EMPLOYMENT TRIBUNALS

Claimant: **Mr A Osingua**

Respondent: **First Security (Guards) Limited**

Heard at: Watford Employment Tribunal **On:** 5 October 2018

Appearances
For the claimant: In person
For the respondent: Mr Smith, of Counsel

Before: Employment Judge Bartlett
Members: Mrs Sood, Mrs Bhatt

JUDGMENT

(1) The complaints for holiday pay set out in **case number 3323749/2017** are struck out in their entirety.

(2) A costs award is made against the claimant in the amount of £7,500.

REASONS

Background

1. The following facts are not disputed:

   i. A preliminary hearing took place on 1 June 2017 at which a deposit order was made in respect of the claimant's claim of direct race discrimination on the grounds that it had little prospect of success.
   ii. A hearing took place on 12, 13 & 14 March 2018. The claimant's claims for direct discrimination and victimization were dismissed.
   iii. The judgement of 14 March 2018 in respect of the holiday pay claim set out the following:

   > *"46. On the first day of the hearing the claimant was unable to give details about what his holiday claim was.*

He was unable to identify the amount claimed and the number of holiday days. The tribunal instructed the claimant's representative to clarify the claim and inform the tribunal on the second day. On the second day the claimant was unable to clarify his claim until given further time after the evidence had been heard and submissions made on the other issues. In these circumstances the respondent was unable to provide evidence and address the claim fairly. A further confusion was that the ET1 identified the holiday claim as covering the period January 2016 to December 2016 the Schedule of loss covered the period January 2017 until May 2017 only."

The respondent's application for strike out

2. In a letter dated 10 April 2018 the respondent made an application that the claimant's claim relating to holiday pay be struck out under rule 37(1)(c) of the Employment Tribunal's Rules of Constitution and Procedure 2013 on the basis that the claimant has not complied with directions of this Tribunal and under rule 37(1)(d) on the basis that the claim has not been actively pursued.

3. The strike out application was pursued by the respondent at the hearing on 5 October 2018.

4. The grounds for the application can be summarized as follows:

    a. The claimant was given many opportunities to particularise his claim for holiday pay but failed to do so even post the substantive hearing which took place in March 2018;

    b. The claimant failed to comply with the directions set out in the Judgement of 14 March 2018 as he did not provide the information requested in the time required.

The Claimant's objections to the respondent's application

5. At the hearing Mr Osinuga objected to the respondent's application for reasons which can be summarised as follows:

    a. the claimant misunderstood the directions of 14 March 2018 because he thought that the respondent was required to provide information in the first instance;
    b. the process used to work out holiday pay was that employees contacted HR and they informed them of their holiday allowance. Around the time the claimant made the claim the respondent's HR system was down and therefore HR could not inform him about his holiday allowance;
    c. the onus is on respondent to let him know if his holiday allowance was accurate or not;

d. the respondent failed to comply with the tribunal directions of 14 March 2018 as it made a strikeout application and he heard nothing else from them;
e. he said that it was difficult to work out his holiday entitlement because his hours varied under the zero hours contract.

Findings of fact

6. In addition to the undisputed facts set out in paragraph 1 above the tribunal makes the following findings of fact:

   a. as set out in the judgement of 14 March 2018 the claimant provided some particularisation of his holiday pay, which set out that the claim was for 69 hours of unpaid holiday multiplied by £10.59 at the end of the hearing after evidence and submissions had been heard;

   b. on 12 April 2018 the claimant set out that he took 23 days holiday between January 2016 to December 2016;

   c. the claimant could not have complied with the date set out in the directions of the 14 March 2018 judgement as they were not sent to the parties until after the deadline had expired;

   d. at the 5 October 2018 hearing the tribunal asked the claimant:

      i. what his total annual holiday allowance was and he could not answer this question;
      ii. if he knew how many days holiday he had accrued for the 2016 holiday year. To which he responded that the respondent had that on their system;
      iii. how did he know that he was not paid all of his holiday in respect of the 2016 holiday year. To which he answered that the onus was on HR of the respondent to know if the holiday was accurate or not.

   e. at the 5 October 2018 hearing the claimant statement that in 2015 he had worked a lot of hours and had accrued a large amount of holiday (27 days) as a result;

   f. the claimant stated that holiday hours were converted into the 12 hour shifts he worked or parts of them;

   g. the 69 hours holiday amount given at the 14 March 2018 hearing equates to 5.75 12 hour shifts. As the claimant stated that he was paid 23 days holiday in 2016 it is not consistent with his other evidence that he was entitled to 28.75 (23 + 5.75) days of holiday in 2016: on his own evidence he worked less in 2016 than 2015 and would have been entitled to less holiday in 2016 than 2015.

Decision

7. Rule 37(1) of the Employment Tribunal's Rules of Procedure 2013 sets out:

"… A tribunal may strike out or any part of the claim or response on any of the following grounds:

…(a) that it is scandalous or vexatious or has no reasonable prospects of success…

(c) for non-compliance with any of these rules or with an order of the Tribunal;

(d)that it has not been actively pursued."

8. The tribunal has decided, under its own initative, to strike out the claimant's claim in respect of holiday pay under rule 37(1)(a) on the basis that it has no reasonable prospects of success:

    a. the claimant has been unable to provide basic evidence about his claim. In these circumstances the claimant has failed to establish his claim. It is not sufficient for the claimant to say that he is not sure that he is owed holiday pay and the burden of proof is on the respondent to prove that he has been paid his holiday pay;
    b. it is unclear how the figures given at the hearing on 12 to 14 March 2018 were arrived at;
    c. there is very little to suggest that the claimant was underpaid holiday.
    d. the claimant has had over 18 months to put together his case in relation to the holiday pay claim but he has still failed to do this;

9. The tribunal does not accept that rule 37(1)(c) has been satisfied because the claimant would not have been able to comply with the time limit set out in the 14 March 2018 judgement as it was not sent to the parties before the time limit set out therein expired.

10. The tribunal finds that rule 37(1)(d) is an alternate ground for strikeout which has been satisfied. The tribunal finds that the claimant has failed to actively pursue his case in that it was open to the claimant to review all of his payslips for the year, identify hours worked and holiday entitlement and to make the calculations about holiday pay himself; he has failed to provide evidence on the basic parts of a holiday claim despite over 5 months elapsing since the March 2018 hearing. The need for this information was repeatedly stated to the claimant and his representative at the March 2018 hearing.

Respondent's Application for costs

11. In a letter dated 10 April 2018 the respondent made an application for costs under regulation 76(1) of the Employment Tribunal's Rules of Procedure 2013 on the following basis:

    a. The Claimant's claim of direct race discrimination was dismissed and had been subject to a deposit order;
    b. The Tribunal made a finding that the claimant's claim for victimisation was "fundamentally flawed" and could not reasonably succeed for the reasons set out in the judgement.

12. This application was repeated at the hearing on 5 October 2018 where Mr Smith submitted a detailed skeleton argument. The tribunal does not consider that it is useful to repeat the skeleton argument here however in very brief summary, it notes the following:

    a. Rule 39(5) imposes a presumption that the paying party is to be treated as having acted unreasonably in pursuing the specific allegation unless the contrary is shown. The reasons why the direct race discrimination claim was dismissed in the judgement of 14 March 2018 were substantially the same as those identified at the preliminary hearing on 17 June 2017;

    b. the judgement of 14 March 2018 made adverse credibility findings against the claimant noting various contradictions and included the finding that "*the tribunal finds that the claimant's emails of 5 and 6 December indicate that the claimant is prepared to say whatever he wishes to further his own ends even if he does not genuinely believe what he says*". This was a finding that the claimant did not have a genuine belief in what he said and demonstrates that the claimant was dishonest and calculating in bringing his claims;

    c. the claimant made a serious allegation that the respondent had fabricated documentary evidence;

    d. the 14 March 2018 judgement found that the claimant's victimisation claim was fundamentally misconceived on the basis that the protected act occurred after the alleged detriment;

    e. lack of collaboration of the claimant's claims

The claimant's objection to the application for costs

13. The claimant's objections to the respondent's applications for costs can be summarised as follows:

    a. the claimant stated that at the preliminary hearing in June 2017 he was a layperson representing himself. The judge looked into his case and:
        i. made a recommendation that the claimant and respondent should both consider the high cost of proceedings and implicitly that they should consider coming to an agreement;
        ii. made a recommendation that the claimant had not put his case in a way that expressed his case correctly;
        iii. recommended that the claimant get a lawyer. He took this advice and obtained a lawyer in August which helped him to put together a very good witness statement and without his lawyer the claimant would have been in a mess;

    b. in pursuing his case the claimant put in the actual facts and no lies. The respondent was at an advantage because the claimant had not received legal advice at the commencement of his claim so they could refer to discrepancies between how the claimant was originally pleaded it and how it was set out at the final hearing;

c. the respondent did not provide sufficient evidence for the claimant to defend his claim;

d. his case could have been turned down at the case management hearing but it was not because the judge felt that the respondent had a case to answer;

e. it was open to the respondent settle the claim as it was for him to bring his claim.

The claimant's evidence about his financial means

14. The tribunal asked the claimant a number of questions about his ability to pay further to rule 84. The claimant gave the following evidence:

a. he is married with 4 children, 2 of whom are adults. The 2 older children attend University away from the home and he provides financial support to them. The 2 younger children are aged 12 and 14;

b. the claimant does not own any property. He lives in council accommodation which has a monthly rent of £550. He is in arrears to the amount of £6000 and he and his wife overpay an extra £200 per month to discharge the arrears. He has been threatened with eviction but has proposed the above overpayments to address the issue;

c. the claimant has a car under hire purchase arrangements. He brought this car as he has started an agricultural degree course at Tunbridge Wells. He needed the car for commuting to University. There was no deposit and the car cost £12,500 he paid £350 monthly;

d. the claimant's monthly income is £1900 to £2000 net;

e. the claimant's wife works part-time and earns less than £1,000 net per month;

f. the claimant's wife receives tax credits in excess of £400 per month;

g. car insurance is £200 per month;

h. car tax is approximately £35 per year;

i. gas and electricity payments are £120 per month;

j. private tuition for his 2 youngest children amounts to £270 per month;

k. he has credit card debts of £9000;

l. his University degree is paid for under student loan arrangements.

15. The tribunal notes that these figures do not include other expenses such as food, mobile phone bills and other travel expenses. The net amount excluding these expenses per month in the family household is

approximately £1780. The tribunal considers that roughly a further £1000 would be spent on household expenditure.

Decision on application for costs

16. Rule 39(5) sets out:

"If the tribunal at any stage following the making of the deposit order decides that (a) the specific allegation or argument against the paying party for substantially the same reasons given in the deposit order the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purposes of rule 76, unless the contrary is shown…"

17. Rule 76(1) sets out:

"a Tribunal may make a costs order or preparation time order, and shall consider whether 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 bringing the proceedings (or part) or in the way that the proceedings (or part) have been conducted; or
(b) any claim or response had no reasonable prospect of success…"

18. The tribunal finds that the claimant acted unreasonably in bringing the claims and that they had no reasonable prospects of success for the following reasons:

    a. the claimant sought to blame various parties as to why he pursued his claim. He blamed the Employment Judge who carried out the preliminary hearing for not striking out all of his claims even though she did strike out the claims of indirect discrimination. He blamed the respondent for not settling the claim and he blamed the respondent in the way that it conducted the claim. The tribunal specifically asked the claimant why did he continue with his claim of direct race discrimination despite the statement that it was the view of the Employment Judge carrying out the preliminary hearing that it had little prospect of success. The claimant's response was that a deposit order was to be expected against an unskilled person like himself and that he got a lawyer to put his case in order. He also identified that the respondent could have settled the claim with him but did not. What the claimant did not mention was that ultimately it was his decision to weigh the risks and benefits in pursuing the claim. He failed to identify how he applied his mind to determining whether his claim had prospects of success. The tribunal found that the order of 17 June 2018 was unambiguous and identifies the lack of prospects of success to the claimant. The claimant chose to ignore the warning and proceed however he was on notice of the risks;

    b. the tribunal found that the claimant stated that he had the right to bring his claim and the respondent had the opportunity to settle the claim. If the respondent did not do so, it was its own fault for incurring

costs. Proceeding with an unmeritorious claim with the aim of pressurising a party to settle the claim is unreasonable conduct;

c. the claimant was warned at the preliminary hearing by the deposit order that there were little prospect of success of the direct race discrimination claim and the tribunal finds that he has not established that he should not be treated as having acted unreasonably;

d. the victimisation claim was fatally flawed because the protected act occurred after the detriment. There could be no reasonable prospects of success in relation to that claim and it was unreasonable to bring the claim in those circumstances;

e. the judgement of 14 March 2018 sets out various adverse credibility findings that were made against the claimant. Findings were made that the Claimant did not have a genuine belief in what he was saying. These were serious findings by the tribunal and they evidence the unreasonable actions of the claimant in pursuing the case.

19. The tribunal then went on to consider the claimant's ability to pay under rule 84.

20. The tribunal considered that the claimant's buildup of council housing arrears was, in light of his recent expenditure in undertaking a university degree and taking on a car which incurred expenditure of at least £600 per month, a calculated decision to deprioritize this expense. It is well known that council evictions take a long time and councils are very reluctant to carry out evictions when minor children are living in the home. It is also well known that councils will agree to significantly reduced payments spread over for a long period of time to discharge arrears and avoid eviction in these circumstances.

21. The tribunal considers that the claimant has quite a reasonable household income. He has made conscious and calculated decisions about which expenses to prioritise and which not to prioritise. The tribunal is not satisfied that the claimant does not have any or indeed a reasonable income every month for discretionary spending.

22. The respondent requested a costs award of £20,000. This included time for preparation of the preliminary hearing. The tribunal did not consider that this should be recoverable as preliminary hearings are a mandatory stage in the course of the claim. The hourly rates and time spent on the case by the respondent's representative were reasonable.

23. The tribunal decided to make a fixed costs award £7500 in total against the claimant for the above reasons.

Case No: 3323749/2017

Employment Judge Bartlett

9 October 2018

JUDGMENT SENT TO THE PARTIES ON
14 November 2018

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FOR THE TRIBUNAL OFFICE