



EMPLOYMENT TRIBUNALS

Claimant: Mr A Algedawy

Respondent: ABM Aviation UK Limited

Heard at: Manchester

On: 1 September 2023

Before: Employment Judge Phil Allen (sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Mr A O'Neill, solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The claim for unfair dismissal is struck out because the manner in which the proceedings have been conducted was unreasonable and the claimant had not complied with the orders of the Tribunal made at/following the hearing on 17 May 2023.
2. The application to strike out the claim for discrimination on the grounds of religion is refused.
3. A costs order is made against the claimant in the amount of **£1,000**. The claimant must pay that sum to the respondent.

REASONS

Introduction

1. The claimant was engaged by the respondent as a sales consultant or causal worker. It was not disputed that he was engaged between 17 September 2022 and 30 October 2022. The claimant alleged that he was employed from 28 July 2018 when he says he undertook a shadow shift (the respondent denied that he did) until

31 October 2022. The claimant claims unfair dismissal and direct discrimination because of religion.

Claims and Issues

2. This was a preliminary hearing arranged to consider whether the claimant had the two years continuous service with the respondent required to pursue his unfair dismissal claim, and for case management purposes. The respondent also made an application to strike out the claim.

3. A preliminary hearing (case management) was previously conducted in this case on 17 May 2023 by Employment Judge Martin and the case management order which she produced following the hearing contained case management orders for the preparation of the case for this hearing (and clarification of the religious discrimination claim).

4. After the decision was made in the strike out application, the respondent also applied for costs. The decision in the costs application is also included in this order.

Procedure

5. The claimant represented himself at the hearing. Mr O'Neill represented the respondent.

6. The hearing was conducted in-person.

7. The respondent provided a bundle of documents. The respondent also provided a witness statement for a witness called to address the service issue in the unfair dismissal claim. That witness attended the hearing.

8. The respondent had made an application to strike out the claim in a letter of 5 July 2023. That application was considered at the start of the hearing. The respondent was given the opportunity to make submissions, followed by the claimant being given the same opportunity. After submissions had been made, I informed the parties of my decision and (briefly) the reasons for it. Those reasons are confirmed below.

9. After the decision in the respondent's strike out application, the respondent made an application for costs. The respondent had warned the claimant in an email of 31 August that a costs application would be made (and had provided a schedule of costs which had been included in the bundle of documents). The respondent was given the opportunity to explain why it believed that a costs order should be made, and the claimant was given the opportunity to respond. Both parties were also allowed to make further comments arising from the other party's submissions. After hearing submissions, I adjourn the hearing to consider my decision. After the adjournment I informed the parties of my decision in the application for costs and the reasons for it. Those reasons are also confirmed below.

The application to strike out

10. In summary, the claimant's position was that he had worked a single shadow shift on 28 July 2018, and he contended that he had remained employed from that date until October 2022. The respondent denied that the claimant had worked the shadow shift, although it agreed that one had been offered to him in July 2018. The respondent acknowledged that the claimant had been engaged to work shifts from 17 September 2022 until 30 October 2022. The issue in dispute was whether or not the claimant had continuity of employment from July 2018 until October 2022, being a period during which he undertook no work for the respondent. If he had continuity for the entire period, he was able to pursue an unfair dismissal claim. If he only had continuity for a short period in later 2022, he would not be able to claim unfair dismissal as he would not have the two years' service required for such a claim.

11. The respondent made an application to strike out the claim in a letter of 5 July 2023. That application was considered at the start of the hearing. The respondent was given the opportunity to make submissions, followed by the claimant being given the same opportunity.

12. The case management order made following the hearing on 17 May 2023 had set out various steps which were required for the case to be prepared for this hearing:

- a. The parties had each been ordered to send to the other a list, together with copies, of all documents relevant to the issue to be determined today. The claimant had never complied with this order. He had sent a video which showed extracts from some emails. He had not listed the emails. He had not provided copies of the emails. He wished to rely upon those emails at today's hearing and he said they were relevant. He had not brought copies with him, so neither the respondent nor I had copies of the emails which the claimant said were relevant.
- b. The parties had been required to each send to the other copies of witness statements prepared for today's hearing on or before 5 July 2023. At approximately 9 am this morning the claimant had provided a witness statement to the Tribunal and the respondent. The respondent had copied it and had included it in the bundle it produced. The respondent's representative had not had the opportunity to consider the statement.
- c. By 21 June 2023 the claimant had been required to send the respondent further information about his complaint of discrimination on the grounds of religion. He had not done so on that date. He had provided a document on 1 August and said that there had previously been an issue with it being sent by email.

13. The respondent applied to strike out the entire claim on the basis that the manner in which the claimant had conducted proceedings had been scandalous

and/or unreasonable, and/or for non-compliance with the Tribunal's orders. The respondent contended that a fair hearing today was not possible.

14. The claimant had no real explanation for the lack of compliance and/or late compliance with orders, save that he highlighted how busy he had been working six days a week and he emphasised that he was not legally represented.

15. After hearing the submissions of the parties, I decided that: the claim for unfair dismissal should be struck out; but the claims for discrimination on grounds of religion should not be. I briefly explained the reasons for my decision in the hearing and those reasons are confirmed below.

16. I have the power to strike out the claim (or parts of the claim) under rules 37(1)(b) and 37(1)(c) of the Employment Tribunal Rules of Procedure 2013. It was for the respondent to persuade me to exercise my discretion to strike out the complaint. Non-compliance needs to be deliberate and persistent or have the effect of making a fair hearing impossible. Even then, I needed to be persuaded that striking out was a proportionate sanction. I must consider all the circumstances, including the magnitude of the default, whether it is the responsibility of the party, what disruption, unfairness or prejudice had been caused, whether a fair hearing was still possible, and/or whether strike-out or some lesser remedy would be an appropriate response.

17. The claimant had not complied with the Tribunal's orders (as I have set out). I found that his conduct in preparing for this hearing had been unreasonable. He had only provided his witness statement at 9 am this morning; far too late for the respondent to prepare for the hearing. He had sent a video showing that he had relevant documents and he confirmed that he had relevant documents upon which he wished to rely today, but those documents had not been provided to the respondent. They were not available today for me to consider. They had never been listed, as the order required. It was my decision that a fair hearing today of the issue to be determined in the unfair dismissal claim (continuity of service), was not possible, as the respondent had not had time to prepare after receipt of the claimant's witness statement and the relevant documents in the claimant's possession or control were not available to me. I also decided that it was appropriate and in accordance with the overriding objective including dealing with cases fairly and justly, for the unfair dismissal claim to be struck out.

18. The position for the discrimination claim was different. Today's hearing had not been arranged to determine an issue in that claim. It was my view that the respondent's application to strike out the entire claim because of the claimant's conduct of proceedings did have some merit. However, I was mindful that the guidance in appeal cases was that I should consider particularly carefully before I struck out a discrimination claim. A fair hearing of the discrimination claim remained possible if the claimant complied with future directions. It was my decision that it was not appropriate in all the circumstances, applying the overriding objective and considering the proportionality of the sanction, for the discrimination claims to be struck out.

The costs application

19. In the bundle of documents provided, the respondent had included a schedule of costs, which recorded the solicitors' costs incurred in the proceedings. It recorded each time entry made by someone at the solicitors' firm acting for the respondent. The schedule showed total time of 29 hours and six minutes recorded and costs of £5,523. The rates for the work charged to the respondent were confirmed in submissions and were not unreasonable. The schedule did not include attendance at the Tribunal today.

20. The respondent was not seeking to recover all of its costs. It sought to recover £2,450 based upon the costs which had been incurred since 15 June 2023.

21. The respondent sought costs on the basis that it said the claimant had acted vexatiously, disruptively, or otherwise unreasonably in the way in which the proceedings had been conducted (particularly in relation to the steps in preparation for this hearing), that the claimant had been in breach of the orders, and/or that the claim for unfair dismissal had had no reasonable prospects of success.

22. In relation to the application for costs arising from the conduct of proceedings, the respondent's representative emphasised what I had already found when the unfair dismissal claim had been struck out (as recorded above).

23. In relation to the contention that the claim for unfair dismissal had had no reasonable prospects of success, he emphasised the implausibility of the claimant's argument that he had two years continuous service when linking a shadow shift in July 2018 (even if one had been worked, which the respondent did not accept) with shifts worked in September and October 2020. He emphasised an email in the bundle from July 2021 when the claimant was asked to provide his basic ID documents, something which it was contended was entirely inconsistent with continuous employment dated from 2018.

24. The respondent submitted that all of the costs incurred in preparing for this hearing had been wasted, either because of the claimant's conduct of proceedings (and non-compliance with orders) or because the claimant's argument in the issues to be determined today had never had any reasonable prospects of success.

25. When he made his submissions, the claimant was asked about his ability to pay a costs award. He said that he earned £1,700 per month and worked six days a week. He referred to family responsibilities. He said he had worked three jobs at a time. He said he could not afford to pay £2,450 if the costs sought were awarded. He declined to say by whom he was currently employed. He confirmed that he was currently working a single job.

26. The respondent's representative questioned the accuracy of the claimant's figures, highlighting the hourly rate which would apply if the claimant's earnings figure was correct, and he was working full time six days per week. The respondent also emphasised that, whether the ability to pay was taken into account, was not obligatory.

27. Costs in the Employment Tribunal are very much the exception and not the rule. Costs do not simply follow the event. The power to award costs is limited to the specific reasons provided in the Employment Tribunals Rules of Procedure.

28. Rules 74, 75, 76, 78 and 84 of the Rules of procedure are relevant to the award of costs.

Rule 76 (1) A Tribunal may make a costs order ..., and shall consider whether to do so, where it considers that - (a) a party ... 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

Rule 78 (1) 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.

Rule 84. In deciding whether to make a costs ... order, and if so in what amount, the Tribunal may have regard to the paying party's ... ability to pay.

29. Also relevant is the costs section of the Employment Tribunals (England & Wales) Presidential Guidance – General Case Management. I considered that Guidance and would highlight the first lines of paragraphs 1 and 19:

The basic principle is that employment tribunals do not order one party to pay the costs which the other party has incurred in bringing or defending a claim.

When considering the amount of an order, information about a person's ability to pay may be considered, but the Tribunal may make a substantial order even where a person has no means of payment.

30. I must look at the whole picture of what happened in the case and 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. There does not have to be a precise causal link between the unreasonable conduct in question and the specific costs being claimed. Causation is relevant.

31. As I have already explained when providing my reasons for striking out the unfair dismissal claim, and for the same reasons, I found that the way in which the claimant had conducted the proceedings in respect of today's hearing was unreasonable. He did not comply with the orders made by Employment Judge Martin. He had attended the hearing without relevant documents and without them having been sent to the respondent. He had only provided his witness statement at approximately 9 am this morning.

32. I also accepted the respondent's submission that the claimant's argument that he had two years continuous employment with the respondent based upon a single

shadow shift in 2018, when he had undertaken no work for the respondent until September 2022, had no reasonable prospects of success.

33. Whether I should award costs is, however, a discretionary decision and is an exception and not the rule. I would not have exercised my discretion to award costs based on the prospects of success of the claimant's argument about continuity. In the Employment Tribunal we see many unrepresented claimants pursue arguments which do not turn out to have had much prospect of succeeding and I would not have awarded costs on that basis in this case based on the weakness of his argument about continuity.

34. I have taken a different view about awarding costs for the claimant's unreasonable conduct of the proceedings and his failure to comply with the orders made. I have considered the claimant's approach of providing a video showing emails which he says were relevant, but not providing copies of the emails themselves. I have also considered his decision to provide a witness statement only at 9 am this morning and not earlier. I have decided that costs should be awarded as a result. It has not been possible to hear today, the issue which today's hearing was listed to determine. I have struck out the unfair dismissal claim for that reason and I have also decided that it is appropriate to award costs as a result.

35. The respondent has sought costs of £2,450, being costs incurred since 15 June 2022. I have no criticism of the respondent for the level of the costs, or the amount claimed.

36. However, I do not think that the claimant should be ordered to pay the full costs claimed. As I have awarded costs for the manner in which the proceedings have been conducted and not the prospects, I do not find that all of the costs claimed were incurred as a result.

37. I have also considered it appropriate to take into account in making an award the claimant's ability to pay. Whilst I understand the respondent's representative's scepticism about the earnings figure I have been given today by the claimant, the claimant is clearly not somebody who has significant disposable income available.

38. Taking account of the two reasons I have given, I have decided I will not award the full costs claimed. I have considered the best way of determining the right costs award. I have decided to take an approach which is not scientific and might be described as rough and ready, that is I have not carefully calculated a specific amount based upon specific time entries and the reasons for them. I have broadly noted the costs incurred in the very recent period since 25 August. I accept that almost all of the respondent's preparation for today's hearing has ultimately turned out to be unnecessary as a result of the claimant's conduct of the proceedings. I have decided to make a costs award of £1,000, as I consider that to be an appropriate award taking into account the costs incurred, the unreasonable conduct, and the claimant's ability to pay. That sum must be paid by the claimant to the respondent as a result of my costs order.

Employment Judge Phil Allen

13 September 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

20 September 2023

FOR THE TRIBUNAL OFFICE

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