EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4100047/2017

Held in Glasgow on 20 September 2019

Employment Judge: Frances Eccles
Member: Peter O'Hagan

Mr F Mutombo-Mpania	**Claimant** **In Person**
Angard Staffing Solutions Ltd	**Respondent** **Represented by:** **Dr A Gibson - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:-

(1) The claimant's application for a preparation time order is refused &

(2) The respondent's application for an order of expenses is refused.

REASONS

BACKGROUND

1 The claim was presented on 12 January 2017. The claimant complained of automatically unfair dismissal, disability discrimination, race discrimination and breach of contract. He sought an award of compensation against the respondent of £572,967.50. The claim was resisted. The claimant sought strike out of the response. The application was refused at a preliminary hearing held on 16 March 2017. The issue of whether the claimant has a disability was considered at a preliminary hearing held on 24 April 2017. By judgment dated 8 May 2017 Employment Judge Wiseman found that the claimant is not a disabled person within the meaning of the Equality Act 2010. The claimant applied for reconsideration of the above judgment. The claimant appealed to the EAT against the above judgment. The claimant's application for reconsideration was refused by judgment dated 30 June 2017. The EAT notified the claimant on 26 September 2017 that Her Honour Judge Eady was of the opinion that his notice of appeal disclosed no reasonable grounds for bringing the appeal. The claimant sought a hearing under Rule 3(10) of the EAT Rules. The claimant sought removal from the case of Employment Judge Wiseman. He alleged bias.

2 The claimant made a further application for strike out of the response on 24 November 2017. He alleged fraud on the part of the respondent's solicitor. He alleged that the respondent and/or their solicitor had relied on a forged email dated 23 December 2016 at the preliminary hearing held on 24 April 2017 and that by doing so had sought to pervert the course of justice. The claimant sought a preparation time order of no less than £100,000 for the proceedings to date.

3 At a Rule 3(10) hearing held on 10 January 2018, the Honourable Lady Wise sitting in the EAT ordered that the claimant's appeal should be set down for a full hearing. The Tribunal claim was sisted pending the outcome of the claimant's appeal to the EAT. The hearing before the EAT was held on 17 July 2018. The claimant objected to the claim being sisted beyond 6 September 2018 on the grounds that the Honourable Lady Wise was

deliberately refusing to deliver her judgment to favour the respondent. The claimant alleged bias on the part of the Honourable Lady Wise on the grounds that she had worked at the same law firm as the respondent's solicitor. The claimant also objected to the claim remaining sisted on the grounds that there should be no further delay in consideration of his application for a preparation cost order and strike out of the response.

4 By judgment dated 13 September 2018 the claimant's appeal to the EAT against the Tribunal's judgment dated 8 May 2017 (finding that he was not a disabled person) was dismissed. By judgment dated 26 September 2018 an application by the claimant for a costs order against the respondent was refused by the EAT.

5 A preliminary hearing was arranged to consider the claimant's application for a preparation cost order and strike out of the response. At the claimant's request, the applications were considered by a full Tribunal. Following a preliminary hearing held on 23 November 2018, the Tribunal issued a unanimous judgment dated 20 December 2018 refusing the applications by the claimant for a preparation time order, strike out order and deposit order. The Tribunal found no dishonesty on the part of the respondent and accepted the explanation provided by the respondent's solicitor that a mistake had been made in relation to the e mail of 23 December 2016 which was neither reckless or negligent. The claimant applied for reconsideration of the above judgment. He appealed to the EAT. The application for reconsideration was refused on 9 January 2019 on the grounds that Employment Judge Meiklejohn considered that there was no reasonable prospect of the original decision being varied or revoked.

6 In correspondence to the Tribunal dated 9 January 2019 the claimant requested a final hearing to allow him to *"go away quickly from the Glasgow Employment Tribunal where* ***injustice is a rule of procedure. Very sad".*** (claimant's emphasis). The claimant notified the Tribunal in correspondence dated 18 January 201 9 that he did not intend to appeal against the decision to refuse his application for reconsideration because he understood that *"this*

Employment Judge was determined to do his best to favourite the respondent, Therefore, to make an Appeal before that Judge was a waste of time ***because he is going to make courageously another perverse decision, what he is an expert to do",*** (claimant's emphasis). The claimant requested that Employment Judge Mieklejohn be barred from hearing his case.

7 The EAT notified the claimant on 20 February 2019 that in the opinion of Her Honour Judge Eady his notice of appeal against the judgment dated 20 December 2018 (refusing applications for a preparation time order, strike out and deposit order) disclosed no reasonable grounds for bringing the appeal. The claimant sought a hearing under Rule 3(10) of the EAT Rules.

8 The claim was listed for a final hearing. The claimant applied for witness orders for Lorna Walton of Royal Mail and Chris Moylan of the respondent. The claimant's application for Witness Orders was granted by the Tribunal. The respondent was subsequently contacted by Lorna Walton who identified Linda Anderson as the person at Royal Mail who may know about the claimant's case. The respondent's solicitor informed the Tribunal by e mail dated 7 March 2019 that they had spoken to Linda Anderson who had confirmed that she did have some limited knowledge of the case *"having emailed the Respondent to inform them that Royal Mail no longer wished the Claimant to be allocated shifts within the Glasgow Mail Centre".* The respondent's solicitor suggested that the claimant may wish to amend his witness order accordingly. The claimant confirmed by e mail later that day that he had *"nothing to do with Linda Anderson"* and would not be amending his witness order. The claimant asked that Linda Anderson provide a copy of the e mail by which she contacted the respondent to ask them to dismiss him. The respondent's solicitor replied by e mail of 11 March 2019 to advise that they had made enquiries of the respondent who were seeking to locate the e mail in question. The respondent's solicitor wrote; *"Given the time past this may not be possible but we are looking in to if.*

9 During the final hearing the claimant sought disclosure of the e mail said to have been sent by Linda Anderson to the respondent on 15 December 2016.

On 9 April 2019 the Tribunal issued a Documents Order for disclosure by Royal Mail of *"all emails sent by Linda Anderson of Royal Mail on 15th December 2016 to Angard Staffing Solutions Ltd about Mr F Mutombo-Mpania".* In response to the above Order, the Tribunal was informed by Lorna Walton of Royal Mail that;

> *"Linda Anderson has gained access to her emails but has been unable to locate any emails in December 2016 at all. Linda has contacted our IT department but to date, and she has checked with IT this morning they have so far not been able to locate emails to this period of time".*

Neither Royal Mail or the respondent have disclosed an e mail dated 15 December 2016.

9 Following the final hearing on various dates in April and June 2019 the Tribunal issued a judgment dated 31 July 2019 that;

1) the claimant was not discriminated against by the respondent because of his race in terms of Section 13 of the Equality Act;

2) the claimant was not unfairly dismissed by the respondent in terms of Section 100 of the Employment Rights Act 1996 (health and safety);

3) the claimant was not unfairly dismissed by the respondent in terms of Section 104 of the Employment Rights Act 1996 (assertion of a statutory right);

4) the respondent was in breach of contract by failing to give the claimant notice of his dismissal &

5) the respondent shall pay to the claimant damages of £165.15 (£132.15 plus 25% uplift) for breach of contract.

10 The claimant made an application for a preparation time order for the period 12 January 2017 to 6 May 2019 in the sum of £76,000. The claimant withdrew his appeal to the EAT against the judgment dated 20 December 2018

(refusing his first application for a preparation time order, strike out and deposit order). The appeal, having been withdrawn, was dismissed by the EAT on 3 July 2019.

11 The claimant applied for reconsideration of the Tribunal's judgment dated 31 July 2019. The claimant alleged bias on the part of Employment Judge Eccles and identified seven alleged errors of law. The application for reconsideration was refused by the employment judge on initial consideration as the she not satisfied that it identified grounds to justify reconsideration of the Tribunal's original judgment. The claimant made a second application for reconsideration of the judgment dated 31 July 2019 on the grounds that the employment judge had not provided reasons for refusing the first application. He alleged that the employment judge is "now *hiding her motivation to favourite the respondent or (who) is now acting as the respondent solicitor'.* The second application for reconsideration was refused by the employment judge on initial consideration as it did not contain any new grounds and, as with the first application, it identified a number of alleged errors of law as opposed to matters that might justify reconsideration of the Tribunal's original judgment.

12 The respondent informed the claimant on 7 August 2019 that in their opinion there was no basis on which an application for a preparation time order could be granted based on the allegation of dishonesty on their part given the findings of the Tribunal in its judgment dated 31 July 2019. The claimant was put on notice that if he insisted on making his application that the respondent would make a counter application for expenses for the period 19 August 2019 to 20 September 2019.

13 The claim was listed to consider the claimant's second application for a preparation time order on 20 September 2019. At the hearing the claimant appeared in person. The respondent was represented by Dr A Gibson, solicitor. The Tribunal provided an interpreter, Ms Isabelle Capoulade.

SUBMISSIONS

14 In addition to the claimant's oral and written submissions, the Tribunal also considered the claimant's application for a preparation time order contained in his written submission for the final hearing in April 2019; additional written submission dated 6 May 2019 (paragraphs 16 to 20); schedule of preparation time and breakdown of work for the period from 12 January 2017 to 6 May 2019 and two additional documents lodged by the claimant as follows;

(1) An e-mail from the respondent's solicitor to the claimant dated 7 March 2019 (C1) &

(2) An e-mail from the claimant to the Tribunal dated 23 March 2017 (C2).

15 The claimant was anxious that the Tribunal record in full his final written submission supporting his application for a preparation time order. While recognising the need for proportionality, the Tribunal considered that it was appropriate and in accordance with the overriding objective to record the claimant's written submission in full. The Tribunal considered the claimant's final written submission along with his oral submissions and the submissions and documents identified above before reaching its decision. The Tribunal considered the authorities to which it was referred by the claimant. The claimant's final written submissions are produced below. The highlights are those of the claimant.

CLAIMANT'S WRITTEN SUBMISSIONS

"Note of evidence

When the claimant had made a witness order application to call Lorna Walton as a witness in this case, the respondent opposed vigorously this application on the ground that ***Lorna Waiton*** *knew nothing about this case and the respondent proposed to the claimant to amend his witness order to call Linda* ***Anderson*** *instead, as if it was the claimant who bears the burden of proof*

showing that Royal Mail Centre sent an email to the respondent on 15 December 201 6.

By its email of 07 March 2019 at 11:45, the respondent informed the Employment Tribunal about ***Lorna Walton's position*** *regarding this case following an email sent to the respondent by* ***Lorna Walton on 04 March 2019.***

In that email of 04 March 2019, ***Lorna Walton*** *said as follow:*

> *"Gents,*
>
> *Thank you for your emails. I have just returned from Annual Leave and have a citation waiting for me. I have no problem with attending;* ***however I have absolutely no knowledge or had any dealings with this Gentleman or indeed Angard.*** *This was all dealt with by* ***Linda Anderson, who was covering the Production Supply Manager role at the time.*** *The Production Supply Manager deals with all Angard staffing arrangements and any enquiries regarding Staffing/Attendance of Angard Staff. The Production Control Manager has no daily dealings with Angard in terms of Staffing or Casual attendance information.* ***I will not be able to provide any information regarding his attendance with us or not as the case I believe is concerned.*** *Linda Anderson dealt with this Gentleman's enquiries at the time.*
>
> *Lorna"*

That was the same evidence given by ***Lorna Walton*** *before the Employment Tribunal at the final hearing of 09 April 2019.*

Lorna Walton *had identified the person who was covering the Production Supplier Manager role at the time as being* ***Linda Anderson.*** *She said that it was the Production Supplier Manager who dealt with all Angard staffing arrangements and any enquiries regarding Staffing/Attendance of Angard staff.*

However, ***Lorna Walton*** *did* ***not*** *say that she* ***was Linda Anderson's spokesperson*** *or if she said that by mistake, she did not disclose to the Employment Tribunal any document showing that Linda Anderson has given her any permission to speak or to give evidence before the Employment Tribunal on behalf her about* ***what happened on*** *15* ***December 2016 regarding the alleged email sent to the respondent regarding the claimant.***

Lorna Walton claimed herself that ***she had absolutely no knowledge or had any dealings with the claimant or indeed Anqard and she would not be able to provide any information regarding the claimant's attendance with Royal Mail Glasgow Mall Centre or not as the case she believed was concerned.***

Therefore, it is clear that the only person who should has given evidence before the Employment Tribunal about what happened on 15 December 2016 was ***Linda Anderson.*** *She was not called however as a witness by the respondent who bears the burden of proof or by the Employment Judge* ***Frances Eccles*** *who has showed extreme sympathy for that the respondent wins the case.*

It was in consequence wrong, as was done by the Employment Judge ***Frances Eccles*** *in her judgement of 31 July 2019, to say that at the final hearing of 09 April 2019* ***Lorna Walton,*** *who claimed herself knowing nothing about the claimant's case, has given clear evidence about the alleged request made by Royal Mail Glasgow Mail Centre by email on 15 December 2016 regarding the claimant.*

Moreover, Lorna Walton was not that person at Glasgow Mail Centre who should have given that evidence. It was only ***Linda Anderson*** *who should have done so and* ***Lorna Walton*** *did not say that she was* ***Linda Anderson's spokesperson.***

Therefore it is correct to say that no one at Glasgow Mail Centre has given evidence before the Employment Tribunal on 09 April 2019

regarding the existence of the alleged email sent by Royal Mail to Angard on 15 December 2016 with any request regarding the claimant.

2. Note of authorities

It is well established that the burden of proof as to any particular fact or allegation lies on that party who wishes the court to believe in its existence.

In this case, the burden of proof was on the respondent which wished the Employment Tribunal to believe in the existence of the fact that ***"it has received by email on 15 December 2016 injunction from Royal Mail to don't book the claimant for any shifts at Glasgow Mail centre". It was*** *legally obligated to the respondent to discharge the burden of proof showing that that injunction was received on 15 December 2016 via an email as alleged.*

In the ***case Re B [2008] UKHL 35 at paragraph 2, Lord Hoffman*** said as follow regarding ***the burden of proof:***

> *"If a legal rule requires a fact to be proved, a judge or jury must decide whether or not it happened.* ***There*** *is* ***no room for a finding that it might have happened.*** *The law operates a binary system in which the only values are 0 and 1. That fact either happened or it did not. If the Tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carried the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If it does discharge it, a value of 1 is returned and the fact is treated as having happened".*

In the case ***Daieside Nursing Home Ltd v Mrs C Mathew UKEAT/0519/08/RN, The Honourable Justice Wilkie*** *has observed that it would be perverse of a Tribunal to fail to conclude that the making of a false allegation at a hearing before it did not constitute a person acting unreasonably (paragraph 20).*

In the case ***Dunedin Canmore Housing Association Limited v Mrs Margaret Donaidson UKEATS/0014/09/B1 , The Honourabie Lady Smith*** has concluded that a claimant had acted unreasonably in respect that her approach to her case was tainted by dishonesty. A Tribunal had found that the claimant had not been telling the truth in evidence, she had lied on oath regarding a matter which was central to her case.

In the case ***Nicolson Highlandwear Ltd v Gordon Nicolson UKEATS/0058/09/B1, The Honourable Lady Smith*** *has judged that an Employment Tribunal can be expected to conclude that there has been unreasonableness on the part of the party where he/she is shown to have been dishonest to his/her claim and then to exercise its discretion so as to make an award of expenses in favour of the other party (paragraph 21).*

In the case ***Mr Daniel Munoz Carrasco v Edinburgh Language Academy Limited Case No: S/41 04590/201 6,*** *The Employment Judge* ***Mr C Lucas*** *has judged that if it had been proved that by defending the claim made against it the Respondent had in any way been dishonest then, following the decision of the EAT in the case of* ***Nicolson Highlandwear Limited v Nicolson,*** *the Tribunal might have exercised its discretion so as to make an award of expenses in favour of the claimant.*

3.Question to be answered by the respondent and the Employment Judge Frances Eccles

On its ground of resistance to the claimant's claim formulated in its response form, the respondent had referred to the false allegation that "it has received ***injunction by email on 15 December 201 6 to don't book the claimant any more at Glasgow Mail Centre"*** *three times: in paragraphs 4, 26 and 27 of its grounds of resistance.*

The claimant is asking the following question to the ***respondent*** *and the* ***Employment Judge Frances Eccles:***

1 *When the respondent representative was writing its grounds of resistance to the claimant's claim on around* ***10 February 2017,***

*did it have in front of it the copy of the email alleged sent by Linda **Anderson on 15 December 2016?***

2 *If the answer to this question is "Yes" why the copy of that email was not disclosed to the claimant following the claimant request of disclosure of that evidence made in his letter of **16 February 201** 7, his application of disclosure order email of **23 March 2017** at **13:25** and at the Preliminary Hearing of **24 April** 2017 where the respondent repeated this falsehood and misled the Employment Judge **Lucy Wiseman** who has referred to this falsehood in her judgement of 10 May 2017 at paragraph 21?*

3 *If the answer to the first question is "No", why then the respondent representative has referred to an allegation whom it did not have any evidence before it to prove the veracity of that allegation?*

4 *If the answer to the first question is "No", how the respondent representative can explain that it did not have a copy of an email allegedly sent to the respondent on **15 December 2016** whereas it wrote its grounds of resistance to the claimants claims on around **10 February 2017,** 1 month and 26 days only after that famous email was allegedly sent to the respondent?*

5 *As the respondent said that it was contacted **by email** on 15 December 2016, what could have been the relevant to prove that that allegation was true ? If the answer to that question is **the copy of that alleged email** what must be the consequence of failure to disclose the copy of that email without any reasonable reason?*

4. Discussion on the claimant's application for preparation time order

*The claimant confirms without hesitation that as the respondent said it was contacted by email on 15 December 2016, the only evidence to show that that allegation **was not false was the disclosure of the copy of that email***

Or, if the respondent was unable to disclose the copy of that email as it was the case, it should has given adequate reason explaining why it was not ***in a position to disclose the copy of that email as requested by the claimant since the 16 February 201 7.***

In her judgement of 31 July 2019 at ***paragraph 59,*** *the Employment Judge Frances Eccles has recognised that the respondent was unable to disclose the copy of the alleged email of 15 December 2019.*

Yes, the respondent was unable to disclose the copy of that email without giving any adequate reason why it was not able to do so.

The consequence of this was that the respondent has failed to discharge the burden of proof showing that that email was sent to it on 15 December 2016.

Therefore, following the words of Lord Hoffman in the case Re B [2008] UKHL 35 at paragraph 2, ***If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. The allegation being simply a false allegation***

Moreover. In the same judgement of 31 July 2019, the Employment Judge Frances Eccles confirmed that Royal Mail Glasgow Mail Centre was unable as well as to disclose the copy of that alleged email.

What the Employment Judge has not said was that ***Linda Anderson and the IT department of the Glasgow Mail Centre spent 10 days to search that copy of email without success, following the 2 documents order made by the Employment Judge Frances Eccles on 09 April 2019 and varied on 10 April 2019.*** *The unique conclusion which could be made to this fact was that that email never existed and was never sent. Therefore the allegation that that email was sent* ***was simply a false allegation made before the Employment Tribunal.***

That is why the Employment Tribunal should conclude that the respondent has acted unreasonably in this case by making a false allegation before it and that a preparation time order should be made in favour of the claimant, in

accordance with the words of ***the Honourable LadySmith*** *in paragraphs 19, 20 and* ***21 of her*** *judgement in* ***the case Nicolson Highlandwear Ltd v*** *Gordon Nicolson UKEATS/0058/09/BI and paragraphs 24 and 25 of her* ***judgement in the case Dunedin Canmore Housing Association Limited v Mrs Margaret Donaldson UKEATS/0014/09/BI,*** *in accordance also with the words of the* ***Honourable Justice Wilkie*** *in paragraph 20 of his judgement in the case* ***Daleside Nursing Home Ltd v Mrs C Mathew UKEAT/0519/08/RN,*** *in accordance with the words of the Employment Judge* ***Mr C Lucas*** *in paragraph 51 of his judgement in the case* ***Mr Daniel Munoz Carrasco v Edinburgh Language Academy Limited Case No: S/41 04590/201 6.***

The claimant invites the Employment Tribunal to consider ***his Scheduie of preparation time order and the detailed breakdown of the 2,000 hours*** *claimed by him and already submitted to the Employment Tribunal on 09* ***April 2019.***

The claimant also invites the Employment Tribunal to consider the submission he made before the same Employment Tribunal in his additional final submissions at the final hearing of ***09 April 2019*** *and the submissions made in his application for preparation time order submitted to the Employment Tribunal at the final hearing of* ***09 April 2019. "***

CLAIMANT'S ORAL SUBMISSIONS

16 In his oral submissions, the claimant submitted that he knew which way the Tribunal would decide the application and that given his experience of proceedings in Scotland, he would be seeking a transfer of his claim to Manchester or London for an appeal. He demanded that the respondent or Employment Judge answer the five questions identified at Section 3 of his written submission. He demanded an answer to his questions and referred to his written request (C2) for disclosure of *"any evidences ie email or letter by Royal Mail to confirm that it was not wishing my services at their site."*

17 The claimant submitted that the Employment Judge could not be for *"one of the parties".* It was not enough, submitted the claimant, for the Tribunal to find that the respondent was probably advised by e-mail from Royal Mail that his services were no longer required. The claimant confirmed that it was his position that there had in fact been no contact between Royal Mail and the respondent.

18 The claimant questioned why the respondent had not called Linda Anderson to give evidence in particular in circumstances where Lorna Watson had explained to them that she did not know anything about the case. The claimant submitted that either the respondent or the Employment Judge should have called Linda Anderson to give evidence. He submitted that Lorna Watson was not a spokesperson for Linda Anderson as she did not have the right to speak on her behalf.

19 The claimant informed the Tribunal that he had sent a copy of its judgment to a friend in America, who after reading it had declared that he was of the impression that Scotland was *"like a village".* The claimant informed the Tribunal that he had also obtained advice that if an e-mail is deleted in error, it stays within the computer and that a computing engineer can find it very easily on the computer's hard drive. The claimant submitted that he did not understand how Linda Anderson and the Royal Mail's computer department had been unable to recover the e mail. He suggested that the Tribunal call an expert, at the cost of the respondent, to examine Royal Mail's computer hard drive. If the e-mail was not found by a computing engineer, submitted the claimant, then it does not exist.

20 The claimant submitted that his application is based on the unreasonable conduct of the respondent. The claimant submitted that the respondent's solicitor has made false assertions to the Tribunal. The claimant submitted that the onus was on the respondent to prove that they were contacted by e-mail and that the Employment Judge had invented a reason to say that they had been contacted. The claimant demanded to know what evidence the Employment Judge had to reach such a conclusion. The existence of a

procedure was not sufficient, submitted the claimant, to prove that contact had been made. The claimant accused the Employment Judge of *"hiding behind proof.* The claimant submitted that the Employment Judge did not have anything upon which to make the finding in fact and that *"this was not justice".* The claimant called upon the Employment Judge *"to speak to her conscience"* and dispense justice. The claimant submitted that he had been left with the impression that Glasgow is a *"friends' club".* He submitted that in Scotland judges are friends with solicitors and *"some people got justice and some not as a consequence".*

21 The claimant submitted that because there was no *"concrete proof* of the e-mail existing that the respondent had failed in their defence. The claimant emphasised the words of Lord Hoffman in the case of **Re B** *(supra).*

22 The claimant referred to the respondent's solicitor as being *"taken offguard"* and having lied to the Employment Tribunal. He submitted that he knew the respondent was lying about being contacted by Royal Mail. He knew that they would not be able to prove it He knew that they could not produce the e-mail and that they must be lying. He referred to the respondent's solicitor as *"knowing the truth"* and having failed in his duties as a solicitor. The claimant referred to the judgment of the Honourable Justice Wilkie in the case of **Daleside Nursing Home Ltd** *(supra).* .

23 The claimant submitted that his first application for a preparation time order concerned unreasonable conduct on the part of the respondent in relation to falsifying an e-mail. The present application, submitted the claimant, concerned the respondent and their solicitor having lied to him and the Tribunal since 10 February 2017 about having received an email from Royal Mail on 15 December 2016 requesting that he no longer work at their Glasgow Mail Centre.

RESPONDENT'S SUBMISSIONS

24 Dr Gibson has represented the respondent throughout the proceedings. He is the respondent's solicitor. Dr Gibson submitted that there was no basis for the

claimant's application. There has been no dishonesty by the respondent or their representatives at any stage in the proceedings. There has been no unreasonable conduct by the respondent or their representative to justify a preparation time order under Rule 76 of the Rules of Procedure 2013.

25 Dr Gibson referred the Tribunal to its judgment of 6 August 2019, in particular paragraphs 59 and 60, where the Tribunal addressed the issue of contact between Royal Mail and the respondent. Dr Gibson questioned how an application for a preparation time order based on dishonesty in the present case had any prospect of success. The Tribunal was satisfied that the respondent was contacted by Royal Mail with a request that the claimant no longer work at their Glasgow Mail Centre. Dr Gibson questioned how such a finding could justify a preparation time order based on dishonesty by the respondent regarding the existence of an e-mail. The application, submitted Dr Gibson, was not only misconceived but also vexatious and brought to further harass and inconvenience the respondent. It was misconceived, submitted Dr Gibson, given that the claimant had sought to show that he was dismissed by the respondent. Even if the Tribunal reversed their decision and drew an adverse inference from non-disclosure of the e-mail and found that the respondent had acted dishonestly by referring to the e-mail, it would make no difference to the claimant submitted Dr Gibson as the Tribunal has already found that he was dismissed. The claimant, submitted Dr Gibson, has not been prejudiced by non-disclosure of the e-mail. In any event, submitted Dr Gibson, even if the Tribunal was to draw an adverse influence and find that the respondent acted dishonestly by referring to the e-mail, it was unclear how this would justify a preparation time order given that the vast majority of the case was lost by the claimant.

26 The existence of the e-mail is of no relevance, submitted Dr Gibson, to whether there was race discrimination or an automatically unfair dismissal. The respondent had denied that the claimant was dismissed. There was clearly a matter of dispute over the facts, submitted Dr Gibson. It did not follow that the respondent acted unreasonably by arguing that the claimant had not been dismissed, in particular given that he was paid to January 2017 following

receipt by the respondent of sick notes. It was entirely reasonable, submitted Dr Gibson, for the respondent to run their defence to the claim of unfair dismissal. It was a question of interpretation of the facts. The claimant's limited success did not justify a preparation time order for any period of the claim.

27 Dr Gibson answered the questions put to him in the claimant's submissions. He explained that he did not have an e-mail when he prepared the ET3. He had evidence before him regarding contact between Royal Mail and the respondent. He spoke to the individuals concerned who told him about the contact. He had the contemporaneous e-mails which were also before the Tribunal from 16 December to 23 December 2016 which referred to contact between Royal Mail and the respondent. He explained that the manner of contact was not explored in any detail at the time of submitting the ET3. He explained that there was no reason whatsoever for him to doubt the instructions he received from the respondent in relation to contact being made by Royal Mail. There was plenty of evidence submitted Dr Gibson for the respondent to show that they were contacted by Royal Mail.

28 The claimant responded to Dr Gibson's submissions by questioning whether he had acted in bad faith or ignorance and accused Dr Gibson of not knowing how to do his job.

29 In relation to the respondent's application for expenses against the claimant, Dr Gibson confirmed that the application was limited to costs for today's hearing. It was made on the basis that the claimant, in making the application, was acting vexatiously, abusively or otherwise unreasonably. Dr Gibson explained that the respondent had had enough of being harassed by the claimant and having to answer hopeless applications. Dr Gibson submitted that the claimant did not have to be legally qualified to understand that the application is without merit. The claimant could have reconsidered whether he intended to insist upon the application. His approach in making the application, submitted Dr Gibson, amounts to an abuse of process. It is

vexatious. The claimant submitted Dr Gibson continues to harass the respondent and act unreasonably.

30 Dr Gibson acknowledged that there is a high threshold for such applications. He submitted that this is a case in which the high test is met. He submitted that the claimant is abusing the privileges given to members of the public to raise claims before the employment Tribunal. Dr Gibson sought the cost of preparing and appearing at today's hearing which he calculated to be 5 hours' work at £114 per hour (£95 + VAT).

CLAIMANTS RESPONSE

31 In response to the application made by the respondent, the claimant referred to Dr Gibson being *"amongst friends'* and that he wished to have his appeal heard in England. He questioned how Dr Gibson as a qualified lawyer could say things before a Tribunal that are untrue, *"talk rubbish"* and be unable to prove what he said. He referred to a *"real lawyer* as someone who takes instructions from his clients and asks them to provide the evidence. He referred to his *"fundamental right to doubf* what the respondent was saying and to require the respondent to prove what they are saying is true.

32 The claimant referred to the respondent's application as vexatious. He referred to their inability to prove that they received an e-mail from Royal Mail. He referred to the authorities in his written submissions. He disputed the suggestion that an unsuccessful party to proceedings cannot seek expenses against a party that has acted unreasonably, for example if they have made a false allegation. He submitted that he had a fundamental right to proceed with his application, referring to paragraph 59 of the Tribunal's judgment, and in particular that the respondent could not produce the copy e-mail. This was sufficient, submitted the claimant, for the Tribunal to make a preparation cost order. The claimant was asked about his current employment status. He confirmed that he is working under a zero hours contract with an income of £8.25 per hour. His hours of work are irregular. He has been employed in the above post since January 2019. The claimant described his outlays as home, debts, food, transport and sending money to his family in the

Democratic Republic of Congo. The claimant informed the Tribunal that he is in receipt of Universal Credit.

DISCUSSION & DELIBERATIONS

APPLICATION BY THE CLAIMANT

33 In terms of Rule 75(2) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("the Rules of Procedure 2013"), a preparation time order is;

> *"an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party (including by any employees or advisers) in working on the case, except for any time spent at any final hearing".*

34 Rule 76(1) (a) of the Rules of Procedure 2013 provides that a Tribunal may make a preparation time order, and shall consider whether to do so, where it considers that;

> "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"*

35 The amount of a preparation time order and hourly rate is regulated by Rule 79 of the Rules of Procedure 2013. The number of hours in respect of which a preparation time order is made is calculated on the basis of information provided by the receiving party and the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on preparatory work with reference to such matters as a complexity of the proceedings, the number of witnesses and documentation required.

36 It is the claimant's position that by failing to produce a copy of an e-mail sent to them by Royal Mail on 15 December 2016 confirming that he should not be

offered further shifts at the Glasgow Mail Centre, the respondent acted vexatiously, abusively, disruptively or otherwise unreasonably in the way that they conducted the proceedings, entitling him to a preparation cost order in the sum of £76,000. The Tribunal considered the conduct of the respondent and their representative in relation to the e mail of 15 December 2016 and during the course of proceedings generally. In the paper apart to their ET3 (at paragraph 4), the respondent stated; "On *15 December 2016 the Respondent informed the Claimant that the Glasgow Mail Centre no longer wished his services at their site due to his persistent non-attendance at shifts he had accepted".* On 23 March 2017, the claimant sought disclosure of any *"evidence ie email or letter'*[1] sent by Royal Mail to the respondent confirming that they did not wish his services at the Glasgow Mail Centre. The respondent did not disclose any e mails or letters in response to the above request.

37 At the preliminary hearing held on 24 April 2017 to determine whether the claimant is a disabled person, the Tribunal heard evidence that the Glasgow Mail Centre contacted the respondent to inform them that they did not wish the claimant to return to work for them (paragraph 21 of the Tribunal's judgment of 8 May 2017). As referred to above, on 7 March 2019 the respondent's solicitor informed the Tribunal by e mail that they had spoken to Linda Anderson who had confirmed that she had some limited knowledge of the case *"having emailed the Respondent to inform them that Royal Mail no longer wished the Claimant to be allocated shifts within the Glasgow Mail Centre".* The respondent's solicitor suggested that the claimant may wish to consider calling Linda Anderson as a witness. In response, the claimant asked that Linda Anderson provide a copy of the e mail by which she contacted the respondent to ask them to dismiss him. The respondent's solicitor replied by e mail of 11 March 2019 to advise that they had made enquiries of the respondent who was seeking to locate the e mail in question. The respondent's solicitor wrote; *"Given the time past this may not be possible but we are looking in to if.* The e mail was not produced by the respondent.

38 The claimant questioned Lorna Walton about the email of 15 December 2016 at the final hearing. Lorna Walton explained to the claimant that she did not have a copy of the e mail as she had not been asked to look for it. She explained her understanding of Royal Mail's procedure of contacting the respondent by email about not offering employees any further shifts. She explained that she could not access e mails sent by Linda Anderson and who was on maternity leave. The respondent's solicitor confirmed that the respondent had been unable to trace the e mail which Lorna Anderson had told him was sent to the respondent on 15 December 2016. As referred to above, on 9 April 2019 the Tribunal issued a Documents Order for disclosure by Royal Mail of "*all emails sent by Linda Anderson of Royal Mail on 15th December 2016 to Angard Staffing Solutions Ltd about Mr F Mutombo-Mpania".* Royal Mail were unable to produce any e mails sent by Linda Anderson to the respondent on 15 December 2016.

39 The claimant submitted that failure to produce a copy of the e mail sent to them by Royal Mail on 15 December 2016 was evidence of dishonesty on the part of the respondent. The Tribunal did not agree with the claimant in this respect. The Tribunal was satisfied from the evidence before it that on 15 December 2016 Royal Mail contacted the respondent to report their concerns about the number of occasions on which the claimant had failed to attend work and requested that because of his failure to attend work the claimant should not be offered any further engagements at their Glasgow Mail Centre. The Tribunal accepted the evidence of the claimant's witness, Lorna Walton, that Royal Mail had probably contacted the respondent by e mail on 15 December 2016 in accordance with their procedures. The Tribunal was not persuaded that it should draw an adverse inference from failure on the part of Royal Mail and the respondent to produce a copy of the e mail.

40 The respondent had sought to show that on 15 December 2016 they were informed by Royal Mail that the claimant should no longer be offered shifts at their Glasgow Mail Centre due to his persistent non-attendance. This was the respondent's position in response to the claim. From the evidence before it the Tribunal accepted the respondent's position. The Tribunal did not consider

that failure to disclose a copy of the e mail by which Royal Mail were said to have contacted the respondent was either material to determining the issues before it or something from which it should draw an adverse inference.

41 The Tribunal was not persuaded that there was any evidence of dishonesty on the part of the respondent or their representative in relation to an e mail of 15 December 2016 or otherwise. The respondent and their solicitor sought to assist the claimant where possible to locate a copy of the e mail or at least to identify the person at Royal Mail who was said to have sent it. In all the circumstances, the Tribunal was not persuaded that the respondent and/or their solicitor acted vexatiously, abusively, disruptively or otherwise unreasonably in the way that they conducted the proceedings. The application for a preparation cost award in this case is misconceived and must therefore be refused.

APPLICATION BY THE RESPONDENT

42 As referred to above, the respondent made an application for expenses against the claimant. Costs are defined in Rule 74(1) of the Rules of Procedure 2013 as meaning fees, charges, disbursements or expenses incurred by or on behalf of the receiving party. The respondent sought to recover the expense of resisting the claimant's application for a preparation time order. As with a preparation time order, Rule 76(1)(a) of the Rules of Procedure 2013 provides that a Tribunal may make an expenses order and shall consider whether to do so, where it considers that;

> "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"*

43 For the most part the claimant has been unsuccessful in his claim against the respondent. At regular intervals during the proceedings he has made disparaging remarks against the respondent, the respondent's solicitor and the Tribunal. He has alleged bias and wrongdoing by all of the above. The

basis on which the claimant could reasonably have considered that the Tribunal would award him up to £76,000 in the circumstances of this case, the claimant having failed to satisfy the Tribunal that he is a disabled person; failed to establish that he was racially discriminated against and failed to show that he was automatically unfairly dismissed is unclear. It is also unclear the basis on which he reasonably considered that the Tribunal would make a preparation time order in circumstances where an application in similar terms, based on alleged dishonesty by the respondent and their solicitor covering most of the same period, has already been refused. The Tribunal was satisfied that in all the circumstances, the claimant's conduct in insisting on making his application for a preparation time order is unreasonable.

44 When deciding whether to grant the respondent's application, the Tribunal had regard to the principle that an award of expenses is the exception in Tribunal proceedings. The claimant has been unrepresented throughout the proceedings. In terms of Rule 84 of the Rules of Procedure 2013, the Tribunal is allowed to have regard to the paying party's ability to pay. The claimant informed the Tribunal of his financial circumstances. The claimant was asked about his current employment status. As referred to above, he is working under a zero hours contract with an income of £8.25 per hour. His hours of work are irregular. He has been employed in the above post since January 2019. The claimant described his outlays as home, debts, food, transport and sending money to his family. The claimant informed the Tribunal that he is in receipt of Universal Credit. In these circumstances, the Tribunal decided that it would not make an order of expenses against the claimant given the strong possibility that to do so would cause the claimant an unacceptable level of hardship. The respondent's application for an order of expenses is therefore refused.

Employment Judge: Frances Eccles
Date of Judgment: 15 October 2019
Entered in register: 16 October 2019
and copied to parties