EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103220/2020

Determination of application on written submission

Employment Judge A Kemp
Tribunal Member E Hossack
Tribunal Member S Larkin

Mr D Johnson	**Claimant** **In person**
Grampian Health Board	**Respondent** **Represented by:** **Mr A Watson,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's application for expenses and wasted costs is refused.

REASONS

Introduction

1. The claimant made an application for either or both of expenses and wasted costs in an email to the Tribunal dated 8 July 2022. In that he referred to previous applications. It was not entirely clear which of those applications for expenses or wasted costs was intended to be made, and

it has been assumed that both were intended to be made. The parties made further submissions by emails dated 19 July 2022.

2. The issue of expenses or wasted costs has been raised by the claimant before. There was firstly a decision by EJ Hosie on 29 July 2021 in which the claim for expenses was refused (the claimant alleged in his application of 8 July 2022 that it had been postponed but that is not the case). Secondly the claimant states that the application was made again on 14 January 2022, although it is not clear to what he refers in that regard. Thirdly the claimant had referred to an application for costs in his witness statement, tendered for the purposes of the Final Hearing. The Final Hearing took place on 9 – 11 February 2022, when the issue was again mentioned by the claimant's counsel.

3. The Judgment following that Final Hearing was sent to the parties on 24 February 2022. Paragraph 151 stated

> "The claimant has, as we indicated above, made an application for a wasted costs order. If he wishes to pursue that application he should inform the Tribunal of that by email, with a copy to the respondent's solicitor, and a hearing to address that shall be arranged. In light of that issue being potentially outstanding no comment on the matters raised by the application shall be made beyond those above."

4. On 14 March 2022, the claimant stated by email "We will prepare a claim for costs in the case and will submit this as soon as possible".

5. No such application was made until that of 8 July 2022 when the claimant suggested that the matter had been inadvertently omitted from the Judgment. The claimant and respondent have each sent further emails to the Tribunal commenting on their respective positions. The respondent argues that the application is made out of time.

6. The parties agreed that the matter should be determined by written submissions. The Tribunal has done so, and reached an unanimous decision on its terms.

The law

7. The power to award expenses is set out in Rules 74 to 84. The power to award expenses is set out in Rule 76 and is, for the purposes of the present case, where

> "a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of proceeding (or part) or the way the proceedings (or part) have been conducted".

8. There is a separate power to award wasted costs in Rule 80, which refers to "any improper, unreasonable or negligent actor omission on the part of the representative….."

9. The procedure for each application is set out in Rules 77 and 82 respectively and requires it to be made within 28 days of the date on which the Judgment is sent to parties.

10. Tribunals have a wide discretion, exercised in accordance with the overriding objective in Rule 2, where they consider that there has been unreasonable conduct in the bringing or conducting of proceedings or such conduct on the part of the representative. It is the proceedings themselves that are covered, from the inception of the claim or defence, through the interim stages of the proceedings, to the substantive hearing. It does not cover actions or omissions prior to the proceedings. Unreasonable conduct is to be construed against the earlier words where there is reference to conduct that is vexatious, abusive or disruptive in light of the use of the word "otherwise".

11. When making an award of expenses on the ground of unreasonable conduct, the discretion of the tribunal is not fettered by any requirement to link the award causally to particular expenses which have been incurred as a result of specific conduct that has been identified as unreasonable (***McPherson v BNP Paribas (London Branch) [2004] ICR 1398***; *in which the Court of Appeal stated that*

> "The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not

> the same as requiring [the receiving party] to prove that specific unreasonable conduct by [the paying party] caused particular costs to be incurred".

The position was addressed further in ***Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78*** in which the Court of Appeal stated that:

> "The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects if had".

The Court also stressed that decisions were likely to be fact and case specific.

12. Finally, Rule 5 permits the Tribunal to extend any time-limit provided in the Rules. The discretion to do so is exercised having regard to the overriding objective in Rule 2.

Discussion

13. The first issue is that of time. The application was not made within 28 days of the Judgment being sent to parties. It ought to have been made by 24 March 2022 but was in fact made on 8 July 2022.

14. The claimant is not correct in what he states in regard to the decision of EJ Hosie on 29 July 2021. EJ Hosie rejected the application for expenses at that stage. The witness statement the claimant tendered did refer to an application, but that was not a competent method of doing so. The witness statement was, as the name implies, a statement of the evidence in chief of the witness on matters relevant to the issues before the Tribunal on the merits of the claim. It ought not to have addressed entirely separate matters such as the application for expenses, which was not a subject for evidence at the Final Hearing. The mentioning of expenses or wasted costs during the Final Hearing, and the issue in relation to any application that had been made, was addressed by the Tribunal specifically in the Judgment, and that stated in terms that an application should be made if

the claimant was to pursue the matter. It was not so made timeously thereafter, even though the claimant indicated initially that he would by an email dated 14 March 2022. It was, or ought to have been, clear to the claimant that the application required to be made under the Rules. Had he done so within two weeks of that email, it would have been in time. No explanation for not doing that has been tendered.

15. The matter was not raised until 8 July 2022, which is well outwith the time for doing so set in the Rules. The claimant had legal advice for the Final Hearing, being represented by counsel, although it is possible that he did not have such advice more widely and after the hearing. He is however clearly a highly intelligent person, being a Consultant surgeon. Taking into account the overriding objective we considered that the time-limit should not be extended to allow consideration of the matter given all the circumstances, and the lengthy delay beyond the period permitted for doing so, together with both reference to the issue in the Judgment and the claimant initially stating that he would do so. We rejected his argument to the effect that the Tribunal had been in error in not addressing the matter in the Judgment, as it had done so in the terms set out above.

16. We also did so having regard to the merits of the application itself. We considered the application on the hypothesis that it had been made timeously, or otherwise competently.

17. Unlike in the civil courts, expenses (costs as they are referred to in England) do not follow success in the Employment Tribunal. As was pointed out by the Court of Appeal in ***Gee v Shell UK Ltd [2003] IRLR 82*** in relation to the Employment Tribunal

> "this is a jurisdiction where an order for costs is very much the exception rather than the rule. Parliament had set a high threshold for a costs order to be made, as the wording of reg. 12(1) illustrates".

That was a reference to a predecessor provision which has since been amended, but in our judgment the basic principle of expenses or costs being very much the exception, and that it requires to meet what can be described as a high threshold, remains valid. The threshold may have

been somewhat lowered by the addition of the words "otherwise unreasonably" to an extent, but that extent is we consider limited.

18. In order to exercise the discretion to make an award the circumstances must fall within the terms of the Rules. That requires firstly that it be related to the conduct of the claim or defence. Some at least of the claimant's complaints as to the conduct of the respondent pre-date the presentation of his claim, or are otherwise not a response to it, as we comment on below. They are accordingly irrelevant to the issue of expenses under the Rules referred to, and must be disregarded, however inappropriate the conduct in that regard was. The inappropriate nature of the conduct in that regard is a matter referred to in the Judgment.

19. Secondly the nature of the conduct must have the character set out within the Rules, specifically within the term "otherwise unreasonably". The unreasonable nature of the conduct of the litigation must be construed having regard to the full terms of the Rule.

20. Regard is also to be had to the terms of Rule 2. It is also necessary to consider all of the relevant circumstances, and that includes the success of the respondent in defending the claim on the merits. That is not a bar to an award, but it is we consider a material factor. That it is not a bar is seen in the case of ***Wolf v Kingston upon Hull City Council and another UKEAT/0631/06*** in which an award was made in favour of the respondent for part of the costs (the English term) where the claimant had otherwise been successful. We consider however that in the present case the fact that the respondent was successful in its defence to the claim is a material factor that we require to take into account.

21. In our judgment the conduct of the proceedings before the Tribunal by the respondent was not such as to fall within the terms of the Rule as to an award of expenses. Whilst matters might have been conducted differently, and issues as to what had been disclosed, or not, could have been made more clear at the outset, the respondent could have been more co-operative in requests for documents, and could have had more accurate pleadings (issues referred to for example at paragraph 127 of the

Judgment) that is far from the level of unreasonableness that the Rule in our view refers to.

22. We can understand why the claimant considers that he was, in effect, misled by the wrong documentation being provided to him, but the primary issue was that there was a subject access request which was made before the litigation was commenced. The request itself is referred to at paragraph 70 of the Judgment, and was made on 10 February 2020, with a reminder on 14 April 2020. The response was sent on 14 August 2020. The claimant's Claim was accepted on 3 August 2020, and sent to the respondent on that date. We consider that the response by the respondent sent on 14 August 2020 was not in relation to the Claim itself, for which a Response Form was presented on 27 August 2020, timeously, but the said subject access request.

23. We do not consider that there was any attempt before us to conceal evidence, obfuscate, give untruthful evidence, or similar conduct by the respondent or its witnesses. We do state at paragraph 149 that there were issues with how the respondent had conducted itself, and that providing fully accurate documents and pleadings is important, but we do not consider that in all the circumstances of the case what happened was of such a level of unreasonableness as attracts an award of expenses in light of the terms of the Rules and the authorities referred to.

24. Similarly we did not consider that the conduct of the litigation by the respondent's representatives, either solicitors or counsel, was of the standard required to fall within the terms of Rule 80. That has a somewhat different test, but there was nothing put before us that we considered met it.

25. Having considered all of the points set out in the claimant's application and later emails we do not consider that there is sufficient within them to exercise the discretion to make an award, and that is a further and separate reason for not exercising discretion to allow it late. Even if it had been accepted late, it would not have succeeded for the reasons we set out. We have therefore addressed it on the merits even although we considered it to be out of time.

Conclusion

26. The unanimous decision of the Tribunal is that the claimant's application is refused.

Employment Judge: A Kemp

Date of Judgment: 9 August 2022

Date sent to parties 10 August 2022