EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104590/2016

Final Hearing Heard at Edinburgh on 10 April 2017

Employment Judge: Mr C Lucas (sitting alone)

Mr Daniel Muňoz Carrasco	Claimant Present but not represented
Edinburgh Language Academy Limited	Respondent Not present and not represented

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is in thirteen parts, namely, -

(First) That on 19 April 2016, when the Claimant, as a Worker – [in terms of section 230(3)(b) of, and for the purposes of section 13 of, the Employment Rights Act 1996] – who had carried out both teaching and non-teaching work for the Respondent during the period which had begun on 25 February 2016 and had ended on 31 March 2016, was contractually entitled to receive payment for such work carried out during that period the Respondent made an unauthorised deduction of £120.80 from the wages properly payable by it to him on that occasion and in so doing breached the provisions of Section 13 of the Employment Rights Act 1996.

(Second) That on 19 May 2016, when the Claimant, as a Worker – [in terms of section 230(3)(b) of, and for the purposes of section 13 of, the Employment Rights Act 1996] – who had carried out both teaching and non-teaching work for

the Respondent during the period which had begun on 1 April 2016 and had ended on 30 April 2016, was contractually entitled to receive payment for such work carried out during that period the Respondent made an unauthorised deduction of £204.00 from the wages properly payable by it to him on that occasion and in so doing breached the provisions of Section 13 of the Employment Rights Act 1996.

(Third) That on 19 June 2016, when the Claimant, as a Worker – [in terms of section 230(3)(b) of, and for the purposes of section 13 of, the Employment Rights Act 1996] – who had carried out both teaching and non-teaching work for the Respondent during the period which had begun on 1 May 2016 and had ended on 30 May 2016, was contractually entitled to receive payment for such work the Respondent made an unauthorised deduction of £793.20 from the wages properly payable by it to him on that occasion and in so doing breached the provisions of Section 13 of the Employment Rights Act 1996.

(Fourth) That as at the date of presentation of the Claimant's claim form ET1 to the Tribunal office, 9 September 2016, no part of the £120.80 deducted by the Respondent from the wages due to him in respect of work carried out by him for the Respondent during the period which had begun on 25 February 2016 and had ended on 31 March 2016 was still outstanding, such previously unauthorised deduction having been paid to the Claimant by the Respondent on or about 19 July 2016.

(Fifth) That as at the date of presentation of the Claimant's claim form ET1 to the Tribunal office, 9 September 2016, no part of the £204.00 deducted by the Respondent from the wages due to him in respect of work carried out by him for the Respondent during the period which had begun on 1 April 2016 and had ended on 30 April 2016 was still outstanding, such previously unauthorised deduction having been paid to the Claimant by the Respondent on or about 19 July 2016.

(Sixth) That as at the date of presentation of the Claimant's claim form ET1 to the Tribunal office, 9 September 2016, the £793.20 deducted by the Respondent from the wages due to him in respect of work carried out by him for the Respondent during the period which had begun on 1 May 2016 and had ended on 30 May 2016 was still outstanding.

(Seventh) That on or about 21 October 2016 the £793.20 previously deducted by the Respondent from wages due to him in respect of work carried out by him for the Respondent during the period which had begun on 1 May 2016 and had ended on 30 May 2016 was paid to the Claimant.

(Eighth) That as at the date of Final Hearing of the Claimant's claim, 10 April 2017, no part of any previously unauthorised deduction by the Respondent from wages due by it to the Claimant for any work done by him for it remained outstanding.

(Ninth) That by the date of the Final Hearing of the Claimant's claim, 10 April 2017, the Claimant had paid the Tribunal sums totalling £390.00 as Lodging and Hearing fees in respect his claim.

(Tenth) That the Respondent is **ordered** to pay to the Claimant, not later than 22 May 2017, the sum of £390 as reimbursement of the sums paid by the Claimant to the Tribunal as Lodging and Hearing fees in respect his claim.

(Eleventh) That the Claimant's application for a Preparation Time Order to be made in his favour and against the Respondent requiring the Respondent to make a payment of £1000 to the Claimant in respect of his preparation time while not legally represented is refused.

(Twelfth) That the Claimant's application for an award of compensation of £150 to take account in the drop in the value of the Pound Sterling against the Euro during the period which began on 30 May 2016 and ended on or about 21 October 2016 is refused.

(Thirteenth) That the Claimant's application for an Order requiring the Respondent to pay compensation of £4000 to him "for all the stress caused during a critical moment in my life" is refused, the Tribunal not having jurisdiction in terms of the Employment Rights Act 1996, or otherwise, to make any such award in the circumstances of the Claimant's claim of unauthorised deduction from wages contrary to section 13 of the Employment Rights Act 1996.

REASONS

Background

1. In a form ET1 presented to the Tribunal office on 9 September 2016 – (hereinafter, "the ET1") - the Claimant claimed that in respect of pay for work carried out by the Claimant for it during, respectively, the period which had begun on 25 February 2016 and had ended n 29 February 2016, the period which had begun on 1 March 2016 and had ended on 31 March 2016, the period which had begun on 1 April 2016 and had ended on 30 April 2016 and the period which had begun on 1 May 2016 and had ended on 30 may 2016 the Respondent had made unauthorised deductions from the wages due to him when such wages fell due to be paid to him and that as at the date of presentation of the ET1 the Respondent still owed him arrears of pay in respect of the work carried out by him for it.

2. The Claimant made it clear in the ET1 that the remedy that he sought was compensation only and that in addition to monies that he alleged were due to him in respect of work undertaken for or services provided to the Respondent he sought compensation as follows, -

> *"For all the time and effort spent revising hours, contacting organisations, looking for help, filling applications, etc. Compensation: £1000.*
>
> *For the devaluation of the Pound Sterling. After Brexit, £1000 is worth 1200 Euros instead of 1400 Euros as it used to. Compensation: £150.*
>
> *For devolution of court fees. Compensation: £160 and probably £230.*

For all the stress caused during a critical moment in my life. .. . Compensation: £4000.
Total: £5540 plus my corresponding wages."

3. The ET1 had, at section 9.1, given an indication that the Claimant was also claiming discrimination but no detail of any such allegation was contained within the ET1.

4. In a form ET3 received by the Tribunal office on 13 October 2016 – [which, in terms of Rule 20 as contained in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, was accepted by an Employment Judge after consideration of an application for an extension of time for presenting such response] – (hereinafter, "the ET3") – the Respondent denied that the Claimant had been employed by it and stated that the Claimant had been self employed and "was knowingly self employed" and "aware he was self employed".

5. The ET3 separately contended that the amounts payable to the Claimant by the Respondent had been paid to the Claimant by the time the ET3 was delivered by the Respondent to the Tribunal office and therefore that "there is no basis of a claim".

6. In response to the reference in the ET1 to discrimination, the ET3 stated that "there was no discrimination in any way from us".

7. An (open) preliminary hearing, convened with the specific purpose of determining the basis of the Claimant's claim and of determining his status during the period which began on or about 29 February 2016 and ended on 30 May 2016, took place at Edinburgh on 23 November 2016 and is hereinafter referred to as "the Preliminary Hearing". The Claimant was represented by a friend, Mr A Langmuir Sanchez. The Respondent was represented there by a Mr Hutchins who was identified as "former employee duly authorised by Mrs O Hutchins, Director" (who was in attendance).

8. It was determined at the Preliminary Hearing that throughout the period which began on 25 February 2016 and ended on 30 May 2016 "the claimant was a worker in terms of section 230(3)(b) and for the purposes of section 13 of the Employment Rights Act 1996 and during which period he worked and performed teaching services for the respondent for which he had a contractual entitlement to receive payment" and that "the claimant has Title to Present and the Tribunal Jurisdiction to Consider his complaints of unauthorised deduction from wages contrary to the provisions of section 13 of the Employment Rights Act 1996".

9. A Judgment to that effect was issued orally to the parties on the date of the Preliminary Hearing, 23 November 2016, and was confirmed, in written form, on 5 December 2016, such written version of the Judgment given orally on 23 November being entered in the Register and copied to the parties on 6 December 2016.

10. The Final Hearing of the Claimant's claim as made in the ET1 was scheduled to begin at the Tribunal's Edinburgh Hearing Centre at 1000 on 10 April 2017. Notification to that effect was sent to the parties by the Tribunal office.

11. The Respondent did not attend and was not represented when the Claimant's claim called for Final Hearing at 1000 on 10 April 2017.

12. Because the Respondent was neither in attendance nor represented when the Claimant's claim called for Final Hearing the Employment Judge directed that the commencement of the Final Hearing of the Claimant's claim be delayed so as to enable him, the Employment Judge, to check whether there had been any communication from the Respondent.

13. By 1030 on 10 April the Employment Judge was satisfied from enquiry made by him to Tribunal staff that there had been no communication from the Respondent, that the Tribunal staff could not make contact either by telephone or by email with

the Respondent and that the Respondent was neither present nor represented at the Tribunal's Edinburgh Hearing Centre.

14. In these circumstances, having considered any and all information which was available to him, after all practicable enquiries, about the reasons for the Respondent's absence, the Employment Judge determined that, in terms of Rule 47 as contained in Schedule 1 to the Regulations and in the circumstance that the Respondent had failed to attend or to be represented at the Final Hearing of the Claimant's claim, the Tribunal would exercise its discretion by proceeding with the Hearing in the absence of the Respondent but that it would do so by hearing evidence from the Claimant and weighing that evidence up against what had been contended by or on behalf of the Respondent in the ET3.

15. The Final Hearing of the Claimant's claim of unlawful deduction from wages, a claim based on section 13 of the Employment Rights Act 1996 – (hereinafter, "ERA 1996") - continued on that basis.

16. The Claimant has not pursued a claim that he was discriminated against by the Respondent in any way which was contrary to any of the provisions of the Equality Act 2010 and at the Final Hearing of his claim, at the stage of preliminary discussion prior to any evidence being heard by the Tribunal the Claimant confirmed that he had not intended to make any such claim of discrimination against him by the Respondent and that there was no such claim being pursued by him.

Findings in Fact

17. The Tribunal found the following facts, all relevant to the Claimant's claim that, contrary to section 13 of ERA 1996, the Respondent had made unauthorised

deductions from his wages – (deductions from wages of a Worker employed by it) – to have been established:-

18. As determined by Employment Judge d'Inverno at an (Open) Preliminary Hearing on 23 November 2016 and as recorded in the Judgment issued on 5 December 2016 as entered in the Register and copied to the parties on 6 December 2016], throughout the period which began on 25 February 2016 and continued to and including 30 May 2016 the Claimant was a "Worker" as defined in section 230 of ERA 1996 who worked under a contract in terms of which he undertook to do or perform work for the Respondent, that definition of "Worker" applying to provide the Claimant with the protection afforded to Workers by section 13 of ERA 1996. The work that he did or the Respondent comprised both teaching and non-teaching tasks.

19. The Respondent is a limited liability company incorporated under the Companies Acts which traded or trades as "Edinburgh Language Academy". During the period which began on 25 February 2016 and continued to and including 30 May 2016 – (the period when the Claimant carried out work for it) - the Respondent had a place of business at 49 Melville Street, Edinburgh. It now conducts its business from 71 George Street, Edinburgh.

20. In terms of the contract entered into between the Claimant and the Respondent the Respondent undertook to pay wages to the Claimant in respect of teaching and in respect of non-teaching work carried out by him for it. For teaching work he was to be paid at the rate of £12 per hour. For non-teaching work – (for example accompanying students on cultural and other trips) - he was to be paid at the rate of £6.80 per hour.

21. The arrangement entered into between the Claimant and the Respondent with regard to payment of the wages due to him was that he would be paid for hours worked in any given month on the 19th of the following month – (so that, for example, in respect of work carried out by the Claimant for the Respondent

during the month of May 2016 he should have been paid, at the latest, on a date earlier than 20 June 2016).

22. In respect of work carried out by the Claimant for the Respondent during the months of February, March and April 2016 there had been a history of unauthorised deductions from the wages falling due to be paid to him, i.e. a history of payments not being made to him, in full, on the 19th day of the following month – (or, to put it another way, before the 20th day of the following month) – but on or about 19 July 2016 the Respondent had made payment to the Claimant of previously-deducted amounts due for work carried out during the period which had begun on 25 February and had ended on 30 April. Specifically, an unauthorised deduction of £120.80 made by the Respondent on 19 April 2016 and an unauthorised deduction £204.00 made by the Respondent on 19 May 2016. The shortfall in payments in respect of work carried out prior to 1 May 2016 was paid by the Respondent to the Claimant on 19 July 2016, a letter from the Respondent to the Claimant on 19 July 2016 including the statement that "I enclose a cheque for the outstanding hours worked in March and April ..". The cheque for a total of £324.80 was written on a Barclays Bank account in name of Edinburgh Language Academy Limited, i.e. the Respondent.

23. The Claimant last carried out work for the Respondent on 30 May 2016.

24. The work carried out by the Claimant for the Respondent during the month of May 2016 had a value of £793.20. That is the sum which should have been paid by the Respondent to him as wages for work carried out during the month of May 2016 and that amount should have been paid to him on 19 June 2016 – (or, to put it another way, before 20 June 2016).

25. No part of that £793.20 due to the Claimant as wages for work carried out by him for the Respondent during the month of May 2016 was paid to him either on 19 June 2016 or before 20 June 2016.

26. On or about 24 October 201, after a great deal of correspondence between himself and the Respondent, the Claimant received an envelope postmarked 21 October 2016 which contained a cheque for the, previously-unauthorised, £793.20 deduction.

27. By 24 October 2016 all monies due by the Respondent to the Claimant as wages for work carried out by him for it had been paid to the Claimant.

28. By not paying the £120.80 properly payable by it to the Claimant on 19 April, the £204.00 properly payable by it to the Claimant on 19 May and the £793.20 properly payable by it to the Claimant on 19 June the Respondent had failed to ensure and procure that the total amount of wages paid on any occasion by it to him, as a Worker employed by it, was less than the total amount of the wages properly payable by it to him on those occasions, in which case the amount of such deficiencies fell within the ambit of section 13 of ERA 1996 as being treatable for the purposes of that section of that Act as deductions made by the Respondent from the Claimant's wages.

29. The Claimant had never authorised the Respondent to make any deduction from wages due to him for any work carried out by him for the Respondent during the period 25 February to 31 March, had never authorised the Respondent to make any deduction from wages due to him for any work carried out by him for the Respondent during the period 1 April to 30 April and had never authorised the Respondent to make any deduction from wages due to him for any work carried out by him for the Respondent during the period 1 May to 30 May, had never previously signified in writing his agreement or consent to the making of any such deduction or deductions and no such deduction or deductions was or were required or authorised to be made by virtue of a statutory provision or any relevant provision of the Claimant's contract with the Respondent.

30. In respect of the wages due to the Claimant by the Respondent for work carried out by him for it during each of the periods which, respectively, had begun on 25 February 2016 and had ended on 31 March, 2016, had begun on 1 April 2016

and had ended on 30 April 2016 and had begun on 1 May 2016 and had ended on 30 May 2016 the Respondent had made unauthorised deductions from his wages – (unauthorised deductions from wages of a Worker employed by it) - contrary to the provisions of section 13 of ERA 1996.

31. During the course of the period which began on the date of presentation of the ET1 and continued to and including the date of the Final Hearing of the Claimant's claim the Claimant has incurred out of pocket expenses which included, -

- Lodging fee payable to the Tribunal £160
- Final Hearing fee in respect of his Tribunal claim £230
- Air fares in respect of attendance at the Final Hearing of his claim
- Copying costs.

The Issues

The Tribunal identified the issues which it considered to be relevant to the Claimant's claim as being,-

- Whether the Respondent had made unauthorised deductions from wages properly payable to him.
- If so, what the deductions that were made were.
- If so, what the remedy that it is open to the Tribunal to apply is.
- What, if any, the award of expenses that should be made in favour of the Claimant and against the Respondent is.

The Relevant Law

A Legislation

- Employment Rights Act 1996, particularly Sections 13 and 230.

B Case Law

- Cartiers Superfoods Limited v Laws, 1978 IRLR 315.
- Nicolson Highlandwear Ltd v Nicolson, 2010 IRLR 859.
- E T Marler Ltd v Robertson, 1974 ICR 72.
- A-G v Barker, 2000 1 FLR 759.
- Gee v Shell (UK) Ltd, 2003 IRLR 82.
- McPherson v BNP Paribas (London Branch), 2004 IRLR 558.
- Dean & Dean Solicitors v Dionissiou, 2008 UK EAT/014008/ZT.

Discussion

32. The basis of the only claim being pursued by the Claimant, a claim that the Respondent had made unauthorised deductions from wages due to him for work carried out by him for it – (i.e. deductions from wages of a Worker employed by it) - is based on section 13 of ERA 1996, legislation which states that, -

> "(1) An employer shall not make a deduction from wages of a worker employed by him unless –
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
>
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction"

and, -

> "(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion".

33. Throughout the period which began on 25 February 2016 and continued up to and including 30 May 2016 the Claimant was a "Worker" as defined in section 230 of ERA 1996 who carried out work for the Respondent.

34. The "wages properly payable" by the Respondent to the Claimant in respect of work carried out by him for it during the period which began on 25 February 2016 and continued up to and including 30 May 2016 were the sums agreed by the Respondent to be paid to him in respect of the combination of teaching and non-teaching work carried out by him for it during that period.

35. In terms of the arrangement entered into between the Claimant and the Respondent, and as evidenced by correspondence from the Respondent to the Claimant, -

- The wages "properly payable" by the Respondent to him in respect of the period 25 to 29 February 2016 and in respect of the period 1 to 31 March 2016 were payable by the Respondent to the Claimant on 19 April 2016.
- The wages "properly payable" by the Respondent to him in respect of the period 1 to 30 April 2016 were payable by the Respondent to the Claimant on 19 May 2016.
- The wages "properly payable" by the Respondent to him in respect of the period 1 to 30 May 2016 were payable by the Respondent to the Claimant on 19 June 2016.

36. The shortfalls in respect of the period which had begun on 25 February 2016 and which had ended on 30 April 2016 were not paid by the Respondent to the Claimant until on or about 19 July 2016, i.e. a date long after he had ceased to carry out any work for it, the Respondent.

37. By failing to pay the total amount of the wages properly payable by it to the Claimant on each of 19 April and 19 May – (i.e. wages in respect of, respectively, the period from 25 February to 31 March and the period from 1 April to 30 April) -

the Respondent had breached section 13 of ERA 1996 by making deductions from the Claimant's wages without any such deduction either being required or authorised to be made by virtue of a statutory provision or a relevant provision of the Claimant's contract or in a circumstance where the Claimant, as a worker working for the Respondent, had previously signified, in writing, his agreement or consent to the making of such a deduction.

38. The wages due to the Claimant in respect of work carried out by him for the Respondent during the period which had begun on 1 may 2016 and had ended on 30 May 2016 were not received by the Claimant until on or about 24 October 2016, i.e. some 6 weeks after the ET1 had been presented to the Tribunal office and more than a week after the ET3 – (which stated in respect of that payment for May that "the claimant was sent 3 cheques" that "2 he received", that "the third was obviously lost as sent to old address", that "we have since sent a cheque to his new address .." and that the Claimant had by then received all of the monies due to him and that, for that reason, "there is no basis of a claim") - had been received by the Tribunal office.

39. The Tribunal was satisfied, and has found, that in respect of the wages due to the Claimant for work carried out by him during the period 1 to 30 May 2016 – (wages which, in terms of the arrangement between him and the Respondent, were payable on 19 June 2016) - the Respondent, by failing to ensure that the total amount of the wages properly payable by it to the Claimant on 19 June – (or before 20 June) – was not less than the total amount of the wages properly payable by it to him on that occasion, made an unauthorised deduction from the Claimant's wages on that occasion and, in so doing, breached the provisions of section 13 of that Act, the section of that Act which deals with "protection of wages" due to a worker employed by it.

40. Although the claim presented by the Claimant to the Employment Tribunal in terms of the ET1 has been found by the Tribunal to be a claim which has been validly made in terms of section 23 of ERA 1996 and the Judgment set out earlier is a declaration to that effect made in terms of section 24 of ERA 1996, the

Tribunal finds itself unable in the circumstances of the present case to make any Order requiring the Respondent to pay to the Claimant, as a Worker who had carried out work for it, the amount of any deduction made in contravention of section 13 of ERA 1996, that inability stemming from the fact that by the time the Claimant's claim came to Final Hearing – (indeed, many months before the Claimant's claim came to Final Hearing) - all monies previously deducted by the Respondent from his wages had been paid to him by it, the Respondent, thereby reducing the amount which the Tribunal would otherwise have been able to order to be paid in terms of section 24(1)(a) of ERA 1996 to £0.00.

41. Implicit within the ET1 was a claim made by or on behalf of the Claimant that he should be paid compensation as follows, -

"For all the time and effort spent revising hours, contacting organisations, looking for help, filling applications, etc. Compensation: £1000.

For the devaluation of the Pound Sterling. After Brexit, £1000 is worth 1200 Euros instead of 1400 Euros as it used to. Compensation: £150.

For devolution of court fees. Compensation: £160 and probably £230.

For all the stress caused during a critical moment in my life. .. . Compensation: £4000.

Total: £5540 plus my corresponding wages."

42. During the course of the Final Hearing the Claimant added to such claim for compensation by making reference to the cost of his flying from his home in Spain to Edinburgh to appear before the Tribunal.

43. The Tribunal has deemed those claims for compensation amounting to £5,540.00 plus air fares as being a combination of an application made in terms of Rule 75(1)(b) as contained in Schedule 1 to the Regulations for reimbursement by the Respondent to the Claimant of the Tribunal fees paid by the Claimant and an application made in terms of Rule 75(2) as contained in Schedule 1 to the Regulations for a Preparation Time Order.

44. The Preparation Time Order sought by the Claimant was an Order requiring the Respondent to make a payment to him in respect of his preparation time while not legally represented – ("preparation time" in that context meaning "time spent by the receiving party (including by any employees or advisors) in working on the case, except for time spent at any final hearing").

45. The Tribunal was satisfied that, taking account of the wording contained in section 9.2 of the ET1, and bearing in mind that the Respondent had every opportunity to attend at the scheduled Final Hearing of the Claimant's claim, the Respondent had had a reasonable opportunity to make representations at the Final Hearing in response to such applications.

46. Having considered such applications, as so made, prior to issuing this Judgment, the Tribunal was satisfied that in the circumstance that the Claimant's claim has been decided in his favour it is appropriate for it, the Tribunal, to make an Order requiring the Respondent to reimburse the Claimant in respect of the Tribunal fees paid by him – (as referred to in Rule 75(1)(b) as contained in Schedule 1 to the Regulations). The Tribunal has borne in mind that such a power afforded to the Tribunal to order such reimbursement is discretionary and does not automatically follow if a fee-paying party is successful but has determined that in this case it is appropriate for such discretion to be exercised in favour of the Claimant and for the Tribunal to order the Respondent to reimburse the Claimant in respect of the aggregate fees paid by the Claimant to the Tribunal in pursuit of his claim from the stage of first presentation of the ET1 to conclusion of the Final Hearing of his claim.

47. So far as the, more general, application for a Preparation Time Order is concerned, however, the Tribunal has not been persuaded that it is appropriate for it to grant such, more general, Preparation Time Order.

48. Put briefly, the grounds on which an Employment Tribunal can make a Preparation Time Order are the grounds that apply where, a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise

unreasonably in the bringing or conducting of proceedings (or part thereof) – [Rule 76(1)(a)], a claim or response had no reasonable prospect of success – [Rule 76(1)(b)], a party has breached an order or practice direction – [Rule 76(1)(2)], a hearing has been postponed or adjourned on the application of a party – [Rule 76(1)(2)] or the Employment Tribunal decides an allegation or argument for substantially the reasons given in an earlier Deposit Order – [Rule 39(5)].

49. The Tribunal was satisfied from the evidence that it heard that on many occasions over the period which began on 25 February 2016 and persisted until, at the earliest, 21 October 2016 the Respondent's behaviour towards the Claimant has been unreasonable. It was satisfied, too, that it is not unreasonable for it, the Tribunal, to believe that it was only the presentation of the ET1 that prompted the Respondent to pay him all or any part of the £793.20 due to the Claimant in respect of work carried out by him for the Respondent in May. But these are not conclusions that entitle the Tribunal to determine that the Respondent has acted vexatiously, abusively, disruptively or otherwise unreasonably in the conducting of the proceedings raised against it.

50. It is arguable that the Respondent's response, as such, had no reasonable prospect of success, but in this context the Tribunal has both taken into account the advice given by the Employment Appeal Tribunal in the case of **Cartiers Superfoods Limited v Laws** to the effect that great care should be exercised by Tribunals before awarding costs against Respondents and has recognised and accepted as good doctrine that a Respondent must be entitled to defend proceedings brought against it by a Claimant, albeit that that defence must be conducted in a way which is objectively considered to be reasonable.

51. If it had been proven that by defending the claim made against it the Respondent had in any way been dishonest then, following the decision of the EAT in the case of **Nicolson Highlandwear Limited v Nicolson**, the Tribunal might have exercised its discretion so as to make an award of expenses in favour of the

Claimant but it is the view of the Tribunal that the Respondent did not act dishonestly in defending the claim. That had not even been alleged by the Claimant and the Tribunal neither found any hint of such dishonesty in the Respondent's defence of the claim made against it by the Claimant nor any basis on which it could find that there had been any such dishonesty.

52. Nor has the Tribunal been persuaded that the Respondent defended the Claimant's claim out of spite to harass the Claimant – (which is a paraphrasing of the classic definition set out in the case of **ET Marler Limited v Robertson**) – or, as envisaged in the case of **A-G v Barker** "that whatever the intention of the proceedings may be, its effect is to subject" [the Claimant] "to inconvenience, harassment and expense out of all proportion to any gain likely to accrue … and that it involves an abusive process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process".

53. The Tribunal has also borne in mind guidance given by higher courts that awards of expenses are and should be very much the exception, not the rule, Lord Justice Sedley in the case of **Gee v Shell (UK) Limited** stating that, "… the Tribunal's job … is to ensure equality of access to its processes for sometimes disparately powerful parties" and that "it is … a very important feature of the employment jurisdiction that … losing does not ordinarily mean paying the other side's costs", "the governing structure" remaining "that of a cost free user-friendly jurisdiction in which the power to award costs is not so much an acceptance as a means to protecting its essential character".

54. In the case of **McPherson v BNP Paribas (London Branch)** Lord Justice Mummery commented that, "when a Costs Order is made by an Employment Tribunal, it is normally after a full Hearing of the case on the Merits" and that "although Employment Tribunals are under a duty to consider making an Order for Costs in the circumstances specified in …" [the then prevailing rule] "in practice they do not normally make Orders for Costs against unsuccessful applicants" and that "the costs regime in ordinary litigation does not fit the particular function and specific procedures of Employment Tribunals".

55. In the Employment Appeal Tribunal case of **Dean & Dean Solicitors v Dionissiou** the EAT observed that "… the regime set up by the 2002 Act and the 2004 Regulations is there as a jurisdiction bar to make sure that the parties take the opportunity to try and resolve issues between them" and that "in the employment field, costs are often threatened by Respondents but applications are rare, findings of unreasonable conduct are unusual and awards are highly exceptional".

56. The Tribunal accepts that the test of what is unreasonable conduct should relate to what was unreasonable at the time of the conduct, in this case at the time of the Respondent deciding to submit the ET3 – (and by so doing to avoid a default judgment being made against it) - but it has also borne it in mind that it is reasonable for it, the Tribunal, to infer that in this case the raising of the claim, albeit initially defended by the Respondent, directly led in October 2016 to all sums due to be paid to the Claimant being paid to him.

57. Having given due consideration to the Claimant's application for a Preparation Time Order the Tribunal is unwilling to make such an Order against the Respondent.

58. To deal, finally, with the claim implicit within the ET1 that the Claimant is entitled to be compensated "for the devaluation of the Pound Sterling" and "for all the stress caused during a critical moment in my life", the Tribunal records that it is not appropriate for it to compensate parties in respect of any fluctuation in currency values and that it does not have jurisdiction, in a claim based on section 13 of ERA 1996, to make any award in respect of any psychological – (or, indeed, physical) - injury caused to a Claimant because of any employer, in this case the Respondent, breaching section 13 of ERA 1996 and for those reasons such (subsidiary) applications made by the Claimant in the ET1 are refused.

Employment Judge: Mr C Lucas
Date of Judgment: 21 April 2017
Entered in Register: 28 April 2017
and Copied to Parties