



## EMPLOYMENT TRIBUNALS

***Claimant***

**v**

***Respondent***

Mr M J Moses

**AND**

The Royal National Institute for Deaf People  
(t/a Action on Hearing loss)

### JUDGMENT ON COSTS APPLICATION

1. I have reviewed the costs application made by the Respondent's representatives dated 28 April 2019 (supported by the Breakdown of Fees dated 16 May 2019) and the response from the Claimant's representative dated 7 May 2019. Both parties have consented to the application being dealt with on the papers without the need for a hearing.

#### Background

2. The claimant's original claim was for ordinary unfair dismissal arising out of his dismissal by the respondent in reaction to information about him being published in the media. At the time of his dismissal the claimant had not accrued two years' service.
3. On his claim form, he also ticked the 'race discrimination' box but provided no details of this part of his claim. The claim was lodged within the time limit but was defective due to the absence of an ACAS early conciliation certificate and was therefore rejected by the tribunal.
4. The claimant remedied the defect and the claim was accepted against the respondent (but not against two other parties). By this point, the claim was out of time.
5. On 17 January 2019, EJ Russell identified the jurisdictional issues and the absence of particulars of the race claim. He ordered that the claimant provide these and listed the claim for a further preliminary hearing to determine if the tribunal had jurisdiction.
6. On 11 February 2019, the claimant served further and better particulars of the race discrimination claim although he did not identify what his

protected characteristic was and it was still not apparent in that document how he put his race discrimination claim.

7. On 21 February 2018, EJ Welch allowed the unfair dismissal claim to proceed on the out of time issue but struck it out as it had no reasonable prospects of success. That hearing started late due to the late arrival of the claimant's solicitor and tribunal time was spent on discussing points that had no merit, such as pursuing a claim for unfair dismissal when the claimant had less than two years' service. The hearing ran out of time to deal with the issue of whether the race discrimination claim should be allowed to proceed, which would require an amendment to the claim. The claimant also raised the Fixed Term Employee Regulations 2002 at this hearing and EJ Welch said that he should carefully consider whether to make an application to include such a claim but, if he did, it would have to be considered at a fresh hearing.
8. The matter came before me on 14 March 2019 and I refused the amendment applications in relation to both the race discrimination claim and the fixed term employee claim.

#### Respondent's submissions

9. The Respondent relies on the submission that all the Claimant's claims were bound to fail either on jurisdictional grounds or because the claims had no prospect of success on the merits. This applies to the claims in the original ET1 and the subsequent amendment applications, all of which ultimately failed. In particular, the original 'ordinary' unfair dismissal claim was bound to fail as the Claimant did not have sufficient service. After this claim was struck out, he sought to amend his claim to include race discrimination and fixed-term workers discrimination claims out of time. Irrespective of the time point, these claims had no prospect of success because his actual complaint was of ordinary unfair dismissal. In addition, the way the case was conducted by the Claimant's solicitor resulted in additional hearing time being required, both due to his lateness and his time-wasting.

#### Claimant's submissions

10. In response, the Claimant's solicitor argues that he was entitled to pursue his claims and the amendments to his claim were as a result of case management orders of various Employment Judges. The Claimant cannot be criticised for articulating his claim in accordance with tribunal orders, in particular an order for further and better particulars of his race discrimination claim (identified as a valid claim on the ET1) and the fixed term employee claim. It should be noted that he was a fixed-term employee and it is not unreasonable for him to claim his rights flowing from that status.

#### Law

11. Under Rule 76 of the Employment Tribunal Procedure Rules 2013, I have discretion to award costs where I take the view that a party (or a party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either bringing the proceedings or the way that the proceedings have been conducted or where a claim was pursued which had no reasonable prospect of success. However, I am conscious that such awards should be the exception rather than the rule.

Determination

12. I find the fact that the Claimant was ultimately unsuccessful in his claims is not sufficient reason to award costs against him. He was entitled to pursue his grievance and he did so initially, apparently without the benefit of legal advice (although he has included his representative's details on the ET1 but it seems that was done before he instructed lawyers). I do not criticise the claimant for complying with case management orders and it became apparent through the process of him attempting to articulate his claim that the claims had no reasonable prospects of success. This should have been apparent to his representative at an early stage.
13. I find that the Respondent has had to prepare for and attend numerous hearings to defend a claim which had no merit to it. I find that the final preliminary hearing before me only needed to be listed because there had been insufficient time at the earlier hearing before EJ Welch to deal with the outstanding matters. This was caused by a combination of a delayed start (due to the Claimant's representative being late) and time wasted during the hearing. I therefore find that the Respondent is entitled to recover its costs in preparing and attending this hearing.
14. I have taken into account the Claimant's oral evidence regarding the ability to pay (when he stated he would have £300 per month free) and the lack of further representations on this issue from his representative.
15. I therefore award costs in relation to attendance at the hearing on 14 March (which lasted 2.5 hours) and some preparation time which I calculate to come to £1000.00. Applying the VAT uplift, the amount of the costs award is £1164.00.

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**EMPLOYMENT JUDGE DAVIDSON**

**31 July 2019**

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Date Sent to the Parties

02/08/2019

For the Tribunal Office