EMPLOYMENT TRIBUNALS

Claimant	**AND**	**Respondents**
Mr Christopher Adams		Royal Mail Group Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 27 August 2021**

Representations

For the Claimant: Claimant in person
For the Respondent: Mr R Chaudhry, Solicitor-Advocate

JUDGMENT

(1) The Respondent's application for costs succeeds. The Claimant is ordered to pay the Respondent **£500**.

REASONS

1. By a letter dated 4 June 2021 the Respondent applied for a costs order pursuant to rule 76(1)(a) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 following the judgment and written reasons sent by the Tribunal to the parties on 11 May 2021. In that judgment the Tribunal found for the Claimant in a claim for unpaid overtime pay pursuant to section 13 of the Employment Rights Act 1996 in the sum of £1,821.04 and also in a claim for holiday pay, accrued but unpaid at the time of termination in the sum of £231.72.

2. All of the other Claimant's claims were dismissed, specifically:

    2.1. Automatically unfair dismissal for assertion of a statutory right s104 Employment Rights Act 1996;

    2.2. Unpaid sick pay (section 13 of the Employment Rights Act 1996);

    2.3. Direct race discrimination (section 13 of the Equality Act 2010);

    2.4. Harassment relating to race (section 26 of the Equality Act 2010);

    2.5. Victimisation (section 27 of the Equality Act 2010).

Procedure

3. The Claimant wrote an email to the Tribunal the day before this costs hearing which seem to suggest that he had not received anything from the Respondent in preparation for this hearing. Although the Claimant did not apply in terms for an adjournment, the Tribunal, bearing in mind that he is a litigant in person, did spend some time considering whether this hearing should be adjourned to another occasion.

4. The Claimant identified that he had received the email containing the Respondent's bundle and submissions which were re-sent yesterday. He complained at the hearing that his eyesight is not particularly good and suggested that he might struggle with these documents.

5. The relevant chronology is as follows:

    5.1. the Tribunal's substantive decision on liability and remedy was sent to the parties on 11 May 2021 by email. The Claimant has received this. He informed the Tribunal that he has put in an appeal against this decision.

    5.2. On 3 June 2021 the Claimant moved house to 4 Pelican Court, Southfields, Letchworth, Hertfordshire SG6 4LU. It seems that he did not update either the Respondent nor the Tribunal of this change in address until he did so in an email sent on 26 August 2021.

    5.3. On 4 June 2021 the Respondent made an application for costs by email, copying the Claimant at the email address that he was using at the time of the hearing on liability and has continued to use, even during the course of this costs hearing.

    5.4. Approximately one month later in early July 2021 the Claimant got internet access up and running in his new property.

    5.5. The Respondent sent a draft bundle to the Claimant by email on 14 and 18 June 2021 and by hard copy on the 29 June 2021, sent a hard copy of the bundle and index to the Claimant on the 26 July 2021 (to his old address)

and provided written submissions to the Claimant by 9 August 2021, together with a copy of the bundle.

5.6. The submissions and bundle were re-sent on 26 August 2021, i.e. the day before the costs hearing, at a time when the Claimant was responding to email, so certainly had the opportunity to consider this.

6. The Claimant obfuscated and would not give a clear answer to the Tribunal's question as to when he had first received the Respondent's bundle and submissions, despite this question being repeated. He made repeated references to accessing emails for deliveries which seemed to suggest that he had been receiving messages even during the period before his Internet was set up in the new property. We believe, although it was not entirely clear, that Mr Adams was able to access emails on his mobile phone. However, giving the Claimant the benefit of the doubt we accept that there was a period following the move of house on 3 June 2021 when he had difficulties in accessing email.

7. The Tribunal came to the conclusion based on the information we have received that the Claimant had originally received the Respondent's application, submissions and bundle of documents a number of weeks before today's hearing and probably sometime in July 2021.

8. The costs application document itself dated 4 June 2021 is only two pages in length and the points in it concisely stated and in our assessment not difficult to understand. The Claimant is plainly already familiar with the content of the Tribunal's decision. We decided that, notwithstanding the Claimant's protestations, it was in the interests to go ahead with today's costs hearing rather than leaving the matter unresolved.

9. Having decided that the hearing would go ahead, we granted the Claimant a further period of preparation time. At 11.20am we adjourned until 1pm. The Claimant spent 15 minutes between 11.20am and 11.35am sorting out a technical problem with the assistance of one of the Tribunal clerks. The remainder of the time until 1 o'clock the Claimant had to prepare any remarks that he wished to make.

10. At 1pm we invited the Respondent's representative to go through the arguments for costs point by point, giving the Claimant the opportunity to respond point by point. We were satisfied that the Claimant was able to understand the points being made and give full and meaningful responses, in some cases engaging with and adopting arguments put forward by Employment Judge Adkin on the basis that a legal representative might have made them on his behalf. Some of the points raised by the Claimant were to the effect that he disagreed with the Tribunal's decision, but he appreciated that this was not the forum to change elements of that decision.

The Law

11. Rule 76 provides:

> **When a costs order or a preparation time order may or shall be made**
>
> 76.—(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.

12. The following propositions relevant to costs may be derived from the case law:

12.1. There is a two-stage exercise to making a costs order. The first question is whether a paying party has acted unreasonably or has in some other way invoked the jurisdiction to make a costs order. The second question is whether the discretion should be exercised to make order (*Oni v Unison* ICR D17).

12.2. Costs orders in the Employment Tribunal are the exception rather than the rule (*Gee v Shell* [2003] IRLR 82, *Lodwick v Southwark* [2004] ICR 844).

12.3. In *Yerrakalva v Barnsley MBC* [2012] ICR 420 Mummery LJ said:

> "7. As costs are in the discretion of the employment tribunal, appeals on costs alone rarely succeed in the Employment Appeal Tribunal or in this court. The employment tribunal's power to order costs is more sparingly exercised and is more circumscribed by the employment tribunal's rules than that of the ordinary courts. There the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the employment tribunal costs orders are the exception rather than the rule. In most cases the employment tribunal does not make any order for costs. If it does, it must act within rules that expressly confine the employment tribunal's power to specified circumstances, notably unreasonableness in the bringing or conduct of the proceedings. The *423 employment tribunal manages, hears and decides the case and is normally the best judge of how to exercise its discretion."

12.4. While the threshold tests for making a costs order are the same whether or not a party is represented, in the application of the tests it is appropriate to take account of whether a litigant is professionally represented or not. Litigants in person should not be judged by the standards of a professional representative (*AQ Ltd v Holden* [2012] IRLR 648).

12.5. While a precise causal link between unreasonable conduct and specific costs is not required, it is not the case that causation is irrelevant. In *Yerrakalva* Mummery LJ said:

> "41. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances."

Factual background

13. This is dealt with in our judgment and written reasons and not repeated here.

Respondent's submissions

14. We have considered each of the Respondent's submissions point by point in our conclusion below.

Claimant's submissions

15. The Claimant did not take the opportunity to put in any written submissions, but argued strongly in oral submissions during the course of today's hearing against the Respondent's application for costs.

Conclusion

WHETHER COSTS JURISDICTION INVOKED

16. The Respondent applies for costs and expenses for the sum of £36,476.00 + VAT to be awarded against the Claimant, in accordance with Rule 76 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the "Rules"), on the following grounds:

16.1. the Claimant has brought and pursued a number of claims listed below which from the outset had no reasonable prospects of success; and or

16.2. the Claimant has behaved vexatiously, disruptively and otherwise unreasonably by pursuing grounds (g), (i) and (j) below.

17. The Grounds (a), (b) etc follows those set out in the Respondent's application.

Statutory right

18. **Ground (a)** C's claim for asserting for a statutory right failed because the ET were unable to identify any allegations that C's rights had been infringed. (Paragraphs 157-163 of the Judgement);

19. There were six dates on which statutory rights were said to have been asserted, as set out at paragraphs 159 – 164. The Claimant was unable during the course of the hearing to identify any statutory rights on these dates. It follows that there was no reasonable prospect of this claim arising from events on those dates succeeding.

20. We found that there was one assertion of a statutory right, namely the presentation of a claim to the employment tribunal on 18 May 2018. A notice of claim was sent to the respondent on 22 May 2018. This cannot have influenced the report documenting the decision to dismiss dated 10 May sent under cover of a letter dated 18 May 2018 i.e. sent on the date the claim was presented and before received by the Respondent. In our judgment there was no reasonable prospect of this part of the claim succeeding.

Evidence of industrial accident

21. **Ground (b)** C failed to show any evidence in support of his claim that his absence was due to an industrial injury at work (184-189);

22. We do not accept that they Claimant failed to show any evidence in support of his claim that his absence was due to an industrial injury at work. There was ample evidence in the bundle that the Claimant had suffered a fracture to his spine, that he was receiving treatment from physiotherapist and that his GP was signing him off from work. It is the Claimant's contention that he notified his employer of an accident at work. It is this part that is in dispute. We do not accept the premise that there was no evidence in support of the claimant that the absence was due to an industrial injury at work. Our finding was that there had not been acceptance by the DWP such as to engage the exception in the Respondent's sick pay policy which is not the same thing.

23. It follows that we do not find that there was no reasonable prospect of this part of the claim succeeding.

Race claim out of time

24. **Ground (c)** All of C's race discrimination claims prior to the 28 January 2018, were found to be out of time because he failed to put forward any reasons as to why the ET should extend time (197);

25. It is open to a Tribunal to find either that there was a continuing discriminatory act or alternatively that the is a basis to exercise its discretion that it is "just and equitable" to extend time. In the circumstances of the case the Tribunal might have done either. We noted at paragraph 198 that the Claimant was seeking to exhaust an internal grievance process which might have been basis to exercise the

discretion to extend time. We do not find that the failure of the Claimant to advance evidence or argument in support of a just and equitable extension is in itself a reason to find that there was no reasonable prospect of this succeeding.

Race discrimination/harassment unsupported

26. **Ground (d)** C failed to put forward an allegation of direct race discrimination or harassment or set out facts from which an inference could be drawn in order to support his claim (201);

27. As the appellate authority on discrimination cases identifies, employers will rarely admit discrimination, even to themselves. There is rarely overt evidence of discrimination. A Tribunal must consider whether inferences can be drawn. In this case the Claimant, who was black complained about the actions of various individuals, who are predominantly white in circumstances where he had a feeling that his race had something to do with it, and against a background where he felt that black colleagues had historically been treated badly.

28. The witness evidence might have, out differently from the Respondent witnesses than the way that it actually did.

29. We cannot say that there was no reasonable prospect of this claim succeeding.

No evidence of fraud or that race reason for non-payment of overtime

30. **Ground (e)** C made allegations of fraud against R's witnesses who the ET found had nothing to gain from the underpayments which occurred because of C's own carelessness in failing to sign forms (209). Nor did the ET did receive any evidence that C's race was the reason why his overtime payment was not paid until the hearing (212);

31. We consider that this ground falls into two parts.

32. First, the allegation of fraud. The Claimant was unable to identify any reason why such a fraud would have been carried out. It was not in anyone's interest. No one stood to gain by it. There is a high threshold for the cogency of evidence required to make such a serious allegation. The Claimant in reality had no evidence nor even any basis to draw an inference that the had been fraud. This part of the ground we find had no reasonable prospect of succeeding.

33. Secondly, for similar reasons for those set out on ground (d) above, we find that the Claimant was entitled to bring a claim regarding the delay in paying his overtime pay. The length of the delay in this case did call for an explanation. It might been found to be the Claimant's race. That is not we found. Nevertheless we do not find that there were no reasonable prospects of this succeeding.

Phone calls

34. **Ground (f)** C's claim that the phone calls made on the 4 October 2017 & 9 October 2017 did not amount to discrimination because he failed to identify who made them, what was said and failed to identify any core facts to support a claim (214, 241 and 250);

35. The failure of the Claimant to identify who made these calls and what was said meant that there was no reasonable prospect of this allegation of discrimination succeeding.

No overtime training

36. **Ground (g)** C's claim that no one had shown him how to fill in overtime forms was unsustainable in the light of his failure to explain why his signature was on so many of the forms, and that his suggestion of fraud was baseless (221)

37. Notwithstanding our finding that the suggestion of fraud was baseless, we find that there was evidently some genuine confusion in the Claimant's mind about the overtime signing process. It is common ground between the parties that some overtime was owed for the Claimant, indeed we have given judgment for the sum. One of the Respondent's witness giving evidence at the liability hearing hypothesised that of the two different types of overtime perhaps managers were not always present to give the Claimant direction to sign.

38. Given we find that the Claimant's confusion on this point was genuine, we do not find that this amounted to vexatious, disruptive or unreasonable conduct. Given the fact that there was overtime owed and the possible confusion over the process for signing up for the two different types of overtime, we do not find that there was no reasonable prospect in respect of this allegation.

Letters

39. **Ground (h)** Mr Ali's and Mr Julian's letters were not found to be less favourable treatment (261 and 264);

40. The tone of Mr Ali's letter is reassuring and in it he offers support. There was no reasonable prospect of this amounting to less favourable treatment.

41. By contrast Mr Julian's letter relates to a fact-finding exercise the context of a disciplinary. We cannot say that there was no reasonable prospect of this amounting to less favourable treatment such as to found a claim of race discrimination.

Special delivery package tampered with

42. **Ground (i)** C's allegation that R had tampered with his special delivery package failed because he was unable to provide any evidence other than to claim it was a day late (272);

43. The fact that the Claimant could not positively identify that any individual had deliberately caused this special delivery package to be late meant that there was no reasonable prospect of this succeeding.

44. We do not find however that this allegation was brought vexatiously, disruptively and otherwise unreasonably. We find that the Claimant had a genuine suspicion as to what had caused this delay.

Victimisation

45. **Ground (j)** C's victimisation claim failed because of the 4 reasons set out paragraphs (306-309) and the ET specifically found that C was verbally abusive and that he made serious and false allegations that went outside the allegations of race discrimination (311).

46. The Tribunal finds that the Claimant made out a *prima facie* case of victimisation (paragraph 301). In those circumstances we are surprised that the Respondent is seeking to argue that there was little reasonable prospect of success or that this was pursued vexatiously, disruptively and otherwise unreasonably.

WHETHER APPROPRIATE TO MAKE A COSTS ORDER

47. We have stepped back from our finding that some of the allegations set out above had no reasonable prospect of success, which invokes the costs jurisdiction and raises the possibility of a costs order.

48. We have separately considered whether we should make a costs order.

49. The arguments that might mitigate against making such an order are, first as far as the Respondent's representative at today's hearing was aware, there was no costs warning letter sent to the Claimant. We are not aware of a deposit order having been made. The Claimant was a litigant in person certainly during the course of the hearing, although he had originally instructed solicitors who put in the claim form, witness evidence was prepared by professional representatives and he had instructed a barrister in preparation for the hearing although that instruction was withdrawn with the result that the Claimant represented himself.

50. We have taken account of the fact that the Claimant did pursue two claims successfully to the Tribunal, namely the claims for overtime pay and holiday pay.

51. We have considered that the Claimant, in our assessment feels a genuine sense of grievance and feels that he has been treated badly by the Respondent. We find that he is genuinely confused about some of the material events and has become suspicious of the Respondent, making more difficult to be objective about the very weakest of his claims.

52. We do however consider it is appropriate to make a costs order, given that there are elements of the claim pursued by the Claimant that had no reasonable basis at all. We have borne in mind Mummery LJ's guidance in Yerrakalva that a precise causal link between unreasonable behaviour and specific costs is not required, but that causation is not irrelevant. We find that the Respondent incurred costs in defending parts of the claim which had no reasonable prospect of success, but this made up a minority of the litigation as a whole. We have consider the effect of the these allegations pursued. In our judgment, as a matter of impression rather than a precise scientific calculation, we find that approximately 15% of the costs that have been incurred by the Respondent relate to these matters in which there was no reasonable prospect of success. 15% of £33,900 claimed by the Respondent is £5,085.

Consideration of the Claimant's means

53. The Claimant gave evidence at today's hearing on oath, and was questioned by the Tribunal and Mr Choudhry of the Respondent. In short he is out of employment and in receipt of a number of benefits (housing benefit, DLA, JSA, council tax-exemption). He did not have the precise figures for income but thought it came to something like £300 per month.

54. He lives in rented accommodation and does not own a property.

55. He has four children, three of them who are minors. One of them lives with him. Another is an adult lives elsewhere. Two of them live with their mother, not with the Claimant.

56. The Claimant estimated that having paid outgoings he has something in the region of £50 left at the end of the month.

57. We do not consider in the circumstances that the Claimant should pay the full amount of £5,085. Given that the Claimant is on benefits, taking account of his financial circumstances generally we find that the just figure for the Claimant to contribute to the Respondent's legal costs is **£500**.

Employment Judge Adkin

Date 4.9.21

WRITTEN REASONS SENT TO THE PARTIES ON

06/09/2021.

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FOR THE TRIBUNAL OFFICE

Notes

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Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.