EMPLOYMENT TRIBUNALS

Claimant: Mr E Joseph

Respondent: Kingdom Security Limited

HELD AT: Manchester **ON:** 24 and 30 March 2021 (in chambers)

BEFORE: Employment Judge Slater

REPRESENTATION:

Claimant: Written submissions
Respondent: Written submissions

JUDGMENT

The claimant is ordered to pay to the respondent costs of £1000.

REASONS

Introduction

1. The Code P in the heading indicates that this was a decision taken without a hearing, on the papers.

2. After a decision on an unauthorised deduction from wages claim given orally on 15 September 2020 (the written judgment then being sent to the parties on 17 September 2020), I began to deal with a costs application made by the respondent about unreasonable conduct in pursuing a race discrimination which had been struck out at a hearing on 7 July 2020. I heard brief oral submissions from the respondent and then from the claimant. The claimant disagreed that he had seen certain documents in February 2020 (as asserted by the respondent in their submissions). Given this dispute about disclosure of documents and the time (it being nearly 5.30 p.m. by this point), I decided that I could not conclude dealing with the costs

application that day. It was agreed that the respondent would make a written application, together with supporting evidence about when the documents were sent to the claimant and with information about costs incurred in relation to the race discrimination complaints in the period 10 February 2020 to 7 August 2020. The claimant would then have an opportunity to respond in writing and I would make a decision on the costs application on the papers.

Background to the costs application

3. The claimant presented a claim on 8 July 2019. The claim at that time was for unfair dismissal only.

4. The claimant wrote to the Tribunal on 20 August 2019 alleging, amongst other things, "discrimination on the ground of tribal differences".

5. At a preliminary hearing on 13 December 2019, the claimant withdrew his claim of unfair dismissal. The claimant was allowed to amend his claim to include a complaint of unauthorised deductions from wages and a complaint of race discrimination. In the record of the preliminary hearing, Employment Judge Ainscough recorded the claim for race discrimination as follows:

> "The claimant has brought a claim for race discrimination following his suspension from his role as a security guard with the respondent on 3rd May 2019. The claimant contends he has been removed because he descends from a different Nigerian tribe to that of his Supervisor. It is the claimant's case that his Supervisor has replaced him with somebody who descends from the same tribe as his Supervisor."

6. The judge recorded that the respondent denied race discrimination and contended that the claimant was removed from his role because of serious customer complaints.

7. The judge recorded that the claimant argued that he was treated less favourably, by being removed from his role as a security guard at Birch Hill Hospital on 3 May 2019, because he was a member of the Igbo tribe and that he was treated less favourably, for the same reason, by being removed from the rota at Birch Hill Hospital on 3 June 2019. The judge recorded an issue as being whether the claimant was replaced by a member of the Yoruba tribe.

8. A public preliminary hearing was listed for 22 June 2020 to consider, amongst other things, an application by the respondent to strike out the claimant's complaint of race discrimination. Because of the restrictions due to the pandemic, the public hearing did not go ahead, but a private preliminary hearing was held by telephone. At that hearing, amongst other things, Employment Judge McDonald made a deposit order in relation to the complaint of race discrimination on the grounds that that claim had little prospect of success. Having regard to the claimant's financial means, the order was to pay a deposit of £25. The written reasons for that order were sent to the parties on 8 July 2020.

9. The judge recorded that the claimant said he was directly discriminated against because he descends from a different Nigerian tribe (the Igbo) to that of his supervisor, who the claimant says is descended from the Yoruba tribe, so he could be replaced by someone who descends from the Yoruba tribe.

10. The judge looked at various documents. The judge wrote, at paragraphs 18 and 19:

> "18. I decided the evidence contradicted rather than supporting the claimant's case. The emails at pages 96-101 clearly supported the respondent's case that it was Mr Burton who told Mr Ogunbodede to remove the claimant from his role at the Hospital. They also clearly supported the respondent's case that Mr Burton did so because he was asked by Mr Adderley of Pennine to remove the claimant from the Hospital. Mr Adderley did so because a patient at the Hospital had made allegations of sexual misconduct against the claimant. The claimant did not suggest the emails at pages 96-101 should not be relied on, e.g. because they were fabricated. He did not suggest that Mr Burton and/or Mr Adderley discriminated against him because of race.
>
> "19. In reaching my decision I was very aware of the warnings in the case law that I am not conducting a mini trial. However, this was a case where there was a central allegation of discrimination against one person (Mr Ogunbodede), but where the documentary evidence (pages 96-101) showed that the decision which is complained about was made by somebody else (Lloyd Burton). Ultimately, I did decide that the claimant's complaint of race discrimination had little reasonable prospect of success. To succeed he would have to somehow undermine what seemed to be the clear evidence in the documentation about who decided to remove him from his role at the Hospital and why."

11. The claimant failed to pay the deposit and the claim of race discrimination was struck out by a judgment sent to the parties on 10 August 2020. In notes of a preliminary hearing held on 7 August 2020, Employment Judge Ainscough recorded the following:

> "(8) The claimant then revealed that he had not paid the deposit required to continue with his claim of race discrimination because, following the making of that order, he understood it had little prospects of success. It was the claimant's view that the race discrimination claim had such little prospects because he wanted to claim tribal discrimination but understood that such a claim was not available in this country.
>
> "(9) I explained to the claimant that it was possible to claim tribal discrimination via a race discrimination claim in this country. The claimant said he understood this but having seen the email documentation at the last hearing which showed he had been removed from his role because of complaints of misconduct, he agreed that such a claim had little prospects of success and had not paid the deposit.
>
> "(10) I informed the claimant that as a result of not paying the deposit his race discrimination claim would be struck out and the only claim before the Tribunal would be the unlawful deduction from wages claim. The claimant

> confirmed he understood and case management orders were made on this basis. A separate judgment will be sent out confirming the strike out."

12. On 15 September 2020, I decided the remaining claim of unauthorised deductions from wages partly in favour of the claimant. The respondent was ordered to pay to the claimant the gross sum of £23,053.11.

The respondent's application

13. The respondent made a written application for costs on 4 September 2020. Following the hearing on 15 September, the respondent sent an email on 29 September 2020, attaching an email sent to the claimant on 10 February 2020 with attached documents. On 1 October 2020, the respondent sent a schedule of costs incurred in relation to the period between provision to the claimant of the documents relating to his removal from site until the race discrimination complaint was struck out by the employment tribunal. The application and subsequent emails were copied to the claimant.

14. The respondent applies for costs on the basis that the claimant 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 and that the claimant's claim of race discrimination had no reasonable prospect of success.

15. The respondent argues that, from 10 February 2020, when the claimant was supplied with copies of emails in which the respondent's client requested that the claimant be removed from site due to allegations of serious sexual misconduct, the claimant was in possession of clear proof of the reason for his removal from site and who had requested this. The respondent argues that it was clear from that information that there was no suggestion of the claimant's race informing any part of the decision to remove him from site and that the request had come from the respondent's client. The respondent's email to the claimant on 10 February 2020 included the following:

> "from the attached documents I trust that you will see that the decision to suspend you from work was not one which was created by the Respondent. The Respondent was responding to a clear requirement of their client, which in turn was related to a serious allegation made by a patient. None of this was related to your ethnic background."

16. The respondent referred to the note of Employment Judge Ainscough, which I have quoted at paragraph 11, and argues that it appears the claimant understood that the documentation showed he had been removed from his role because of the allegation rather than due to his race.

17. The respondent submits that the claimant's continued pursuit of the claim of direct race discrimination following disclosure of the relevant documents was vexatious, abusive of the Employment Tribunal process and was unreasonable. In addition, they argue that the claim of race discrimination had no reasonable prospect of success. The claimant did not withdraw his claim; rather it was struck out.

18. The respondent submits that, in continuing to defend the race discrimination claim, the respondent was required to prepare for two preliminary hearings, prepare a bundle and prepare multiple witness statements from witnesses whose testimony was not required after the complaint of race discrimination was struck out.

19. In the original costs application dated 4 September 2020, the respondent asserted that, in the period between disclosure and the race discrimination claim being struck out, the respondent had incurred legal costs of £4,800 inclusive of VAT.

20. The respondent provided on 1 October 2020 a schedule of costs incurred in the period 28 May 2020 to 7 August 2020 inclusive, which it said related to work done in the period from provision to the claimant on 10 February 2020 of the documents relating to his removal from site and the striking out of the race discrimination claim on 7 August 2020. The total amount is £3048 including VAT, representing 12.70 hours work done at a rate of £200 per hour. The respondent did not provide an explanation for the figure being lower than that set out in the application dated 4 September 2020.

The claimant's response to the costs application

21. The claimant replied in writing to the respondent's application on 12 October 2020 with a document of just over 11 pages. I summarise what I understand to be his principal arguments.

22. The claimant argued that, if the respondent had provided him with information about the accusations against him and the emails between the client and the respondent leading to his removal from Birch Hill on 3 May 2019 at any time before he amended his claim to include tribalism, it is likely there would not have been any tribunal claim. The claimant argued that the long period of silence by the respondent gave rise to suspicion as to the motive or reason behind his sudden removal from site. The claimant submits that he never made a complaint of direct race discrimination but argued tribalism and the complaint of race discrimination was substituted by the Manchester Employment Tribunal for his complaint of tribalism. The claimant asserted that he did not accept this substitution of discrimination based on tribe or tribalism with discrimination based on race. The claimant argued that it should not reasonably be expected of him to withdraw a purported direct race discrimination claim that he did not put forward or agreed to pursue.

23. The claimant pointed to the discrepancy in the costs figures put forward by the respondent and suggested this raised doubt about the credibility and integrity of those seeking the amounts. The claimant asked that the Tribunal ask the respondent and their legal representative for copies of all correspondence between the representative and the client to verify the correspondence claimed in the schedule of costs, if the Tribunal thought that the costs application merited entertaining.

The Law

24. Rule 76 of the Employment Tribunals Rules of Procedure 2013 provide that a costs order may be made where the Tribunal considers that 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 where any claim has no reasonable prospect of success.

25. Rule 78 sets out the amount that may be ordered in a costs order. This includes ordering a specific amount, not exceeding £20,000, to be paid.

26. Rule 84 provides 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.

Conclusions

27. I consider first whether the circumstances in rule 76 apply, so that I could make an order for costs.

28. The claimant argued that he never made a complaint of race discrimination; rather, he made a complaint of tribalism. It is clear from the record of the preliminary hearings before Employment Judge Ainscough that she correctly understood the factual basis of the claim and categorised it as a complaint of direct race discrimination. I have no reason to doubt that it was correctly categorised as such.

29. It appears possible to me, from correspondence and the note of the preliminary hearing on 7 August 2020 that the claimant remained unconvinced, after the hearing on 13 December 2019, that the judge had correctly categorised the complaint which he had described as "tribalism" as one of direct race discrimination. However, if he did remain unconvinced it appears to me that his alternative view, expressed at the hearing on 7 August 2020, was that what he described did not fall within direct race discrimination and a claim for tribal discrimination was not available in this country (see (8) quoted in paragraph 11). This would mean that he must have understood that the complaint of "tribalism" would not succeed because it was not a complaint of race discrimination and "tribalism" was not a complaint for which the law in this country provided a remedy. If he genuinely held this belief, I consider he was incorrect in holding it. He did not withdraw his complaint of "tribalism", which had been categorised as a complaint of race discrimination.

30. The alternative possibility is that the claimant did understand, following the hearing on 19 December 2019, that he could pursue his complaint of "tribalism" in relation to his dismissal as a complaint of direct race discrimination and he was not being truthful at the hearing on 7 August 2020 and in his written submissions on the costs application about his understanding. The record of the hearing on 7 August 2020 at (9) (see paragraph 11) indicates that the claimant did understand he could bring his complaint as one of race discrimination but had not paid the deposit because, having seen the documents which showed he had been removed from his role because of complaints of misconduct, he agreed that such a claim had little prospects of success. The claimant's assertion to me in oral submissions at the hearing on 15 September 2020 that he had not seen the documents in February 2020, since proved to be untrue by the respondent providing the Tribunal with a copy of the email sent to the claimant on 10 February 2020, with attachments, casts some doubt on the claimant's credibility.

31. Whichever understanding the claimant did hold, following the hearing on 13 December 2019, I conclude that he understood, by no later than receipt of the documents on 10 February 2020, that his complaint of "tribalism" or direct race discrimination had no reasonable prospect of success.

32. I have read the documents which were disclosed by the respondent to the claimant on 10 February 2020. I agree with the conclusion of Employment Judge McDonald noted in paragraph 18 of his reasons for making a deposit order, quoted at paragraph 10 above, that the evidence supports the respondent's case, rather than the claimant's. Employment Judge McDonald was required to assess whether the complaint of race discrimination had little reasonable prospect of success. I conclude, on the basis of the documentary evidence, that the complaint had no reasonable prospect of success. There is nothing in the documents to suggest that anyone involved in making the decision to remove the claimant from his role at the hospital was influenced at all by the fact that the claimant is from Igbo descent. The documentary evidence suggests the claimant was removed at the client's instruction because of an allegation of sexual comments being made to a vulnerable female patient, which the client understood to be alleged to have been made by the claimant. Whether the allegations of misconduct are true or not is not something which has been, and will not be, decided by the Tribunal and is not relevant to this costs application.

33. I conclude that the complaint of race discrimination had no reasonable prospect of success. For the reasons given previously, I have concluded that the claimant was aware, by no later than when he read the documents disclosed on 10 February 2010, that his complaint had no reasonable prospect of success.

34. Whilst it may have been understandable that the claimant's suspicions about the reasons for his removal from site were fuelled by a lack of explanation for his removal prior to 10 February 2020, once he received the documents disclosed on that date, he could see that his suspicions were not well founded.

35. I conclude that it was unreasonable to continue with this complaint, knowing that the complaint had no reasonable prospect of success.

36. I conclude, therefore, that on both the grounds of unreasonable conduct of proceedings and that the complaint had no reasonable prospects of success, I have power to award costs.

37. Rule 76 gives me power to award costs but does not require me to award costs. I have discretion as to whether to make an award and as to the amount of any award. One of the matters I may take into account in deciding whether to make an award and, if so, for how much, is the claimant's ability to pay. Employment Judge McDonald acknowledged that, as at 22 June 2020, the claimant did not have significant disposable income and, on that basis, set the deposit at the modest level of £25. The claimant has provided me with no further information about his ability to pay. However, I ordered the respondent to pay the claimant the sum of £23,053.11 on 15 September 2020, so can assume, because of that, that the claimant's ability to pay is significantly greater than in June 2020.

38. I conclude that it would be appropriate to make an award of costs in all the circumstances. I have concluded that the claimant knew, from when he read the documents disclosed on 10 February 2020 at the latest, that his complaint of race discrimination, or "tribalism" as he has described it, had no reasonable prospect of success. As a result of the claimant continuing with this complaint until it was struck out on 7 August 2020, I accept that the respondent has incurred costs which would not otherwise have been incurred. I consider it in the interests of justice that the claimant should be ordered to pay at least some of the costs attributable to his continuing with the complaint of race discrimination after 10 February 2020.

39. I do not consider that I can identify from the schedule of costs which costs were directly related to the race discrimination complaint and which costs would have been incurred whether or not the claimant had continued to pursue his complaint of race discrimination. Time was spent by the respondent in preparing for and attending the preliminary hearing on 22 June 2020. Much, but not all, of the hearing related to the complaint of race discrimination. The hearing also considered the claimant's application to amend his claim to include a complaint of unlawful deduction from wages. That application to amend was successful and, ultimately, resulted in a decision in the claimant's favour at the final hearing on 15 September 2020.

40. I would expect some of the work after the successful amendment application on 22 June 2020 to relate to work on the unauthorised deduction from wages complaint. An amended response was presented on 6 July 2020. The schedule of costs does not specifically identify drafting this amended response, but there is an email to the Tribunal dated 6 July 2020 referred to. The only email from the respondent to the Tribunal of that date attached the amended response.

41. The hearing on 7 August 2020 was to have dealt with applications by the respondent relating to the race discrimination complaint but these did not need to be addressed because the complaint was struck out for failure to pay the deposit. Case management orders were made to prepare the remaining unauthorised deductions from wages complaint for final hearing. Had the claimant withdrawn his complaint of race discrimination at the hearing on 22 June 2020, these case management orders could have been made at that hearing, without the need for a further preliminary hearing.

42. At the hearing on 13 December 2019, a final hearing to deal with the complaints of race discrimination had been listed to start on 15 September 2020. Witness statements were ordered to be produced by 8 June 2020. The respondent's schedule of costs indicates that work was done to finalise witness statements on 8 June 2020. The respondent was acting in accordance with the case management orders by preparing its witness statements which, at that time, were to deal with the complaints of race discrimination only. This work would not have been necessary had the claimant withdrawn the complaint of race discrimination shortly after 10 February 2020.

43. The respondent has not explained why its application dated 4 September 2020 contains a higher figure for costs than in the schedule of costs sent on 1 October 2020. However, since the figure sent 1 October 2020 is lower than that given (without a supporting schedule) on 4 September 2020, I do not consider that the

disparity is enough, by itself, to cause me to doubt the veracity of the schedule provided. I do not, therefore, order the respondent to provide any more supporting material for its application before I make my decision.

44. I do not doubt that the work recorded on the schedule was work done in relation to the case. However, as previously noted, I cannot identify from the schedule of costs which costs were directly related to the race discrimination complaint and which costs would have been incurred whether or not the claimant had continued to pursue his complaint of race discrimination. I consider it more likely than not that the majority, but not all, of the costs recorded on the schedule related to the race discrimination complaint. Taking a broad brush approach, I would estimate that two thirds of the costs incurred in that period were attributable to the race discrimination complaint and would not have been incurred had the claimant acted reasonably.

45. On this basis, the maximum I would consider ordering the claimant to pay would be £2000. However, the only financial means from which the claimant could realistically be expected to pay an award of costs would be from the award made to him for unauthorised deductions from wages. I note, from Employment Judge McDonald's deposit order, that the claimant had been struggling financially since the respondent had stopped paying him and he had relied on help from family and friends and the use of credit cards. Had the claimant been paid when he should have been paid for the wages which were the subject of the successful unauthorised deduction from wages claim, I doubt that, given his modest income, the claimant would have been able to save a very large proportion of that income. I expect that a considerable amount of the award will have gone on rectifying his financial position. In these circumstances, I consider an appropriate level of costs to be awarded is £1000 and I order the claimant to pay this amount to the respondent.

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Employment Judge Slater
Date: 30 March 2021

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON
7 April 2021

FOR THE TRIBUNAL OFFICE