EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104531/2024

Final Hearing held in person in Glasgow on 28 October 2024
Employment Judge: Russell Bradley
Tribunal Member: Mr R Taggart
Tribunal Member: Mr R McPherson

Mr A Seymour	**Claimant in person**
L Mackie	**First Respondent Represented by: M Leon - Solicitor**
D McLean	**Second Respondent Represented by: M Leon - Solicitor**
Sky Subscribers Services Ltd	**Third Respondent Represented by: M Leon - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that the respondents' application for expenses is refused.

REASONS

Introduction

1. On 3 June 2024 at a case management preliminary hearing EJ McCluskey fixed a five day final hearing in this case. It was to start on Monday 28 October. She made various orders to do with preparation for that hearing. The claims were of unfair (constructive) dismissal and direct discrimination. It was recognised at that hearing that the claim of unfair dismissal was competent only against the third respondent, the claimant's employer.

2. On Friday 25 October (at 13.30) the claimant wrote to the tribunal, copied to Mr Leon to say, "*Please take this email as confirmation that I am withdrawing my case. I have been ill at the thought of facing Lara & Dannette again and this has made my mental health suffer. Because of this, I am withdrawing my tribunal case*."

3. At 16.56 on 25 October the respondent made an application for expenses. It sought £8000 said to represent the costs it had incurred "*in instructing professional counsel to prepare for and attend the hearing on its behalf*". The application relied on an assertion that (a) the timing and reason given for the claimant's withdrawal "*at this late stage*" amounted to unreasonable conduct and (b) his claims had no reasonable prospect of success. The email set out support for each ground. It said that Mr Leon would expand on the reasons. It requested that the claimant attend this heairng to give submissions in answer to its application. It noted the claimant's concerns with the two individual respondents and undertook to ensure that they did not attend "*to avoid distress to the Claimant*."

4. On Saturday 26 October the claimant emailed to oppose the application. He set out 5 grounds, one of which was that the application should be dealt with on written submissions. As is obvious, the claimant attended at this hearing and made oral submissions to supplement his email.

5. Meantime, following the claimant's withdrawal and in the course of the afternoon on 25 October, a legal officer signed a judgment dismissing the claims, albeit it had not been issued to the parties before this hearing.

The Issues

6. The application is made pursuant to Rule 76(1)(a) and (b) of the Employment Tribunal Rules of Procedure 2013. We set it out at paragraph 11 below.

7. From the application and opposition the issues for us are:-

1. In withdrawing the claim at the stage that he did and for the reasons he relied on, did the claimant act unreasonably?
2. Alternatively or in addition did the claims have "*no reasonable prospects of success*"?
3. If the answer to question 1 and/or 2 is "*yes*", is it appropriate to exercise our discretion in favour of awarding expenses against the claimant?
4. If the answer to question 3 is "*yes*", what award should be made?

Submissions

8. We mean no disservice to either party by not repeating their oral submissions which we took into account in addition to their emails.

9. On the first question, the respondent argued that the claimant's conduct, in withdrawing the claim when he did and for the reason he relied on, was unreasonable. Mr Leon referred to and provided us with a copy of the judgments in th Court of Appeal in the case of ***McPherson v BNP Paribas (London Branch)*** [2004] I.C.R. 1398 He invited us to draw the inference that the claimant had decided, earlier than 25 October, not to proceed with the final hearing. He said the inference could be drawn from (i) the fact that the claimant had not downloaded various parts of the bundle which were sent to him via links on various occasions on and after 30 September and (ii) his failure to provide an updated schedule of loss by 14 October which had been noted in Order 3 from EJ McCluskey's hearing. On the latter, he maintained that the claimant was in breach of the Order. On the

claimant's reason for withdrawing the claim when he did, it was said that (i) it was not vouched by medical evidence, (ii) he should have known from the start of the claim that by naming the first two respondents it was inevitable that he would have to "*face them*" and (iii) he was as it turned out well enough to attend this hearing. The suggestion was that there was no real basis to support the reason itself.

10. On the second question Mr Leon accepted that the respondent had not issued a "*costs warning*" letter to the claimant. Nonetheless (and as set out in the respondent's email of 25 October) taken at its highest on the pleadings and the agreed issues there is no claim of discrimination against the first respondent. Logically, therefore that claim could not succeed against her. Separately, the claim of constructive dismissal relies on the last straw doctrine but on a proper analysis the conduct relied on by the claimant as being the last straw (said to have occurred at a meeting on 8 March 2024 with the second respondent) could not possibly be regarded as such. Reference was made to her note of that meeting (**page 335**). In addition, it was said that he waited 12 calendar days after 8 March before resigning.

Law

11. Rule 76(1) provides, "*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*."

12. "*It is well-established that the first question for a Tribunal considering a costs application is whether the costs threshold is crossed, in the sense that at least one of r 76(1)(a) or (b) is made out. If so, it does not automatically follow that a costs order will be made. Rather, this means that the Tribunal may make a costs order, and shall consider whether to do so. That is the second stage, and it involves the exercise by the*

Tribunal of a judicial discretion. If it decides in principle to make a costs order, the Tribunal must consider the amount in accordance with r 78." ***Radia v Jefferies International*** [2020] IRLR 431 at paragraph 61.

13. " *…the remarks in earlier authorities, about the meaning of 'misconceived' in r 40(3) in the 2004 Rules of Procedure (Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, SI 2004/1861, Sch 1), are equally applicable to this replacement threshold test in the 2013 Rules. See in particular Vaughan v London Borough of Lewisham UKEAT/0533/12/SM, [2013] IRLR 713 at paras 8 and 14(6). However, in such a case, what the party actually thought or knew, or could reasonably be expected to have appreciated, about the prospects of success, may, and usually will, be highly relevant at the second stage, of exercise of the discretion*." (***Radia*** at paragraph 64.)

14. "*In considering whether the respondent should have known that a response had no reasonable prospects of success, a respondent is likely to be assessed more rigorously if legally represented: see for example* ***Brooks V Nottingham University Hospitals NHS Trust*** *UKEAT/0246/18/JOJ, at paragraph 3*." (cited at paragraph 26 in the judgment of His Honour Judge James Tayler in ***Opalkova v Acquire Care Ltd*** Case No: EA-2020-000345-RN (previously UKEAT/0056/21/RN)).

Discussion and decision

15. In our view the application has not crossed either threshold.

16. On the question of unreasonable conduct, we took account of the paragraphs (29 and 31) from ***McPherson*** to which Mr Leon referred. We noted the reference (in paragraph 31) to a failure to comply with orders in that case as an example of unreasonable conduct. In our view the claimant has not "*not complied*" with Order 3 of 3 June. It says "*The schedule of loss must be updated, if necessary, by 14 October 2024*." It is relevant to note that the claimant had produced a schedule (**page 32**) presumably by 1 July (as per Order 2). The claimant accepted in his oral submission that while his schedule referred to earnings in his current employment which (despite requests) he had not vouched, his claim was not for loss of

earnings in the period after the termination of his employment with the third respondent. There was thus no need to update the schedule. On the claimant's own analysis of his loss, we agree. The words "*if necessary*" must have some meaning in the context of the Order. The party primarily responsible for deciding if a second schedule was necessary was the claimant. One other point is worth noting. Absent any other information about loss, it would have been open to the respondent to argue that his actings in attempting to mitigate loss were unreasonable. But strictly speaking the point is irrelevant. We did not draw the inference which Mr Leon invited. The claimant had a full paper copy of the bundle with him at this hearing. He said (and we accepted) that there was therefore no need for him to have downloaded a virtual copy. Neither of the respondents' bases founded the inference we were invited to draw. As far as his reason was concerned, there was no medical evidence to vouch his state of health. But we accepted what the claimant said to the effect that his GP operates an online appointment booking service which would not have given him an appointment in time to seek any vouching. Separately, and while we accept that on convening the first and second respondent the claimant knew (or should have known) that he would "*have to face them*", our view was that the relevant question is; was his mental state healthy enough by 25 October so that he could do so? We accepted his position which was that it was not. We had no reason to doubt the claimant's word that by 25 October the idea of facing them in person had "*made his mental health suffer*." In our view the reason for withdrawal of the case, when it was withdrawn, was a genuine one.

17. On the second question, we do not accept that the claims had "*no reasonable prospects of success*." It might be said that on the claimant's pleadings that there was no relevant case of discrimination against the first respondent. But there remained that claim against the second and third respondents and Mr Leon did not argue the contrary. On the face of it therefore there was no argument that the claim of discrimination against at least those respondents had no reasonable prospects. On the constructive dismissal claim, the claimant said that he did not agree that **page 335** was an accurate representation of his conversation with the

second respondent. Had the hearing proceeded, that would have been an issue of fact for us to decide. Separately, he told us that he resigned later using an online portal whereby he provided his reason for leaving using some "*drop down options*." Mr Leon did not contradict that assertion. It appeared that there was not in our bundle a paper copy of that information. The whole reason for the claimant's resignation would in all likelihood have become clear from the claimant's oral evidence. Put shortly, we were not willing to accept that the claim of unfair dismissal had no reasonable prospects of success without some further enquiry into the factual basis behind it. It was relevant that the respondent had not applied to strike out that claim. Based on what we heard, it would have been open to it to have made that application much earlier in this litigation.

What expenses were sought

18. In its email the respondent sought £8000. Before us, Mr Leon restricted it to £6000. We understood from the respondent's email of 25 October and what Mr Leon said that that lower amount represented his instructions to prepare for a five day hearing and his attendance on the first day. In answer to our question, he agreed that that lower amount was accurate and did not exceed the costs which the respondents were liable to pay. He agreed that if an award were made it should include VAT. Ultimately, his position was that if we were not with him on his application for £6000 + VAT then we should award an amount which we consider fair and reasonable in the circumstances. It was unnecessary for us to do so.

Answers to the issues

19. We answer the questions as follows:-

    1. No
    2. No
    3. N/A
    4. N/A

R Bradley

Employment Judge

04 November 2024

Date of judgment

Date sent to parties **06 November 2024**