EMPLOYMENT TRIBUNALS

Claimant: **Mr M De Sousa**

Respondent: **FedEx Express UK Limited**

Heard at: **Birmingham**

On: **20, 21, 22, 23 & 24 March 2023 and in chambers on 6 October 2023**

Before: **Employment Judge Flood**
Mr T Liburd
Mr R Virdee

Representation
Claimant: In person
Respondent: Mr I Wright (Counsel)

JUDGMENT ON COSTS APPLICATION

The respondent's application for costs is dismissed.

REASONS

Background

1. The claimant presented a claim on 2 April 2021 bringing complaints of unauthorised deductions from wages and direct race discrimination. A preliminary hearing was held before Employment Judge Meichen on 31 August 2021 and at this hearing the claimant's allegations of race discrimination were identified and recorded as per the list of issues that came before the Tribunal at final hearing.

2. On the final day of a five day hearing held on the dates above, the Tribunal gave oral judgment dismissing all the claimant's complaints and provided its reasons.

3. Mr Wright made an application for costs at the conclusion of the hearing under rules 76(1) (b) of the Employment Tribunals (Rules of Procedure) 2013 ("ET Rules"). The claimant was in attendance but had not provided any information about his means/ability to pay nor responded in substance. The Tribunal decided to hear the respondent's application for costs at the hearing (and any initial response from the claimant) but decided to order the claimant to provide information on means (and the respondent to provide a further breakdown of the costs claimed) within 21 days. The parties would then be given a further

opportunity to make submissions on the information provided within 14 further days and then the matter would be listed for a reserved decision to be made on the basis of the application and submissions made.

4. The respondent submitted a copy of a letter it had sent to the claimant on 19 July 2022 shortly before a previous hearing (which was postponed) was due to take place.

5. The Tribunal heard oral submissions from both parties and the hearing was adjourned for a reserved decision on the respondent's application for costs to be made not before 25 April 2023. The Tribunal made case management orders at the conclusion of the hearing requiring the claimant to provide further information about his ability to pay and the respondent to provide further information about its costs, in both cases by 11 April 2023. The parties were also permitted to provide further submissions by no later than 25 April 2023. Unfortunately due to an administrative oversight the written version of the judgment and case management order was not sent to the parties until 13 April 2023.

6. On 18 April 2023, the claimant provided a breakdown of his income and outgoings. On 26 April 2023, the respondent wrote to the Tribunal stating that it believed that the claimant had not fully complied with the Tribunal's Orders. The respondent applied for an Unless Order to be made requiring the claimant to fully comply. On 2 May 2023, the respondent provided a breakdown of the costs it had incurred. It subsequently applied on 10 May 2023 for an Order requiring the claimant's wife's current employer to provide details of her income. The claimant objected to this application on 17 May 2023, stating that he had provided full details of his income and his wife was no longer part of his household, her personal details were not required. Although unfortunately this was not considered and determined at the time, we have decided to refuse these two applications in any event. The purpose of the initial case management orders was primarily to give the claimant the opportunity to provide information on his ability to pay any costs award that could be made. Some limited information has been provided but the Tribunal is in any event entitled to take a view on the evidence around ability to pay and decide not to consider it, in particular if the evidence is unsatisfactory (see **Jilley** below). Therefore we were satisfied that the respondent was not prejudiced by the failure to provide full information on means had we been required to consider it (ultimately because of the reasons set out below this was not necessary).

7. The matter was listed to be heard on the papers with no parties in attendance on 9 June 2023. The parties were informed of this date on 10 May 2023 and told that they would not be required to attend on this date, but that the decision would be made on the papers. The parties were then given until 26 May 2023 to submit additional evidence. Unfortunately the hearing listed for 9 June 2023 was postponed because of issues arising with the Tribunal's list and judicial availability and unfortunately the parties were not informed. The matter finally came before the Tribunal for a decision on the papers today, 6 October 2023, which was the first time an available date could be found. The Tribunal profusely apologies for the long delay in dealing with this matter and the difficulties with communication.

The Issues

8. The issues which fell to be determined by the Tribunal were:

8.1. Did the claim against the respondent have no reasonable prospects of success (rule 76 (1) (b) ET Rules)?

8.2. Should, in the Tribunal's discretion, a costs order be made against the claimant?

8.3. If so, how much should be awarded?

The relevant law

9. References to rules below are to rules under **Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.**

10. Rule 76 provides

(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
(b) any claim or response had no reasonable prospect of success.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

11. The relevant part of rule 78 provides:

"*A costs order may—*
(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;…."

12. Rule 84 provides:

"*In deciding whether to make a costs, preparation time or wasted costs order and if so in what amount, the Tribunal may have regard to the paying party's (or where a wasted costs order is made the representative's) ability to pay."*

13. A Tribunal must ask whether a party's conduct falls within rule 76(1)(a) or (b) as applicable. If so, the Tribunal must then go onto ask whether it is appropriate to exercise the discretion in favour of awarding costs against that party. It is only when these two stages have been completed that the tribunal may proceed to the third stage, which is to consider the amount of any award payable

14. **Gee v Shell UK Limited [2003] IRLR 82.** The Court of Appeal confirmed that that costs are the exception rather than the rule and that costs do not follow the event in Employment Tribunals.

15. **McPherson v BNP Paribas [2004] ICR 1398**. In determining whether to make an order under the ground of unreasonable conduct, a Tribunal should take into account the "nature, gravity and effect" of a party's unreasonable conduct.

16. **Barnsley Metropolitan Borough Council v Yerrakalva [2012] ICR 420** - "*The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case, and in doing so to identify the conduct, what was unreasonable about it and what effects it had.*"

17. **Oliver Salinas v Bear Stearns International Holdings UKEAT/0596/04/ DM.** The question of whether a costs order was exceptional or unusual was not significant, so long as the proper statutory tests were applied.

18. **Radia v Jefferies International Ltd EAT 0007/18 –** the EAT emphasised that the Tribunal must consider whether the claim had no reasonable prospect of success on the basis of the information known or reasonably available at the start, considering, the prospects of success at that earlier stage (although it should take account of any information and evidence heard during the case that was available at the time).

19. **Vaughan v London Borough of Lewisham & Ors UKEAT/0533/12/SM –** it was not wrong in principle to make a costs order even though no deposit order had been made and the respondents had made a substantial offer of settlement (on an avowedly "commercial" basis). Nor was it wrong in principle to make an award which the claimant could not in her present financial circumstances afford to pay where the Tribunal had formed the view that she might be able to meet it in due course.

20. **Jilley v Birmingham and Solihull Mental Health NHS Trust UKEAT/0584/06/DA,** - if a Tribunal decided not to take account of the paying party's ability to pay, it should say why. If it decides to take into account ability to pay, it should set out its findings about ability to pay, say what impact this has had on its decision to award costs or on the amount of costs, and explain why. There may be cases where for good reasons ability to pay should not be taken into account: for example, if the paying party has not attended or has given unsatisfactory evidence about means.

Analysis and Conclusion

21. Mr Wright submitted that the Tribunal should exercise its discretion to award costs against the claimant under rule 76 (1) (b), namely that the claimant's claim had no reasonable prospects of success. He relies on and referred to a letter sent to the claimant on 19 July 2022 which he submits set out in mild and proportionate terms that the respondent believed the claim to have no reasonable prospects of succeeding and on that basis it would apply for costs in the event it was unsuccessful. He points out that the claimant was advised to take legal advice on the terms of the letter (and also suggests that the claimant had access to such advice as his wife is a solicitor working in the employment law field). He submitted that both of the claims made by the claimant were very weak from the outset and became even weaker once witness statements had been exchanged and it became clear how the claimant was putting his case forward. He submitted that the claimant's claim for unlawful deduction of wages was made on the basis of nothing more than the claimant's genuine and heartfelt belief that the deduction was unfair and no supporting documentary evidence was provided to support his claim as a matter of contract.

22. In terms of the race discrimination complaint, Mr Wright submitted that the claimant did not himself even have a genuine belief that he had been discriminated against on the grounds of face when looking at the contemporaneous evidence (where no reference to race is made at all). He points out that this was only mentioned in a short section towards the end of the claimant's witness statement and also that the claimant did not put this very serious allegation to any of the respondent's witnesses. He pointed out that these allegations were very stressful for the respondent's witnesses to have hanging over them. He points out that the claimant was unable to establish primary facts to shift the stage 1 burden of proof requiring the respondent to explain its conduct.

23. The respondent seeks its costs as set out in that letter and provided a breakdown subsequently providing further detail. However it submits that the award is sought as a matter of principle, that the sums actually incurred are far in excess of the sum sought.

24. The claimant submitted that the main reason he brought the complaint to the Tribunal was that the respondent refused to participate in the ACAS early conciliation process to attempt to resolve matters before the Tribunal. He suggests that this failure has led costs to escalate.

25. The claimant further submitted that he "honestly believed" he had a good case against the respondent and did the best he could to represent himself and follow the Tribunal's orders and process. He submitted that he had not had any legal representation throughout the process as he was unable to afford it.

26. The claimant provided a breakdown of what he said was his household income and outgoings indicating that he was left with a surplus of £47 each month after paying outgoings and expenses and stating that he had no savings. He did not provide any information about assets held or provide details of what some of the items represented e.g. maintenance.

Have the tests within Rules 76 (1) (b) been met?

27. We must consider whether the complaint made by the claimant had no reasonable prospects of success. We have considered the submissions of the respondent. Firstly in relation to the complaint of unlawful deduction of wages the respondent acknowledges the genuine but ultimately mistaken belief of the claimant that he was entitled to the sums claimed. As a Tribunal we also found that the claimant had a strong and genuine belief that the self isolation notes he submitted had the same status as a medical certificate. We acknowledged in our reasons that this argument was indeed superficially attractive. However the claimant was unable to show any legal or contractual basis for his assertions. Nonetheless this was far from a straightforward issue given the uncertainty around at the time this was being considered (in the height of the Covid 19 Pandemic) which the respondent's witnesses acknowledged. The issue of isolating from work and how that should be paid was a rapidly evolving situation at this time. After our full analysis of the various contractual and statutory provisions, we were able to conclude that the claimant did not have a legal entitlement to statutory sick pay for the period in question. However, we were not able to conclude that the claim had no reasonable prospects of success from the start of the claim. The respondent was ultimately successful in its arguments, but this is not a case which had no reasonable prospects of success from the outset,

given the uncertainties and difficulties with interpretation which we were able to analyse following a full hearing.

28. Secondly, we looked at whether the claimant's complaint for race discrimination was one which had no reasonable prospects of success and take note that the respondent largely asserts that this was not a genuine complaint by the claimant and it was pursued in the knowledge that it was unlikely to succeed. We have considered this aspect of the claim and our reasons given orally at the time for dismissing it. Firstly we note that the factual allegations behind the treatment the claimant alleged was direct race discrimination was made out at least in part. The claimant was (clearly given the conclusions on the unlawful deductions complaint) not paid sick pay during the period in question and there was no discussion about his wellbeing during the telephone call on 19 November 2020. His allegations on the grievance process were not made out on the facts. Therefore the issue for the Tribunal was consideration of whether in the respects found to have occurred whether the claimant was treated less favourably on the grounds of his Portuguese nationality. It was on this element that the claimant's claim failed. In respect of not paying sick pay, the comparators identified were in materially different circumstances to the claimant and the claimant was unable to point to anything which might suggest that any failure to pay him was connected to race or nationality. Similarly the claimant was unable to point to any difference in treatment regarding the phone call or any connection to his race/nationality.

29. The respondent points out that the issue of these matters being because of the claimant's race/nationality were only raised essentially as an afterthought by the claimant suggesting that he never genuinely believed his race/nationality was the reason. We indeed also noted in our reasons that the specifics of this complaint for discrimination only appear to have arisen once the Tribunal claim started. However we did acknowledge that the claimant had made reference at the relevant time in February 2021 to being "*discriminated and victimised*" and "*treated differently and unfairly compared with other employees*". Race/nationaility is not specifically mentioned but it is clear that the claimant did at this time believe that he was being singled out and treated in a different manner and that this had occurred on previous occasions as well. The claimant commenced Tribunal proceedings relatively quickly after this in April 2014 and this is when the allegation that this was discrimination on the basis of race is made. It is correct that the claimant did not put allegations of race discrimination to the respondent's witnesses and the Tribunal had to elicit the response to this allegation by its own questions. However we also note that the claimant was representing himself during the hearing and may not have appreciated what was required. We were not satisfied that the claimant did not genuinely believe that what had taken place was related to his race as the respondent suggests. Whilst he may not have articulated this clearly or elucidated why he thought this was so, we conclude that the claimant did genuinely believe the actions to be connected with his Portuguese nationality.

30. Ultimately of course this argument did not succeed and the genuineness of the claimant's belief does not of itself preclude a finding that the claim had no reasonable prospects of success. Despite the claimant's inability to cross the threshold of proving a prima facie case and thus shifting the burden of proof, we were not able to conclude that from the outset this was a claim that had no reasonable prospects of succeeding. Even though there was little in dispute factually, the motivation and reasoning of the decision makers here was precisely

what we had to examine and consider to decide the complaints. We were able to do this having heard oral evidence from the decision makers and assessed this along with any contemporaneous documentary evidence available. Having carried out this exercise we were were then satisfied that the claimant's Portuguese nationality was not in the mind of the decision makers and thus were not the reason for any treatment. However this was not necessarily clear from the outset meaning we cannot say there was no reasonable prospect of the claimant succeeding.

31. As we have not found that this claim was one which had no reasonable prospects of success within the meaning of rule 76 (1) (b), then we do not need to go on to consider whether a costs award is appropriate and if so at what level it should be made. The respondent's application for an award of costs to be made is dismissed.

Employment Judge Flood

6 October 2023

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