EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113790/2021

In Chambers based on Written Submissions

Employment Judge M Robison

Mr D Robertson	**Claimant** **In person** **Written submission**
Taskmaster Resources Ltd	**First Respondent** **Represented by** **Mr S Rice-Birchall** **Solicitor** **Written submission**
Richmond Containers CTP Ltd	**Second Respondent**

ORDER OF THE EMPLOYMENT TRIBUNAL

The first respondent's application for expenses dated 16 February 2022 is refused.

REASONS

1. A hearing listed to consider the claimant's application for interim relief due to take place on 7 February 2022 by CVP was converted to a case management preliminary hearing because following discussion the claimant did not insist on **E.T. Z4 (WR)** his application for interim relief. In particular the claimant accepted that he was a worker not an employee which meant that he could not proceed with his application for interim relief. A note of the discussion at that preliminary hearing was finalised on 7 February 2022, but unfortunately due to an administrative error not issued to parties until 7 March 2022.

2. The first respondent did not oppose the conversion of the hearing to a case management preliminary hearing, subject to reserving the right to apply for the expenses associated with the aborted interim relief hearing.

3. I did not deal with that application at that hearing not least because the claimant had prior notice of the application. The first respondent subsequently made an application for expenses by e-mail dated 16 February 2022.

Factual background

4. The claimant lodged claim in the employment tribunal on 21 December 2021, claiming unfair dismissal for making a protected disclosure and arrears of pay and holiday pay. He made an application for interim relief.

5. In accordance with usual procedures, on 31 December 2021 a case management preliminary hearing was listed to take place on 21 February 2022 by telephone, with an ET3 response due by 2 February 2022.

6. Parties were then advised on 10 January 2022 that the case would be listed for a hearing on interim relief to take place by CVP on 7 February 2022.

7. Parties were advised by e-mail dated 25 January 2022 that no oral evidence would be led and the decision would be made on the basis of documents lodged and legal submissions.

8. The second respondent lodged an ET3 response on 26 January which was forwarded to the claimant on 31 January 2022.

9. The first respondent lodged an ET3 on the 2 February which was sent to the claimant on 3 February 2022.

10. A bundle of documents for the interim relief hearing was lodged by the first respondent on 2 February 2022 (and updated 3 February 2022)

First respondent submissions/application

11. By e-mail dated 16 February 2022, the first respondent made an application for costs under rule 76 of the Employment Tribunal Rules of Procedure, which properly speaking in this jurisdiction should be termed expenses (rule 74(1)).

12. The application was made on the basis that the claimant had acted unreasonably in his conduct in bringing and pursuing his application for interim relief and/or that his application had no reasonable prospects of success.

13. The parties were advised that a hearing on interim relief would take place on 7 February 2022. The first respondent issued a "costs" warning letter to the claimant on 17 January 2022, inviting the claimant to withdraw his claim.

14. The respondent stated that the claimant declined to withdraw his application and responded to the first respondent by e-mail with a gif of Robert Downey Jr "eye roll" and stating "still happening" (copy submitted).

15. The first respondent advised that they commenced a significant amount of work in a very short time period, including preparation of a joint hearing bundle, a witness statement a skeleton argument and an authorities bundle.

16. The first respondent submitted that, in response to their attempts to produce a joint bundle, the claimant responded in a vexatious manner, including telling the first respondent's representative to "cut the shit and lawyery amateur dramatics" (copy submitted).

17. The first respondent produced a detailed schedule seeking expenses totalling £17,734.50. The first respondent asked the Tribunal to exercise its discretion to allow the application for obvious lack of reasonable prospects due to the claimant's status as a worker and the fact that the first respondent offered the claimant the opportunity to withdraw his claim without pursuing him for costs.

18. The first respondent sought a hearing on the application. I refused that application because it would incur further costs and the matter could be dealt with on the basis of written submissions.
19. The claimant set out his position in an e-mail dated 16 February 2022.
20. Both parties were invited to provided any additional submissions which they wanted taken into account. The claimant forwarded a further e-mail dated 25 February which I have taken into account, but which was largely a repeat of previous submissions.

The claimant's submissions

21. In his e-mail of 16 February, the claimant made the following relevant submissions.

    a. The claimant did not receive the ET3 response until a couple of days before the interim relief hearing.

    b. The respondent had failed to respond to his request for basic information, or to communicate with the claimant prior to their lawyers submitting over 600 documents a week before the hearing.

    c. It was not until the claimant had read those documents over the weekend that the claimant lost trust and confidence in the respondents.

    d. The claim is not abusive or vexatious: a Judge had decided that an interim relief hearing should go ahead after assessing the respondent's pleadings and the reasons/arguments provided by the claimant.

    e. The respondent agreed that the claimant had a right to pursue matters.

    f. The hearing was not wasted because "the claimant arranged to have the case management dealt with at the same time".

    g. The interim relief hearing was changed on Judge Robison's request.

22. Other submissions made which are apparently less relevant include (as I understand the submissions, which I paraphrase here):

    a. The respondent had an opportunity to re-employ the claimant again in January 2022 and again after the hearing.

    b. If the respondent had watched the CCTV then the matter could have been easily resolved.

23. On ability to pay, the claimant submitted that he was unemployed and would not have the means to pay (but also that he had started a new job the next week).
24. He argued at some length that the amount sought was excessive and disproportionate (encapsulated in his use of the word “laughable”).

Relevant law

25. Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, sets out when an expenses order may or shall be made.
26. Rule 76(1) states that a Tribunal may make an expenses order and must consider whether to do so, where (a) it considers that 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 prospects of success.
27. Rule 74 states that in Scotland all references to costs should be read as references to expenses.
28. Rule 78 sets out the provisions regarding the amount of the expenses order and Rule 84 states that a tribunal may have regard to the paying party’s ability to pay.
29. The courts have emphasised when considering costs or expenses generally, that awards of costs or expenses are the exception and not the rule (*Gee v Shell (UK) Ltd* 2003 IRLR 82 CA). Further, the aim in making an order is to compensate the party which has incurred the expense in winning the case and not punishment of the losing party (*McPherson v BNP Paribas* 2004 IRLR 558).
30. The Tribunal in exercising its discretion must have regard to the nature, gravity and effect of any unreasonable conduct. That does not require the respondent to prove that specific unreasonable conduct by the claimant caused particular costs to be incurred (*McPherson v BNP Parabis* 2004 IRLR 558 CA) but any award of costs must, at least broadly, reflect the effect of the conduct in question (*Barnsley Metropolitan Borough Council v Yerrakalva* 2012 IRLR 78 CA).

31. In *Radia v Jeffries International Ltd* 2020 IRLR 431 HHJ Auerbach issued the following guidance at [61] – [64]:

"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. Rule 84 provides that, in deciding both whether to make a costs order, and if so, in what amount, the Tribunal may have regard to ability to pay.

At the first stage, accordingly, it is sufficient if either r 76(1)(a) (through at least one sub-route) or r 76(1)(b) is found to be fulfilled. There is an element of potential overlap between (a) and (b). The Tribunal may consider, in a given case, under (a), that a complainant acted unreasonably, in bringing, or continuing the proceedings, because they had no reasonable prospect of success, and that was something which they knew; but it may also conclude that the case crosses the threshold under (b) simply because the claims, in fact, in the Tribunal's view, had no reasonable prospect of success, even though the complainant did not realise it at the time. The test is an objective one, and therefore turns not on whether they thought they had a good case, but whether they actually did……

This means that, in practice, where costs are sought both through the r 76(1)(a) and the r 76(1)(b) route, and the conduct said to be unreasonable under (a) is the bringing, or continuation, of claims which had no reasonable prospect of success, the key issues for overall consideration by the Tribunal will, in either case, likely be the same (though there may be other considerations, of course, in particular at the second stage). Did the complaints, in fact, have no reasonable prospect of

> success? If so, did the complainant in fact know or appreciate that? If not, ought they, reasonably, to have known or appreciated that?"

Tribunal's deliberations and decision

32. The focus of this application is only the claimant's application for interim relief. The respondent relies on two reasons, first that the claim had no reasonable prospects

> of success and second that the claimant acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing the claim or in the conduct of the proceedings.

33. This is a two stage test. The first question I must ask is whether one or both

grounds have been made out, ie whether the required threshold is met. If so, then I must consider whether or not I should exercise my discretion to make an award of expenses.

34. I should say at this stage that my starting point is that an award of expenses is still the exception rather than the rule in employment tribunals.

First stage of test: has one or both of the grounds been made out?

First ground: no reasonable prospects of success

35. Following the *Radia* guidance, the first question for the Tribunal to consider is "Did the complaints, in fact, have no reasonable prospect of success?"

36. An application for interim relief is an emergency measure allowing the claimant to seek an order for re-employment pending the final decision of any unfair dismissal claim. The relevant legal provisions are set out in the Employment Rights Act as follows.

37. Section 94 states that "an employee has the right not to be unfairly dismissed by his employer".

38. Section 103A states that "an employee who is dismissed shall be regarded….as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure".

39. Under section 128 of the Employment Rights Act 1996, "an employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and where the reason (or if more than one the principal reason) for the dismissal is one of those specified in….. section 103A….may apply to the tribunal for interim relief".

40. What is clear from those provisions is that it is only employees who can claim unfair dismissal and only employees who can claim interim relief.

41. Although the claimant did make a claim for unfair dismissal on the grounds that he had made a protected disclosure, following discussion at the converted case management hearing, he accepted that he was not an employee, but a worker. This meant that he could not pursue a claim of unfair dismissal after all, and it was understood that he accepted that and that his claim for unfair dismissal was

to be withdrawn. It was however apparent during the discussion that he could purse a claim that he had suffered detriment (that detriment being that his engagement had been terminated) because he had made a protected disclosure in his role as worker (see section 47B of the Employment Rights Act 1996, discussed below). It was accepted by the first respondent that he could pursue such a claim in his role as a "worker", but not that he was entitled to rely on the interim relief measures.

42. Given the view of both respondents, and given the paperwork relied on, and given the claimant's acceptance that he was a worker and there being no dispute that he was not an employee, the claimant was not entitled to claim unfair dismissal and an application for interim relief was not competent.

43. It is clear therefore that the application for interim relief viewed objectively had no reasonable prospects of success. I therefore find that the threshold test has been met in this case.

44. This means that I require to move to stage two and I require to consider whether to make an award of expenses or not, although I am not obliged to do make any award.

Second ground: unreasonable conduct

45. However, before moving to stage 2, I consider it appropriate to deal with the second ground relied on by the first respondent, in particular that the claimant acted unreasonably in making the application. As I understood it, the first respondent's position was that it was unreasonable for the claimant to proceed with the application because it had no reasonable prospects of success, and indeed the claimant had been warned that the application had no reasonable prospects of success.

46. The threshold will be met if the claimant could be said to have acted "vexatiously, abusively, disruptively or otherwise unreasonably" in bringing proceedings or in the conduct of these proceedings. I considered whether the claimant had acted unreasonably in persisting with the application for interim relief. I considered that

this is a case where there is an “overlap” between the two “no reasonable prospects of success” question and the unreasonableness question.

47. Following the guidance of HHJ Auerbach in *Radia*, having accepted that the claim had no reasonable prospects of success, I asked whether the claimant in fact knew or appreciated that; and if not whether he ought to have known. The question I asked then was “Did the claimant act unreasonably – given his state of knowledge – in pursuing the claim”.

48. I considered whether the claimant knew or ought to have known that the claim had no reasonable prospects of success. In making this assessment I take into account the fact that the claimant was not legally represented.

49. The respondent relies on the "costs" warning issued to the claimant in which they set out the relevant legal provisions and point out that given the claimant is not an employee his application has no reasonable prospects of success. This letter was dated 17 January 2022. The interim relief hearing took place on 7 February, the claim itself only having been lodged on 21 December 2021.

50. It is clear from the correspondence that the claimant had lost trust in the respondents and did not apparently trust the respondent's lawyers.

51. While I do not accept that there was a legitimate reason for that, I do accept that it was not self evident that the claimant should accept the premise behind the "costs" warning letter given that he did not have the benefit of legal advice. The claimant is of course entitled to represent himself in these proceedings and should not be required to obtain legal advice, even if that may be advisable.

52. However, it should be noted that the claimant accepted, during the hearing when the point was discussed, that he was a worker and not an employee. As discussed above that had the indisputable consequence that the interim relief hearing could not proceed.

53. The claimant however apparently understood that the hearing had to be aborted because he had decided that he did not wish to be reinstated after all; and he only came to that realisation when he lost trust and confidence in the respondents because of the way they had handled the employment tribunal claim. He had only come to that realisation during the week-end before the interim relief hearing (which was due to take place on a Monday).

54. From correspondence received recently the claimant still appears not to appreciate the significance of the fact that because he is a worker he cannot claim

unfair dismissal whereas as a worker he can claim that he has suffered a detriment because he made a protected disclosure, and his "dismissal", or perhaps termination of his contract or engagement as it might more accurately be called, is categorised as a "detriment" for the purposes of the relevant provisions.

55. This is not an entirely straightforward distinction for a lay person. The law in this area is undoubtedly complex. Indeed during the course of the case management preliminary hearing, the second respondent's counsel did not initially accept that it was clear that a worker (as defined) could potentially at least claim that a "dismissal" is a detriment for the purposes of the relevant provisions and wanted more time to consider her position.

56. She was referred to 47B of the Employment Rights Act which sets out that "a worker has the right not to be subjected to any detriment….by his employer on the ground that the worker has made a protected disclosure", worker and employer having the extended meaning given by section 43K. Section 47B(2) states that the section does not apply where the worker is an employee and the detriment amounts to a dismissal. It is apparent therefore that a "dismissal" of a worker (as defined) can be a detriment for the purposes of that section.

57. What I take into account is the fact that the claimant, following discussion in the context of the hearing, readily accepted that he was not an employee, and as I had understood at the time, following direction from the employment judge (rather than a partisan representative of the first respondent) that he could not therefore claim interim relief.

58. Although the claimant had been advised of this by the first respondent's representatives so to that extent he could be said to have "known", I accept that he did not know or appreciate at the time that his application for interim relief had no reasonable prospect of success when he made it and indeed until this was discussed during the hearing. It was only then that it was made clear to the claimant that the claim had no reasonable prospect of success.

59. Given the complexity of the law, I accept that it could not be said that the claimant ought to have known that his application had no reasonable prospects of success, and I could not conclude that his conduct in proceeding with the application was unreasonable.

Second stage of test – should an award of expenses be made?

60. Although I accept that it could not be said that the claimant reasonably ought to have known, at the time prior to the interim relief hearing, that the claim had no reasonable prospects of success, I do accept that objectively speaking the application had no reasonable prospect of success.

61. This means that I need to consider the second stage, but as discussed above, this does not mean that I require to make an award of expenses, just that I must consider whether or not to make an award of expenses.

62. I take account, as discussed above, that the law in this area is complex and it is not at all self evident to a lay person that a claim for interim relief would have no reasonable prospects of success, where his claim that his engagement had been terminated because he had made a protected disclosure was a valid one. I did not accept that the “costs” warning letter (especially in the time frame between its issue and the hearing) should necessarily have caused the claimant to withdrawn the application. Indeed the claimant thought, perhaps understandably, that the fact that an employment judge had listed it for a hearing must mean that it had some prospect of success.

63. The claimant made a good point when he noted that the hearing had not been in vain because I decided and it was a matter of agreement that the hearing should be utilised to undertake case management. It should therefore be noted that the result was that the case management preliminary hearing due to take place on 21 February could be cancelled, so that no expenses will be incurred in attending

or preparing for that hearing which otherwise would have been had that decision not been made to utilise the hearing in the way that I did (and there would be little if any prospect of a successful application in regard to expenses for a first case management hearing).

64. In summary then, I did not consider that it was appropriate to make any award of expenses for the following reasons: an award of expenses is the exception and not the rule; the claimant did not have the benefit of legal advice; this claim is at its very early stages; this was the first hearing when the claimant had the benefit of a discussion about proceedings with an Employment Judge; the point at issue was a complex one; the claimant readily accepted during discussion when the matter was to be adjudicated by an Employment Judge that the interim relief hearing could not proceed; the time used at the hearing (and indeed preparing for the hearing) was well used since it was converted to a case management

hearing which meant that the subsequent case management hearing could be cancelled.

65. I conclude therefore that no award of expenses should be made in the particular circumstances of this application. The first respondent's application for expenses is therefore refused.

Inappropriate behaviour

66. It should be noted that I did not consider whether the claimant's behaviour was otherwise "vexatious, abusive or disruptive", but have focused on the submission that it was unreasonable for the claimant to pursue an application for interim relief which had no reasonable prospect of success.

67. However, to the extent that the respondent makes such as argument, I do not accept that the relevant threshold has been reached.

68. I noted that the first respondent claims in their application the assertion that the claimant responded to the first respondent's e-mails in a vexatious matter, including

reference to an e-mail including at least inappropriate language, and one where his response included a “gif”. The respondent copied to Tribunal these two e-mails which had been exchanged between the parties but which were not communications with the Tribunal.

69. Notwithstanding what is said above, the claimant should appreciate that he should be courteous and respectful in all dealings connected with these proceedings, and that he should take cognisance of the overriding objective. this is to enable Tribunals to deal fairly and justly with all cases, and requires parties and representatives to assist the Tribunal in furthering that objective and to cooperate generally with each other and with the Tribunal. The Tribunal is entitled even with unrepresented parties, to expect appropriate behaviour in all dealings with parties and respondents, and would be entitled to make an award of expenses against the claimant should his behaviour cross the relevant threshold.

70. Finally, I take this opportunity to bring another matter to the attention of the claimant. I noted in his correspondence with the Tribunal that the claimant asks “why would I show my cards and give them all my case information before the hearing”.

71. The claimant should be aware that the correct approach to litigation in the employment tribunal is indeed that he should "show his cards" before the hearing. All parties are entitled to what is called "fair notice" of the other party's arguments to allow them to prepare for hearings and should not be taken by surprise. The claimant should in further preparation of this case ensure that he has given the respondent fair notice of his arguments.

Employment Judge: M Robison
Date of Judgment: 09 March 2022 Entered in register: 09 March 2022 and copied to parties