EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
Mr K Lawrence	**Unilever UK Ltd**

PRELIMINARY HEARING

HELD AT **London South** **ON Friday, 5 May 2017**

Regional Employment Judge P Hildebrand (sitting alone)

Appearances

For Claimant: **In Person**

For Respondent: **Mr C Milsom, Counsel**
Ms A Crabtree, Solicitor

JUDGMENT

The judgment of the Tribunal is that:-

1. The Claimant's claim of discrimination on grounds of race is struck out on the grounds that under Rule 37(1) (a) it stands no reasonable prospect of success and under Rule 37(1) (c) for non compliance with orders of the Tribunal.

2. The Claimant is to pay a deposit pursuant to Rule 39 of £ 250 within 28 days of the date this order is sent to him as a condition of proceeding with his claim of unfair dismissal

3. The Claimant is to pay a deposit pursuant to Rule 39 of £ 250 within 28 days of the date this order is sent to him as a condition of proceeding with his claim for accrued holiday remuneration due on termination of employment

REASONS

1. By letter dated 12 April 2017 the Respondent applied for the claim to be struck out or for an order for a deposit to be made. An Employment Judge directed that these applications were to be considered at a preliminary hearing listed on 5 May 2017 following an earlier preliminary hearing on 6 January 2017.

2. At that earlier hearing Employment Judge Baron heard from the Claimant in person and from Mr Milsom for the Respondent. He listed the case to be heard for 6 days commencing on 6 November 2017.

3. It is acknowledged by the Claimant that at the earlier preliminary hearing Employment Judge Baron had grappled with the case in order to identify the legal and factual issues and to assist the Claimant and Respondent in the resolution of the issues in dispute. The Employment Judge identified the following three reasons why the dismissal was said to be unfair. The Claimant contended his line manager had knowingly provided false information to the Respondent's HR Department in order to have disciplinary proceedings instigated. The Respondent had failed to investigate before arranging a disciplinary hearing. Finally, the Claimant's evidence had not been properly considered.

4. In relation to leave pay this appears to be a dispute as to an amount of leave which the Claimant had at the end of the 2015 leave year and how much of that time he was entitled to carry forward to 2016.

5. In relation to race discrimination the Judge emphasised the importance which he attached to a clear identification of allegations of discrimination. The Judge set out 11 respects in which the Claimant made claims. These included the level of a bonus award, arrangements for an end of year review, the outcome of the end of year review, false allegations being made against the Claimant, a refusal of the Claimant's flexi work application, the cancelation of a meeting to deal with the outcome of an appeal, change to the wording of an e-mail, instigation of a disciplinary process, the production of dishonest statistics, delay in dealing with the Claimant's grievance, and finally considering that grievance on paper without an oral hearing.

6. The Judge made provision for the Respondent to seek further particulars by 10 February and for the Claimant to supply those particulars by 3 March. A further preliminary hearing was listed to consider any applications which the Respondent might make for the claims to be struck out or for a deposit to be ordered.

7. On the preliminary hearing I received submissions from the Respondent in writing and orally and from the Claimant orally.

The Claimant's Submission

8. I explained in detail to the Claimant the terms of the order made by Employment Judge Baron. The Claimant expressed his approval for the work undertaken by the Employment Judge and that he recognised it was for him to "fill in the blanks." This meant in terms pinpointing when a race discrimination allegation had been made. The Claimant said that in his meeting with his line manager on 22 March 2016 he had said he considered it was discrimination on the grounds of race which he had experienced. He said he had also raised this in the disciplinary hearing, but it had not been recorded in the notes.

9. The Claimant accepted he had received the request for particulars as ordered from the Respondent. This was provided by the Respondent to him on 25 January 2017 some time in advance of the date in the order 3 February 2017. He acknowledged that he had not provided the response as ordered or at all. He said he had dealt with the first two parts although he had not provided them to the Tribunal. These dealt with the Claimant's unfair dismissal claim. He said he had tried to get a solicitor but could not afford the cost. He said he could provide the response by Monday or Tuesday that is 8 or 9 May 2017.

10. The Respondent indicated that they had heard nothing from the Claimant since the preliminary hearing in January.

11. The Claimant said he had prepared the responses for the unfair dismissal and holiday pay questions but not for the race discrimination questions.

12. In his oral submissions in reply the Claimant said that a colleague had refused to post a cost in the books. The line manager did not go to the HR department and say the individual had refused a manager's instruction. The Claimant had been asked to do something by e-mail and acted on it and did and reported in 1 hour and was sent for a disciplinary for sending out confidential information. The Claimant had been told he did not follow a manager's instruction. The instruction was in October. In November he sent the document to the same list and was told that he had sent out confidential information. Others had been copied in to this information. The Claimant indicated he was able to question the instructions of his line manager and go to the manager above. He acknowledged it was hard to prove race discrimination. The Claimant said instructions given to others had not been followed. He sent out the information to the recipient as he was the only one in the business who could do this. He had received only one complaint from the individual who wrote to him when he overlooked the instructions.

13. The Claimant explained that he had not worked since leaving the Respondent. He was not in receipt of benefits. He had other means

but had now exhausted them. He lived with his partner. He had no other capital. His partner owns the property in which they live.

The Respondent's Submission

14. The Respondent's submission was that the Claimant had declined to attend the internal investigation. He had no medical reason for this. He had produced two letters. His grievance and the appeal. There had been three meetings which had all been noted. There was no suggestion in all the minutes that the Respondent's treatment of the Claimant was tainted by race. Differential treatment alone was not sufficient. There was no suggestion here of a race taint. The Respondent contended that much of the pleaded case was out of time. The Claimant stood little or no reasonable prospect of success. The Claimant had not complied with the Tribunal's orders. The Respondent submitted this was conspicuous and contumelious.

15. The Respondent helpfully summarised the underlying facts. The Claimant had been employed as a finance process accountant from 3 June 2013. Lateness on the part of the Claimant had led to a first written warning on 12 May 2014 and a reminder as to his expected hours of work on 4 December 2015. Notwithstanding these warnings a pattern of unauthorised absences continued. This was raised in the Claimant's review for 2015. He was awarded a score of 2 in relation to his performance. This is score out of 5 with 1 being the lowest score. This score fed into his bonus award. He made a flexible working request which would have perpetuated his late arrival in the office. On consideration the request was refused as was the Claimant's appeal. On 29 January 2016 the Claimant was invited to a disciplinary hearing regarding allegations of poor time keeping, a breach of confidentiality and failure to follow reasonable management instructions. The Claimant attended a disciplinary hearing on 4 February 2016 chaired by Julia Metcalf, an independent chair. In the outcome letter Ms Metcalf concluded that a number of serious allegations were well founded and issued the Claimant with final written warnings. Within a few weeks of those warnings further difficulties arose. The Claimant was notified as to his bonus entitlement on 16 March. His response indicated awareness of the bonus payments made to others in comparison with their performance rating. The Line Manager, Mr Rados concluded that the Claimant had accessed the pay details of colleagues and relied on these as leverage for a higher bonus award. In response Mr Rados had said to the Claimant that he must not use confidential information to evaluate himself against other employees. The Claimant had suggested that he was just relying on a conversation with a colleague. He had refused to identify the colleague despite invitations. The Respondent could not therefore explore his corroboration for his defence to the allegations. The Claimant was due to attend an investigation meeting on 23 March 2017. He did not attend but commenced a period of sickness absence on 24 March. He failed to engage with the Respondent during his sickness absence.

The occupational health advisor concluded the Clamant was fit to attend but not willing to work. The Claimant failed to attend investigation hearings on 15 and 29 April. The Claimant was then invited to a disciplinary hearing. In the course of this meeting the Claimant confirmed that he could in principle access the bonus information of individuals and that he had in fact seen the bonus information of his colleagues. He said he had never been told that he could not use confidential information. At this meeting the Claimant produced a grievance alleging Mr Rados had discriminated against him. Its contents were inextricably linked with the disciplinary allegations. The grievance alleged discrimination but made no mention of any protected characteristic.

16. At the reconvened hearing the Claimant's grievance was considered in further detail. The Claimant was subsequently notified of the decision to dismiss and a detailed letter of dismissal was provided to him. The Claimant appealed against the decision to dismiss which led to an appeal hearing. A detailed outcome letter rejected the appeal. The grievance was considered at the hearing on 11 May 2016 and in a separate deliberation by an independent person, Daniel Balmer. The Claimant was invited following the initial meeting to provide further evidence or representations and failed to do so. His grievance was dismissed on 17 August 2016. The Respondent has not been able to understand the Claimant's holiday pay claim. The Respondent has paid outstanding days. The records of leave are clear as other rules governing taking of holiday and carry forward. The Claimant has failed to explain how the rules can be circumvented.

17. The Respondent's submission deals with strike out emphasising the distinction between breaches of orders and "wilful and contumelious default". The question is whether it is just to allow the Claimant to continue to have access to the tribunal for his claim. The Respondent referred to ***Rolls Royce v Riddle [2008] IRLR 873***. In ***Harris v Academies Enterprise Trust [2015] ICR 617*** in which Mr Justice Langstaff stated:-

> "A party that does not observe an order is at the mercy of the tribunal. Though in many cases an unless order will be granted before there is a strike-out, it is not an essential prerequisite of an application to strike out and is no guarantee that one will not follow in an appropriate case."

The Respondent submitted here that the Claimant had engaged in wilful default. He had offered no reason for disappearing from the litigation for over four months. There can be no confidence that compliance will be achieved in sufficient time to ensure the hearing date of October 2016 will be effective.

18. The second ground of the Respondent's application related to strike out on the prospects. After dealing with the House of Lords case of ***Anyanwu v South Bank Student's Union [2001] 1 WLR 638***

emphasising the fact sensitive nature of discrimination cases and the importance as a general rule of deciding these cases only after hearing evidence, the Respondent submitted that if there is no meaningful dispute on the facts there is no good reason why a discrimination complaint should proceed to a futile hearing.

19. The Respondent submitted strike out is appropriate where there is no core of disputed facts. The Respondent cited Mrs Justice Langstaff in ***Chandhok and anor v Tirkey [2015] ICR 527***:-

> "There may still be occasions when a claim can properly be struck out ... where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic ..."

Further appellate authority indicates that the Claimant's case can be taken at its reasonable highest at which point a decision whether it can succeed may be made. Finally, the Respondent submitted that it would be appropriate if the case is not to be struck out to make deposit orders.

20. The Respondent supplied for use on this hearing an extensive bundle of documents.

21. In oral submissions the Claimant appeared to put forward a case that his Line Manager, Miguel Rados is the individual against whom the Claimant primarily brings the claim. While strongly resisting the temptation to embark on a trial of the case on this preliminary hearing it is clear that the Claimant cannot succeed on the basis of that contention. The Claimant received a first written warning for continued lateness on 12 May 2014 from his then line manager, Nathalie Lukas. Mr Rados emphasised the need for the Claimant to comply with requirements to attend the office punctually on 4 December 2015. The Claimant was invited to a disciplinary hearing on 29 January 2016. Mr Rados set in train the process but had no function as a decision maker after that point. The charge for the warning was distribution of information without ensuring that only the appropriate employees had access, sharing information with unauthorised employees, not taking personal responsibility for its proper use and not using judgment to determine who Unilever's information should be shared with. The Claimant was also charged with failure to follow reasonable managerial request and repeated unauthorised absence. Comprehensive investigation reports had been undertaken. Fiona Lloyd, a finance manager in Gloucester, sent an e-mail to the Claimant on 1 September 2015 to tell him only to send a sensitive payroll report to herself and to specific others. Contrary to this instruction the Claimant sent the report to a previous recipient Matt Bacon by e-mail on 23 September. On the same day Fiona Lloyd again confirmed that Mr Bacon should be removed from the distribution list. The report was sent again by the Claimant to Matt Bacon on 22 October. On that day Mr Rados confirmed to the Claimant that Matt Bacon should be removed from the

list. The Claimant sent the report to Matt Bacon again on 23 November 2016. The conclusion was that the Claimant had ignored clear written instructions from both Fiona Lloyd and Miguel Rados.

22. Mr Rados had not been involved in the decision to dismiss which was taken after the Claimant disputed the bonus awarded to him by making use of information not available to others but available to him thorough his position.

The Law

23. In the case of ***Hak v St Christopher's Fellowship UKEAT/446/14*** the then President of the Employment Appeal Tribunal, Mr Justice Langstaff set out an authoritative decision on the question of striking out on the merits. He referred to the case of ***Balls v Downham Market High School and College [2011] IRLR 2017*** regarding the correct analysis to be applied to the test of no reasonable prospect. He analysed whether in that case there existed the exceptional circumstances where a claim should be struck out as having no reasonable prospect of success even though the central facts were in dispute.

24. In relation to strike out for non compliance the authorities identify the precondition is wilful and contumelious default. Here the default is from 3 March 2017 to 5 May 2017 and continuing.

Conclusion

25. In relation to the strike out on merits the Claimant has not supplied any further material following the hearing which took place before Employment Judge Baron. In the extensive text supporting his claim form he makes no mention of race discrimination. He does refer to his Line Manager, Mr Rados discriminating against him and that he accused Mr Rados of this on 22 March 2016 and he states that the allegations made against him arose from accusing Mr Rados of discrimination. The Claimant makes clear in the claim form that he made his allegation before he was dismissed. In the Grievance sent on the 10 May the Claimant indicates he wished to raise a grievance based on his belief that his Line Manager Miguel Rados has discriminated against him. On the second page of the letter he says:-

> "I do not feel that I have been assessed fairly and feel that I have been discriminated against."

He also states on the same page:-

> "On 22nd March 2016, I accused Miguel of discriminating against me..."

Insofar as the Claimant sought to bring a claim of race discrimination that was expressly stated in the text supporting his application to the Tribunal where he said: “In my grievance letter sent to Unilever I set out some of the occasions where I felt Miguel Rados discriminated against me because of my race.”

26. It appears that the claimant thus did not mention race at the time of his grievance. I accept the difficulty a claimant may feel in making the assertion that there has been discrimination on grounds of race. However it is also fair to say that the term “ discrimination “ has in common parlance a meaning more akin to poorly treated that the technical use to which it is put in the context of the Equality Act. In the hearing on 6 January 2017 Employment Judge Baron identified as stated above components related to the Claimant’s bonus, cancellation of an appointment, a grade 2 marking, false allegations said to have been made, refusal of flexible working, cancellation of a meeting, change the wording of an e-mail, instigation of a disciplinary process, the production of dishonest statistics, a delay in dealing with the Claimant’s grievance and consideration of the grievance without an oral hearing.

27. On the other side of the scales the Respondent places insubordination in relation to confidential information, directly evidenced by undisputed documents, a clear disciplinary track regarding poor attendance, and misuse of confidential information in support of the Claimant’s grievance regarding his bonus level.

28. While it is recognised that direct evidence of discrimination is rarely available the disciplinary tracks identified in this case do not involve Mr Rados as a decision maker and he, as the Claimant’s line manager, is the only target of the Claimant’s allegations of discrimination. The allegation does not extend to those who decided on the sanction to be imposed on the Claimant.

29. The Tribunal offered the Claimant an opportunity to supply the detail which was absent from his claim form. This is not the case where the Claimant was deficient in his response but a case where the Claimant completely failed to respond. While the power to strike out a claim on the grounds that it stands no reasonable prospect of success must be used sparingly it is hard to see how there could be a more stark example of a case which should be struck out on that ground. The allegation of discrimination on grounds of race is simply not coherently formulated by the Claimant. Despite intervention by an Employment Judge and the Respondent’s comprehensive request for further particulars the Claimant has failed to respond and failed to remedy the evident deficiencies which he has accepted in his claim as pleaded.

30. My conclusion is accordingly that the correct course of action is to dismiss the discrimination claim on the grounds that it stands no reasonable prospect of success.

31. If I am incorrect in that conclusion it has also to be said that the Claimant has failed to comply with the Tribunal orders. He has treated the process with contempt. He has not been engaged in other employment or indicated anything that is an alternative claim on his time. He has completely failed to comply with the order to supply particulars to the Respondent. He has not objected to the ambit or level of detail required in the request. He was offered an opportunity to indicate why he was unwilling or unable to provide particulars in the order of 6 January 2017 and has failed to do so. It follows that the decision to strike out of the claim of discrimination on the grounds that it stands no reasonable prospect of success is amply supported in this case by the Claimant's complete failure to comply with the Tribunal orders or seek further time.

32. Turning to the Claimant's claim of unfair dismissal the Claimant appears to accept that the Respondent had a potential ground for dismissal. The Claimant had a written warning for lateness on 12 May 2014, which remained on his record for 9 months. He received a final written warning on 2 March 2016 for gross misconduct in relation to distribution of information in the form of a confidential report sent to someone to whom he was expressly told not to send it and he received a second warning for persistent lateness. Following concerns about his misuse of confidential information in challenging the level of bonus given to him a further disciplinary hearing took place which upheld the allegations that his conduct amounted to a breach of the Respondent's code of business principles and an express clause prohibiting the use of confidential information for personal gain. The Claimant asserted that he had another source for the information which he had used. He failed to make clear the basis for that contention. It was found that he had accessed payroll information for his own purposes and not for the purposes of the business.

33. This is a claim of unfair dismissal where the Claimant cannot be said to stand no reasonable prospect of success since the hearing of the case requires analysis of the decision making process of the Respondent's decision makers. Given the background it is however difficult to see how he stands more than little reasonable prospect of success given the large body of undisputed facts including his disciplinary track and his admission that he accessed confidential information, namely bonus information for other staff in the payroll system. This accordingly is a case where a deposit would be appropriate and in that context I take into account the level of his current earning which he places at zero and the fact the Claimant lives with his partner who owns her property.

34. My conclusion is that the appropriate level of deposit in this case is £250. In the event that the Claimant pays the deposit and loses the case at hearing on the grounds identified above the rules provide that he is to be taken as acting unreasonably and it is consequently likely that he will be required to pay costs to the Respondent.

35. Finally, I turn to the Claimant's claim in respect of holiday pay. The Claimant argues that he was entitled to carry forward a substantial number of days from 2015 into 2016. He has not provided any basis for that contention. The Respondent in accordance with policy allowed the Claimant to carry forward the maximum of 5 days and paid him on that basis plus his accrual in 2016 less the holiday he had taken when he was dismissed.

36. It is not possible to say at this stage that that claim stands no reasonable prospect of success but it does appear that in the absence of further information and on the basis of what the tribunal has received to date it stands little reasonable prospect of success. Again a deposit is appropriate in the amount thereof is to be £250 for the reasons outlined above.

Regional Employment Judge Hildebrand

Date 8 June 2017

NOTE ACCOMPANYING DEPOSIT ORDER
Employment Tribunals Rules of Procedure 2013

1. The Tribunal has made an order (a "deposit order") requiring a party to pay a deposit as a condition of being permitted to continue to advance the allegations or arguments specified in the order.

2. If that party persists in advancing that complaint or response, a Tribunal may make an award of costs or preparation time against that party. That party could then lose their deposit.

What happens if you do not pay the deposit?

3. If the deposit is not paid the complaint or response to which the order relates will be struck out on the date specified in the order.

When to pay the deposit?

4. The party against whom the deposit order has been made must pay the deposit by the date specified in the order.

5. If the deposit is not paid within that time, the complaint or response to which the order relates will be struck out.

What happens to the deposit?

6. If the Tribunal later decides the specific allegation or argument against the party which paid the deposit for substantially the reasons given in the deposit order, that party shall be treated as having acted unreasonably, unless the contrary is shown, and the deposit shall be paid to the other party (or, if there is more than one, to such party or parties as the Tribunal orders). If a costs or preparation time order is made against the party which paid the deposit, the deposit will go towards the payment of that order. Otherwise, the deposit will be refunded.

How to pay the deposit?

7. Payment of the deposit must be made by cheque or postal order only, made payable to HMCTS. Payments CANNOT be made in cash.

8. Payment should be accompanied by the tear-off slip below or should identify the Case Number and the name of the party paying the deposit.

9. Payment must be made to the address on the tear-off slip below.

10. An acknowledgment of payment will not be issued, unless requested.

Enquiries

11. Enquiries relating to the case should be made to the Tribunal office dealing with the case.

12. Enquiries relating to the deposit should be referred to the address on the tear-off slip below or by telephone on 0117 916 5015. The PHR Administration

Team will only discuss the deposit with the party that has been ordered to pay the deposit. If you are not the party that has been ordered to pay the deposit you will need to contact the Tribunal office dealing with the case.

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DEPOSIT ORDER

To: **HMCTS**
Finance Support Centre
Spur J, Government Buildings
Flowers Hill
Brislington
Bristol
BS4 5JJ

Case Number _____

Name of party _____

I enclose a cheque/postal order (*delete as appropriate*) for £_____

Please write the Case Number on the back of the cheque or postal order