



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4110531/2021

5 **Hearing held remotely in Glasgow on 15 September 2022**

Employment Judge D Hoey

Members: F Paton and S Keir

Mr L Ramos

**Claimant
In Person**

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**Lady Coco Ltd t/a Shamela's Fresh Hot and
Cold Food**

**Respondent
Represented by:
Ms Yeo -
Director**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

16 Oral judgment was issued in this case with the judgment sent to the parties on 21
17 September 2022. Written reasons having been requested in accordance with Rule
20 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons
are provided.

REASONS

1. Following an oral judgment having been issued dismissing the claims, the
25 respondent made an application for a preparation time order. The parties were
given the opportunity to consider the position, in light of the facts found and
reasons given for the judgment. The claimant had submitted written
submissions and he spoke to them. The respondent presented their position
and the claimant was able to respond.
- 30 2. The Tribunal had unanimously found that the claimant had raised a claim of
sex discrimination against the respondent to seek money from them, following
an unlawful advertisement that had been posted by the respondent which the
claimant saw online. The Tribunal found that while the advertisement was

unlawful, the claimant had no genuine desire to apply for the role. While the claimant alleged he did not know the law, his submissions had made it clear that he fully understood the law. The most recent Employment Appeal Tribunal judgment confirmed that the law was in fact clear. That was something known to the claimant. The claimant was intelligent and articulate and had shown an understanding of the law during the hearing together with the practice within Employment Tribunals.

3. The Tribunal had found that the claimant had no genuine desire to apply for the role (or work in it) and the sole purpose of his claim to the Tribunal was to seek money from the respondent during the process.

Law

4. In terms of rule 75 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 a preparation time order is an order where the paying party pays the receiving party in respect of the preparation time when they were not legally represented (excluding time spent at the final hearing). The order in this case only covered the time when the respondent was not legally represented.

5. Rule 76 states that an order can be made if (a) the party acted vexatiously, abusively or otherwise unreasonably in the bringing of the proceedings or in the way the proceedings were conducted or (b) where the claim had no reasonable prospects of success.

6. Rule 77 states that the paying party must have a reasonable opportunity to make representations before an order is made.

7. The amount of a preparation time order is set out in rule 79 and is determined by the Tribunal assessing the number of hours spent preparing for the case when not represented and what the Tribunal considers is reasonable and proportionate with reference to the complexity of the proceedings and the documents required. The applicable rate given the date of this claim is £41 per hour.

8. Rule 84 allows the Tribunal to have regard to the paying party's ability to pay.

9. Any sum awarded should be proportionate and not punitive. The amount awarded should therefore be no more than is proportionate to the loss caused by the unreasonable conduct in question.
10. In **Hossaini v EDS** 2020 ICR 491 at paragraph 64 the Court confirmed that a 3 stage process should be followed in considering this issue. Firstly is the threshold met for considering the making of an order? If so, secondly, is it appropriate to make the order (applying discretion judicially) and finally how much should be awarded applying the rules above.
11. With regard to whether or not a litigant has acted “otherwise unreasonably”, the key question is whether the act was unreasonable. It is not whether the Tribunal would have acted differently but whether the decision taken by the litigant was reasonable in all the circumstances, applying a wide objective test (See **Brooks v Nottingham** UKEAT/0246/18). A party litigant should be given greater latitude and the position assessed from their perspective.
12. In **Daleside Nursing v Matthew** 2009 All ER (D) 99 it was noted that a claimant who has lied may be found to have acted unreasonably but that is not automatically the position. Similarly giving false evidence does not automatically mean the claimant acted unreasonably. The Tribunal should look at the whole picture and consider what happened in the case.
13. It is a question of fact whether conduct is unreasonable (**Arrowsmith v Nottingham** 2011 EWCA Civ 797).
14. Vexatious conduct is rare and the threshold to be vexatious is extremely high. To be unreasonable the claimant need not be aware of the nature of the conduct (since an objective assessment of the conduct and its effect should be considered within the full context). Vexation requires a degree of knowledge. A claimant who pursues a claim knowing it is false or that it has no reasonable prospects or who acts with malice may be vexatious, but not necessarily so. A careful assessment of the full factual matrix should be carried out.

15. Whether or not a claim has reasonable prospects of success is looked at from the claimant's perspective at the time the claim is raised. It is important not to assess matters as if the claimant was a solicitor.

Submissions

- 5 16. The Tribunal heard submissions from both parties, with the parties having been given time to consider their respective positions overnight. The claimant produced further documents in support of his position, including 11 documents and an 8 page submission (to which the claimant spoke), all of which were taken into account by the Tribunal in full in considering its
10 decision. It is not necessary to repeat those submissions which are in the case file.

Decision

17. The Tribunal firstly considered **whether or not the jurisdiction to make the order had been engaged**. The Tribunal was satisfied that the claimant had
15 acted vexatiously in bringing the claim. The claimant had no genuine desire to apply for the role or work for the position. The purpose of the claim was solely to seek money from the respondent as a result of its unlawful advertisement via the Employment Tribunal process. The claimant was aware that the claim was false since he had no intention of moving his life to Scotland
20 to work in Ruchill. The claimant pursued a claim knowing it had no prospects of success and was solely seeking money from the respondent. The Tribunal considered that the high bar of establishing vexatious conduct had been met in this case. The Tribunal did not reach that conclusion lightly given how high the bar has been set in establishing vexatious conduct but having assessed
25 the evidence led, the Tribunal concluded the claimant had acted vexatiously.
18. The Tribunal was also satisfied that the claimant had acted unreasonably in bringing this claim. Looking at matters from the claimant's position and from his perspective in light of what he knew, he knew the law and how the Tribunal process worked. He knew that a claim is only stateable where there is a
30 genuine desire to apply for the role. The law had been set out in a number of the other claims in which the claimant was a party. The claimant had no such

desire or intention. He acted unreasonably in bringing a claim against an employer where he had not in fact applied for the position and had no intention of taking on the role (evidenced by the fact the had not submitted an application for it and the context). He also knew how costly and inconvenient the process is and how that would impact upon a potential employer. Armed with that knowledge he made the claim in an attempt to seek money from the respondent. The Tribunal assessed the evidence and concluded the claimant had acted unreasonably.

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19. Finally the Tribunal was also satisfied the claim had no reasonable prospects of success and the claimant was aware of that at the time he raised it, looking at the position from the claimant's perspective (as a party litigant). The claim was presented with the claimant knowing he had no intention of applying for the role. While he attempted, after the event, to seek to justify why he had not made an application, the Tribunal did not accept that evidence and considered that the claimant had sought to justify that position after the event. The Tribunal was satisfied the claimant knew precisely what he was doing and had no genuine desire to apply for the role in this claim. It was solely an attempt to seek compensation from the respondent.

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20. The jurisdiction pertaining to the making of a preparation time order was therefore engaged.

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21. The second question was **whether it was appropriate to make a preparation time order**. The fact the test for the order has been met does not automatically mean it is appropriate to make an order and the Tribunal should consider the full factual matrix. The Tribunal considered the full facts before it in reaching its conclusion. The Tribunal was satisfied that it was appropriate on the facts of this case to make the order. The claimant was articulate and intelligent. The claimant knew the process, the rules and the law. He knew what the impact upon the respondent would be. This was a case where it was just to consider making the order. The claimant had acted vexatiously and otherwise unreasonably in bringing this claim. He knew it had no reasonable prospects and used the Tribunal process to seek to obtain money from the respondent. Exercising our discretion judicially and

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considering all the circumstances given the facts in this case the Tribunal decided that it was in the interests of justice to make a preparation time order.

22. Finally the **Tribunal considered the amount** that should be awarded given the legal principles above. The Tribunal considered the nature of the claim its complexity and the position carefully in respect of the time when the respondent was not legally represented. The Tribunal accepted that in part the respondent had not fully complied with orders that had been issued which had led to some further procedure and the respondent's approach was taken into account. The Tribunal also took account of how the claimant had conducted this case.
23. In all the circumstances the Tribunal decided that it would be fair and just to make a preparation time order in respect of 17 hours. While the respondent argued that it had spent a significantly greater amount of time preparing for this case, the Tribunal was satisfied that 17 hours was reasonable and proportionate taking account of the nature of the claim, the documents involved, the way the claim had been conducted and each party's actions, in respect of the vexatious and unreasonable conduct of the claimant.
24. The Tribunal expressly took into account the claimant's financial position. He argued that he had no additional funds (with little by way of savings and his income (from being a self employed interpreter) covered his outgoings). Nonetheless the Tribunal was satisfied the sum ordered was something that was just, fair and reasonable and something that the claimant could pay from his income.
25. The Tribunal considered that the sums awarded could be met by the claimant from his income and savings. It was appropriate to make the award as it was just to do so.

Claimant's submissions

26. In reaching its decision the Tribunal carefully considered all the points the claimant had made in his objection to the respondent's application. Many of the issues the claimant had raised were not relevant to the key issue of this

application. He focussed upon arguing that the respondent had breached the law and issued a fake advert. The Tribunal did not accept that the advert was fake. It was accepted that the advert breached the terms of the Equality Act. Neither points were relevant as to whether or not the claimant had acted vexatiously or otherwise unreasonably or in bringing a claim that he knew had no prospects of success in light of the facts.

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27. The claimant also made references to various acts of the respondent which, the claimant maintained, were further acts of misconduct or examples of the respondent not complying with the orders of the Tribunal. These were matters the Tribunal took into account in assessing what a reasonable amount of time should be in assessing the order. The issues did not impact upon the decision as to whether the threshold for making the order had been met (which focused on the claimant's actions and the legal test in light of the rules). There was no basis for raising this claim and this was known by the claimant. He used the Tribunal process to seek money from the respondent and had no genuine desire to apply for the role that had been unlawfully advertised.

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28. The claimant made a number of submissions as to the respondent's failure to provide the advert prior to the hearing. The respondent had indicated that it did not have the advert in its possession. In any event the claimant had produced the advert to which he had responded and both parties had been content to proceed upon the basis that this was the relevant advert. The respondent's acts had no bearing upon whether or not the claimant's actions were such as to justify the order sought by the respondent.

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29. The claimant also argued that the Tribunal overlooked the explanatory notes in the Equality Act that parties may be deterred from making an application to a discriminatory advert. As explained in the Tribunal's judgment (and reconsideration judgment), this was something the Tribunal took into account. The Tribunal found the claimant not to be credible and found that these were matters the claimant had considered after the event in an attempt to explain why he had not made an application. The Tribunal found the claimant to be articulate and intelligent and in no way deterred from making an application nor from contacting the respondent to discuss the position (or the advert). The

claimant was in no way deterred from making an application; He chose not to do so as he was not genuinely interested in the role.

5 30. The claimant also argued the Tribunal overlooked evidence that parties may be psychologically prevented from applying from roles which they have little prospects of securing. The Tribunal did not overlook that point and specifically considered it. The Tribunal found, as a fact, that the claimant had not been deterred from applying for the post nor from responding to the advert. While there was evidence that some may be deterred, the Tribunal found the claimant had obtained this information in an attempt to seek to explain why 10 no application had been made, but that it was not in fact a reason why the claimant did not apply. The only reason why the claimant in this case did not apply for the role was because he had no genuine desire to take up the role and his sole motivation in raising these proceedings was to seek money from the respondent.

15 31. The claimant also argued that the Tribunal overlooked the “injury to feelings the claimant sustained” as a result of seeing the discriminatory advert. The Tribunal did not overlook this issue. That issue was not relevant in determining whether or not the claimant had a genuine desire to carry out the role that had been advertised in an unlawful manner. He was not unlawfully discriminated 20 against and could not therefore suffer injury to feelings, there being no unlawful act relative to the claimant.

25 32. The claimant argued that he did not know what he had “done wrong because to issue a claim because of a discriminatory advert is not bad conduct because it was up to the respondent not to post it”. The Tribunal considered this submission in detail. It was not in dispute that the advert was unlawful. The issue was whether the claimant had any desire to take the position that was advertised. If he had established a genuine desire, he would have a 30 statable claim. From the facts, the Tribunal found there was no such desire. Further the only purpose of the claim being raised was to seek money from the respondent. The issue in this case is not the respondent posting the unlawful advert but the claimant seeking to use the Tribunal system to seek money for himself for a role in respect of which he had no genuine interest.

Issuing the claim in such circumstances was vexatious and amounted to unreasonable conduct. The claimant knew when he raised this claim that there were no reasonable prospects of success. It is for those reasons the order was made.

- 5 33. The claimant argued that the respondent had acted unlawfully. That was not, however, relevant for the purposes of the respondent's application given the legal position and facts as noted above. Discriminatory adverts are matters in respect of which the Equality and Human Rights Commission has the power to consider. The Equality and Human Rights Commission has a significant amount of material about this on its website which is easily identifiable. See:

10 <https://www.equalityhumanrights.com/en/advice-and-guidance/how-report-discriminatory-advert>

https://www.equalityhumanrights.com/sites/default/files/ehrc_advertising_-_make_inquiries_12.pdf

- 15 34. The claimant further submitted that: "The only problem is that I do not live in Scotland and I would not have applied for the position but we have to take into account the difference in costs of living between London and Glasgow, that the position was near a "beautiful area" and that I was deterred from applying because the discriminatory contents of the advert as confirmed by an example in the "Explanatory Notes" of the Equality Act 2010". These were matters the Tribunal took into account but did not accept. The claimant was not credible and his evidence was not accepted by the Tribunal, having carefully considered each point he raised.

- 25 35. The claimant also argued that "According to the Equality Act 2010 there is only one "shifting of the burden of proof" because the victim of discrimination has to prove that an advert requiring a female exists and then the burden of proof is shifted to the employer to prove that it has an "occupational requirement"". The Tribunal considered this issue. The Tribunal had explained to both parties at the outset of the hearing that as the respondent had accepted the advert was unlawful, the only issue that required to be determined in this case (as a result of prior robust case management) was
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whether or not the claimant genuinely wished to apply for the position. Issues as to the lawfulness of the advert were irrelevant (including any issue around occupational requirements, which was not relied upon by the respondent), the matter having been conceded by the respondent.

5 36. Finally the claimant made 2 submissions with regard to fairness. He said: "It is not fair that in addition to being a victim the victim has to go through the ordeal of proving also that it was interested in the position which is something which is difficult to prove with certainty because it is subjective. Hence, the "default position" is that it is up to the respondent to prove its accusation because this issue is not regulated by the Equality Act 2010 because it does not make any reference to it" and "There is also the issue of fairness because it is not fair that not only the respondent gets away with discrimination by having posted several discriminatory adverts and having committed four other acts of bad conduct and is also awarded a preparation time order".

15 37. The Tribunal considered each of these issues carefully. The claimant was not a "victim" in this case as he had no desire to carry out the role that was advertised in this case. He was therefore subjected to no detriment and the approach taken and decision was fair and in accordance with the law. The law is clear. An individual with no desire to apply for a role cannot be subject to unlawful direct discrimination as a result of that since there is no detriment in not being offered a role in respect of which the individual has no interest.

20 38. Finally, this matter was not about the "respondent getting away with discrimination". The advert was unlawful (and a remedy in respect of that law elsewhere). This application related to the claimant's conduct and the rules pertaining to a preparation time order and the time the respondent required to expend in dealing with this issue as a consequence of his conduct.

Summary

30 39. In reaching its decision the Tribunal paused to consider the overall circumstances and the fairness to both parties. The Tribunal took account of the fact that the advert was unlawful. The Tribunal also took account of the reasons why this claim had been raised and the claimant's knowledge of the

claim's prospects and his motivation in raising this claim together with the amount of time the respondent had spent in defending it when not legally represented. Having taken a step back the Tribunal was unanimous in being satisfied from the evidence led before it and from having considered the applicable law that the decision it reached was fair and just in all the circumstances.

40. A preparation time order was therefore issued in favour of the respondent requiring the claimant to pay to the respondent the sum of £697, being 17 hours at £41 per hour, the Tribunal having found that the claimant acted vexatiously and unreasonably in bringing the claim and because the claim had no reasonable prospects of success, pursuant to regulations 76 and 79 of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.

Employment Judge: D Hoey
Date of Judgment: 14 October 2022
Entered in register: 19 October 2022
and copied to parties