EMPLOYMENT TRIBUNALS

Claimant: **Mr C Tchapdeu**

Respondent: **Unipart Group Limited**

Heard at: **Leicester** **On:** **Tuesday 12 November 2019**

Before: **Employment Judge Hutchinson**

Members: **Mrs C A Pattisson**
Ms K Mcleod

Representatives

Claimant: **No appearance – written representations**
Respondent: **Mr S Willey, Solicitor**

JUDGMENT

The unanimous judgment of the Employment Tribunal is that: -

The Claimant is ordered to pay costs of the Respondent in the sum of £4,971.42.

REASONS

Background

1. The Claimant was employed by the Respondent from 19 October 2009. He presented his claim to the Tribunal on 15 February 2017 and claimed that he had suffered: -

- Direct race discrimination
- Indirect race discrimination
- Victimisation

2. We heard the Claimant's claims over seven days including a reading day and reserved judgment day between 10 April 2019 and 30 April 2019. The reserved judgment was dated 19 July 2019 and was sent to the parties on 20 July 2019. All the Claimant's claims were dismissed.

3. On 15 August 2019 the Respondents made an application for an order for costs to be paid by the Claimant. They said that the Claimant had acted unreasonably in both bringing and continuing with the case in circumstances where he knew or ought reasonably to have known that it stood little or no reasonable prospect of success. On 20 August 2020 Dr Ibakakombo on behalf of the Claimant sent a response to the Respondent's application. The response went to 14 pages. Among other matters it accused me of abusing my legal power and required me to provide further information and reasons for the tribunal's original decision. I directed that a costs hearing would be listed. A notice of hearing was sent to the parties on 21 September 2019. On 31 October 2019 Dr Ibakakombo wrote to request a postponement of the costs hearing on the grounds that the decision on liability had been appealed to the Employment Appeal Tribunal. I considered that postponement request and refused it. The grounds for doing so were: -

3.1 The Tribunal should deal with the issue of costs.

3.2 The fact that the Claimant appeals the liability decision does not affect that.

3.3 I urged the Claimant and his representative to attend the hearing to make their points in person.

3.4 I reiterated that if the Claimant and his representative chose not to attend the Tribunal would take into account any written representation.

4. Dr Ibakakombo wrote again on 4 November 2019. He said that he and the Claimant were willing to attend the costs hearing to make their points in person, provided that the Tribunal were also willing to properly address correspondence to the Tribunal i.e. the letters dated 20 August 2019, 5 September 2019 and 6 September 2019 by 9 November 2019.

5. I replied to that correspondence saying that the Tribunal had provided its judgment and written reasons on liability and had nothing further to add and that there would be no further explanation of the Tribunal's reasons. I said that I would be happy to explain the reason for this at the costs hearing but I would not be explaining further the reasons for the Tribunal's decision.

6. I urged the Claimant and his representative to attend the costs hearing and be prepared to participate in it and if they did not attend the Tribunal would take into account any written representations.

7. By a letter of 11 November 2019 Dr Ibakakombo made it clear that neither he nor Mr Tchapdeu would be attending the hearing. The matter had to therefore progress in their absence although the Tribunal was able to take into account the written representations that had been previously submitted on the Claimant's behalf.

The application for costs

8. The Respondent submitted their application for costs under Rule 76 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("the rules").

9. The application is made on 2 grounds which are: -

9.1 That the claims had no reasonable prospect of success.

9.2 That the Claimant acted unreasonably and vexatiously in the manner in which he conducted the proceedings.

10. The Respondent in this case is seeking the expenses they have incurred in defending these proceedings. All the witnesses are employees of the Respondent and have been reimbursed by the Respondent their expenses. They are: -

- Claire Burgess, HR representative
- Miranda Leech
- Kyle Newall
- Steve Good
- David Harper
- Dean Ellis
- Korensa Rushton, HR representative and notetaker

11. The expenses are set out in the schedule of the Respondent's costs which was provided to the tribunal and also to the Claimant prior to the hearing Their expenses were for: -

- Parking
- Train travel
- Hotel
- Meals
- Mileage
- Salary costs

12. There was also a claim for legal costs comprising Counsels fees for attending the Preliminary Hearing on 6 April 2018 in the sum of £900. Counsel had to be instructed because the Claimant had sought to amend the claim by making an allegation against the Respondent's representative of discriminating against the Claimant.

No reasonable prospect of success

13. Mr Willey referred us to the comments made by three separate Employment Judges at Preliminary Hearings which were all attended by Dr Ibakakombo.

14. On 10 April 2017 Employment Judge Ahmed expressed the view that the claims seemed unlikely to succeed. Of his own motion, and not on the application of the Respondent, he directed that the case should be the subject of a Preliminary Hearing to determine if the claim should be struck out on that basis (or a deposit order made).

15. At a hearing conducted by Employment Judge Blackwell on 18 August 2017 he struck out a number of the claims and made a deposit order in respect of all the allegations that survived. It can be seen from his reasons that Employment Judge Blackwell said:

> "I… urge the Claimant and his advisers to think carefully before proceeding and to re-read both this decision and the earlier decision I have referred to above."

16. On 6 April 2018 Employment Judge Clark conducted a further Preliminary Hearing to consider striking out some additional claims the Claimant had sought to plead. In his judgment and reasons, he described the whole case as being "weak".

17. It can be seen from the above therefore that on 3 separate occasions the Claimant was advised that his claims stood little reasonable prospect of success. Of course, the Judges had not heard any evidence at that stage but made their assessment based on the pleadings that were before them.

18. The Respondents make the point that Dr Ibakakombo although not legally qualified is a highly skilled and experienced advocate with a specialism in discrimination matters as he is often referred to in his correspondence with the Tribunal being also an author of a book titled "Black phobia at work place and lack of remedies and recommendations". He is a skilled lay adviser and the Claimant must have been aware or should have been aware that his claims had no reasonable prospect of success.

Unreasonable conduct

19. The Respondent also submits that the Claimant acted unreasonably in the manner in which he conducted the proceedings. They remind us that where a Claimant pursues a claim in which an order for a deposit was made and the Tribunal subsequently decides the case against him, then unreasonable behaviour will normally have been made out. The Respondent says that there are other acts of behaviour which amount to unreasonable conduct of the proceeding.

20. That the Claimant acted unreasonably in bringing the amendments to the claim dated 24 October 2017 when he made allegations against the Respondent's solicitor. At the hearing conducted by my colleague Employment Judge Clark on 6 April 2018 he found that those claims were vexatious and had no reasonable prospect of success and struck them out. As the claims were against the solicitor representing the Respondent it was necessary for the Respondent to instruct Counsel for that hearing and the Respondent was therefore put to time and costs of preparing for, attending and being represented by Counsel at that hearing.

21. The Respondent's point out that in his judgment and reasons Employment Judge Clark described the claims as "speculative" and "weak" and in relation to the allegations of race discrimination which the Claimant sought to bring against Mr Willey, he said "there is nothing that raises even a prima facie concern".

22. The Respondent's also say that the Claimant acted unreasonably in the number and length of the amendments he made to his claim. None of the amendment application was successful. Those amendment applications were made on: -

- 3 July 2017
- 27 July 2017

- 24 October 2017

23. The Respondent says that the first and second applications whilst alleged to have been concerning new events were broadly the same as had already been pleaded. The third application ran to seven closely typed pages, much of it dealing with what they described as "satellite issues only loosely related to the main claim". Much of the application comprised a wholly spurious argument around the Respondent's decision not to respond to further correspondence for the Claimant in relation to matters which had already been the subject of grievance hearings.

24. Thirdly the Respondent submits that the Claimant acted unreasonably in changing his definition of his race from Black African to Black African Cameroon part way through the case. In this matter the claim was lodged on 2 February 2017 and the change was only confirmed at the Preliminary Hearing on 6 April 2018 by which time witness statements had been exchanged.

25. The Respondent's point out that the Claimant had never identified himself by reference to his nationality at any time during his employment and none of the witnesses knew his country of origin. The Respondent's do not object to the fact that the Claimant chose to identify himself in that way but do submit that it amounted to unreasonable conduct because it had only been done a substantial way through the proceedings.

26. Because of the amendment to the pleadings which took place after witness statements had been prepared the witness statements had to be amended at considerable cost to the Respondents.

27. Finally, the Respondents say that the Claimant acted unreasonably in insisting on the use of a separate bundle of documents at the hearing which consisted very largely of the case papers relating to the case of **Onuoha v Unipart Group** which was a case in which was a case in which the Claimant had appeared as a witness and Dr Ibakakombo had been his representative. In insisting on including this it was necessary for the Respondent's witnesses to read documents so that they could be prepared to answer questions on this. In the event no reference was made to the documents at any stage during the hearing and the entire time spent preparing was therefore wasted.

The law

28. The Tribunal was referred to the following rules: -

28.1 Rule 76. This provides for when a costs order or a preparation time order may or shall be made:

> "(1) A Tribunal may make a costs order or a 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 the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success;"

28.2 Rule 78 deals with the amount of a costs order: -

"(1) A costs order may: -

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000 in respect of the costs of the receiving party;

(d) Order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in Rule 75(1)(c)."

28.3 Rule 75 states: -

"(1) A costs order is an order that a party ("the paying party") make a payment to: -

(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;

(c) another party or a witness in respect of the expenses incurred, or to be incurred, for the purposes of, or in connection with, an individual's attendance as a witness at the Tribunal."

28.4 Rule 84 deals with ability to pay and says: -

"In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's …. ability to pay."

29. In deciding whether to make a costs order we must adopt a two stage test in assessing the Respondent's application. We must first decide whether: -

29.1 The claims had no reasonable prospect of success and/or;

29.2 the Claimant acted unreasonably and/or vexatiously in the manner in which it conducted these proceedings;

29.3 decide whether we should exercise our discretion and make an order in all the circumstances of the case.

30. If we decide to exercise our discretion we must then consider the amount of the costs order the Claimant should have to pay. That is also a matter of discretion for the Tribunal.

31. On the issue of the ability to pay the rules recognise that we may have regard to the paying party's ability.

32. We have been referred to several cases namely: -

- **Dyer v Secretary of State for Employment** EAT 183/83
- **Yerrakalva v Barnsley Metropolitan Borough Council** [2012] ICR 420
- **Sud v Ealing London Borough Council** [2013] ICR D39
- **Scott v HMRC** [2004] ICR 1410
- **Raveneau v Brent London Borough Council** EAT 1175/96
- **Mvula v The Cooperative Group Limited** ET number 1300032/2015
- **Arrowsmith v Nottingham Trent University** [2012] ICT 159
- **Herry v Dudley Metropolitan Borough Council** [2017] ICR 610

33. In his written submission on behalf of the Claimant Dr Ibakakombo also referred us to many cases namely: -

- **Meek v City of Birmingham District Council** [1987] IRLR 250
- **Cordell v Foreign and Commonwealth Office** UK EAT/0016/11/SM
- **Sheffield City Council v Norouzi** UK EAT/0497/10/RN
- **Lang v Manchester City Council** [2006] IRLR 745
- **Bahl v The Law Society** [2004] IRLR 810
- **Anya v Oxford University** [2001] IRLR 377

34. Although the Claimant and his representative declined to attend the costs hearing we did have the benefit of a twelve-page submission from Dr Ibakakombo in support of his contentions that we should not make an order for costs.

35. Broadly it can be said that Dr Ibakakombo does not accept at any time that the claims had no reasonable prospect of success. He suggests that although the three experienced Employment Judges had all expressed their views about the claims being weak, this was done without seeing any documents or evidence and without considering the claims in depth. We now have had the benefit of considering his claims in depth.

36. Dr Ibakakombo also refuses to accept that the Claimant acted unreasonably in pursuing these claims or that he was unreasonable in his conduct of the proceedings in any way, or that he had acted vexatiously as found by Employment Judge Clarke in pursuing an amendment to the claim to complain of race discrimination by the Respondent's solicitor.

37. Although he knew that the Tribunal could take into account the Claimant's ability to pay, he did not provide any details of his financial circumstances.

38. The only details of the Claimant's ability to pay were provided at the deposit hearing in August 2017. He was not working at that time and as far as we know he is still not working although we cannot be sure. He did not make any mention at the Tribunal of what he was doing now. There is no reason though why he should not be working. He had been employed by the Respondents for some ten years.

Our conclusions

39. Making a costs order in the employment tribunal is still the exception rather than the rule. The tribunal's power to order costs is more sparingly exercised and more circumscribed than that of other courts where the general rule is that costs follow the event. We are satisfied in this case that it is appropriate for us to make a costs order. We are satisfied in this case that none of the claims of discrimination had any reasonable prospect of success. This had been highlighted by three Employment Judges to the Claimant at separate hearings, all taking the same view that the claims were weak. Although a costs warning had not been issued by the Respondents it was entirely unnecessary.

40. At a hearing on 18 August 2017 Employment Judge Blackwell made a deposit order in relation to all the claims and urged the Claimant to think carefully before proceeding.

41. Mr Tchapdeu was represented by an experienced legal representative and there really is no excuse for him to think that at any stage of the proceedings his claims had any prospects of success at all. In the view of the Tribunal having heard the evidence at no stage did the claims have any prospect of success.

42. We are also satisfied that the Claimant acted unreasonably in the manner in which he conducted the proceedings. Having been subjected to a deposit order, the Claimant continued with the proceedings to the very end and this would normally be sufficient for us to make a costs order.

43. We are also satisfied that the Claimant acted unreasonably in other ways in his conduct of the proceedings.

44. He continually sought to amend the claims to add further claims which also had no prospect of success and were struck out.

45. He pursued claims against the solicitor representing the Respondent which necessitated Counsel to be instructed at a Preliminary Hearing at which Employment Judge Clark not only struck out the allegations but also found that they were "vexatious". We are bound by Employment Judge Clarke's decision that the claimant had acted vexatiously in pursuing that amendment which necessitated the instruction of Counsel

46. The Claimant also acted unreasonably by changing his chosen definition from Black African to Black African Cameroon part way through the case. He did this despite that in all the previous complaints that he had made to the Respondents he had never referred to his race in this way.

47. It was also unreasonable for the Claimant to insist on using a separate bundle of documents containing the case papers relating to a case which was irrelevant to the proceedings being brought before us.

48. Having decided that the Claimant had acted unreasonably and vexatiously and that his claims had no reasonable prospect of success, we are satisfied in this case that it would be appropriate to exercise our discretion.

49. We are satisfied that the schedule of the Respondent's costs is reasonable. It consists of the Counsel's fees for attending the Preliminary

Hearing on 6 April 2018 and the costs incurred for the witnesses to attend the hearing.

50. All these witnesses had been accused of acting in a discriminatory way towards the Claimant. All the witnesses had to be called to give their evidence as they were all accused. None of the accusations had any foundation at all. We are satisfied that we should make an award for the sums claimed which total £4,971.42 as per the schedule of costs.

51. The Claimant has chosen not to provide us any details of his ability to pay or to attend the hearing to give us evidence or submissions about his ability to pay other than the written submissions from Dr Ibakakombo. We are satisfied that there is no reason why the Claimant should not be working at this stage but in any event the behaviour is such that we are satisfied that it would not be appropriate for us to take into account his ability to pay in any event.

52. For these reasons the Claimant is ordered to pay to the Respondent the sum of £4,971.42.

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Employment Judge Hutchinson

Date 15 January 2020

JUDGMENT SENT TO THE PARTIES ON

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