



Additional Support Needs

DECISION OF THE TRIBUNAL

1. The claimant made an application for an award of expenses against the responsible body in terms of rule 6(1) of The First Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure which states, inter alia, that the tribunal may make such an award of expenses “against a party if that parties act, omission or other conduct has caused any other party to incur expense which it would be unreasonable for that other party to be expected to pay, with the maximum cover of recoverable expenses being the expenses incurred”.

Decision

2. It is unreasonable for the claimant to meet the expense of the procedure occasioned by lack of proper instruction or progress in preparation of this case. I accordingly grant the claimant’s motion for party and party expenses in favour of the claimant, as taxed by the Auditor of the Court of Session, to include the cost of expert witness reports (£2,490) and costs of expenses and taxation procedure.

The claimant’s submission

3. The claimant seeks an order for expenses on the basis that the conduct which caused the expenses to be incurred was the responsible body’s refusal to settle the case on terms which were belatedly agreed by them just days before the hearing of the case. Detailed submissions are contained within the written submissions lodged with the tribunal on 8th January 2020 on behalf of the claimant.

The Responsible Body’s position

4. The responsible body’s (“RB”) written submissions are enclosed in a document dated 13th January 2020. The detailed submissions are contained within the written submission for the respondent. The respondent’s position is that conduct of the respondent was reasonable throughout the period of the case and that it was reasonable throughout the case for the respondent to make the appropriate investigations which ultimately led to the admission of disability discrimination.

The procedure

5. Both parties provided written submissions at the request of the tribunal. In the claimant’s written submissions, reference was made to correspondence between the parties. I requested copies of that correspondence and, by agreement between the parties, this was provided to me on 29th January 2020.
6. Procedural issues in this case determined in advance of the hearing were as follows:

- a. On 28th March 2019 a direction was issued in relation to the lodging of written submissions to enable a motion lodged by the RB in respect of dismissal of the claim due to personal bar and time-bar to be determined.
 - b. On 25th April 2019 a decision was issued refusing the motion to dismiss the claim
 - c. A case conference took place on 2nd May 2019. The RB sought further time to investigate matters, and the parties had agreed in advance that there was no opposition to a motion to continue the case conference.
 - d. A case conference on 19th June 2019 was further continued as the responsible body's representative awaited further instructions from his clients. He acknowledged that he had previously been given a lengthy continuation for this purpose. The claimant's representative conceded a short continuation on the basis that there was no prejudice to the child. I noted that I was concerned regarding the lack of progress in respect of the case, the claim having been lodged in December 2018 but in the circumstances allowed a continuation until 4th July 2019.
 - e. For various reasons, the case conference required to be re-arranged and the next suitable date for 15th August 2019. The case statement was to be amended to allow for matters raised by the child in his advocacy statement, and further adjustment allowed to answer that. Various witnesses were identified including an expert witness, who was to provide his report no later than 9th December 2019. A full hearing was set down for 5 days commencing 16th December 2019.
 - f. On 28th October 2019 I issued a decision in respect of a motion by the responsible body under s78(1) to direct the Head of Social Policy to produce social work records relating to the child.
 - g. On Friday 13th December 2019 the parties advised the Tribunal that the case had been settled, save in respect of a motion for expenses, and the hearing was discharged.
7. The test in rule 6 is in relation to the question of whether it is unreasonable for a party to be expected to pay expenses which have been incurred because of the opponent's act, omission or other conduct. It is not the case that expenses are awarded as a matter of course in tribunal proceedings and accordingly the circumstances require to be explored to consider whether any award should be made.
8. In reaching a decision in this case I have considered the procedure in the case along with the submissions made, correspondence produced and the decision in *Dymoke vs FTTS Housing and Property Chamber* 2019 UT50. In terms of said decision, I am required to identify the conduct which is said to justify an award of expenses, say what was unreasonable about it and say what effect it had. I acknowledge that the purpose of an award is to compensate the party who incurred the expenses and not to punish the party that occasioned the expense.

The Conduct which is said to justify the award of expenses

9. The responsible body failed to conduct the case in a manner which enabled settlement to be achieved without extensive tribunal procedure.
10. The claimant's submissions fully detail the basis upon which the motion is made for expenses. Copies of the correspondence between the parties from 23rd January to 31st January was, by agreement, provided to me. It is clear from that correspondence that the proposal made by the responsible body would have been acceptable if it had contained an acknowledgement of unlawful discrimination. The matter would have been resolved at that stage without tribunal procedure. Compromise on this issue was invited. By emails of 25th and 31st January the responsible body advised that the matter would proceed to a tribunal.
11. The responsible body proposed settlement on 19th December 2019 in terms which were as suggested by the claimant in January 2019 (all as detailed in emails of 23rd January to the claimant's representative from the responsible body's representative, response by the claimant's representative of 24th January 2019 and 25th January, and apology letter issued on 19th December 2019).
12. Settlement was agreed 12th December and the hearing fixed for 5 days commencing 16th December was discharged. All preparation for the hearing had been undertaken by the claimant.

What was unreasonable about said conduct

13. The email of 31st January from the responsible body's representative to the claimant's representative advising that the matter would progress to a tribunal indicated difficulties in obtaining some of the requested information, there being other ongoing urgent business and a reduced team.
14. The responsible body's representative acknowledges in his submissions that he was instructed in February 2019. He did not formally precognose witnesses pending determination of the motion to dismiss, which motion was lodged on 7th March 2019. The motion was determined on 25th April 2019 and was refused.
15. The responsible body's representative confirms in his submissions that he had identified the need to instruct an expert by 13th June 2019. He could not prepare a report until December 2019. That expert was not relied upon in reaching a decision to discuss settlement terms.
16. By 19th June the responsible body was aware that issues of restraint had arisen, and an expert opinion was required. Settlement discussions arose following the receipt of a report from an expert in restraint on 22nd November 2019, which was then considered along with reports from the claimant's representative.
17. The responsible body's representative submits that the respondent's investigations and actions have been entirely reasonable in this case. I cannot accept that submission for the following reasons:
 - a. Throughout the pre-hearing procedure issues were raised by the responsible body's representative in relation to difficulties identifying witnesses and making progress with his enquiries.

- b. On 19th June 2019 he advised that he awaited instructions to enable him to identify witnesses and productions. He had sought a continuation from May 2019 to enable him to prepare his case.
- c. The responsible body's representative was fully aware of the issues to be determined in the case and ought to have been instructed by the responsible body in a manner which enabled the case to be resolved at an early stage if appropriate.
- d. At the earliest stage it was intimated to the claimant's representative that enquires were delayed due to difficulties obtaining requested information (from their own authority) and other urgent business, and it does not appear that this matter was progressed by the responsible body in a manner which enabled settlement to be achieved at the earliest opportunity. If proper investigation had taken place at that time, the procedure that followed may not have been required.

The effect of the conduct

- 18. The claimant incurred expense in preparing for a case which did not proceed and was ultimately resolved in the terms proposed by him before procedural issues were determined and dates for a tribunal hearing were fixed.