EMPLOYMENT TRIBUNALS (SCOTLAND)

5 **Case No: S/4118851/2014**

Hearing Held at Dundee on 23 February 2017 (on the papers)

Employment Judge: I McFatridge (sitting alone)

10

Mr P Longland	**Claimant**
Meat & Livestock Commercial Services Ltd	**First Respondents** **Written representations**
Anglo Beef Processors UK	**Second Respondents** **Written representations**

15

20

25

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The first respondents' application for an award of costs against the second respondents is refused.

30

REASONS

35 1. In this case the claimant, Mr Longland, submitted a claim to the Tribunal in which he claimed that he had been unfairly dismissed. He directed his claim against the first and second respondents. This was on the basis that the first respondents averred that there had been a relevant transfer in terms of the TUPE Regulations

from the first respondents to the second respondents and that the second respondents were responsible for dismissing the claimant and that any liability for compensation lay with them. I heard the claim over two days on 13 and 14 July 2015 and found that there had been a relevant transfer to the second respondents. I found that the claimant had been unfairly dismissed by them and awarded the claimant compensation to be paid by the second respondents. I directed that the claim against the first respondents be dismissed. Subsequently the first respondents indicated that they wished an award of costs made in their favour against the second respondents. The second respondents appealed the decision to the Employment Appeal Tribunal and the costs application was held in abeyance until after the outcome of the appeal process.

2. On 18 December 2016 the Employment Appeal Tribunal refused the second respondents' appeal. The first respondents renewed their request for a Costs Order. Both parties were in agreement that the matter should be dealt with by way of written submissions and both submitted helpful submissions to the Tribunal which I considered in chambers. I will not attempt to fully repeat these submissions in this Judgment since they are available in writing and I do not feel that I would be able to do full justice to them however the salient points of each side submission was as follows.

First Respondents

3. It was confirmed that they were making their application in terms of Rule 76(1) and in particular it was their position that the claim or response of the second respondents had no reasonable prospect of success. They referred to the case of ***Scott v Inland Revenue Commissioners [2004] ICR 1410*** and clarified that the key question in this regard is not whether a party thought he was in the right but whether he had reasonable grounds for doing so.

4. The first respondents' position was firstly that it would have or should have been plain to the second respondents that its defence that there had been no TUPE transfer had no reasonable prospect of success. Secondly it was their position that it should have been apparent to ABP that their defence had no reasonable

prospect of success and they therefore acted unreasonably in pursuing their defence in such a manner that required MLCS to be put to the cost of defending the proceedings through to trial. The first respondents made the point that there were two separate issues and clearly if I found that there had been no reasonable prospect of success then I would not require to go on to make a finding that the second respondents had conducted the proceedings unreasonably. The first respondents then set out the various matters which they consider ought to have led the second respondents to the realisation that their defence had no reasonable prospect of success. The first point was that the pleaded case, in the view of the first respondents showed no reasonable prospect of success. They also said that, as it turned out, the evidence from the second respondents' own witnesses did not support their case and on this basis it should have been apparent to the second respondents and their representatives from the outset that that particular aspect of the defence would be found to be unsustainable. The first respondents note that ABP's assertion that the new system had dispensed with the requirement to manually grade carcasses was simply incorrect as it was evident that the second respondents were required to continue to manually grade 25 carcasses a day plus any missed by the new system. The first respondents also referred to paragraph 44 of my Judgment when I note that the clear evidence of both of the second respondents' witnesses was that additional software was required for the VIA machine to be capable of undertaking the task of allocating carcasses to particular customers and there was no intention to purchase this. Again they say that this evidence was available to the second respondents in advance of the hearing. The assertion by the second respondents' representative that this was not the case during the hearing was completely contrary to his own witnesses' evidence. They also refer to the point I made in my Judgment that this was not a borderline case but one where I consider that there was really very little room for doubt that the activities carried out by the second respondents after the transfer were fundamentally the same as those carried out by the first respondents prior to the transfer.

5. With regard to unreasonable conduct they referred to paragraph 51 of my Judgment where I note that many of the assertions made by the second respondents' representative in final submissions were unsupported by evidence

and considered that this was indicative of a wider unreasonable approach the second respondents took to the conduct of the case in failing to properly assess the evidence. The first respondents also referred to the section in my Judgment where I was critical of the second respondents' point made regarding the case of ***Huke***. Essentially the first respondents' position is that the second respondents were represented by experienced employment lawyers and ought to have appreciated that their claims had no reasonable prospect of success and that proceeding in those circumstances was unreasonable. They referred to the various points made by the second respondents in answer. They refute the suggestion that if the first respondents were confident of their case they should have stepped aside and should not have incurred the level of costs they did in defending a case when it was evident they were going to win anyway. The first respondents point to the fact that the case pled by the second respondents contained factual inaccuracies which required to be addressed. They make the point that had the second respondents properly conceded that there was a TUPE transfer then the first respondents would not have incurred the costs which they did. They point to the fact that on 20 April 2015 the second respondents were formally put on notice by the first respondents that the first respondents intended to claim costs if the second respondents continued to pursue the defence that the claimant had not transferred to them under TUPE. They also point to the fact that at the Preliminary Hearing I indicated to parties that I considered TUPE rules had been subject to considerable judicial clarification over the years and that a finding of costs against the losing respondent would be extremely likely. They accept this was in the context of a possible claim by the claimant. The first respondents' position was that the costs incurred by them in defending the claim were £24,525.80 but they were content to confine their application to a Costs Order in the sum of £20,000 being the maximum sum the Tribunal could award. They refute the second respondents' suggestion that the costs claimed are excessive.

6. The second respondents' position was that neither their conduct in pursuing the defence nor in conducting the proceedings met the unreasonableness threshold which would engage my discretion as to whether or not to award expenses in this case. They referred to the well known principle that in Tribunal proceedings an Expenses Order is an exception not the rule. With regard to specific points made

by the respondents they note that my finding that two employees were on categorisation of carcasses both before and after the transfer was qualified by the use of the word “generally”. More importantly, they referred to the fact that the body of case law on service provision changes indicate that relatively small changes can be enough to prevent there from being a transfer. They go on to state that I did find in my Judgment that there had been a number of changes before and after the alleged transfer they list these in their submissions. They also referred to a factual dispute as to the extent to which the VIA machine replaced the claimant’s former manual duties and indicated that it was right that a Tribunal should hear the evidence in order to make findings in respect of the factual matters which remained in dispute between the parties. They referred to the fact that subtle changes such as changes in the “ethos” of the service might lead a Tribunal to find that TUPE did not apply. They say that whilst in the current case it was open to the Tribunal to find that a change from manual to electronic classification did not prevent TUPE from applying this was something which required a decision from the Tribunal and it could not be said that it was *“inevitable”* that manual activities should be found to be fundamentally or essentially the same as activities carried out electronically. They make the point that the issue I raised at paragraph 44 related to something said by their representative in submissions. They suggested it cannot possibly be unreasonable conduct for a party to make a submission which is not accepted by the Tribunal. They also make the point that when I say *“there was very little room for doubt”* it is not the same as saying *“there was no reasonable prospect of success”*. The second respondents go on to dispute the amount of costs incurred and refer to the various costs warnings. They referred to the fact that the costs warning was issued at a time when the second respondents’ ET3 contained limited and basic information and that this was not repeated after the second respondents lodged further and better particulars.

Discussion and Decision

7. I considered that both parties had accurately referred to the law on the subject and to the way in which I should approach the matter. I required to adopt a two-stage process. The first stage is to decide whether or not my discretion to award costs at all is engaged and this means that I have to be satisfied that at least one of the

conditions set out in Rule 76 is met. The second step is that if I find that the terms of Rule 76 are met I required to decide whether or not it is appropriate to make an award and if so how much.

5 8. I agree with the first respondents that Lord Justice Sedley's comments in ***Scott v Inland Revenue Commissioners [2004] ICR 1410*** are helpful to me in assessing whether or not the respondents' case had no reasonable prospect of success. I am conscious that I am looking at matters with the benefit of hindsight and I require to keep in mind that the issue for me is whether prior to the hearing it was 10 reasonable for the second respondents to believe they were in the right. Whilst taking on board the various criticisms made by the first respondents I consider that they are adopting far too high a standard in judging the second respondents in saying that it ought to have been clear to them that their defence on the issue of TUPE had no reasonable prospect of success.

15

9. I entirely accept the second respondents' submission to the effect that where the allegation is one of service provision change relatively small changes can be enough to prevent there from being a transfer.

20 10. There will be cases where TUPE is alleged where the alleged transferee clearly has no defence and where it would clearly be unreasonable for them to consider that they did. I do not believe that this was one of them.

11. It may well have been that if their advisors were considering matters appropriately 25 at the time, the advice would have been that there was more chance of them losing than winning but this is not at all to say that they had no reasonable prospect of success.

12. Whilst I agree with the first respondents that the evidence of the second 30 respondents' witnesses was less helpful to the second respondents than it might have been I do not consider that this in itself indicates that the case had no reasonable prospect of success from the outset. It is not a particularly unusual occurrence for a party's own witnesses to give evidence that is somewhat disappointing and may not be precisely in line with the statements they have given

pre-trial. The second respondents are not to be penalised for this nor are their representatives. It is simply a fact of litigation that witnesses when giving evidence on oath and subject to cross examination will sometimes remember things differently or give evidence which is not precisely on all fours with their previous statements.

13. I do not think that the correspondence about the costs warnings given in this case really adds anything. The issue of costs raised at the Preliminary Hearing was primarily about the claimant's costs. The claimant's position in this case was that he felt that it was clear he had been unfairly dismissed after many years' service and that it was unfortunate to say the least that he was having to incur expense to determine which of the respondents would be responsible for compensating him.

14. With regard to conduct of the proceedings I understood the primary thrust of the first respondents to be that it had been *per se* unreasonable of the second respondents to persist with their defence in circumstances where it had no reasonable prospect of success. Given that I have not found that the defence had no reasonable prospect of success I reject that argument. With regard to the specific points raised by the first respondents I did not consider that either individually or collectively they came anywhere near the threshold of unreasonableness required to make an award under Rule 76. I endorse the comments of the second respondents that the fact that a submission is made which I find contrary to the evidence is not of itself unreasonable conduct. I therefore find that the terms of Rule 76 have not been met and it is therefore not open for me to make an award of costs in this case. I should say that had I found otherwise then I would not have made an award in the sum of £20,000 as sought by the first respondents. Had I found that on the information before me the second respondents had had no reasonable grounds for believing that they would succeed at the time they decided to proceed with the defence of the action then I would have felt that taking all matters into account it would not have been appropriate for them to require to pay the whole costs of the first respondents or even a large percentage of them. At the end of the day a party is entitled to do what it can do defend itself. The fact that a party does not succeed does not of itself mean that they behaved unreasonably. The Tribunal rules are such that expenses do not

invariably follow success. Whilst the policy behind that is no doubt with a view to regulating the issue between claimants who in the normal course are individuals and employers who will usually have greater financial resources there is nothing in the rules which suggests that I apply a different standard where, as here, the parties are two fairly substantial business organisations. The first respondents' application for costs/expenses is therefore dismissed.

Employment Judge: Mr I McFatridge
Date of Judgment: 20 February 2017
Entered in register:22 February 2017
and copied to parties