EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107178/2023

Hearing held in Chambers on 16 April 2025

Employment Judge I McFatridge
Tribunal Member P Fallow
Tribunal Member E Coyle

Mr G Wark	**Claimant** **Written representations**
Leisure & Culture Dundee	**Respondent** **Written representations**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the respondent's application for expenses does not succeed and is refused.

REASONS

1. The tribunal issued its judgment in this case on 19 June 2024 following a hearing which took place in Dundee on 15, 16, 17, 18, 19, 23, 24, 25, 26 April 2024. The claimant's claims of unfair dismissal and disability discrimination were dismissed. As noted in the judgment the claimant had

previously made a number of other claims including claims of age discrimination and sex discrimination as well as claims relating to public interest disclosure. The age and sex discrimination claims were withdrawn immediately prior to the hearing as was the claim of detriment for making disclosures. The claim automatic unfair dismissal claim based on public interest disclosure was withdrawn during the hearing on the afternoon of 23 April 2024 after the end of the claimant's case.

2. On 17 July 2024 the respondent made an application for expenses under paragraph 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 which were the rules relevant at the time and the rules which are relevant to this determination. Subsequently, on 26 July 2024 the respondent provided a detailed schedule of expenses bringing out a total sum claimed of £42,656.50. The claimant was asked to respond, however before matters could proceed further the tribunal were advised of an appeal to the EAT. On 23 September 2024 the EAT advised that the appeal had not passed the sift and would be dismissed unless the claimant asked for a Rule 3(10) hearing. On 25 November 2024 the claimant's representative advised the tribunal that they had been instructed not to apply for a Rule 3(10) hearing. There was then a discussion between the parties which led to an agreement that the application would be dealt with on the basis of written submissions. The parties helpfully reached agreement on a timetable which was slightly delayed due to the non-availability of Counsel. The claimant's representative submitted their response on 15 January 2025. Unfortunately the tribunal were unable to meet in order to consider the representations until 16 April.

3. Given that the submissions in this case were made by each party in writing, the submissions are not repeated in full below. Instead the tribunal sets out its view on the contentions made in this case.

4. As noted above we consider that this application requires to be dealt with under the 2013 regulations since these were in force at the time. In any event, the matter is of no consequence since the 2024 regulations which are relevant are in broadly similar terms. 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; or*
> *(c) a hearing has been postponed or adjourned on the application of a party made less than seven days before the date on which the relevant hearing begins."*

5. It is noted that the rules require a two-stage process. The tribunal first of all requires to decide whether or not the threshold set out in Rule 76 has been passed or not. If the threshold set out in that rule has not been met then that is the end of the matter and no order for expenses will be made. If the threshold is met then the tribunal has a discretion as to whether or not to make an expenses order and if so how much. Rule 78 sets out the amount of any such order and it is well established law that in making any such order the means of the party paying requires to be taken into account.

6. In this case the first question to be decided by the tribunal was whether the threshold set out in Rule 76 was met or not. The first ground relied upon by the respondent is that in their view the claimant's behaviour amounted to unreasonable conduct in terms of paragraph 76(1)(a). For purposes of completeness I should say that this is now paragraph 74(2)(a) of the 2024 rules.

7. The respondent relies upon comments made in the judgment itself. The first of these is that the claimant was said to be "*extremely disingenuous such as where he flatly denied having been in touch with the press but then accepted that he had contacted his union and that his union representative had spoken extensively to the press with his authorisation*". The second was that the claimant had been found to be derogatory and lacked respect towards his manager. The third was that he had made serious allegations of discrimination and whistleblowing claims against the

respondent which had no basis and were subsequently withdrawn at the last moment. The respondent noted that the claimant only withdrew his discrimination claims on Thursday 11 April 2024 and the PID detriment claims only on Friday 12 April 2024 when the hearing was due to start on 15 April. The PID dismissal claim was then only abandoned after three days of the claimant giving evidence. The respondent submitted that in this case it did amount to unreasonable conduct.

8. The tribunal's view was that taking matters as a whole the claimant's conduct did not reach the threshold of being unreasonable in terms of the rules. Many witnesses are disingenuous and try to give an impression in examination in chief which they later withdraw or clarify in cross examination. The tribunal's view was that this was what happened in the case of the claimant. His evidence was not untrue in that he had personally not contacted the press. It was disingenuous in that when he was cross examined he admitted that his union representative did on his behalf. At the end of the day such matters are the daily experience of tribunals and indeed it is why witnesses are cross examined. It is not ideal but in the view of the tribunal fell far short of the standard of unreasonableness required.

9. With regard to the suggestion that the claimant had no respect for his manager this was undoubtedly true however this does not amount to unreasonable conduct of the case. The tribunal's view is that the claimant was sincere in his view that his manager's skills were not up to the mark. This was very clear from his evidence. To a large extent, the tribunal was about pitting the claimant's narrative of events against that of the respondent. The claimant was quite entitled to put his honestly held view to the tribunal. The fact that the tribunal preferred the respondent's version of events does not make the claimant's conduct of the case unreasonable. Again the tribunal could see nothing in this which came close to meeting the necessary standard of unreasonable conduct of the case.

10. With regard to the final point we were referred to the case of ***McPherson v BNP Paribas*** [2004] ICR 1398. In paragraph 28 it is stated

"In my view, it would be legally erroneous if, acting on a misconceived analogy with the CPR, tribunals took the line that it was unreasonable conduct for employment tribunal claimants to withdraw claims and that they should accordingly be made liable to pay all the costs of the proceedings. It would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs on withdrawal, which might well not be made against them if they fought on to a full hearing and failed. ….

29. On the other side, I agree with Mr Tatton-Brown, appearing for BNP Paribas, that tribunals should not follow a practice on costs, which might encourage speculative claims, by allowing applicants to start cases and to pursue them down to the last week or two before the hearing in the hope of receiving an offer to settle and then, failing an offer, dropping the case without any risk of a costs sanction. …..

The crucial question is whether, in all the circumstances of the case, the claimant withdrawing the claim has conducted the proceedings unreasonably."

11. In this case the claimant's position is that he acted throughout on the basis of legal advice. The position is that he had been dismissed from a well paying job in his chosen career in circumstances where there was essentially a clash of personalities between senior managers in the organisation. He was not dismissed for reasons of conduct and the reason given for his dismissal was that there had been such a breakdown in relationships as to amount to a breach of trust and confidence. He was dismissed for some other substantial reason. It is unsurprising that in those circumstances his legal advisers would, initially at least, raise all possible claims. His advisers indeed appear to have acted responsibly in giving appropriate advice at various times and this is certainly not a situation where speculative claims were raised and only abandoned at the last minute with a view to seeking a settlement. The tribunal's view is that it would indeed be unfortunate if in the circumstances of this case legal advisers were constrained in giving advice and individual claimants constrained in taking that advice by the thought that if they drop claims which, after examination are perhaps not as good as they appeared

earlier, this would lead to an application for costs. The tribunal's view is that the respondent's contention that the claimant behaved unreasonably in respect of these matters is not well-founded. Accordingly, the tribunal considered that the threshold set out in Rule 76(1)(a) was not met.

12. The second ground argued by the respondent was that the claimant had no reasonable prospect of success in establishing any of his claims.

13. With regard to the discrimination and public interest disclosure claims the tribunal is invited to find that the claimant had the benefit of legal advice and was likely therefore to have been aware from an early stage that he had no reasonable prospect of success in these claims given they were all withdrawn. In relation to the unfair dismissal claim it was their position that it was absolutely clear that there was an irretrievable breakdown in relationships and the claimant must have been aware that he had no reasonable prospects of success in showing that the reason for dismissal was anything other than irretrievable breakdown in relationships. It is said by the respondent that the claimant must have been aware that the respondent had acted fairly given the exhaustive investigation process that included extensive interviews with staff, changing investigation manager on spurious allegations made by the claimant and then further investigation by Mr Mullen. The respondent also make the same point in respect of the section 15 Equality Act claim. The respondent set out the difficulty with this claim which was essentially also pointed out by the tribunal in their judgment. While the claim was not fully articulated it did appear to go on along the lines that if the claimant had behaved unreasonably or aggressively he had done so as a result of his disability. This was a difficult claim to make given that the claimant denied behaving unreasonably or aggressively.

14. The tribunal did not accept the respondent's argument that the claimant had no reasonable prospect of success in respect of any of his claims. We agree with the respondent that the question is whether the claims had no reasonable prospect of success when those claims were raised. This was at a time when the claimant's internal appeal process was still continuing and had not been responded to. We note the claimant's position that at all times he acted on legal advice from extremely reputable

legal advisers. The respondent can really point to nothing other than the withdrawing of certain of the claims as suggesting that they had no reasonable prospect of success from the outset. They are effectively inviting the tribunal to find that because the claims were ultimately withdrawn this means they had no reasonable prospect of success from the outset. The tribunal observes that there can be many reasons for withdrawing a claim other than that it has been decided that it has no reasonable prospect of success. It may be withdrawn because there are limited prospects of success. It may be withdrawn because it is thought it better to concentrate on other claims which are more clear cut rather than confuse matters by throwing in a large number of other claims. Given that the tribunal heard no evidence about these claims other than the section 103A claim we cannot properly reach the conclusion that they had no reasonable prospect of success from the outset. With regard to the section 103A claim we note that this was only withdrawn after a considerable amount of evidence had been led. The tribunal's assumption was that it was withdrawn quite properly on the basis that following cross examination the claimant was not in a position to state that his protected disclosures were known to the decision maker who decided on dismissal. That is far from saying that it would have been clear at the start that the claim had no reasonable prospect of success.

15. With regard to the unfair dismissal claim we would again reiterate the points we made above. The claimant had been dismissed from his job. His honestly held belief was that he had, during his employment raised issues about the abilities of his manager which were in the interests of the organisation. He accepted that there had been a breakdown in relationships but felt this was due to management rather than himself and his colleagues. In those circumstances it is putting an incredibly high burden on a claimant if one says that they are not behaving reasonably when they submit a claim of unfair dismissal. No doubt the claimant genuinely believed that his claim was justified. In the event the tribunal did not agree with him. As has often been said, matters on the battlefield often become clear with hindsight which were anything but clear while the smoke of battle raged.

16. Similarly, with the claimant's claim under section 15 the tribunal did indeed find this hard to understand. The context of this however is that the claimant was and is disabled with mental health issues. He clearly felt that these were relevant to his claim in some way. We do not believe that at the time the claim was raised it could in any way be said that it was clear that such a claim had no reasonable prospect of success.

17. In all the circumstances we consider that the situation here did not meet the threshold set out in section 76(1)(b) either. If we are incorrect in saying the 2013 rules apply and the new rules apply then our decision would be the same. The relevant provision under the new rules is section 74(2)(b).

18. Given that the tribunal's clear view was that the situation in this case did not meet the threshold set out in Rule 76 for making an order for costs or expenses we did not see any need to move on to the second stage. The respondent's application for expenses is therefore refused.

Date sent to parties **22 April 2025**