EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr L Mustafa	**v**	**Abellio London Limited**

Heard at: Watford by CVP **On**: 3 December 2020

Before: Employment Judge Bloch QC
Members: Mrs L Thompson
Mr R Reuben

Appearances:

No appearances for the parties the case having been directed to be dealt with by written submission alone.

The present CVP hearing was directed by the tribunal in accordance with the current guidance in response to the covid-19 pandemic.

COSTS JUDGMENT

1. The respondent's application for costs is upheld and the claimant is ordered to pay the sum of £3,396.55 in respect of those costs.

REASONS

1. The claimant was employed by the respondent as a Staff Manager at the respondent's Southall/Hayes Depot. He was employed from 1 May 2017 subject to a six month probationary period. He was dismissed during the probationary period on 17 August 2017.

2. Following a full merits hearing (before Judge and Members) from 29 to 31 October 2018, the claimant's complaints of discrimination on grounds of religion or belief contrary to sections 13 and 16 of the Equality Act 2010 and his claim for breach of contract, were dismissed. The judgment was sent to the parties on 9 November 2018. At the hearing detailed reasons were provided for the decision which were recorded but, given that neither party requested the reasons be provided in writing, in the usual way, the reasons were not typed up.

3. On 14 November 2018 the respondent applied for costs pursuant to Rules 75 and 76 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. In a detailed schedule the total of the costs were set out in the amount of £5,094.83.

4. There followed an unusual period of delay caused by a combination of administrative problems in the tribunal office, the ill-health of one of the Members and the difficulty of arranging a suitable date convenient to the Judge and two Members and the current pandemic.

5. On 15 June 2020 there was a preliminary hearing by telephone at Watford (Judge alone). The claimant did not appear. Indeed, despite various communications between the parties since the date of the hearing there is no record of the claimant engaging with the tribunal or the respondent after the hearing in October 2018.

6. Given the substantial delays which had already occurred in listing the costs hearing and with the agreement of the Members, I deemed it appropriate for the matter to be dealt with in writing pursuant to Rule 77 of the Employment Tribunal Rules of Procedure. The respondent was in agreement with this course (being represented by a solicitor by telephone). I made the following orders.

> "1. The claimant was by 13 July 2020 to provide in writing to the claimant (respondent) and the tribunal any response he wishes to make to the claimant's written application for costs served at the end of 2018. (6 pages plus attachments).
>
> 2. His response, if he wished to make one, was to address the following:
>
> (a) whether or not it is appropriate for costs to be awarded against him, if not, giving his reasons;
>
> (b) whether the costs claimed by the respondent are or are not reasonable, explaining why any (or all) items are unreasonable; and
>
> (c) whether (if the tribunal decides that an order for costs should be made against him) the claimant wishes the tribunal to have regard to the claimant's ability to pay costs. If so, the claimant should give relevant details of his financial position and disclose all documents on which he relies to show his inability to pay the costs claimed by the respondent, (including whether he can pay costs by instalments of how much and when).
>
> 3. The respondent must by **20th of July 2020** provide to the claimant and the tribunal any written response on which it wishes to rely."

4. No response has been received by the tribunal in regard to these directions.

5. It is not necessary to quote from Rule 75 of the Rules of Procedure (costs orders etc but Rule 76 states that:

> "A Tribunal may make a costs order… and shall consider whether to do so, where it 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;"

6. I should also refer to Rule 84 which states that:

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

7. Having considered the matter in detail and assisted by the my and members' notes of the hearing, the hearing bundle as well as a draft typed up version of the reasons given orally at the hearing, the tribunal concluded that the claim of discrimination on grounds of religion or belief was indeed one which the claimant had brought vexatiously or otherwise unreasonably in either the bringing of the claim (or part) or the way that the proceedings (or part) were conducted; and that the claim in respect of discrimination on grounds of belief had no reasonable prospect of success. As regards the claim for breach of contract (in the form of non-compliance with the terms of the respondent's Probationary Policy) after some hesitation the tribunal concluded that while the Probationary Policy was in its view non-contractual, nonetheless, there were aspects of the respondent's employment documentation which might not make this entirely clear to an employee, particularly one who was not legally represented. In particular (for example) the Probationary Policy stated that it was:

> "…directly aligned to employee terms and conditions of employment and to the requirements of UK employment legislation"

8. There was no express negation of contractual liability in respect of the Probationary Policy, eg a statement that (unlike various other policies referred to in the respondent's terms and conditions), the Probationary Policy was non-contractual. Therefore, although we found that the policy was non-contractual, we did not regard this part of the claim either vexatious or one which had no reasonable prospects of success.

9. In brief, the reason for granting the application for costs in regard to the religious discrimination case are those set out in the respondent's written application for costs, which accurately sets out the findings of the tribunal and the reasons for a costs order, which in our judgment are compelling.

10. In summary, the tribunal concluded that there were no racists remarks (or remarks based upon religion or belief) such as alleged by the claimant. Nor was there discrimination against the claimant in the form of his being put under pressure in relation to after work socialising because of his not drinking. The tribunal accepted that there were very few social occasions and that the claimant was involved in those occasions. There was no

harassment in relation to his not drinking because the tribunal (amongst other things) found that the claimant did in fact engage in drinking at that stage.

11. In particular, the tribunal dismissed the allegations by the claimant of a series of discriminatory comments made by Martha Leszczynska ("ML"). There was no evidence that she ever made any such remarks and having heard her evidence we regarded it as highly unlikely that she would ever have said any such things as are alleged to have been said by her. Moreover, and very oddly, at an early stage the claimant was alleging that her anti-Muslim comments were contained in texts from her which he had retained. However, we accepted the evidence of the respondent (and rejected that of the claimant) in finding that it was the claimant who wiped his telephone on the day of his dismissal before handing it back to the respondent, putting it back to factory settings. Therefore, on the face of it, the claimant's claims that he was able to rely upon such emails was plainly incorrect.

12. The matter did not stop there. In looking at how the claim was presented, it is noteworthy that the claim form (ET1) was vague in the extreme and did not mention the alleged comments specifically. Matters were not much improved when the claimant served further particulars by way of an email to the tribunal on 4 February 2018. It was only when the mater came before Judge Manley on 6 April 2018 that the claimant mentioned specific incidents of ML saying things such as "You Muslims are all the same" and that "Muslims don't have fun… It's all haram" and the like. However, notwithstanding the clear order made regarding the necessary content of witness statements, the claimant did not refer to these statements in his witness statement. Instead, in his evidence before the tribunal he mentioned two graphic new comments which had not previously been mentioned by him, namely that ML had allegedly said that she "doesn't like Muslim women because she is a lesbian and they dislike her". Even more surprisingly he then alleged that ML had said in regard to Muslims: "You are all terrorists". The claimant's explanation of the late recollection of these much more graphic comments than those told to Judge Manley was unpersuasive and unsatisfactory. It was further noted by the tribunal that during his closing submissions the claimant made no reference whatsoever to racists comments having been made by ML, focussing his time on the probationary period procedures part of his case.

13. The tribunal further concluded that the claimant was not a teetotaller at the relevant time accepting clear evidence from other witnesses who had seen him drinking and photographic evidence of him holding a glass of wine on one occasion and a glass of beer on another. His initial explanation that the glass of wine was in fact a glass of coca cola was changed by him in evidence to an acknowledgment that the glass contained wine but that it had been given to him as a mere "prop" for the purposes of the photographs. The tribunal did not accept this explanation.

14. The tribunal also rejected the contention that the claimant had been marginalised or ostracised through his being a teetotaller based on the evidence of the photographs and the persuasive and clear evidence of the various witnesses. The tribunal considered but rejected the possibility of collusion between the witnesses but regarded their evidence in regard to his attending social occasions and drinking alcohol as being wholly convincing.

15. On the other hand, there was no evidence whatsoever to support the key contentions of the claimant both in regard to the alleged verbal abuse and detriments suffered by him as a result of not drinking for religious reasons (as he alleged and the tribunal rejected). Also, significantly, the tribunal rejected the evidence by the claimant that he had not wiped his telephone upon handing it over to ML when he was dismissed.

16. The tribunal carefully considered whether the claimant's evidence and manner of pursuing his discrimination claim could be explained away on grounds of mis-recollection or misunderstanding of tribunal procedures or otherwise. However, it was plain to the tribunal that the claimant was, in regard to the religious discretion claim, wilfully misleading the tribunal. We regard that as being the case from the outset but more especially since his receipt of a letter by the respondent's solicitor dated 20 July 2017, pointing out the weakness of the claimant's case and the photographs which were in the possession of the respondent showing him drinking alcohol. For all those reasons the tribunal concluded that this part of the claim was vexatious and unreasonable and had no reasonable prospects of success.

17. In regard to the claim of breach of the Probation Policy, the tribunal regarded this claim as also very weak. On a reading of the appointment letter together with the terms and conditions of employment and the Probationary Policy (quite a lengthy document) it was the tribunal's clear conclusion that this policy was non-contractual. That said, we do not regard it as so obvious that the claimant should not have made his claim or withdrawn it after receipt of the respondent's solicitor's letter of 20 July 2017. It is the sort of case in which, had there been a preliminary hearing, the tribunal might have ordered a deposit to be paid but not have dismissed it as disclosing no reasonable cause of action.

18. Turing to the amount of costs claimed. As a matter of general impression these costs seemed to us to be reasonable, indeed, even modest for a three day hearing. Also, looking at the individual items there do not appear to be any items that are unreasonable. Further, the claimant was given the opportunity (as set out above) to object to any of or all of the items but did not take up the opportunity of doing so. A more difficult exercise for the tribunal was to apportion the costs between the two different claims. While it is right that the argument about the Probationary Policy did take up a fair amount of time, by far the most serious claim was that of race discrimination. It is most likely that the respondents would have taken that part of the case much more seriously than the breach of contract claim and spent more time in preparation for the purposes of defending that claim. Indeed, in the way that the case was conducted, it was plainly the most important and time-consuming part of the hearing. For those reasons, doing

the best we could, we decided that the respondent should be awarded two thirds of its costs, being a rough attribution of the costs which it would have spent on the race discrimination claim. Accordingly, we decided that a deduction of one third should be applied to the total sum of £5,094.83 set out in the respondent's costs schedule.

19. The tribunal had in mind Regulation 84 concerning the ability to pay but had no information concerning the claimant's financial position - and the claimant did not take the opportunity of addressing the tribunal in writing on that matter.

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Employment Judge Bloch QC

Date: ……9/2/2021.

Sent to the parties on: ...9/2/2021...

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For the Tribunal Office