EMPLOYMENT TRIBUNALS

Claimant: **Mr Esase Awazou**
Respondent: **Abellio London Limited**

Before: **EMPLOYMENT JUDGE CORRIGAN**
Members: **Ms BC Leverton**
Mr M Walton

In Chambers by CVP (London South) **On: 8 October 2020**

JUDGMENT

This was a remote hearing on the papers which was not objected to by the parties. The form of remote hearing was V – Video (CVP). A face to face hearing was not held because no-one requested the same. We had regard to the Tribunal's Reserved Judgment and Reasons sent to the parties on 31 May 2018, the Deposit Order, the Respondent's costs application, costs schedule and those emails attached which were without prejudice save as to costs, and correspondence on the Tribunal file since the full merit hearing.

1. The Claimant's deposit of £200 shall be paid to the Respondent.

2. The Claimant is ordered to pay £300 towards the Respondent's costs (in addition to his £200 deposit).

3. No wasted costs order is made against Simon Noble Solicitors.

REASONS

1. On 11 July 2018 the Respondent's representative applied for costs and/or wasted costs against the Claimant and his representative, Simon Noble solicitors.

2. On 4 October 2018 the Tribunal wrote to the Claimant's representative stating that **"the Claimant's Representative should provide the Claimant's response in relation to the application for costs…., and their own response to the wasted costs application against the Claimant's representative, within 14 days of the date of this letter….The Claimant's response should address his ability to pay costs."**

3. No response was received from either the Claimant or his representative, though it is noted the Claimant's representative was still also on the record as acting in the EAT appeal, from the EAT letter sent to the parties' representatives on 22 October 2018.

4. On 16 November 2018 the Respondent's representative wrote to the Tribunal asking that the matter be determined as the Claimant and his representatives had had an opportunity to respond and had not done so.

5. The Claimant's representative responded copying in the Respondent's representative, saying that they were no longer instructed in this matter.

6. The Respondent's representative responded to that on the same date as follows:

   "As the Respondent's application dated 11 July 2018 included an application for wasted costs against…Simon Noble Solicitors, we are of the view that …Simon Noble Solicitors should not be absolved of any potential liability by coming off record…

   Accordingly we would ask that Simon Noble Solicitors be added as a named party to the proceedings for the determination of the Respondent's costs application…."

7. On 25 January 2019 the Tribunal then wrote to the Claimant in person and the Respondent's representative asking for their views on whether the matter could be determined on the papers. The Claimant did not reply. The Respondent replied on 2 February 2019 agreeing to the determination on the papers. The Tribunal had not copied the letter dated 25 January 2019 to the Claimant's representative nor determined the request to add the Claimant's representative as a party, but the Respondent's representative did not raise this or take any issue with it.

8. Unfortunately it appears that response was overlooked and no further action was then taken until the Respondent's representative called the Tribunal on 24 February 2020, over a year later. Unfortunately there was then further delay due to the Covid-19 lockdown before on 17 August 2020 the Tribunal informed the Claimant and

Respondent's representative that the matter would be considered on the papers. This was not copied to Simon Noble Solicitors.

9. On 15 September 2020 the parties were informed that the costs application would be decided in chambers on the above date. Again Simon Noble Solicitors were not copied into that communication.

10. There has been no further correspondence from either side and so no complaint has been made that Simon Noble Solicitors have not been included in the correspondence. We considered that due to the passage of time, and our decision below not to award wasted costs, that it was appropriate to continue and make our decision without adjourning to copy Simon Noble Solicitors into the above correspondence.

Issues

11. The issues for us to consider were:

    11.1 whether or not the Claimant's deposit of £200 should be paid to the Respondent or refunded to the Claimant;

    11.2 whether costs should be awarded against the Claimant on the basis that the claim had no reasonable prospects of success and/or was pursued or conducted unreasonably;

    11.3 whether or not wasted costs should be ordered against the Claimant's representative on the basis they had been negligent.

Relevant law

12. Rule 39 provides that:

    "Where at a preliminary hearing the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success" it may make a deposit order. Rule 39 (5) provides that "if the Tribunal at any stage following the making of the deposit order decides the specific allegation or argument against the the paying party for substantially the reasons in the deposit order_

        (a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument; and

        (b) the deposit shall be paid to the other party..."

13. Rule 76 of the Employment Tribunals Rules of Procedure states that:

"(1) A Tribunal may make a costs 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...have been conducted;

(b) any claim ...has no reasonable prospects of success....

14. Rule 77 states that "no such order may be made unless the paying party unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

15. Rule 80 states: "A Tribunal may make a wasted costs order against a representative in favour of any party ...where that party has incurred costs ...as a result of any improper, unreasonable or negligent act or omission on the part of the representative".

16. Rule 84 states that in deciding whether to make either a costs or a wasted costs order, and the amount of any such order, the Tribunal may have regard to the paying party's (or in the case of wasted costs, the representative's) ability to pay.

17. We had regard to the following cases which are applicable to the Employment Tribunal. Firstly, *Ridehalgh v Horsefield and other cases* 1994 3 All ER 848 where it was emphasized that "a legal representative should not be held to have acted improperly, unreasonably or negligently because he [or she] acts for a party who pursues a claim....which is plainly doomed to fail". Secondly *Medcalf v Mardell and ors* 2002 3 All ER 721 in which it was commented that it is the duty of the advocate to present his or her client's case even though he or she may think it hopeless and may have advised the client that it is.

18. We also noted that legal privilege (which is for the client to waive) may prevent a legal representative from making a proper defence to a wasted costs order and the observation, again in *Ridehalgh v Horsefield*, that "Judges who are invited to make or contemplate making a wasted costs order must make full allowance for the inability of respondent lawyers to tell the whole story. Where there is room for doubt, the respondent lawyers are entitled to the benefit of it. It is...only when, with all allowances made, a lawyer's conduct of proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order". Similarly we also took account the observation in *Medcalf v Mardell* that "the court must be satisfied before it makes the wasted costs order that there is nothing that the lawyer could say, if unconstrained, to resist the order and that it is in all the circumstances fair to make the order".

Conclusions

Deposit Order

19. The deposit order of £200 was made by Employment Judge Hall-Smith following

the preliminary hearing on 13 September 2017. It relates only to the allegation of unfair dismissal on grounds of making a protected disclosure. It was made because it appeared to Employment Judge Hall-Smith that the case was a weak case because of the Claimant's uncertainty and inconsistency about the date he made the protected disclosure (changing it from May 2017 to August 2017) in response to questions from Employment Judge Hall-Smith.

20. In our judgment (at paragraphs 20,21, 43 and 44) we decided the claim of automatic unfair dismissal against the Claimant. We accepted that, contrary to his evidence, the Claimant had made no disclosures to Mr Harvey, the Fleet Manager and dismissing officer. We found the Claimant showed his managers photographs of faults in the performance of his duties and objected to buses being sent out which he wanted to work on. We did not accept that he raised a risk to public health and safety or dangerous fuel emissions to his managers at all. We found he did not disclose the information in the belief it was in the public interest or because in his reasonable belief it tended to show that the health and safety of the public was likely to be endangered or that there were dangerous emissions. We took into account that the Claimant had not mentioned two disclosures in October 2016 until his witness statement, despite the questioning of Employment Judge Hall-Smith at the preliminary hearing and being required to set out ful particulars after that hearing.

21. We considered the reasons for our decision were substantially the same as the reasons for the deposit order. The reason we did not find that the Claimant had made protected disclosures was that we preferred the Fleet Manager's evidence. However one of the reasons for this was the Claimant's prevarication about the dates of the disclosures, which was also the reason the claim was considered weak at the preliminary hearing and the deposit ordered. Although not our only reason for rejecting the Claimant's evidence, we expressly referred to the Claimant's prevarication on dates of the disclosures and the fact that the Claimant had not mentioned the October 2016 dates despite being questioned at the preliminary hearing. The deposit order was made because of the early signs that the Claimant's evidence on whether and when he made protected disclosures was weak and this did carry through to our decision when we did not accept his evidence about this.

22. The deposit should therefore be paid to the Respondent.

Costs against Claimant

23. Pursuant to rule 39 (a) the Claimant must also be treated as having unreasonably pursued the claim of automatic unfair dismissal. In any event we consider having heard all the evidence that the Claimant's claims in respect of automatic unfair dismissal and race discrimination had no reasonable prospect of success. The overwhelming evidence was that the Claimant did not have the necessary qualification for the role and that was why he was dismissed (paragraph 45 of our reasons). During his employment the Claimant was asked a number of times to produce a copy of his formal qualifications and did not do so. He knew he did not have them, which he candidly accepted in his probationary meeting. We accepted the Respondent had little choice but to dismiss in those circumstances. In these circumstances we must follow rule 76 and consider awarding costs, and we decided

that it is appropriate to award costs.

24. The Respondent had produced a costs schedule covering the cost of the preliminary hearing on 13 September 2017 and Counsel's fees for the final hearing totalling £2,913.26. We considered the Claimant had an arguable case in respect of the breach of contract claim, however the automatic unfair dismissal and the race discrimination claim did increase the length of the hearing substantially. We considered there would have been no need for the open preliminary hearing and the breach of contract claim could have been determined in one day, rather than three days.

25. The Claimant had not responded to the invitation to provide details of his means. There had been some evidence of the Claimant's means at the deposit order stage as set out at paragraph 16 of the deposit order. This was of course out of date. At that time the Claimant had some agency work earning £500 per week when in work. He lived in rented accommodation. We noted that when he worked for the Respondent he earned between £16.14-£17.18 per hour. We considered these facts give an indication of his level of earnings when working.

26. We took into account that the Claimant had paid the deposit of £200. He had also originally paid the tribunal fee of £250 when he first submitted his claim, although was not required to pay a further hearing fee due to the abolition of fees. We therefore considered that at his level of earnings he is able to pay those kind of sums when required. We decided in the circumstances to award costs in favour of the Respondent of £300. Although not all of the Respondent's costs were incurred unnecessarily we considered that the unnecessary costs did exceed the sum of £500 (the forfeited deposit and £300 additional costs).

Wasted costs against Simon Noble Solicitors

27. The Respondent invites us to find that Simon Noble Solicitors were negligent. There has been no response from Simon Noble Solicitors to the wasted costs application. However they have also not been copied into much of the correspondence including that this In Chambers hearing was taking place.

28. We consider that the Respondent is inviting us to find, contrary to the principle in *Ridehalgh v Horsefield,* that the Claimant's solicitor behaved negligently because they acted for the Claimant in a case that was "plainly doomed to fail".

29. The Respondent referred us to correspondence with respect to settlement discussions. Some were marked without prejudice as to costs or are replying to such an email. We have taken those into consideration. These were the emails dated 26 March 2018, 22 March 2018 and 27 October 2018. We did not take into account the emails of 21 March 2018 as they were only marked "without prejudice".

30. We note that the Respondent set out clearly the problems with the Claimant's claim and made a costs warning to which the Claimant's Solicitor responded on 27 October 2017 that they had taken instructions and they were confident that his claim would be successful. We note that there was a similar letter from the Respondent

on 22 March 2017 setting out the hurdles for the Claimant and taking issue with the fact the Claimant's solicitor had countered the Respondent's costs warning with their own costs warning, despite the deposit order. The response from the Claimant's Solicitor was that the offer was rejected by the Claimant. It said that the comments with regard to the deposit were noted but "we maintain that our client has made a protected disclosure and as such our client will be successful ...[at] trial. Our costs warning still stands." We noted the Respondent's contention that this suggested the claim was pursued on a fundamentally flawed understanding that if the Claimant was found to have made a protected disclosure his claim would be successful.

31. We agree that there is no apparent basis for a costs warning from the Claimant (though we don't take account of the correspondence in which is was originally made), especially when he had been ordered to pay a deposit. The statement "our client had made a protected disclosure and as such our client will be successful" ignores the very obvious problem that the Claimant did not have the necessary qualification for the job which was the reason given by the Respondent for the dismissal. We agree that this comment raises questions as to whether the Claimant was being given appropriate advice. However we also note the constraints Simon Noble are under in defending the wasted costs due to legal privilege and are not satisfied that the high test, namely that there is nothing that the lawyer could say, if unconstrained, to resist the order, has been met.

32. Moreover in circumstances where the firm have not been copied into the correspondence since 25 January 2019, without this issue being raised by the Respondent, it would in any event be unfair to make the order.

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Employment Judge Corrigan
10 December 2020