Case Number: 1401924/2021

EMPLOYMENT TRIBUNALS

Claimant	and	**Respondent**
Mr Stevens		**West End Motors (Bodmin) Ltd**
Held at: Exeter by video		**On: 21 July 2023**

Before: **Employment Judge Smail**
Mr L. Wakeman
Mr N. Thornback

Appearances

Claimant: **Ms L. Santoro (partner)**
Respondent: **Mr T. Styles (consultant)**

JUDGMENT having been sent to the parties on 10 August 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS ON COSTS APPLICATION

1. The respondent brings an application for costs in the form of preparation time in respect of the time spent by Mr Styles, a Consultant instructed by the respondent, helping the respondent resist these claims. We heard the claim back in January 2023 from 4 – 6 January. We noted that the parties had come to an agreement in respect of holiday pay, including a bonus payment in respect of its calculation. £798.81 was paid in June 2021 and a further payment of £65 was paid in April 2022. Those sums were paid after the issue of the claim by the claimant; that part of the claimant's claim had therefore some merit and we therefore acknowledge that not all of the preparation time claimed by Mr Styles can be claimed in principle because at least part of the claimant's claim was successful. However, that resolved itself in April 2022; we had our hearing in January 2023. Two principal claims of indirect discrimination and indirect disability discrimination were brought by the claimant both of which we rejected.

2. We noted at the beginning of that hearing that there was a disconnect between the size of the schedule of loss, which was considerable, compared

with the liability points that were being pursued in front of us. Some significant time was spent exploring whether in fact the claimant had brought all the claims that he could or wanted to bring before us, and after an application to amend which did not work for the claimant, that application was refused. We were limited to the claims as brought. It had been noted in the course of the amendment application that on 17 November 2020 a manager within the respondent had issued an ill conceded direction in these terms.

> It has come to my attention that certain staff members are discussing wages bonus. I will remind you that this is a company policy breach. Any staff member found guilty of being a leader or discussing wages with another staff member will be dismissed under gross misconduct. If any member of staff has wages concerns, please contact their manager directly.

It was accepted by the respondent that this was misconceived but nonetheless, as Miss Santoro has alluded to in her defence of this costs application, not everything at the respondent was operating in text book manner. That said, where a claimant brings specific claims, if those claims are subsequently shown to be misconceived as having no reasonable prospect of success that does entitle a respondent to bring an application for costs. The remaining claims of the claimant that were litigated were rejected comprehensively by us in that the premise behind them, the PCPs for example being alleged, or the Respondent's alleged refusal of the Claimant's requests, were simply not made out on the facts.

3. The second claim was that there was a policy or practice that employees could only be accompanied by a trade union representative or a work colleague at grievance hearing and furthermore that this substantially disadvantaged the claimant in that he could not have his representative who would have been Miss Santoro present at a grievance hearing.

4. The PCP alleged was prima facie supported by the rule in the handbook which is the statutory rule but as it happened a grievance hearing never happened. One of the reasons for which was that the claimant had decided he would go down the tribunal route rather than attend an internal appeal or internal grievance hearing. Much of his grievance had been resolved informally over the telephone but he did ask for a grievance hearing, as our findings of fact made clear, on 11 February 2021 after the informal telephone grievance hearing. The claimant wrote to Mr Martin asking for a grievance hearing. There was some delay on the part of the respondent in offering a grievance hearing. It maybe that part of the delay was explained by a concern at the fact that the claimant was signed off at the time, but a holding letter was sent on 26 March and it was not until 31 March that a grievance hearing was offered on 8 April 2021. There was no express consideration as to whether or not Miss Santoro would have been allowed to attend. Mr Cook says that had he been asked then of course he would have allowed it. He is probably right about that but the merits of this allegation are not quite as clear cut against the claimant as the first claim, the respondent's position is a little undermined or is significantly undermined by the delay in offering a grievance hearing, and in the exercise of our discretion, even if the root argument had no or little reasonable prospects, we choose not to award preparation time in respect of that issue, the matter of a grievance hearing was not organised as promptly as it might otherwise have been by the respondent.

5. The first claim brought by the claimant, however, in the tribunal's assessment truly had no reasonable prospects of success. The premise behind that claim was that there was a policy or practice of not providing written records of annual leave for use by employees and it became clear in the course of the hearing that the wage slips record how much holiday is taken and how much holiday remains. We looked in detail at this matter and we noted that in correspondence in respect of disputed matters, including in the grievance, that the claimant did have knowledge of his holiday entitlements as per the payslips.

6. We noted there was a change of practice between before September 2021 and post September 2021. Before paper payslips were sent to every employee; thereafter, electronic records were kept. It was demonstrated to us that simple accessing of the system would immediately show a written record of annual leave entitlement. This was a claim which was doomed to failure from the beginning and moreover the claimant had knowledge of his annual leave in writing. That was a claim which should never have been brought. Miss Santoro on behalf of the claimant says if it was that clear cut why did they not put on a deposit application and that submission has made us think. However, if the claim was known or should have been known to have no merit in the first place it should not have been brought. We look at the costs rules.

7. Rule 76 provides that 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. (b) Any claim or response had no reasonable prospect of success.

8. In particular 76(1)(b) is in play because this argument had no reasonable prospect of success and that was or should have been known to the claimant; it should not have been brought.

9. We are dealing with preparation time because Mr Styles, although having been called to the bar is not a practising barrister nor a practising solicitor. He is not entitled to costs: he is only entitled do preparation time and he has never said otherwise.

10. The costs application when first brought also made particular complaints about unrealistic without prejudice proposals from the claimant but the respondent has decided not to pursue that argument respecting the without prejudice nature of the communications. That aspect then has been withdrawn. We noted for ourselves the scale of the schedule of loss which prompted us to make enquiry at the beginning of the hearing as to whether the issues were correct. It proved after consideration that the issues were correct.

11. We have a discretion to make a preparation time order where the claim or response had no reasonable prospect of success. We chose to exercise our discretion in favour of making a preparation time order because we have seen from the evidence that the claimant did have access to wage slips and did know from the information on the wage slips that the amount of his holiday was recorded in writing.

12. Mr Styles has put forward a schedule just over £2,000 in respect of all of his preparation time. We choose only to order a proportion of that, being fair between the parties, representing the extent of the allegation which we do hold to merit a preparation time order. We have come to the decision unanimously that the correct amount is £500 of preparation time that the claimant must pay in respect of bringing this argument which was doomed to fail from the beginning. We will give the claimant a choice either of clearing that £500 within fourteen days or £50 per month over ten months failure to pay one instalment would entitle the respondent to pursue the remainder.

_____

Employment Judge Smail
Date 3 October 2023

REASONS SENT TO THE PARTIES ON
23 October 2023 By Mr J McCormick

FOR THE TRIBUNAL OFFICE