Case Number: 3307831/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms O Gboyega	v	Study Group UK Limited

Heard at: Watford, via CVP **On**: 2 March 2022

Before: Employment Judge Hyams, sitting alone

Appearances:

For the claimant: Not present or represented
For the respondent: Ms Nicola Brown, solicitor

JUDGMENT

The claimant's claim of direct discrimination because of race within the meaning of section 13 of the Equality Act 2010, contrary to section 39 of that Act, is dismissed.

REASONS

1 The claimant's claim was presented on 10 August 2020. It was of (a) unfair dismissal and (b) direct race discrimination. The details of the claim were insufficient to enable the respondent, or the tribunal, to know on what factual basis it was asserted that the claimant had been discriminated against because of race. The claimant's employment ended on 22 July 2020 when she resigned with immediate effect. Her employment started on 1 September 2018, so she had insufficient continuous employment to make a claim of unfair dismissal within the meaning of section 98 of the Employment Rights Act 1996 with the result that that claim was outside the jurisdiction of the employment tribunal. That claim of unfair dismissal was accordingly rejected by Employment Judge ("EJ") Loy. That rejection was communicated to the claimant in a letter dated 19 October 2020.

2 The respondent's response to the claim of direct race discrimination was measured and informative, but it was also necessarily provisional in that it could

not respond meaningfully to the claim because the alleged factual basis for it could not be discerned from the claim form.

3 The claim and the response to it were considered by a judge under rule 26 of the Employment Tribunals Rules of Procedure 2013 and in a letter dated 6 March 2021, the parties were (unusually) directed to disclose all relevant documents to each other and the claimant was (understandably) directed to give some further information about her claim.

4 There was a first preliminary hearing in the case on 15 July 2021. The claimant did not attend that hearing. It was conducted by EJ R Lewis, whose record of the hearing was written and sent to the parties on that day. In paragraphs 6-12 of that record, EJ R Lewis said this:

> "6. The narrative set out at boxes 8.2 and 9.2 of the ET1 is almost impossible to understand.
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> 7. The response was received on 16 November. The respondent denied discrimination, while also saying that the claims were unclear. It said that the claimant resigned her employment after rejection of a grievance.
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> 8. The claim and response were considered by a judge in accordance with rule 26. His directions were set out in a letter from tribunal staff dated 6 March. The letter contained the following: notification of the date and time of today's hearing; confirmation that this hearing would proceed by telephone, for which contact numbers were to be provided by both sides; directions for provision by the claimant of a schedule of loss, and for mutual disclosure of documents; and, at paragraphs 4-6, an order for simple additional information about her claims of race discrimination. The claimant was directed to state what had happened to her, when, and who was responsible.
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> 9. On 14 April the claimant sent the tribunal a long document, which contained what appeared to be her reply to the orders for disclosure and additional information. It was not compliant with paragraphs 4-6 of the original direction.
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> 10. Thereafter, the claimant has emailed the tribunal to state that she does not agree to correspond directly with Ms Brown [the respondent's solicitor, who attended the hearing before me on 2 March 2022]; that she will correspond with Ms Brown by emailing to the tribunal, for tribunal staff to forward; she has asked for advice from a judge; and has said more than once that she has not read documents sent to her, and will not do so, either because of her objections to the actions of Ms Brown; or until she hears satisfactorily from the tribunal.

> 11. The ET1 did not contain a contact telephone number for the claimant. Tribunal staff wrote to ask her to provide one so that the judge could call her for this hearing. She did not do so.
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> 12. As I was unable to contact the claimant, and in light of the above, I conducted this hearing with Ms Brown only, and have made the orders set out herein. I add that given what has been recorded at paragraph 10 above, it is unlikely that participation by the claimant today would have been productive."

5 EJ R Lewis then listed a further preliminary to take place on 28 September 2021, to take place in public, to consider:

> "[1] If applied for, whether to strike out the claim or any part of it on grounds that it is incapable of fair trial, and/ or has not been actively pursued; and/ or has been conducted unreasonably by the claimant;
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> [2] If applied for, whether a party should be ordered to pay a deposit or deposits as a condition of proceeding with any contention(s);
>
> [3] If not struck out, further case management, including listing."

6 On 19 July 2021, the claimant sent a detailed (6-page) response to the case management summary which was sent to the parties on 15 July 2021. It ended with these words:

> 'I strongly stand against the negativity in the document, how it's made me feel about Watford Tribunal and moving forward. No informal process that requires being supportive to all parties and show no partiality can conduct itself in such a manner and be critical about me when I did my best. Can you imagine Gareth Southgate going up to Bukayo Sako after missing that vital penalty and saying to him "Bukayo you let your team down, you're ignorant and inexperienced of the law and procedure required when taking penalties. Watford Tribunal if this is what you represent, I'm very let down. A preliminary hearing is in place to avoid matters of contentions. Imagine being in that meeting and hearing all these negative words over the phone. I will not tolerate any more negative actions from any parties that sets out to crush my spirit when I speak the truth.'

7 On 16 September 2021, Regional Employment Judge Foxwell responded to that document, in the following manner:

> "Turning to your e-mail of 19 July 2021 and its attachment, it would be inappropriate for Judge Lewis to enter into correspondence with you (or, indeed, the respondent) to explain his orders. In any case, an explanation is contained in the case management summary itself even though you

> may disagree with it. If you consider that the judge failed to consider a relevant matter in making an order, then you can ask him to reconsider the order or the terms of the order provided that you explain why it is necessary in the interests of justice to change it. If you consider that the Judge has made an error of law then your remedy is to appeal to the Employment Appeal Tribunal in London. You should be aware, however, that there are strict time limits for this.
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> I have noted your observation that you did not consent to the preliminary hearing on 15 July 2021 taking place by telephone. You were given notice of this hearing and of the fact that it would be by telephone in the Tribunal's letter to you dated 6 March 2021. There is nothing on the Tribunal's file to show that you objected to this at the time or subsequently. I note also that you did not provide a telephone number to the Tribunal as you were directed to in the letter of 6 March 2021, nor did you inform the Tribunal that you did not have access to a telephone (if that be the case). You did not take steps therefore to attend the hearing before Judge Lewis.
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> As you will have seen, Judge Lewis has scheduled another hearing in your claim on 28 September 2021. In view of the issues you have raised, I have directed that this is to take place in person at the Employment Tribunal, Watford. ... The issues to be decided at the hearing, which will be in public, are those set out at paragraph 3 of the case management summary sent to you on 15 July 2021."

8 Those are the issues which I have set out in paragraph 5 above.

9 On 27 September 2021, the hearing of 28 September 2021 was postponed by Acting Regional Employment Judge R Lewis because it was "extremely unlikely that the ... case could have been heard on 28 September 2021". That was because of a shortage of judges to hear the cases which had been listed to be heard on 28 September 2021. The hearing was relisted to take place on 2 March 2022 but it was converted to a video hearing. There was in the tribunal's file an email from the claimant enclosing a letter dated 21 February 2022. The letter started in this way:

> "I acknowledge receipt of the email sent by Terence Cadman dated Thursday 10th February 2022 at 22:34 with the attached letter informing me of the re-listed hearing to be heard by an employment Judge at Watford Employment Tribunal 2nd Floor, Radius House, 51 Clarendon Road Watford, WD17 1HP on 2nd March at 10:00 am.
>
> My response to the re-listed hearing is to confirm that I do not give my consent to the process and decline the request to attend. And I can also confirm that the grounds for re-listing the preliminary hearing are unjust and unfair and the Employment Tribunal cannot provide an impartial

> service as expected due to a number of actions that have taken place which I have communicated to Nicola Brown and the Employment Tribunal.
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> The actions of Employment Judge Lewis and Nicola Brown at the preliminary hearing dated 15th July 2021 in which it was noted that I did not take part has caused fundamental flaws in the rules and regulations set out by Watford Employment Tribunal. I refer you to the case management summary sent by Employment Judge Lewis to me via email and in this document a judgement was made which strongly contradicts the role and purpose of the Judicial Assessment."

10 There had been no such Judicial Assessment on 15 July 2021. The fact that the claimant believed that there had been such an assessment was an indication of her lack of understanding of the nature and conduct of litigation. So was her statement that she "decline[d] the request to attend" the hearing of 2 March 2022. She was neither requested nor obliged to attend that hearing, but if she wanted to press her claim then, unless she had good reason for not attending it (i.e. an objectively good reason for not attending) then she risked the claim being struck out or dismissed on the basis that she was not actively pursuing it.

11 I conducted the hearing of 2 March 2022. I started it at 10:00 with Ms Brown present, but the claimant was not present. I waited until 10:05 to see whether the claimant attended the hearing but she did not do so. I therefore at that point adjourned the hearing until 10:30 to see whether the claimant would attend or inform the tribunal why she had not attended, but during that period I left the video hearing room open and watched it online to see whether the claimant joined the hearing online. She did not do so and had not done so by 10:30 am.

12 I therefore resumed the hearing with, again, only Ms Brown present.

13 In the circumstances, rule 47 of the Employment Tribunals Rules of Procedure 2013 ("the 2013 Rules") applied. That provides:

> "If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence."

14 I concluded that the claimant was not pressing her claim of direct discrimination because of her race, and that in the circumstances to which I refer above it was appropriate to dismiss the claim. That was because in my view the interests of justice were best served by dismissing the claim. That in turn was for the following reasons.

14.1 The claimant had been warned in the manner stated in paragraph 5 above that the claim might be struck out at the hearing which (in the event) I conducted.

14.2 The precise factual basis for the claimant's claim of less favourable treatment of her because of her race was still, on 2 March 2022, unclear. She had put in her long document sent to the tribunal on 14 April 2021 as described in paragraph 9 of EJ R Lewis' case management summary set out in paragraph 4 above (the claimant's long document was at pages 34-95 of the bundle prepared by the respondent's solicitors for the hearing) much material, but it was in the form of a narrative, with a number of extracts from original documents included, along with frequent interposed comments. It did not consist of a statement of material facts, or something similar to which the respondent could fairly be required to respond.

14.3 By 2 March 2022 the claimant had twice failed to attend a preliminary hearing without giving a good reason for doing so.

15 That meant that the proceedings were at an end unless there was an application for costs, which there was.

The application for costs

16 Ms Brown had informed the claimant in advance of the hearing of 28 September 2021 that she (Ms Brown) would be making an application for the respondent's costs. The claimant referred to that information in her letter to the tribunal of 21 February 2022 to which I refer in paragraph 9 above.

17 I discussed with Ms Brown the basis of the respondent's application for its costs. She said that it was that (1) the claim had had no reasonable prospect of success, (2) it had been brought and conducted unreasonably, and (3) the claimant had not complied with orders of the tribunal.

18 I pointed out that costs do not follow the event in employment tribunals and that an award of costs is exceptional. I referred to the applicable test for determining whether a claim had no reasonable prospect of success, but I gave the wrong case name. The correct name was *Cartiers Superfoods Ltd v Laws*. What I had in mind was this passage in *Harvey on Industrial Relations and Employment Law*, which is paragraphs PI[1083] and [1084]:

> "[1083]
> When considering whether to award costs in respect of a party's conduct in bringing or pursuing a case that is subsequently held to have lacked merit, the type of conduct that will be considered unreasonable by a tribunal will obviously depend on the facts of the individual case, and there can be no hard-and-fast principle applicable to every situation. In general, however, it would seem that

> the party must at least know or be taken to have known that his case is unmeritorious. In *Cartiers Superfoods Ltd v Laws* (which was decided under the 1974 rules, when the only grounds for awarding costs were whether the claimant or respondent to any proceedings had acted frivolously or vexatiously), Phillips J considered that, in order to determine whether a party had acted frivolously, it was necessary '*to look and see what that party knew or ought to have known if he had gone about the matter sensibly*'. On the facts of that case, the EAT held that if the employers had taken the trouble to inquire into the facts surrounding the alleged misconduct for which the employee had been dismissed, instead of reacting in a hostile manner with threats and false statements that the employee was guilty of dishonesty, they would have realised that they had no possible defence at all to the claim, except as to the amount of compensation.
>
> [1084]
> But such an approach needs to be applied with caution, otherwise parties could end up being penalised for not assessing the case at the outset in the same way as a tribunal may do following a hearing and evidence. As Sir Hugh Griffiths stated in *E T Marler v Robertson* [1974] ICR 72, NIRC: 'Ordinary experience of life frequently teaches us that which is plain for all to see once the dust of battle has subsided was far from clear to the combatants once they took up arms'. In that case costs against the claimant were refused notwithstanding that, at the end of a nine-day hearing, he had admitted under cross-examination that the respondents had acted reasonably in dismissing him. Similarly, in *Lothian Health Board v Johnstone* [1981] IRLR 321 the EAT (overruling an employment tribunal) held that it was a wrong exercise of discretion to award costs against the respondents on the basis that they 'should have thrown in the towel' after the second day of a four-day hearing, as it had then become obvious that they were not going to establish their stated reason for the dismissal. Lord McDonald commented that the *Cartiers Superfoods* approach did not 'lay down a general proposition governing the conduct of solicitors who represent parties before tribunals and who may be thought to insist in their pleas beyond the stage which a tribunal deems appropriate'."

19 I could not accept that I should conclude that the claim as made had had no reasonable prospect of success or that it had been brought unreasonably. That was because, while the claim was badly presented, it was not possible on the material before me (including the document at pages 34-95 to which I refer in paragraph 14.2 above) to say that it had had no reasonable prospect of success or had been brought unreasonably.

20 However, I agreed with Ms Brown that the claimant had conducted the proceedings unreasonably, so that I was now obliged to consider whether to make an order for costs. Whether I should make such an order was a different question, however: I could make one only if I considered it appropriate to do so.

21 The claimant was of course not present to respond to the application for costs. Rule 77 of the Employment Tribunals Rules of Procedure provides:

> "A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application."

22 The claim had proceeded in the usual way but without the claimant attending the hearing of 15 July 2021 and then the hearing before me of 2 March 2022. As a result, as I indicated to Ms Brown on 2 March 2022, if I had been prepared to make an order for the payment by the claimant of any part of the respondent's costs, then it would have been limited to the costs incurred in relation to, and by reason of attendance at, the hearing of 2 March 2022.

23 The respondent was now, by reason of my decision that the remaining claim should be dismissed, no longer going to be required to defend the case, which was at an end.

24 Given all of those factors, I concluded that it was appropriate to make no order for the payment by the claimant of the respondent's costs incurred to date, or any part of those costs. I therefore dismissed the respondent's application for costs.

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Employment Judge Hyams
Date: 3 March 2022

JUDGMENT SENT TO THE PARTIES ON

18/3/2022

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FOR THE TRIBUNAL OFFICE