Case No: 2300825/2019
2301421/2019

EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Mr Z Ahmed		**Ward Security Limited**

PRELIMINARY HEARING

Heard at: London South Employment Tribunal **On:** 06 May 2020

Before: Employment Judge Hyams-Parish

Representation:
For the Claimant: Mr A Boatswain (GMB Union Representative)
For the Respondent: Ms N Gyane (Counsel)

JUDGMENT

The claim of race discrimination is dismissed because the Tribunal has no jurisdiction to hear it.

The unlawful deduction from wages claims have little reasonable prospects of success. The Claimant is therefore ORDERED to pay a deposit of £75.00 (£37.50 for each claim) as a condition of being permitted to continue to advance the above claims, not later than 21 days from the date this Judgment is sent to the parties.

REASONS

1. This case was listed for a Preliminary Hearing today. I was based in the Tribunal, given the need for the hearing to be public, whilst the parties participated remotely using Skype for Business. The reason for this was due to all "in person" hearings being cancelled because of COVID19.

2. The purpose of the Preliminary Hearing was to consider whether the claims brought by the Claimant should be struck out and/or a deposit order made in respect of all or any of them.

Claims

3. By two claim forms presented to the Tribunal on 7 March 2019 ("the first claim") and 25 April 2019 ("the second claim") the Claimant brings claims of unlawful deduction from wages and race discrimination.

4. The unlawful deduction from wages claims were set out in the first claim and repeated in the second claim; whereas the race discrimination claim was only referred to in the second claim. In fact, the only indication that the Claimant was bringing a race discrimination claim was the fact that he ticked the box headed "Race Discrimination" on page 6 of the claim form.

5. During this hearing, Mr Boatswain represented the Claimant. Mr Boatswain is a trade union representative for the GMB and is named as the Claimant's Representative on the second claim - but not the first claim.

6. The claim of unlawful deduction from wages is in two parts. The first alleges that the Respondent failed to provide, and has continued not to provide, the Claimant with a pay rise following the successful completion of his probationary period. The Claimant alleges that he was contractually entitled to such pay rise. The second claim relates to an underpayment of salary between the period between 19 May and 31 December 2018 when the Claimant alleges that he was not provided with the number of hours work that the Respondent was contracted to provide. The Respondent's position is that there was no entitlement, contractual or otherwise, to a pay rise or to be given a number of hours work.

7. This case came before Employment Judge Pritchard on 11 September 2019 for a Case Management Discussion. He observed that the second claim contained no details of the race discrimination claim. Upon an application by the Respondent, he listed the case for this preliminary hearing.

8. Following the above-mentioned Case Management Discussion, the Claimant provided further and better particulars of his discrimination claim. I think it is important to say, at this point, that during the hearing I asked the Claimant to explain his claim for race discrimination as I wanted the him to tell me about the complaints in his own words. Having given the Claimant that opportunity, at times I found it difficult to reconcile what he told me during the hearing and what he said in his further and better particulars; by that I mean that many of the allegations he told me about during the hearing were not in the further and better particulars, and many of the points made in the further and better particulars were not referred to by the Claimant

during the hearing. I was left with the impression that the race discrimination claim was at risk of expanding well beyond the particulars and that the Claimant did not have a clear view of the allegations he was making.

Applications

9. Turning now to the applications made by the Respondent, I dealt with the race discrimination and unlawful deduction from wages claims separately.

(a) Race discrimination

10. Given that the only indication that the Claimant was seeking to bring a race discrimination claim was the fact that he had ticked the relevant box on the claim form, the first issue I thought it important to determine was whether the second claim could fairly be considered to contain a claim of race discrimination at all. I was referred by Ms Gyane to the case of **Baker v Commissioner of Police of the Metropolis EAT/0201/09** where the EAT upheld a tribunal's decision that a claim form did not include a complaint of disability discrimination where the only indication that such a claim was being brought was the fact that B had ticked the box headed "disability discrimination". In another case, **Ali v Office of National Statistics [2005] IRLR 201**, the Court of Appeal held that when considering whether an ET1 contains a particular complaint that the claimant is seeking to raise, reference must be made to the claim form as a whole.

11. Applying the above principle, I concluded that the second claim contained no claim of race discrimination, notwithstanding the Claimant had ticked the race discrimination box, because nowhere else in the claim form was there any reference of race discrimination or any facts supporting such an allegation. I therefore concluded, and treated, this as an application to amend the claim form to bring a claim of race discrimination, applying the now familiar principles set out in the case of **Selkent Bus Co Ltd v Moore [1996] IRLR 661**. **Selkent** identified certain factors to be taken into account when considering an application to amend: (a) the nature of the amendment; (b) the applicability of time limits; and (c) the timing and manner of the application. An application to amend should not be refused solely because there has been a delay in making it, but I must take into account such factors as the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision.

12. A new race discrimination claim brought by the Claimant at this stage would be considerably out of time (i.e. outside the three-month time limit for bringing such claims) and therefore as well as applying the **Selkent** principles, I would need to be satisfied that it is just and equitable to allow

the Claimant to bring the claim out of time. Clearly, there is a great deal of overlap between the principles to be applied here, as the issue of time limits must also be considered when deciding whether to allow the Claimant to amend his claim.

13. Turning to the Claimant's reasons for the delay, at first the Claimant suggested that he did not understand the process. I do not find this argument very compelling given that the Claimant was assisted by the union to complete his claim and indeed the part of it that related to the unlawful deduction from wages claim was clear and well written. The Claimant could not provide a satisfactory explanation why he did not tell the person assisting him about the race discrimination claim, when it appears he told him about the unlawful deduction from wages claim. I find the most probable reason for this was because the unlawful deduction from wages claim was upper most in the Claimant's mind, rather than allegations of race discrimination, the latter almost becoming an after thought.

14. I considered the balance of prejudice and concluded that the Respondent would be significantly prejudiced in a number of respects: they would need to prepare a new defence, thereby incurring additional cost which it is unlikely they would recover; the length of the hearing would increase from 3 hours to potentially 3-5 days; and a number of additional witnesses would need to attend the hearing to give evidence. On the face of the allegations, I was concerned about the merits of the race discrimination claims and that they continued to lack particularity.

15. For all of the above reasons I refused to allow the Claimant to amend his claim. I further concluded that it would not be just and equitable to extend the time limit to allow the Claimant to bring a race discrimination claim.

(b) Unlawful Deduction from Wages – strike out/deposit application

16. Rules 37 and 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provide the power to make a strike out or deposit order respectively. For reasons which become clear below, I do not need to set out the provisions of Rule 37, but Rule 39 provides as follows:

> ***(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.***
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> ***(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.***
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> ***(3) The Tribunal's reasons for making the deposit order shall be provided***

with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified, the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(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; and

b. the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

17. During the hearing, I was shown documents which tended to show that there was no contractual entitlement for the Claimant receive a pay rise after he had completed his probationary period. I was also shown documents which tended to show their was no obligation on the Respondent to provide the Claimant with a minimum number of hours work. However, I was also referred to conversations and other correspondence which I was told supported the Claimant's case. Whilst I was not at all convinced of the merit of the Claimant's case, and indeed considered striking out these claims, I decided to give the Claimant the benefit of the doubt and leave the matter to be dealt with at the final hearing. I urged the Claimant to seek legal advice about his case. I commented that pointing to other employees who received pay rises upon completion of their probationary periods was unlikely to help the Claimant's case. I also commented that the Claimant might face time limit problems, certainly with the first of the two claims. On this basis I was certainly convinced that the claims had little prospects of success and concluded that a deposit order was appropriate.

18. In deciding the amount of the deposit order, I had little choice but to set this at a low figure bearing in mind that the Claimant was unemployed and had very little disposable income. Nevertheless, I hope that a deposit order will encourage the Claimant to think carefully about his case and the hurdles he now knows he needs to overcome.

CASE MANAGEMENT ORDERS

The Final Hearing

19. As the final hearing in this case was listed for June 2020, during a time when there are no in person hearings, I had no choice but to vacate that date and re-list as follows:

Date(s) of hearing:	**6 October 2020**
Hearing centre:	London South Employment Tribunal.
Address:	Montague Court, 101 London Road, Croydon, CR0 2RF.
Duration:	3 hours.
Tribunal:	Employment Judge sitting alone.

20. The hearing will start at 10am or as soon as possible thereafter depending on other cases that may be in the list. The parties are expected to arrive at the hearing centre by no later than 9.30am.

21. The hearing will consider **both** liability (whether or not the Claimant succeeds with any or all of the claims) and remedy (how much compensation should be awarded if the Claimant is successful).

22. The parties must inform the Tribunal as soon as possible if they think there is a significant risk that this time estimate is no longer accurate, the case is not ready for the final hearing or if they reach a settlement of the case.

23. No postponement of the hearing date will be granted unless there are exceptional and unforeseen circumstances.

24. The Tribunal may transfer this case at short notice to be heard at another hearing centre.

25. The following is a summary of the orders which were made by consent:

	Direction	By when
a.	The parties must send each other copies of all documents in their possession or under their control that are relevant to the issues in this case, including remedy and mitigation (documents relating to attempts to secure alternative employment), regardless of whether such documents are supportive or adverse to their case.	10/06/20

b.	The parties are to agree an index to a consolidated bundle of documents for the final hearing.	17/06/20
c.	The Respondent must send one hard copy of an agreed paginated bundle to the Claimant.	24/06/20
d.	The parties must exchange witness statements at the same time.	22/07/20

Disclosure of documents

26. The term "documents" includes letters, notes, emails, memos, diary entries, audio or visual recordings, text messages and any other legible records.

27. If handwritten documents are being relied on, a typescript must be provided by the party relying on them and inserted in the bundle of documents immediately after the handwritten document.

28. If a recording is being relied on a transcript must be prepared by the party relying on it. The transcript must be included in the bundle of documents and sent to the other party, together with a copy of the recording.

29. The Tribunal does not have facilities for playing audio or visual recordings and the parties should bring suitable equipment (certified PAT tested) if they wish to play a recording.

30. No documents or copy correspondence should be sent to the Tribunal unless a party is required to do so.

Hearing bundle

31. The parties should agree a bundle of documents for the final hearing, which the Respondent shall be responsible for compiling, paginating and indexing.

32. The Respondent should bring **three** copies of the bundle to the hearing.

33. The bundle should only include documents relevant to any disputed issue in the case and those that will be referred to at the final hearing. At the front of the bundle in a separate section it is also helpful to include the claim form and response, any amendments to the response, this written record of the preliminary hearing and any other case management orders that are relevant.

34. When preparing the bundle, the following rules must be applied

    a. unless there is good reason to do so (e.g. there are different versions

of one document in existence and the difference is relevant to the case or authenticity is disputed) only one copy of each document (including documents in emails) is to be included in the bundle;

b. the documents in the bundle must follow a logical sequence, usually chronological order;

c. it must be held together so it opens flat;

d. it should not include the witness statements, which must be provided separately;

Witness statements

35. The Claimant and the Respondent shall each ensure that written statements are prepared for each and every witness they propose to call to give evidence at the hearing.

36. The statements must contain all of the evidence to be given at the final hearing. No additional witness evidence will be allowed at the final hearing without the Tribunal's permission.

37. The written statements must have numbered paragraphs, include page numbers from the bundle when referring to a document, and contain only evidence relevant to the issues in the case.

38. At the discretion of the Tribunal hearing the case, statements of witnesses may be taken as read. This means that they will be read in advance by the Tribunal and the witness will not need to read them aloud at the hearing when giving evidence.

39. It is expected that all witnesses that have provided a witness statement will be available to attend and give evidence at the hearing unless their evidence is not disputed by the other party, who have confirmed that their attendance is not necessary. The parties should bear in mind that the Tribunal may place little or no weight on the statement of any witness whose evidence is disputed and who does not attend the hearing in person to give that evidence orally and be available for questioning under oath.

40. The parties are each responsible for ensuring that they bring **three** copies of each of their witness statements to the hearing.

General matters

41. Anyone affected by these orders may apply for it to be varied, suspended or set aside. Any applications should be made on receipt of these orders or

as soon as possible after it has become apparent that a variation is required.

42. The parties may by agreement vary the dates specified in any order by up to 14 days without the Tribunal's permission except that no variation may be agreed where that might affect the hearing date. The Tribunal must be told about any agreed variation before it comes into effect.

43. This Order constitutes a notice of hearing pursuant to rule 58 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. At the hearing all parties will have the opportunity to submit written representations and to advance oral argument. If a party wishes to submit written representations for consideration at the hearing, they shall present them to the Employment Tribunal Office not less than 7 days before the hearing and shall, at the same time send a copy to all other parties.

CONSEQUENCES OF NON-COMPLIANCE

Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.

If any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84. The Tribunal may also make an "Unless Order" providing that unless an order is complied with, the claim, or as the case may be, the response, shall be struck out on the date of non-compliance without further consideration of the proceedings.

Employment Judge Hyams-Parish
12 May 2020