EMPLOYMENT TRIBUNALS

Claimant: Paul Larmond

Respondent: Immanuel and St Andrews Primary School

Heard at: London South (by CVC) **On:** Friday 3 November 2023

Before: Employment Judge G Phillips

Appearances
For the claimant: Mr. Abu, Solicitor
Respondent: Mr. Magee, of Counsel

JUDGMENT

1. **On or before Monday 20th November 2023**

    1. Lambeth Solicitors are to pay the Respondent's advisers the sum of £750 in regard to wasted costs;

    2. The Claimant is to provide to the Respondent's advisers, the information set out at Paragraph 26 below with regard to his race discrimination claim, failing which, unless he has withdrawn the claim, it will be struck out forthwith without further order.

REASONS

2. This matter was listed for an Open Preliminary Hearing today in order to deal with three applications made by the Respondent, namely
    i. Should the tribunal order a wasted costs order against the Claimant's representatives;
    ii. Should the Claimant's race discrimination claim be struck out;
    iii. If not, should the tribunal make a deposit order.

3. I had before me a Bundle of all the relevant documents. When I refer to a page number [xx], it is to documents in this Bundle. I also had a skeleton argument from Mr Abu on behalf of the Claimant, Case Management Agendas and suggested Lists of Issues from both parties and a Schedule of Loss from the Claimant.

4. The Respondent's three applications arose out of a Case Management Hearing on 7 August 2023, before EJ Self [46/7] when neither the Claimant, nor any representative on his behalf, attended. As set out in more detail in the Case Management Order made by EJ Self following that hearing, the following directions were made:
   i. With regard to the claim for race discrimination, EJ Self observed that "Having read the papers it struck me that the claim for race discrimination contains no more than a bare assertion that certain acts are in fact acts of race discrimination" and he indicated that he would order the Claimant "to provide information of what he intends to rely upon to support his race claims or at the very least to shift the burden of proof onto the Respondent; he accordingly made a direction that "The Claimant and his representatives shall, by no later than 4 pm on 28 August 2023, write to the Tribunal and the Respondent stating "What the Claimant intends to rely upon to demonstrate that the reason for the detriments alleged were because of his race";
   ii. With regard to the non-attendance of the Claimant and his representative, that "The Claimant and his representatives shall, by no later than 4 pm on 28 August 2023, write to the Tribunal and the Respondent stating "the reason for their respective non-attendance today with any supporting documents".
   iii. By no later than 11 September 2023, the Respondent shall make any applicated for costs / wasted costs against the Claimant / the Claimant's representatives in relation to costs wasted today on account of the Claimant and his representative's failure to attend.
   iv. Further upon consideration of the response provided from the Claimant, the Respondent to determine whether or not it wishes to make an application for the race discrimination claim to be struck out and/or the subject of a deposit order.

5. Mr. Abu, the Claimant's solicitor, [49-51] and the Claimant [52-55] duly made their statements as directed. The Claimant's statement also purported to deal, from paragraphs 5-10, with the direction relating to the provision of further information with regard to his claim of race discrimination.

6. On 11 September, the Respondent's solicitor made the three applications which are before me now.

<u>Wasted costs application</u>

7. Wasted costs are dealt with in Employment Tribunal rule *80, which states*
   (1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs— (a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or (b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.

8. It was agreed by the parties that the key authorities in a wasted costs application were *Ridehalgh v Horsefield 3 All ER 848, Medcalf v Mardell [2002] 3 All ER 721,* and *Mitchells solicitors v Funk Werk Information Technologies York (UKEAT/0541/07/MAA*)**.** *Ridehalgh* sets out a three-stage test:

i. Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently?
ii. If so, did such conduct cause the applicant to incur unnecessary costs?
iii. If so, is it in all the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs.

9. The authorities also make clear that the threshold for a wasted cost order is high. The jurisdiction should only be exercised with great caution, and as a last resort.

10. Mr. Magee submitted that, as set out in the CMO of EJ Self, a Notice of the hearing on 7 August, was sent out by the Tribunal on 21 April 2023 [35], which was addressed to both parties and received by the Respondent. He said that further indications of the existence of the preliminary hearing were given to Mr. Abu and his firm (i) by an email from Acas in June; (ii) an email from the Tribunal with a link for the CVP hearing sent on Friday 4 August; (iii) an email from the Respondent's advisers on Sunday 6th August with relevant documents for the Hearing; (iv) contact from the Tribunal on the morning of the CMO; and (v) a call from the Claimant at about 2.00 that day. There was no substantive response from the Claimant's firm on the Monday. Mr. Magee submitted this was evidence of negligence. He said Counsel's fees of £1250 + VAT had been incurred. He said there was no reason why it would be unjust for the party at fault here not to compensate the Respondent.

11. Mr. Abu referred to his skeleton argument. He submitted that, by reference to Department for Business Energy and Industrial Strategy guidance (BEIS) guidance: employment tribunal powers:

> *"improper" covers but is not confined to conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice and other serious professional penalty;*
> *"unreasonable" describes conduct that is vexatious or designed to harass the other side rather than advance the resolution of the case; and*
> *"negligent" should be understood in a non-technical way to denote failure to act with the competence reasonably expected of ordinary members of the legal profession.*

12. Mr. Abu submitted in his skeleton that the actions of the Claimant's representatives should not be viewed as negligent because they were not aware of the hearing and as such were not aware that they would have needed to act in relation to preparing and attending the hearing. He submitted in his skeleton that the reason for the non-attendance was because the Claimant's representatives did not receive notice of the scheduled hearing prior to the scheduled hearing and was therefore not aware that the hearing was taking place.

13. However, he conceded, with due candour, during the hearing that an email had been received from Acas on 6 August which, while it did not mention a date for a preliminary hearing, did refer to "the preliminary hearing approaching". He also accepted that the emails referred to by Mr. Magee were received, but said he was on annual leave over this period. He said that there was a receptionist and a solicitor in place to monitor the email box. He accepted that the emails – particularly the one

on the Friday before the hearing on the Monday - had been overlooked and their importance had not been appreciated.

14. **Conclusion on wasted costs application**. Having heard the submissions of both sides, I came to the conclusion that the actions of the Claimant's representatives did amount to negligence, in that there was undoubtedly a failure by Mr. Abu in regard to the June email from Acas and his firm in regard to the later emails, which in my judgment did amount to a failure to act with the "competence reasonably expected of ordinary members of the legal profession". In my assessment, this caused the Respondent to incur some unnecessary costs, which were appropriately reflected in Counsel's fee for the 7 August hearing.

15. I did not accept that the whole of the CMO on 7 August was time wasted: certain matters were usefully discussed and actions put in place; it was always likely that there would need to be a further hearing to deal with the race discrimination claim. Certainly, however if the Claimant had attended, a number of consequential matters would not have occurred.

16. On that basis, in all the circumstances, it appeared to me just that Mr. Abu's firm pay the Respondent's advisers the sum of £750 in regard to wasted costs. **Such sum to be paid on or before Monday 20th November 2023**.

Application to strike out and/or for a deposit order

17. Applications to strike out are dealt with at Employment Tribunal rule 37, which states:
    (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds— (a) that it is scandalous or vexatious or has no reasonable prospect of success; (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious; (c) for non-compliance with any of these Rules or with an order of the Tribunal; (d) that it has not been actively pursued; (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
    (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

18. Applications for a deposit order are dealt with at Employment Tribunal rule 39(1), which states;

    (1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

19. While, it is ultimately a matter for the Tribunal's judgment whether a case should be struck out, the courts have noted that a power to strike out is a "draconian remedy not to be exercised too readily" (see *Blockbuster Entertainment v Jones, [2006]*

IRLR 630, CA). It is important the tribunal identify the claim under challenge and the issues.

20. Mr. Magee submitted that there was a clear order from the Tribunal following the CMO on 7 August with regard to the need to particularise the race discrimination claim [47]. He submitted that the Claimant's response in his witness statement was inadequate, and amounted to non-compliance with the Order and that the claim remained defective; he submitted that this application was based upon two of the grounds listed in Rule 37, namely (a) "has no reasonable prospect of success" and/or (c) "for non-compliance with any of these Rules or with an order of the Tribunal"*.* He submitted that the information in the Claimant's witness statement was not compliant and was made against the background of the order made by EJ Self that the Respondent would be at liberty to make a strike out application. He pointed out that the Claimant was represented, and that those representatives will have been well aware of the need to particularise discrimination claims – particularly the who, what, where and when – as well as any witnesses - of the matters that were relied upon. Mr. Magee accepted that on the authorities, tribunals should be particularly hesitant to strike out discrimination claims, but said that was in regard to claims which were properly pleaded, which was not the case here. In the alternative, the Respondent relied upon the lower threshold in Rule 39 for the making of a deposit order.

21. Mr. Abu noted that the submission of Mr. Magee was the first time the Respondent had specified the ground(s) under rules 37 or 39 on which it relied. Up to that point he said, the reason given by the Respondent was that the claim was "vague, broad, and far too generic in nature", which was not a ground in rule 37. He further submitted that if further clarification was still needed, the tribunal could order further particularisation. Mr. Abu highlighted that there was a distinction between the "little" reasonable prospect of success ground under rule 39 and the "no reasonable prospects of success" ground in rule 37. He referred the tribunal to *Wright v Nipponkoa Insurance (Europe) [2014] All ER (D) 102,* which gives guidance on deposit orders in the context of rule 39(1). He submitted that in relation to rule 39(1), the tribunal's role was to consider whether the facts asserted are credible and submitted that the Claimant had identified times, places and events in regard to the discrimination part of his claim. He reminded the tribunal that if the tribunal was minded to view the Claimant's claim as having little reasonable prospect of success, the making of a deposit order does not automatically follow (*Hemdan v Ishmail [2017] IRLR 228*): "the tribunal has a discretion which must be exercised in accordance with the overriding objective, having regards to all the particular circumstances of the case".

22. **<u>Discussion and conclusion on strike out and deposit order applications.</u>** While the courts have made clear that the power to strike out a claim on the ground it has no reasonable prospect of success should only be exercised rarely, and not when the central facts are in dispute, part of the problem here is that the detail provide remains vague. It is hard to make an assessment of whether the central facts on the three incidents that Mr Larmond relies upon are in dispute.

23. Those three matters are said to be

i. inadequate access to IT and computer equipment;
ii. inadequate access to a telephone to allow him to carry out his role;
iii. being made to wait for prearranged meetings and/or such meetings being cancelled on short notice, with the Respondent's senior leadership members.

24. I also noted that it appeared on the face of it as per the information set out in the Claimant's witness statement, that all the matters currently relied upon by the Claimant were out of time, occurring as they did more than three months before the date of the claim: the ET1 was dated 28 December 2022, the Acas Early Conciliation certificate was dated 16 November, so 3 months before that would be from 17 September. On any basis, the latest date advanced by the Claimant – for the last of the three matters he relied upon - was March 2022. If there were issues on timing, then the "no reasonable prospect of success" ground for a strike out would clearly come into play.

25. On balance, and bearing in mind the draconian nature of a strike out order, I was not satisfied at this moment in time that it was appropriate to strike out the Claimant's race discrimination case or order a deposit order. I noted that the case as a whole – there is no challenge per se to the unfair dismissal claim - was not listed for a final hearing until August 2024, and so there was plenty of time for matters to be remedied, if they were capable of being remedied. I noted and agreed with Mr. Magee that there were a number of deficiencies in the race discrimination case as currently set out, even allowing for the additional information provided by the Claimant. No sufficient details were given in my judgment as to the who, what, where and when elements of such a claim. Further, the Claimant's race, ethnicity or nationality were not specified, nor was it made clear whether he relied upon a comparator. These are all key matters for a direct discrimination claim, and matters which a respondent is entitled to be informed of, so that it knows the case against it.

26. In the circumstances, I determined that it was proportionate to allow the Claimant a further period of 14 days in which to either fully and properly particularise his race discrimination claim, or to decide whether he wished to withdraw it. I accepted in regard to this, Mr. Magee's point that it would be appropriate that this should be accompanied by an unless order. I therefore ordered that the Claimant should set out and detail:
   i. what race/nationality/ethnicity/national origins he identifies as;
   ii. whether he relies upon an actual or hypothetical comparator;
   iii. particulars of "who, what, when and where" with regard to each of the three matters he relies upon as evidence of less favourable treatment, as set out at paragraph 23 above;

   on or before Monday 20th November 2023, failing which, unless he decides to withdraw that claim, it will be struck out forthwith, without further order.

Employment Judge Phillips
Date: 3 November 2023