



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 8000154/2022

Judgment on Expenses Application by Respondent

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Employment Judge: M A Macleod

Natalie Valente

**Claimant
In Person**

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20 **McEwan Fraser Services Limited**

**Respondent
Represented by
Mr F Smith
Manager**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that the respondent's application for expenses under Rule 76 of the Employment Tribunals Rules of Procedure 2013 is refused.

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REASONS

1. The claimant presented a claim to the Employment Tribunal on 18 November 2022 in which she complained that she had been discriminated against on the grounds of disability.

2. The respondent submitted an ET3 response in which they resisted the claimant's claims.
3. On 14 February 2023, the claimant wrote to the Tribunal to withdraw her claims of discrimination arising from disability under section 15 of the Equality Act 2010 ("the Act"), harassment under section 26 of the Act and victimisation under section 27 of the Act "in their entirety".
4. The claim was dismissed under Rule 52 of the Employment Tribunals Rules of Procedure 2013 by Judgment of Legal Officer K Monteith dated 17 February 2023.
5. On 17 March 2023, the respondent wrote to the Tribunal to "make an application to claim back company expenses from the claimant through this case". They asked for advice as to what information would be required from them to proceed.
6. The Tribunal responded that it was unable to provide advice to any party and referred the respondent to the Employment Tribunals Rules of Procedure 2013 to determine how to proceed. The Tribunal made clear, further, that the respondent's email was not being treated as a formal application for expenses at that stage.
7. On 23 March 2023, the respondent wrote again to the Tribunal to make a formal application for expenses, and provided details of the costs which they were seeking to recover.
8. The claimant opposed that application.
9. The Tribunal established that the parties were content for the application to be dealt with by written submissions alone. Further submissions were requested from the parties.
10. The Tribunal now addresses the application and submissions by the respondent; the claimant's opposition and her submissions; the relevant law; and then the decision reached.

The Application

11. The application submitted by the respondent was a formal application for company expenses, and referred to Rule 76(1) of the Employment Tribunals Rules of Procedure 2013, arguing that:

5 (a) the claimant had acted vexatiously in making her claim along with several allegations against the respondent and its staff; and

(b) the claim in any event had no reasonable prospect of success.

12. They requested that the claimant pay expenses totalling £3,400, including counsel's fees (with invoice attached), sums relating to the time of the
10 respondent's officers to attend a Preliminary Hearing, and to the investigation of the claims by the Client Relationship Manager both before and after the Preliminary Hearing.

13. In response to the claimant's opposition to the application, the respondent submitted an email dated 29 March 2023 in which they refuted the
15 claimant's assertion that the claim was not vexatious. They submitted that the claim was totally vexatious and that the claimant clearly relied upon her medical condition as the basis and foundation of her claim against the firm. They argued that she had completely failed to provide any medical evidence, or any evidence, to support her claim, and therefore had no
20 prospect of success. They called upon the claimant to produce her medical records in support of her position in relation to expenses and to her honesty.

14. The respondent went on to state that they had evidence from the claimant's landlord, Yvonne McKenzie, to the effect that the claimant was "plotting an
25 employment claim" for some months against the respondent. They also asked the Tribunal to rule that the claimant should return all company property and reserved the right to report that matter as a breach of data protection legislation.

15. They also asked for permission to report the claimant to the Law Society of Scotland, on the basis that she had a history of making malicious and
30 vexatious claims against her employers and private individuals.

The Claimant's Opposition

16. In her initial email opposing the application, the claimant denied that the claim was vexatious at all, and insisted that she was entitled to apply to the Tribunal if she considered that her employment rights had been infringed.
5 She maintained that she had documentary evidence of the "bully tactics" she said she had been subjected to, and had evidence that she had been completely ignored by the respondent and their staff. She also confirmed that she is disabled and had the medical evidence to prove it.

17. She stated that she was not prepared to pay the respondent's fees in respect of the officers who attended the Preliminary Hearing, on the basis that there was no need for either of them to attend in light of the instruction of counsel. She suggested that it was "all nonsense designed to punish me for applying to the Employment Tribunal as is my right."
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18. On 29 March 2023, the claimant wrote again to the Tribunal. She said she had no problem disclosing her medical records if that would indicate to the respondent that she was not lying. Her condition was that of anxiety and she had to be prescribed additional sleeping tablets and antipsychotics as a result of the respondent's behaviour towards her.
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19. She asked the Tribunal for guidance about the comments made by the respondent in relation to her landlord, Ms McKenzie, and whether they were entitled to call a third party to give evidence. She acknowledged that she had discussed the actions of the respondent with her flatmate when she could not sleep and was anxious at the time, but maintained that this was for support. She suggested that Ms McKenzie would have had a motive for providing evidence which was unsupportive of her given that they had had a disagreement about an unrelated matter.
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20. She denied that she had been guilty of any data protection breach, and asked why the respondent would consider reporting her to the Law Society of Scotland.

21. She maintained that she did not raise the proceedings on a whim, but on the basis of evidence of having been harassed in the workplace.

22. Finally, the claimant sent an email on 7 April 2023 in which she expanded upon her previous submission.

5 23. She said that she had been diagnosed with anxiety at the age of 13, and had taken “SSNRs” regularly. While employed by the respondent, she said that she had been prescribed sleeping tablets and antipsychotics by the Out of Hours Service at the Edinburgh Royal Infirmary. She told the respondent’s HR Executive that she had to take time off work as she could
10 not sleep, which affected her cognition. She offered again to disclose her medical records.

24. She repeated her assertion that she had considerable evidence, including emails, to support her allegations that she was bullied and ignored by the respondent. She described her treatment by members of the respondent’s
15 staff as “agnostic and undermining” (understood to mean antagonistic and undermining). She would have provided witness evidence in support of her assertions.

25. The reason for the withdrawal of her claim, she said, was that she was becoming increasingly unwell with anxiety and took the decision to withdraw
20 the claim in order to avoid making herself seriously ill. She said that she had never made a claim to an Employment Tribunal before and she submitted this claim because her health had suffered due to the respondent’s actions against her.

The Relevant Law

25 26. In this case, the application is made under Rule 76(1) of the Employment Tribunals Rules of Procedure 2013, which provides:

“A Tribunal shall make a costs order.. and shall consider whether or 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

5 (b) any claim or response had no reasonable prospect of success..."

27. In the case of **Beat v Devon County Council & Another** **UKEAT/0534/05/LA**, (to which I was not referred by the parties in this case) the EAT provided guidance as to the making of expenses awards. At paragraph 25, the EAT (His Honour Judge Altman) said: *"Having found the*
10 *areas of unreasonableness and misconception, a Tribunal, it seems to us, is bound to pause; to stand back and to look at all the factors that are to be taken into account when assessing the appropriate level of compensation. This involves balancing the amount of costs incurred by the unreasonableness, or the misconceived part of the claim against other parts*
15 *of the claim and by taking account of the need, if the Tribunal considers there is a need for some compensation and costs."*

28. In **Power v Panasonic (UK) Ltd UKEAT/0439/04**, the claimant, who had succeeded in her complaints of discrimination, unfair dismissal and breach of contract, appealed against an award of costs against her in the sum of
20 £10,000. The award was made on the application of the respondent, in light of the fact that an offer of settlement had been made in advance of the hearing, but rejected by the claimant, unreasonably in the mind of the Tribunal. In rejecting the appeal, the EAT set out, at paragraph 12, some guiding principles by which Tribunals should abide when determining
25 whether or not to make a costs order on the grounds of unreasonable conduct, summarised briefly as follows:

1. Costs orders in the Employment Tribunal remain the exception not the rule, though the question is not whether the case is exceptional but whether the party
30 has brought themselves within the meaning of the relevant Rule of Procedure;

- 5 2. A two stage exercise is envisaged, namely to determine firstly whether the paying party has acted unreasonably, and secondly, if so, whether the Tribunal should exercise its discretion in favour of awarding costs against that party;
3. Costs are compensatory, not punitive;
4. The rule in relation to Calderbank offers is not applicable in the Employment Tribunal;
- 10 5. The discretion of the Tribunal is not limited to those costs which are caused by or are attributable to the unreasonable conduct found;
- 15 6. Where a party has obstinately pressed for some unreasonably high award despite its excess being pointed out and despite a warning that costs might be asked for against that party if it persisted, the Tribunal could in appropriate circumstances take the view that that party had conducted the proceedings unreasonably;
- 20 7. Any appeal against the exercise of the Tribunal's discretion will not succeed unless it can be shown that the Tribunal disregarded relevant factors or was just plain wrong; and
- 25 8. An appeal court should read the reasoning of the Tribunal as a whole, and not scrutinise it for error line by line.

29. Some of these principles were derived from the Court of Appeal decision in **McPherson v BNP Paribas [2004] EWCA Civ 569**.

30. In the case of **Marler Ltd v Robertson 1974 ICR 72**, the court stated that if an employee brings a hopeless claim not with any expectation of recovering

compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously and likewise abuses the process.

31. **Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255** is a decision in which it was found, at paragraph 41:

5 *“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 it had. The main thrust of the passages cited above from*
10 *my judgment in **McPherson** was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous*
15 *notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances.”*

Discussion and Decision

20 32. The respondent has made an application for expenses under Rule 76(1) of the Employment Tribunals Rules of Procedure 2013, on 2 grounds.

33. The first ground is that the claimant conducted the proceedings in a vexatious manner; and the second is that in any event the claimant's claim had no reasonable prospect of success.

25 34. The application is very short on details. The respondent has not made clear in any detail why they consider the claimant to have conducted the proceedings in a vexatious manner, except to say, in fairly general terms, that she should not have made the allegations she did in the first place; that she had told her landlord or other person that she was “plotting” to make a claim against her employer to the Tribunal; and that she withdrew her claim
30 after putting the respondent to expense.

35.1 deal with each of these assertions in turn, noting the principles which Tribunals must apply in dealing with expenses applications.

5 36. The respondent clearly considers that raising the proceedings in the first place amounted to vexatious conduct. I interpret this as an allegation that the claimant knew that she had no possible chance of success in the claim, but brought it in order to cause as much inconvenience to the respondent as possible, and thereby abused the process.

10 37. It is important to understand that the Tribunal has heard no evidence as yet in this case, and therefore has made, and is unable to make, any findings in fact as to the history of events which have led us to this point. That said, if it were clearly demonstrated that the claimant had acted vexatiously, the Tribunal would be in a position to determine whether or not expenses should be awarded against her as a consequence.

15 38. It is trite to say that an expenses award in the Employment Tribunal does not automatically follow success - or the withdrawal of a claim by a party - and that it is the exception rather than the rule.

20 39. In this case, the parties disagree strongly about the nature, truthfulness and effect of the allegations made by the claimant in her claim. The claimant insists that she had not only the basis for making such allegations but also evidence to support her assertions. If she were able to prove that she had been the subject of bullying by the respondent or their staff, on the grounds of disability, which is what her claim asserts, then she would be in a position to succeed in her claim. Similarly, if the respondent were able to defend her allegations and disprove or undermine those allegations in evidence, they
25 would be likely to succeed in their defence.

30 40. However, at this stage, and on the information available, it is impossible for the Tribunal to make a positive conclusion that in raising the proceedings the claimant was well aware that she would not succeed, and was thus abusing the process. She had offered to prove allegations which amounted to discriminatory conduct. Whether she could do so or not would essentially come down to an assessment of the evidence of all of the witnesses at a

Hearing on the Merits. To find, at this stage, that the claimant had acted vexatiously- in other words, deliberately and maliciously - is simply beyond this Tribunal's authority.

5 41. The respondent alleges that they have information from a witness who knew the claimant outwith the workplace, namely her landlord, which would be available by affidavit, to the effect that the claimant told her that she intended to - was plotting to - raise proceedings against the respondent.

10 42. Without any evidence to this effect, the respondent's assertion is merely an allegation which has no factual support to it. The Tribunal cannot make a finding to this effect, when it is plain that this is strongly disputed.

15 43. There are a number of difficulties which this assertion presents: the respondent has interpreted and reported it as a clear assertion of conspiracy; the claimant has strongly denied that she told the landlord what was alleged; the evidence of the witness has not been heard and would require to be made available for assessment by the Tribunal and challenge by the claimant; and the truth may be more complex than is asserted. For example, the claimant says that she told her landlord that given her treatment by the respondent she intended to make a claim to an Employment Tribunal against them; the landlord may have interpreted this as plotting against the respondent, or she may have used those very words; and in any event, the evidence of the landlord may have been subject to considerable challenge on the basis that there is asserted to have been some divergence between her and the claimant on an unrelated matter.

25 44. There is therefore no basis upon which the Tribunal can confidently find that the claimant has acted in such a way, so as to attract a finding that her conduct of the proceedings was vexatious. The respondent asserts it; the claimant denies it; and the evidence is unavailable to the Tribunal to resolve that dispute. Accordingly this aspect of the application cannot be sustained.

30 45. The respondent also criticises the claimant for having withdrawn her claim, after proceedings had been ongoing for some time.

46. To consider this allegation, it is necessary to review the process which had been followed to that point in this case.

47. As has already been noted, the claim was presented on 18 November 2022, and set out allegations of discrimination arising from disability, harassment and victimisation, as well as details of the condition relied upon as a disability, namely anxiety. It is lengthy, and while setting out a considerable amount of detail which is more akin to a witness statement than a legal pleading, it is comprehensive, chronological and straightforward to follow.

48. The respondent submitted an ET3 response form on 20 December 2022 setting out their defence to the claim. It consisted of a short and general denial of the claims made, together with a series of witness statements by individuals employed by the respondent, an unusual approach to take to a legal pleading.

49. A Preliminary Hearing took place on 25 January 2023, before Employment Judge d'Inverno, at which both parties appeared, and for which they both submitted agenda documents in advance. Following that Hearing, the Employment Judge issued a number of Orders, including a requirement that the respondent write to the claimant requesting further specification of the claim, and fixing a further Preliminary Hearing to take place for the purpose of case management on 3 April 2023.

50. Following the issue of that Note and the Orders attached, the claimant withdrew her claim on 14 February 2023.

51. When the sequence of events is considered in this way, it is clear, in my judgment, that the claimant has presented her claim, has attended to the matters required of her by the Tribunal, has attended the Preliminary Hearing on 25 January, and thereafter, within a relatively short space of time, has withdrawn her claim. She has maintained that the reason why she has withdrawn the claim is that she was concerned about the impact upon her health. There is no doubt that if she continued with her claim, she would require to carry out a considerable amount of work to provide further specification of her claim, produce medical evidence in support of her

assertion that she was and is a disabled person within the meaning of the Act and face a number of witnesses contradicting her factual version of events. She has, in her own words, withdrawn the claim because she wanted to avoid making herself seriously ill.

5 52.It appears that the respondent argues that her withdrawal of her claim amounted to vexatious or scandalous behaviour. However, the respondent has provided no clear argument as to why this is the case. Withdrawal of a claim at a relatively early stage of the proceedings may be interpreted as an act which saves the respondent considerable work and expense. It was
10 done well in advance of the next stage of the process, namely the Preliminary Hearing on 3 April 2023, and accordingly it cannot be said (and does not appear to be said) that unnecessary work was undertaken by the respondent in preparing for that Hearing which was then rendered redundant by the claimant's withdrawal.

15 53.It is not my view that the claimant's withdrawal of her claim at the point when she did it can be said to amount to vexatious behaviour in these proceedings. Like many claimants, and parties, she has required to consider whether or not it is right for her to continue with proceedings once started, and on the face of it has taken a decision based on her concern for
20 her own health and wellbeing, after it became clear to her what she was going to have to face in pursuing the claim. I do not, on the information available, consider this to have been an unreasonable act.

54.It appears to me that the respondent's fundamental objection to the claimant's actions is that she raised the proceedings at all. I have already
25 addressed that, to some extent, above, and now proceed to consider the argument that the claim had no reasonable prospect of success.

55.So far as the respondent's argument that the claim had no reasonable prospect of success is concerned, I note that the respondent never sought to apply for strike out of the claim on this basis during its currency. The
30 respondent appears to have adopted the position at the Preliminary Hearing that it was appropriate and reasonable to allow the claimant time to provide

further particulars of the claim, and to participate in a process whereby they would assist her by advising her of the aspects of the case which would require further specification. Certainly, that was the nature of the Order issued by the Employment Judge who heard that Preliminary Hearing.

5 56. In any event, to say that a claim has no reasonable prospect of success
requires that the Tribunal considers the terms of the claim as drafted, and
determines its prospects from the written claim, taking the facts set out
therein at their highest. In my judgment, it cannot be said that this claim had
no reasonable prospect of succeeding. It is a claim which is significantly
10 dependent on the facts which would be found by the Tribunal, following the
hearing of evidence from a number of witnesses including the claimant. No
such findings in fact have been, nor could be, made to this point. While it is
clear that the respondent presented a number of witness statements to the
Tribunal with its ET3 in an attempt to fortify its defence, those statements
15 have no status at this stage in the proceedings until a witness under oath or
affirmation has given evidence in support of them, and been subject to the
challenge of cross-examination. The Tribunal had made no order that
witness statements should be relied upon as the evidence in chief of any
witness, and accordingly oral evidence would require to be led from each
20 witness, which may or may not match exactly the terms of the witness
statements presented.

57. In other words, it is impossible, in this case, to assess the prospects without
making findings on the disputed facts asserted by each side. It cannot be
said by this Tribunal that the claimant would or would not be likely to have
25 succeeded in her claim, until the evidence had been heard and
appropriately challenged. At this stage, it is simply impossible and
inappropriate to say that the claimant's claims would have no reasonable
prospect of success.

58. Accordingly, it is my conclusion that the respondent's application for expenses, set out on the basis dealt with above, must fail and be refused, for the reasons I have given.

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Employment Judge: M Macleod
Date of Judgment: 13 April 2023
Entered in register: 13 April 2023
and copied to parties

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