



EMPLOYMENT TRIBUNALS

Claimant: Mr D McGreal

Respondent: Mexichem UK Limited

HELD AT: Liverpool **ON:** 13 July 2017

BEFORE: Employment Judge T Vincent Ryan

REPRESENTATION:

Claimant: Mr R Maddocks, Solicitor

Respondent: Mr P Gorasia, Counsel

JUDGMENT having been sent to the parties on 19 July 2017 and written reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS FOR COSTS ORDER

1. The Background

Rather than repeat the details of the substantive documentation, all of which is in the possession of the parties and was referred to, I set out below the relevant documents that led me to the decision that the claimant had acted unreasonably in the way that the proceedings or part of these proceedings have been conducted, namely:

- 1.1 ET1: The claimant (C) presented an ET1 claim form on 16 February 2017. He made claims of direct race discrimination and direct age discrimination contrary to section 13(1) Equality Act 2010 ("EA"). The claim runs to some 35 paragraphs.
- 1.2 ET3: The respondent (R) presented its ET3 response on 21 March 2017 and in that response raised requests for further and better particulars of the claimant's claims whilst maintaining that some of the claimant's claims were presented out of time, some of the claims lacked particularity, all of the claims were denied; it was also denied that the grounds upon which

the claims are made were connected with any acts of continuing discrimination and that it would not be just and equitable to extend time to allow the claimant to continue his claims.

- 1.3 Preliminary hearing minutes and Case Management Orders of 21 April 2017 (sent to the parties on 2 May 2017): It was indicated on behalf of C that he would wish to amend his claim to include a claim of unfair dismissal (having been dismissed subsequent to the presentation of his claim), and that he may be calling as many of 13 witnesses to a final hearing with an estimated length of hearing of eight days in view of the breadth of the claims. The minutes reflect the necessity for C to clarify the claims and it is evident from the minutes that subject to such clarification the respondent would have wished to pursue a number of applications. In the light of this a preliminary hearing was listed for 13 July 2017 with a time estimate of one day by agreement with the parties. Case Management Orders were made which included C having to provide further and better particulars of the claims being advanced by no later than 19 May 2017.
- 1.4 C did not provide adequate further and better particulars in accordance with the Order to the respondent by 19 May 2017 such that R was not in a position to file an amended response.
- 1.5 Correspondence from R: On 15 June 2017 R wrote to C a lengthy letter inviting C to withdraw his as yet un-particularised and unclear claims and warning as to cost implications of proceeding with the matter.
- 1.6 Application: By a written application of 16 June 2017 R applied to the Tribunal for a number of orders dealing with C's intimated but un-particularised claims, and including a costs application.
- 1.7 Correspondence: On 12 July 2017 (the day before the listed preliminary hearing) C wrote to the Tribunal and notified R that he was withdrawing his race discrimination which had been the subject of enquiry and correspondence by the respondent to that date. In withdrawing the claim and inviting its dismissal C explained that he was doing so "to save time and expense in dealing with that part at the preliminary hearing and to assist in narrowing down the issues".
- 1.8 Minutes/Judgment of Preliminary Hearing: On 13 July 2017 there was a preliminary hearing, the details of which are contained in the minutes prepared and signed on that day and sent to the parties on 19 July 2017. This is a detailed minute and I rely on its contents without reiterating them in explaining the reason for the costs order made against the claimant. Expressed briefly, C had advanced claims, a number of which he sought to clarify by withdrawal on the eve of a lengthy planned preliminary hearing (the listing of which was agreed between the parties) and attempted to make further clarification of the continuing claims differentiating them from what were said never to have amounted to claims but background only. In the light of the withdrawal and explanation given by Mr Maddocks at the preliminary hearing on 13 July 2017, Mr Gorasia for C was able to accept

that the Tribunal had jurisdiction in respect of various claims being pursued and he withdrew a number of his applications as detailed in the preliminary hearing Judgment of 13 July 2017 sent to the parties on 19 July 2017. The preliminary hearing judgment and case management order of 13 July 2017 ought to be read together to provide reasons and an understanding of the costs order that I made.

2. The Law

- 2.1 Rule 76 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides that a Tribunal may make a costs order and shall consider whether to do so where it considers that a party has, amongst other things, acted unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted, or where any claim (or response) had no reasonable prospect of success.
- 2.2 By virtue of rule 76(2) a Tribunal may also make such an order where a party has been in breach of any order or practice direction or a hearing has been postponed or adjourned on the application of a party.
- 2.3 Rule 2 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 sets out that the overriding objective of the Rules is to enable Employment Tribunals to deal with cases fairly and justly, and sets out a number of factors to be taken into account into consideration, so far as practicable, in deciding what is fair and just, including dealing with cases in ways which are proportionate to the complexity and importance of the issues while avoiding delay (so far as compatible with proper consideration of the issues) and saving expense. Whilst a Tribunal shall seek to give effect to the overriding objective in interpreting or exercising any powers given to it by the Rules, the parties also, and their representatives, shall assist the Tribunal to further it, and in particular shall cooperate generally with each other and with the Tribunal.

3. For all the reasons stated by the respondent in its written application to the Tribunal for a costs order dated 16 June 2017, and illustrated in the minutes and judgment of the preliminary hearing on 13 July 2017:

- 3.1 I considered that C had acted unreasonably in bringing proceedings lacking such details as were reasonably required by R. In those circumstances the matters before the Tribunal ought properly to have been clarified at the preliminary hearing on 21 April 2017 failing which, and this is not uncommon, they ought to have been clarified by way of the provision of written further and better particulars in accordance with Case Management Orders that were made on that occasion. It would have been reasonable for C to do so, as was offered voluntarily, and was confirmed in a agreed order. C failed to do so:
- 3.2 It was only as a result of the last minute withdrawal of the race discrimination claims on 12 July 2017, and the clarification given by Mr Maddocks in the light of Mr Gorasia's applications, that it became evident

what in the claim form was actually background that did not form the basis of a claim, which claims were being pursued and therefore which were in time. I note that in the claim form there is a section headed "Background", but the situation as to what was merely background and what constituted claims was not self evident from the ET1 claim form and was not clarified at the preliminary hearing on 21 April 2017, nor in subsequent further and better particulars provided to R.

- 3.3 Insofar as it was understood that the claim form included a race discrimination claim and a number of matters which were later clarified as background information only, it is evident that some of the apparent claims had no reasonable prospect of success.
- 3.4 Because of the lack of clarity at the outset and as at 21 April 2017, and allowing for the Case Management Order giving a date for further particularisation, it was agreed that R's applications and any further clarification of the claim would still require a one day preliminary hearing. Matters were likely to be technically complicated and Mr Gorasia's continued instruction was justifiable in all the circumstances.
- 3.5 In the event, the combination of C's withdrawal of the race discrimination claim on 12 July 2017 and the clarification given orally for the first time by Mr Maddocks at the hearing on 13 July 2017 made it abundantly clear that if R took the practical and sensible approach which was in fact adopted by Mr Gorasia on 13 July 2017, there was never a need for a full one day preliminary hearing with counsel. The hearing was concluded in fact in one hour and 20 minutes, which included consideration of the costs application and the making of new Case Management Orders with the provision of strike out warnings to C for reasons which were explained on 13 July 2017 and confirmed in the preliminary hearing minutes.
- 3.6 R's application for costs was limited to the preparation for the detailed and potentially complicated and lengthy preliminary hearing that the parties had agreed was appropriate to list for 13 July 2017. What occurred in fact was a relatively straightforward short preliminary hearing to deal with case management matters and the consequential costs application. Earlier professional analysis, preparation, and cooperation by C with R could have reached this result without the need for R to prepare fully for a contested public preliminary hearing.
- 3.7 Ideally the C's claim should have been clear from the ET1 claim form. Failing that, as it often the case, matters ought to have been clarified at the preliminary hearing on 21 April 2017. As often happens, however, where full clarification is not possible at that stage and where it may be beneficial for parties to exchange documentation, it was appropriate for there to be an order for the provision of further and better particulars by C to R. Where the C's behaviour crossed the line of being reasonable to being unreasonable was in the failure to provide the further and better particulars required in a timely, detailed and helpful fashion. Any credit C can take for withdrawing the race claim prior to the preliminary hearing on 13 July 2017 is tainted somewhat by the fact that it was a last minute withdrawal when

R had already incurred costs in respect of preparation to make applications in respect of it. It was only during the course of the C's response to my setting out of the agenda for the preliminary hearing on 13 July 2017 that Mr Maddocks made C's position clear with regard to a number of the claims. Mr Gorasia's exasperation was evident and appeared genuine. C had had ample time to provide the clarification required and yet did not do so until I set out the agenda point by point as to what needed to be done at the preliminary hearing and the various applications that were being made. It was unreasonable for C to allow the claim to unfold in that way and so late.

3.8 In all the circumstances, by reference to rules 2 and 76, I considered that I ought to consider making a costs order, and I did so limited to the costs incurred by R in respect of what was anticipated as being a one day preliminary hearing. The matters that in fact needed to be dealt with could have been dealt with at most by a brief telephone conference call preliminary hearing. They may in fact have been dealt with thoroughly by the parties in correspondence and the parties could have presented the Tribunal with an agreed preparatory timetable for endorsement.

3.9 R's application for costs in the sum of £905.25 was justified in terms of the time spent, charging rates and expertise involved.

4. I did not receive evidence of C's means save that it was confirmed that he had received a substantial payment on termination of employment and it appeared likely that he would be in a position to meet the order. I did not wish to add to the cost and inconvenience to both parties by deferring the question any further but instead provided at paragraph 9 of the minutes of the preliminary hearing an explanation as to the approach I had adopted, namely that should C wish the order to be reconsidered I was only likely to do so on receipt of compelling evidence that he lacked means. To date I have not received an application for consideration of details of C's means.

Employment Judge T Vincent Ryan

Date: 01.08.17

REASONS SENT TO THE PARTIES ON
3 August 2017

FOR THE TRIBUNAL OFFICE