



EMPLOYMENT TRIBUNALS

Claimant

Respondent

v

Mr Y Li

Vision Security Group Ltd

Heard at: London Central Employment Tribunal

On: 6 March 2020

**Before: Employment Judge Palca
Mrs G Bradfield
Ms G Gillman**

Appearances

For the Claimant: In person
For the Respondent: Mr J Cook

JUDGMENT ON COSTS APPLICATION

The tribunal orders that the £300 paid into court by the claimant pursuant to the deposit orders made on 13 March 2019 be paid to the respondent. In addition, the claimant is ordered by 27 March 2020 to pay the respondent £3.700 toward its costs on the basis that he has acted unreasonably in bringing the proceedings.

REASONS

Background and facts

1. The claimant brought proceedings against the respondent claiming direct discrimination on the ground of several protected characteristics. The act of discrimination was, following a day at an assessment centre, failing to appoint the claimant to a particular role for which he was applying. The Respondent defended the claim.
2. After a preliminary hearing before EJ Grewal on 2 February 2019 the matter was listed for a further hearing to consider, among other things, whether a deposit order should be made.

3. This application was made before EJ Davidson on 13 March 2019 who struck out one of the claimant's claims (that he had been discriminated against because of his marital status) and made deposit orders of £150 each in relation to the two remaining claims – that the claimant had been discriminated against on grounds of race and age. The deposit order made it clear both at the beginning and the end that the deposit order was being made because EJ Davidson believed that both of the claimant's remaining claims had little reasonable prospect of success.

4. The reasons for the making of the order began:

“In determining a discrimination claim, the claimant must show a link between the less favourable treatment (in this case, not being offered a job vacancy) and the protected characteristic relied on”

and concluded

“The basis on which the claimant alleges a discriminatory reason for the respondent's decision is lacking in substance”.

5. We should also mention that EJ Davidson stated, that in the absence of a cogent document which set out the test results of all the candidates on the day, she was unable to assess whether or not the claimant had been the best performer on the day., but that live evidence would be needed on the point. The claimant has said in argument before the tribunal today that EJ Davidson's refusal to strike out the claims gave him the confidence and encouragement to carry on. However, there was no logical reason for this belief, because the judge had clearly stated that she thought both his claims had little reasonable prospect of success. It is standard when considering whether strike out or deposit orders should be made to try to determine whether there is sufficient before the tribunal to make a relevant order without the benefit of evidence. If there is not sufficient, because evidence is needed, the case can proceed to trial. The purpose of a deposit order is to signal to the claimant that his claims are not strong, that he must pay money (in this case £300) if he wishes to pursue the claims, and that the money is likely to be forfeit to the respondent should the claimant lose the hearing at the end of the day.

6. The full merits hearing of this case took place on 17 and 18 June 2019, and judgment was given on June 2019. The tribunal decided in favour of the respondent. It found that the claimant was not a credible witness, and reached its decision that he had not been discriminated against, in essence, for three reasons: that he had not suffered detrimental treatment; that there was insufficient evidence to shift the burden of proof on to the respondent to show a non-discriminatory reason for the decision not to appoint him, and that in any event the respondent showed a non-discriminatory reason for not appointing the claimant, in that the candidates who it appointed for the role had performed better than the claimant. This was substantially the same as a reason given by the tribunal for concluding that the claimant's claims for discrimination failed.

7. Following receipt of the judgment, the respondent applied for its costs on the basis that
- a. The claimant knew or ought reasonably to have known his case had no foundation and gave untruthful and/or misleading evidence in support of the central themes in the case;
 - b. The claimant persisted in bringing his claims despite the fact that deposit orders had been made;
 - c. The claimant failed to comply with tribunal orders relating to exchange of witness statements;
 - d. The allegations made by the claimant were so weak as to have had no reasonable prospect of success.
- The respondent argues that the claimant was acting unreasonably on these grounds.

Law

8. Rule 39 of the Employment Tribunal Rules relates to the granting of deposit orders where a tribunal considers that any specific allegation or argument in a claim has little reasonable prospect of success. It continues at rule 39(5):

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

9. Rule 74 of the Employment tribunal rules defines costs to mean fees, charges, disbursements or expenses incurred by or on behalf of the receiving party.
10. Rule 76(1) provides that a costs order may be made when the tribunal considers that:
- a. *A party... 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.*
11. Rule 76(2) states that a tribunal may also make a costs order when *a party has been in breach of an order.*

Submissions

12. The Respondent's representative had prepared a detailed skeleton argument, which the tribunal will not repeat in this judgment, but which argued that the claimant's actions had been so unreasonable that they should recover their costs, limited for the purpose of today's hearing to £15,000.

13. The claimant stated that he believes he should have won his case, and that the decision against him was one-sided, unfair, unjust and not deserved. He said that the respondent had won relying on fake documents, and that they had not been co-operative. He declined the opportunity of telling the claimant about the value of his assets, but told the tribunal that he was earning £22,256 pa. and that his wife did not work. He argued that where he lived and the value of his property could not be relevant, and that he was not obligated to pay the respondent's legal costs, since this was not the norm in tribunal cases, that he had paid his own and had spent much time and incurred much stress in doing so. The respondent, he thought, did not deserve any further favours from the tribunal.

Conclusion

14. The tribunal looked at the whole picture, bearing in mind that the claimant is a litigant in person. They looked at the issue whether he should have understood that his claim had no reasonable prospect of success. Of itself, the tribunal bore in mind that the claimant was allowed to continue with his claims by EJ Davidson, provided he paid deposits in relation to them, and that he took from this that his claims had a prospect of success. He did not focus on the wording of the order, nor the repeated statements that EJ Davidson thought the claims had little reasonable prospect of success.

15. The tribunal thought that, by his own light and in his own belief, the claimant irrationally believes the evidence he gave to the tribunal. However, it found that his evidence was not credible. He continues to persist in allegations against the evidence, for example he states that the respondent's solicitor insisted that he give her his witness statement before she gave him those of the respondent's witnesses. In fact, and in writing only, the respondent's solicitor was suggesting simultaneous exchange at a particular time. The claimant generally characterized evidence which did not support his case as fake, and in addition to finding him not credible, the tribunal also found his evidence at times implausible.

16. In addition, for the reasons set out above, the tribunal found that the claimant had unreasonably refused simultaneously to exchange witness statements, so that the evidence was not exchanged until the first day of the full merits hearing, though the tribunal notes that the respondent's solicitor was perhaps approaching this issue quite aggressively.

17. In looking at whether the claimant acted unreasonably in bringing these proceedings and in pursuing them the tribunal decided that he had been unreasonable. In particular, it decided that the reason why EJ Davidson made a deposit order was substantially the same as a reason why the tribunal rejected the claimant's claims, namely that there was no evidence that the reason why the claimant was not appointed to the role he sought had anything to do with his age or race. By virtue of rule 39(5) of the Employment Tribunal Rules therefore, the claimant is deemed to have acted unreasonably in

pursuing his claims. The tribunal also found that the claimant had failed to comply with the court order simultaneously to exchange witness statements.

18. Having found that the claimant acted unreasonably and in breach of Rule 76(2)00, the tribunal next turned to whether or not it was appropriate for it to exercise its discretion to make a costs order against the claimant. It bore in mind that making a costs order is exceptional rather than the rule, and that costs are compensatory not punitive. It also took into account the fact that a deposit order had been made, that it thought that the claimant had little reasonable prospect of winning his claims for one of the reasons cited by the full tribunal, and that the claimant did not comply with the order concerning exchange of documents. It did not attach weight to the fact that the respondent had given the claimant a costs warning, as this had only been given two days before the hearing, which gave the claimant insufficient time to consider its implications. Bearing in mind all the facts set out above, and the fact that the tribunal had found the claimant not to be a credible witness, who continues to allege that he was the best performing candidate and that any evidence to the contrary is fake, the tribunal decided to exercise its discretion and make a costs award.
19. The claimant did not give the tribunal evidence concerning his assets. He maintained he earned £22,256 per annum, not relying on payslips or an employment contract, but to an inconclusive document which had been in the original court bundle. Bearing in mind his likely salary, and all the other matters set out above, the tribunal exercised its discretion to decide that an appropriate award was £4,000. The claimant has paid £300 into court following the making of the deposit orders. The tribunal orders that this sum should be paid out to the respondent, and that the claimant should pay the respondent an additional £3,700 by 27 March 2020.

Employment Judge Palca

6 March 2020

Sent to the parties on:

13/03/2020

For the Tribunal