EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4104605/2024, 4104236/2024 and 4104237/2024
In Chambers on 23 October 2024
On written representations

Employment Judge: R Bradley

Mr D Doyle	**First Claimant** **Represented by:** **Ms S Christie -** **Solicitor**
Mr G Lawson	**Second Claimant** **Represented by:** **Ms S Christie -** **Solicitor**
Mr G Booth	**Third Claimant** **Represented by:** **Ms S Christie -** **Solicitor**
Lloyds Bank plc	**Respondent** **Represented by** **Mr O Sargent -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimants are ordered to pay to the respondent the sum of **FOUR THOUSAND NINE HUNDRED AND TWENTY ONE POUNDS AND TWENTY PENCE** (£4921.20) as expenses in terms of Rules 78 of the Employment Tribunal Rules of Procedure 2013 on the basis that the claims had no reasonable prospect of success.

REASONS

Introduction

1. On 4 September 2024 the parties were copied my judgment and reasons from an open preliminary hearing on 30 August. That judgment struck out the claims on the basis that they did not have reasonable prospects of success.

2. On 1 October the respondent's solicitor made an application for a Costs Order. I say more about it below. On 15 October the claimants' solicitor opposed the application and set out reasons for doing so.

3. Parties were agreed in that correspondence that it was in line with the overriding objective that the application be considered on the papers. I agree.

4. As an aside, I note that Rule 74 of the Employment Tribunal Rules of Procedure 2013 provides that in Scotland all references to "*costs*" should be read as references to expenses. I will refer to expenses from hereon.

5. The application attached a schedule which detailed (i) the time and cost of time spent by solicitors in preparing for the two preliminary hearings which have taken place, and in preparing the expenses application and (ii) outlays, being counsel's fees for those hearings. The solicitors have confirmed that they "*are true and accurate and do not exceed the costs which the Respondent is liable to pay in this matter*."

The Issues arising from this application

6. The application is made pursuant to Rule 76(1)(a) and (b) of the Rules. I set it out at paragraph 10 below.

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

    1. Did the claims have "*no reasonable prospects of success*"?
    2. If so, from what point in time should the claimants and their representatives been aware of that position?

3. In bringing the claims or in continuing with them did the claimants act unreasonably?

4. If the answer to questions 1 and/or 3 is "*yes*", is it appropriate to exercise discretion in favour of awarding expenses against the claimants?

5. If the answer to question 4 is "*yes*", what award should be made?

Submissions

8. The respondent's application is made on two bases, albeit they are linked. First and relying on my earlier judgment and reasons, the claims "*had no reasonable prospects of success*" (Rule 76(1)(b)). The claimants ought reasonably to have known of that position. Reference was made to a number of dates in a timeline spanning the period from 19 April 2024 (when the first ET3 was lodged) to 9 August. On that latter date the claimants' solicitor confirmed that they wished to proceed to the preliminary hearing on 30 August. The claimants do not take issue with the relevance of that timeline or what is said by the respondent in its submission about what occurred on its various dates. I note in passing that by letter dated 22 April (shortly after the lodging of one ET3) the tribunal ordered the fixing of a one hour case management preliminary hearing to discuss case management. That hearing took place on 3 June. It fixed the issues for the preliminary hearing on 30 August. Taking account of what is sought by way of expenses, the logic of the respondent's argument is that by the time of its preparation for the case management preliminary hearing the claimants should have known that the claims had no reasonable prospects of success. It appears that a bundle for that hearing was received by the tribunal office on 31 May. On 9 May the respondent's solicitor wrote (without prejudice save as to expenses) to the claimants' solicitor inviting withdrawal and reserving "*the right to refer the Tribunal to this letter and any related correspondence in support of*" an application for expenses. It set out the respondent's rationale as to why the claims had no reasonable prospects of success and asserted that in continuing to pursue them they were acting vexatiously and unreasonably. I summarise the claimants' position thus; there was no direct authority regarding the issue in question in these

cases; the case of ***Ajaz v Homerton University Hospital NHS Foundation Trust*** [2023] EAT 142 to which reference had been made in interparty correspondence was not applicable and was "*clearly distinguishable*"; the claimants required a tribunal determination on the preliminary issues in this case; and "*as there was no direct authority regarding this issue, it could not be said from the outset that these claims could not succeed*."

9. Separately, the respondent says (Rule 76(1)(a)) that the claimants acted unreasonably "*by continuing to advance their claims … without meaningfully engaging with the uncontroversial legal points that were put to them …*". The claimants refer to my decision that the continuance of the claims was not an abuse of process and reiterate their point that the respondent had not provided a relevant "*in point*" authority in support of its position. They also say "*We act for a Trade Union - and a large number of claimants - with claims of a similar nature. Consequently, it was in the interests of justice for us to pursue these three claims and obtain a determination from the Employment Tribunal on this issue. By receiving this determination, we have clarity over the issue of whether a second reconsideration of an employee's flexible working request amounts to a fresh request for an employee. This will, in turn, mean that we avoid bringing claims with the same set of facts in the future. This Judgement will be able to assist many members of the Trade Union that we act for*." And "*Whilst these claims were struck out, the Judgement from these claims will assist us, and many claimants that we, and the Trade Union, represent in the future. It was therefore, as we have previously stated, in the interests of justice for us to pursue these claims and obtain clarity on an issue we are dealing with on an increasing basis*."

Law

10. 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."

11. "*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.

12. " *… 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.)

13. "*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

14. I begin by focussing on the basis on which I concluded that the claims did not have reasonable prospects of success. I repeat what I said in paragraphs 54 and 55 of my reasons:-

> *54. "In my view the parties have, correctly, agreed that what took place at the time of the reconsiderations, was a reconsideration of their flexible working requests from 2023. It is difficult to see how that is not a reconsidertion of the same subject matter between the same parties. It is therefore difficult to see how the substance of dispute in the present claims would not be on the same grounds and between the same parties. The litigation of those requests was disposed of by Rule 52 dismissals. Neither of the Rule 52 caveats ((a) or (b)) applied. That being so, Rule 52 expressly operates so as to prevent any of the claimants from commencing a further claim against the respondent raising the same, or substantially the same, complaint. The claims are res judicata.*
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> *55. Section 80I(1) make express provision for the remedy of a reconsideration by an employer if a complaint is well-founded. Subsection (4) provides that in such a case the employer must treat it as if it were a new or (to use Ms Christie's word) a "fresh" request. But in these cases the COT3 forms did not require such a reconsideration. Had the claimants wanted a "Section 80I reconsideration" that could have been set out in the COT3 forms. But they did not*."

15. In short, the claimants could have "*reserved their rights*" to bring these proceedings by (i) the use of a Rule 52 caveat or (ii) by wording the COT3 form to reflect section 80I(1) of the 1996 Act but did not. I answer the first issue "*yes*".

16. Rule 76(1)(a) and (b) are (obviously) separate. Clearly there may be cases where it is "*unreasonable conduct*" to bring or continue with a case because it has no reasonable prospects of success. But given what was said by Ms Christie as to the wider implications of my original judgment and reasons, I am not persuaded that the claimants have acted unreasonably in bringing the proceedings or conducting their claims. I answer question 3 "*no*".

17. I accept that the respondent did not adduce a relevant in point authority prior at any stage. But logically it is possible for a claim to have no reasonable prospects in circumstances where there is no such authority. This is such a case. In my view the claimants (and their solicitors) should have known that without the reservation of rights referred to above any future litigation involving a reconsideration of the original flexible working requests would be litigation of the same dispute between the same parties. In my view this should have been known before the ET1s in these cases were presented, which is the answer to question 2. The respondent has been put to a cost which was on my analysis unnecessary. I consider that an order for expenses should be made. I have taken into account what

was said in ***Opalkova***. I answer question 4 "*yes*". Given the time from which the respondent seeks expenses it is enough for me to find that the claimants should have known the position before they prepared for the case management preliminary hearing.

What expenses should be awarded?

18. In the discussions on 30 August on the question of a deposit order, there was no issue as to the ability to pay one had an order been made. Ms Christie has not reversed from that position now. In deciding the amount of the order (Rule 84) I proceed on the same basis.

19. I first note that the case management preliminary hearing (by CVP) was fixed for one hour. Ms Christie says it lasted 30 minutes. I am entitled to trust her professional integrity and believe her. Its purpose was case management. In my respectful opinion, the respondent's solicitor could easily have represented at it. Mr Sargent was named as solicitor in all three ET3s. By 3 June he was (or should reasonably have been) familiar enough with the claims to conduct that hearing. An assumption of one hour of his time to prepare for it, and 30 minutes to conduct it brings out a cost of £265.50 + VAT. I will discount entirely counsel's fee of £750 + VAT for that hearing and substitute the £265.50 + VAT instead.

20. I do not agree with the claimants' submission that the respondent is not entitled to recover the cost of Scottish counsel for the open preliminary hearing. Their criticism is not as to the amount charged but about the instruction *per se*. In my view given the importance of the issues to all parties and the relevance of Scottish authorities which were cited particularly on a plea of *res judicata,* it was reasonable for a solicitor based in England (as Mr Sargent is) to instruct Scottish counsel for that hearing. I make no deduction from the cost for preparation and presentation at it.

21. The respondent seeks expenses relative to this application. There is no suggestion (from either side) that the respondent has sought to have expenses agreed (and paid) informally. But it is reasonable to assume given the claimants' formal opposition that such an exercise would have been fruitless. That being so this application was necessary. In my view the respondent is entitled to recover its (reasonably incurred) expenses in

making it. From the schedule it appears that partner time spent on it was 42 minutes, and that solicitor time was 6 hours. No information is provided as to what was done in that time other than to say *"Preparing and advancing costs application*." It is surprising that over 6.5 hours or solicitor time was spent writing a 3 page letter + a schedule the information on which is no doubt computer-generated. In my view that amount of time is unreasonable. In my view the letter could reasonably have been prepared by a solicitor in 2 hours. I accept that some oversight by a partner is reasonable. The respondent therefore is entitled to expenses of £536.00 + VAT on this element of the schedule.

22. Using the same table/schedule, the expenses awarded are £4101.00 + VAT. I assume the rate is 20%. The total as shown including VAT is thus £4921.20 which is reflected in the judgment. That amount is specified as per Rule 78(1)(a) of the 2013 Rules.

	Partner cost	**Solicitor cost**	**Total solicitors' cost**	**Counsel's fee**	**Total**	**Total including VAT @ 20%**
CM PH	£78 + VAT	£737 + VAT	£815 + VAT	0	£815 + VAT	£978.00
OPH	£156 + VAT	£1094 + VAT	£1250 + VAT	£1500 + VAT	£2750 + VAT	£3300.00
Expenses Application	£182 + VAT	£354 + VAT	£536 + VAT	0	£536 + VAT	£643.20
TOTAL					£4,101 + +VAT	**£4921.20**

23. Neither solicitor addressed the question of apportionment of an award of expenses among the three claimants. I note that the respondent has not (properly in my view) sought expenses against the claimants on a joint and several basis. I assume that with professional representation on both sides the respondent will be paid in full without further application to the tribunal.

R Bradley

Employment Judge

23 October 2024

Date of judgment

Date sent to parties **29 October 2024**