EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4102570/2024 Hearing in Chambers on 8 October 2024

Employment Judge: M A Macleod

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Ms C Mahamba	**Claimant** **Represented by** **Ms L Munjoma** **Lay Representative**
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Clinical 24 Staffing Limited	**Respondent** **Represented by** **Mr A Williams** **Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the respondent's application for expenses under Rule 76(1)(a) of the Employment Tribunals Rules of Procedure 2013 succeeds, and that the claimant is ordered to pay
30 **the sum of SEVEN THOUSAND FIVE HUNDRED POUNDS (£7,500) to the respondent in respect of expenses incurred by his unreasonable conduct of these proceedings; and that the respondent's application for expenses under Rule 76(1)(b) is refused.**

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REASONS

1. In this case, the claimant's claim was struck out by the Tribunal by Judgment dated 3 July 2024, sent to the parties on 4 July 2024.

2. Following receipt of that Judgment, the respondent's solicitor wrote to the Tribunal on 25 July 2024 to make an expenses application under Rules 75 and 76 of the Employment Tribunals Rules of Procedure 2013.

3. Parties were invited to comment on the Tribunal's proposal that the application should be dealt with in chambers by the Tribunal, on the basis of written submissions only. The respondent confirmed that they were content with such an approach. No response was received from the claimant. In the circumstances, it appeared to the Tribunal to be consistent with the overriding objective to deal with the matter on written submissions alone, in order to save expense and time.

4. I set out below the terms of the application and the Tribunal's decision, together with a short summary of the relevant law.

The Application

5. The respondent alleged that the claimant had acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing or conduct of these proceedings, contrary to Rule 76(1)(a), and that the claims he brought had, in any event, no reasonable prospect of success (Rule 76(1)(b)).

6. They submitted that they had incurred expenses in excess of £20,000 but limited its application on the basis that expenses were sought under a summary assessment.

7. They summarised the terms of the Judgment striking out the claim, and the reasons for that Judgment.

8. The respondent then argued that the conduct observed by the Tribunal was inherently unreasonable, amounting to disruptive conduct and an abusive of process to commence proceedings and then effectively abandon them without informing the Tribunal or the respondent of an intention not to pursue the claims. He was made aware of the steps in the proceedings required of him but failed to take them on numerous occasions without any explanation or indeed response.

9. Secondly, the respondent argued that the claimant had indulged, through his representative, in unwarranted challenges to the decisions of the Tribunal. It was pointed out that following the first preliminary hearing in this case, the claimant's lay representative requested, by email of 12 April 2024, "a review of the preliminary hearing maybe with a different Tribunal officer in chair". The reason was said to be that there was a "lack of credibility" and that "both the tribunal officer in charge and Clinical 24 solicitors tried to confuse us by agreeing that Clinical 24 and ICG are 2 different companies". On 19 April 2024, the Tribunal responded with a clear explanation and that, to the contrary, the claimant's representative had been asked to consider the documentation and ask the Tribunal to decide against whom the claim was directed. The criticism of Employment Judge MacLean was unreasonable.

10. Thirdly, the respondent criticised the claimant for having made unwarranted postponement applications. He made an application for the indefinite postponement of the Preliminary Hearing at which strike out was to be considered, by email of 9 April 2024, on the basis that the claimant had made a complaint to the police about the respondent. That application was opposed, and then refused by Employment Judge O'Donnell who observed the lack of any basis to grant the application given that the police report was not relevant to the issues to be addressed by the Tribunal. A further application for postponement was refused in May 2024 by Employment Judge Whitcombe in the absence of medical evidence supporting his assertion that he was unfit to attend the hearing. The respondent submitted that these applications appeared to reveal a pattern of the claimant seeking to disengage with the proceedings as the strike out application was about to be heard, a pattern culminating in his complete failure to pursue the claim.

11. The respondent then invited the Tribunal to strike the claim out on the alternative basis that it had no reasonable prospect of success.

12. They pointed out that they had applied for strike out on 10 May 2024, an application which was never determined as the Tribunal struck out the claim

for the claimant's failure to pursue. They attached the application in full, but summarised it by reference to the following points:

1. The claimant was an agency worker. On two occasions the respondent was informed of a safeguarding complaint or incident about the claimant and removed him from his assignment pending investigation. He was not paid during those two periods.

2. The claimant's case amounted to a bare assertion that the reason for the making of the allegations, the two periods of suspension and the lack of pay during suspension was his race.

3. The Tribunal could be satisfied without a hearing of evidence that the claims had no reasonable prospect of success given that

    a. If the making of a safeguarding allegation is alleged to be discriminatory, this was not conduct by the respondent;

    b. The reason for the claimant not being offered work following the documented safeguarding concerns was to enable the allegations to be investigated before allowing the claimant to undertake patient-facing duties, in line with the respondent's regulatory obligations. It is recorded in contemporaneous documentation of 8 September and 14 December 2022, and the claimant has presented no basis upon which to doubt this course of events.

    c. The claimant was simply not entitled to pay during periods when he was not working. The respondent referred to clause 6 of the their terms and conditions of engagement for temporary workers, which states that the claimant was only entitled to pay in respect of assignments he undertook on behalf of the respondent. The claimant has not identified any contractual or other entitlement to pay during these periods.

4. The claims relating to the first period of suspension and pay during that period were also significantly out of time.

13. The respondent then referred to well-known case authorities, and set out a number of reasons why they considered it appropriate for the Tribunal to exercise its discretion to award expenses, and the factors which the Tribunal should take into account. These are considered in the decision section below.

14. They attached a schedule of expenses, noting that the total legal fees have been £34,200.50 plus VAT, of which £8,000 plus VAT represented counsel's fees.

15. As indicated above, the claimant did not respond to the application, nor to the Tribunal's correspondence asking for his comments or objections thereto and whether or not the application should be dealt with on written submissions alone.

Discussion and Decision

16. The relevant provisions relied upon by the respondent in the Rules of Procedure are found in Rules 76(1)(a) and (b). Rule 76 is set out here in its entirety:

"(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.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—

(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and

(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing."

17. The application is based on two points: that the claimant acted unreasonably in his conduct of the claim, and that in any event, his claim lacked any reasonable prospect of success.

18. The claim was dismissed owing to the fact that the claimant did not respond, ultimately, to a strike-out warning issued to him by the Tribunal, following a period during which he had not responded to the Tribunal nor attended the most recent Preliminary Hearing on 14 May 2024. The reason for the strike-out was that the claimant was not pursuing his claim before the Tribunal.

19. Accordingly, no conclusion has been reached by the Tribunal as to whether or not his conduct of these proceedings has been unreasonable, nor whether the claim had no reasonable prospect of success.

20. In determining this application, the Tribunal requires to decide, firstly, whether or not the claimant's conduct of the proceedings has been unreasonable, and if so, in what way; and secondly, whether or not to

exercise its discretion to award expenses against the claimant. At that point, if the Tribunal determines that discretion should be exercised, it is then a matter for the Tribunal to consider the level of any award to be made against the claimant.

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21. It is well-established that the award of expenses in the Employment Tribunal is the exception rather than the rule (**Yerrakalva v Barnsley Metropolitan Borough Council and Another 2012 ICR 420**). However, the Tribunal must be aware that an award is justifiable if the circumstances justify it in terms of the Rules of Procedure. In this case, the question is whether or not the claimant has acted unreasonably in the conduct of these proceedings.

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22. There are a number of aspects of the conduct of the claimant (and, by extension, his representative) in this case which require to be examined.

23. Firstly, the respondent argues that the claimant's failure to pursue the claim is inherently unreasonable. While I am not prepared to sustain such a broad submission in itself, I accept that there is force in the respondent's argument that the claimant's failure to respond to correspondence from the Tribunal (his last email to the Tribunal was sent on 8 May 2024, and he simply failed to reply to any emails or letters from the Tribunal after that date) may itself amount to unreasonable conduct. Further, it is entirely unhelpful if the claimant does not attend a hearing which was to be conducted by CVP due to a medical condition in respect of which he has provided not medical evidence at all.

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24. Secondly, the respondent maintained that the claimant's approach to the facts was unsustainable. In particular, they criticised his assertion that he had been entitled to payment in relation to his suspension. The information relied upon by the respondent demonstrated that the claimant was not entitled to payment beyond the scope of any assignment on which he was sent by the respondent, and there is simply no evidence that he was suspended from his work by the respondent. In my view, this is slightly more difficult. The claimant is an unqualified person, as is his representative, and accordingly may not have understood the differences

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between the position of an agency worker and an employee. It is not entirely clear to me that this amounted to unreasonable conduct.

25. Thirdly, the respondent pointed to unwarranted challenges to the decisions of the Tribunal, and quoted a number of remarks made by Ms Munjoma on the claimant's behalf following the first PH. In my judgment, the claimant's conduct, carried out on his behalf by his representative, goes beyond this. it is clear to me that the claimant's comments about the "Tribunal officer in charge" (that is, the Employment Judge) were dismissive not only of the decisions made by the Tribunal but also of the very authority of the Employment Judge to make the decisions or dispositions she chose to make according to the judgment she exercised following the Preliminary Hearing. It was alleged that the Employment Judge tried to confuse the claimant and his representative with the discussion about the correct identity of the respondent. Reading the Note following that Hearing, this is an entirely incorrect characterisation of the Employment Judge's actions and words. It is quite plain from further correspondence that the claimant and his representative did not understand the legal concepts which they were being asked to address, and continued to argue for some time that the wrong respondent was being sued. The whole tenor of the Employment Judge's position here was to assist and guide the claimant's representative to consider whether or not the correct respondent had been sued, but also to be quite clear that she is offering the claimant the opportunity to make a final decision on the identity of the respondent.

26. In my judgment, this dismissive attitude to the authority of the Tribunal is unacceptable and unreasonable conduct by the claimant and his representative. The use of the term "Tribunal officer" to describe a judicial office holder may be inadvertent, but a superficial reading of the Tribunal's correspondence and the Note following Preliminary Hearing will make it clear to any party as to the correct form of address to be adopted. Further, and on any view much more seriously, to allege that an Employment Judge has tried to confuse the claimant, particularly when it is clear that she was doing no more than helping him, is quite unreasonable conduct on the part of the claimant and his representative. It is, in a sense, quite provocative to

attack the integrity of an Employment Judge. As a result, I consider that in this aspect the claimant did act unreasonably.

27. Fourthly, the respondent complain of the unwarranted postponement applications made by the claimant in advance of two PHs. In this, while it is correct to say that the applications were not made in such a form or on such a basis as to be granted, there were reasons which appeared to be concerns on the part of the claimant and his representative which they may have genuinely believed were creating a difficulty for them. Asking to sist proceedings pending a police investigation is not only common but also entirely proper in circumstances where that investigation may impinge upon issues to be the subject of evidence before the Tribunal. The Tribunal refused the application in plain terms, but I do not consider it to be an entirely unreasonable request. Further, the claimant may well have been ill at the point when the PH took place in May 2024; his application was refused because he did not comply with the Presidential Guidance, and in any event, the fact that it was a CVP hearing and also that he had a representative to attend on his behalf meant that the application was refused by the Tribunal. Again, it is the claimant's failure to attend at the PH following the refusal of his application to postpone the hearing which is of much greater concern than the several applications to postpone hearings in this case by the claimant.

28. It is therefore my conclusion that the claimant did act unreasonably by failing to pursue his claim and attend at Hearings or respond to Tribunal correspondence, and by dismissing and criticising the actions of the Employment Judge without any proper basis for doing so.

29. I return below to the question of whether or not an award of expenses should be made as a result of his unreasonable conduct.

30. The second main aspect of this application is whether the claim had any reasonable prospect of success.

31. The respondent relies upon a number of aspects of the claim in seeking to advance this application.

32. Firstly, the respondent maintains that the claimant was an agency worker who was removed from assignments due to safeguarding concerns pending investigation, during which he was not paid, and secondly that the claimant's case amounted to a bare assertion that the reason for the making of the allegations, the two periods of "suspension" and the lack of pay during those periods was due to race.

33. I accept that the claim is not a strong one on paper, and that it lacked a degree of specification and indeed weight in the manner in which it was presented. However, I am not prepared to conclude that on these bases alone the claim had no reasonable prospect of success. The evidence to be led in any final Hearing would require to have covered these issues, and while it seems unlikely that the claimant would succeed in his claims, I do not consider, on the face of it, that he would have no reasonable prospect of demonstrating that decisions taken to his disadvantage by the respondent were visited upon him on the grounds of race.

34. The respondent also argues that the claimant's claim relating to pay was out of time. Again, in my judgment, it cannot quite be found at this stage that the claim would have no reasonable prospect of success, in that the claimant was likely to have given evidence about the reason for the late presentation of his claim. The Tribunal has no knowledge of the likely explanation and its strength, and accordingly at this stage I am not prepared to conclude that the claim had no reasonable prospect of success based on the information available.

35. However, it is my conclusion that the claimant acted unreasonably in his conduct of the proceedings, either himself or through his representative, in relation to the failure to pursue his claim and attend at Hearings or respond to Tribunal correspondence, and by dismissing and criticising the actions of the Employment Judge without any proper basis for doing so.

36. I accept the respondent's assertion that the claimant's conduct of these proceedings, and the demonstration of his attitude towards the Tribunal by

that conduct, must have been knowing. The claimant attended the first Preliminary Hearing at which the process was explained to him.

37. I accept, further, that the respondent should receive a contribution towards their legal expenses incurred as a result of the unreasonable behaviour of the claimant in these proceedings outlined above.

38. I am not persuaded, even given the absence of any financial information relating to the claimant's means to pay, that the entire expenses claim should be paid by the claimant. Any Order issued by the Tribunal must be one which the Tribunal is satisfied can be enforced and met. Given that the Tribunal simply has no knowledge as to the means of the claimant to make any payment, it does not seem to me to be in the interests of justice to award the full sum incurred by the respondent in these proceedings.

39. While the claimant has failed, and in some respects failed quite egregiously, to pursue his claim and adopt a reasonable and respectful attitude towards the Tribunal, it must be taken into account that a claimant without legal qualification or experience, being represented by a similarly unqualified person, may have embarked upon these proceedings without a clear understanding of the risks which they faced in the event that they did not take the proceedings seriously or pursue them appropriately.

40. It is right, however, to make an award which will serve as a contribution to the respondent's legal fees, as well as a warning to the claimant that he must not raise proceedings which he is not then willing to pursue, or bring a matter before the Tribunal without accepting the authority of the Tribunal and complying with its Orders.

41. In my judgment, noting that the fees incurred by the respondent are very significantly higher than this, I have reached the conclusion that the claimant is ordered to pay to the respondent the sum of £7,500 in compensation for the unreasonable conduct of these proceedings in terms of Rule 76(1)(a) of the Employment Tribunals Rules of Procedure 2013.

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M Macleod
Employment Judge

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28 October 2024
Date of Orders

15 Date sent to parties **29 October 2024**

I confirm that this is my Judgment in the case of Mahamba v Clinical 24 Staffing Limited and that I have signed the Judgment by electronic means.

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