact that their own witnesses had not supported some of these points and the Tribunal had given a judgment rejecting these defences.

13. The Respondent's submissions did not provide any detail of why they asserted that the Respondent had any reasonable prospect of success at trial. Given that their position had been rejected by the Tribunal at the hearing, there appeared to be nothing within the Respondent's submission to counter the Claimant's application.

14. In relation to the assertion of unreasonable conduct in the proceedings, the Respondent explained (for the first time) that the Respondent's key witness had suffered a stroke five weeks prior to the hearing and that they were told her condition was serious and she would not return to work or provide evidence for the foreseeable future. The Respondent chose not to apply for

a postponement, but to seek to settle the case. However, they were unable to settle within the authorised limit provided by HM Treasury and were unable to gain authority for a higher figure.

15. The Respondent finally asserted in relation to the NATTC report that this was not produced until shortly before the hearing and there was insufficient time to agree the content, which the Respondent thought was contrary to the evidence they held.

The Law

16. The Tribunal takes into account that costs are the exception and not the rule; *Yerrakalva v Barnsley Metropolitan Borough Council* [2012] ICR 420, CA.

Rule 76.— When a costs order or a preparation time order may or shall be made

(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;

(b) any claim or response had no reasonable prospect of success [; or]

17. The test to be applied is a three stage test; firstly whether the statutory ground is met, secondly whether to exercise the discretion to make an award of expense and thirdly to assess the actual amount to be awarded.

18. In considering the issue of conduct, the Tribunal can consider the conduct of the parties representative. If the party is represented and has acted ‘otherwise unreasonably’ in their conduct via their representative, it remains open to the Tribunal to make an award against the party under r76(1)(a).

19. In deciding whether to exercise its discretion the Tribunal reminded itself of *Scott v Inland Revenue Commissioners 2004 ICR 1410, CA* where Lord Justice Sedley observed that *'misconceived'* for the purposes of costs under the Tribunal Rules 2004 included *'having no reasonable prospect of success'* and clarified that the key question in this regard is not whether a party thought he or she was in the right, but whether he or she had reasonable grounds for doing so.

20. Under r.76(1)(b), the Tribunal must consider whether there was a reasonable prospect of success of the Respondent successfully defending the claim.

21. The Tribunal must only award expenses from the point where the claim had no reasonable prospect of success. The fact that the claim may have, on the papers, appeared to have prospects initially, does not prevent an expenses order where that prospect later disappeared.

22. A further factor to consider when deciding whether to exercise the discretion is whether the paying party has had the benefit of legal advice.

23. The Tribunal is also entitled to take into account the means and resources available to the paying party.

Decision

24. The Tribunal considered whether the Respondent's defence had no reasonable prospect of success in respect of each of the four claims:

    a. <u>Failure to make reasonable adjustments - PCP</u>

       The Respondent's own evidence, both documentary and witness evidence supported the allegation that there were adjustments which the Respondent could have made to assist the Claimant to carry out the role. Conversely there was not evidence to support the Respondent's contention that adjustments could not be made.

    b. <u>Failure to make reasonable adjustments – Lack of Auxilliary Aids</u>

The Respondent had internal emails which showed that aids could be applied, that they were compatible with the Respondent's phone system.

c. Discrimination arising from Disability – Delay

The Respondent admitted that the delay was as a result of something connected to the disability – i.e, the need to make adjustments. The Respondent put forward no evidence to support a legitimate aim and therefore the chance of a successful defence was nil.

d. Discrimination arising from Disability – Withdraw of offer

Once again the Respondent admitted the withdrawal arose due to something connected to the disability. The assertion that there was no solution which would allow the Claimant to engage in the effective delivery of service was not supported by their own evidence, which contradicted this point. On that basis it was never going to be possible to successfully defend the claim.

25. The point at which the Respodent would have known that their evidence supported their pleaded case, came when all documents held by the Claimant were disclosed to the Respondent. At that point the Respondent would have known all the evidence which would become available to the Tribunal. Despite being aware of the documentary evidence and presumably their own witness evidence, the Respondent did not take sufficient steps to settle the claim.

26. The Tribunal considered whether the Respondent conducted themselves unreasonably in failing to bring the evidence of Christine Kilmartin and failing to agree the NATTC evidence.

27. The Tribunal accept that the illness of a key witness such as Ms Kilmartin was unfortunate and the Respondent cannot hold responsibility for her unavailability, the issue with regard to conduct is about how the Respondent dealt with the situation. It is clear that that Respondent did not tell the Claimant prior to the hearing why Ms Kilmartin could not attend, or the fact that it was unlikely that a postponement would assist the situation. More importantly the

Respondent chose not to tell the Tribunal this during the course of the hearing and it was not until cross examination of another Respondent witness that her absence due to illness was exposed. Even then, the Respondent did not clarify their situation.

28. Furthermore, having had a few weeks' notice of Ms Kilmartin's absence the Respondent did not arrange an alternative witness or witnesses to cover the evidence which she would have given. Members of the IT department, or those consulted about adjustments could have been brought to Tribunal (and the Claimant's solicitor notified). But the Respondent instead did not bring a key witness and did not explain to the Tribunal why she was not there.

29. This left the Claimant without the opportunity to ask key questions and the Tribunal without explanation of the steps taken by the Respondent. Whilst this conduct was suboptimal, the Tribunal did not consider that it amounted to unreasonable conduct of the claim.

30. The Claimant obtained expert evidence in relation to the hardware and software which would have been appropriate to help the Claimant. This was obtained without the approval of the Tribunal or knowledge of the Respondent. However, given the circumstances, it is understandable why the Claimant took this step.

31. The Respondent was provided with this evidence a week before the hearing and therefore had the opportunity to both review the evidence itself and to consider whether it would oppose the content and require Mr Catt, the author of the report to attend and give evidence. The Respondent chose to object to the evidence and to cross examine Mr Catt. The cross examination did not contradict anything he had suggested, as the Respondent's own evidence supported similar equipment and software.

32. The Tribunal consider that the Respondent could and should have avoided the expense of Mr Catt giving evidence and therefore it was unreasonable conduct to have opposed this evidence, given what the Respondent clearly knew of their own evidence by that time.

33. The conclusion of the Tribunal was that there was both unreasonable conduct and no prospect of success on the Respondent's side in this case and therefore an expenses award may be appropriate.

34. The Tribunal then considered whether to exercise its discretion, taking into account all the circumstances including the fact that the Respondent is one of the key Government departments with extensive resources.

35. The Tribunal considered that whilst the Respondent may have considered that a defence of the claim was possible at the pleading stage; at the point in early January 2024, where the parties had made disclosure of documents, it would have been apparent to the Respondent that their documents did not support the pleaded case, nor the evidence of the witnesses.

36. By this time, the Respondent was also aware that Ms Kilmartin was not available to give evidence. The Tribunal therefore concluded that from 3 January 2024 onwards, the Respondent was aware that their defence on both the failure to make adjustments claim (s.20) and the something arising from disability claim (s.15) were unsustainable.

37. To continue to defend the case (as the Respondent continues to do in answer to this expenses application) is misguided and inappropriate and is conduct worthy of an expenses claim.

38. The Tribunal acknowledges that the Respondent took steps to try to settle the claim but did not have sufficient financial authority from HM Treasury to do so. The Tribunal do not consider that to be a point of mitigation. The impact of failing to be able to settle the claim is that the Claimant was put through the stress and upset of a three day hearing, that is no different to the Respondent failing to engage in settlement negotiations at all, and therefore does not act as mitigation.

39. The Tribunal concluded that from 3 January 2024, the Respondent was aware that their documentary and witness evidence did not support their pleaded case and that they had no prospect of success. The claim ought to have been settled at this point, but it was not and the Respondent's actions forced the

Claimant to come to trial and prove her case. The Tribunal have therefore awarded the Claimant her expenses from this point forward, in line with the Schedule of Expenses provided by the Claimant. This amounts to £13,767.

40. The Tribunal also considered that it was due to the persistence of the Respondent that the Claimant felt that expert evidence was required. Whilst this was not discussed with the Respondent prior to instruction, as would normally be expected, it was understandable that the Claimant obtained assistance from an expert before approaching the Respondent, in these circumstances. The lack of agreement by the Respondent to the report which was produced a week prior to the hearing was a further flaw in the Respondent's conduct. Had the Respondent taken the time to carefully read the report and obtain instructions, they would have recognised that what Mr Catt was saying was that not only could the Respondent have made adjustments, but that they in fact already had some of the software licences in order to do so.

41. The decision to continue to contest the evidence and require Mr Catt to give evidence to the Tribunal was a further error in the conduct of the case by the Respondent. The cross examination of Mr Catt did not produce any useful evidence for the Tribunal. No alternative was put to Mr Catt. Essentially this was a waste of both time and resources in the Tribunal.

42. The Tribunal concluded that the expense of both the report and the attendance of Mr Catt at the Tribunal should be paid by the Respondent. A further £1,374.

43. The total award of expenses which the Respondent must pay the Claimant is £15,141.

Employment Judge: **S Cowen**
Date of Judgment: **27 June 2024**
Entered in register: **28 June 2024**
and copied to parties