Case Number: 2214605/2023

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R Wilson	**v**	(1) National Union of Maritime and Transport Workers (RMT) (2) Ms S Jensen

Heard at: Central London Employment Tribunal **On: 6-7 March 2024**

Before: **Employment Judge Norris, sitting with Members Ms L Moreton and Ms S Brazier**

Appearances
For the Claimant: Mr C Fray, Equality Officer
For the Respondent: Mr S Brittenden, Counsel

JUDGMENT

The Tribunal's decision is as follows:

1. The Claimant's claim is dismissed on withdrawal against both Respondents named above.
2. The Claimant is ordered to pay the sum of £10 towards the Respondents' costs.

REASONS - COSTS

1 The claim was withdrawn against both Respondents in "Claim B" (the Second and Tenth Respondents in the claim overall) straight after lunch on day two of the Hearing. The Respondents immediately made a joint application for the costs of Counsel's attendance at the Hearing in the sum of £4,000 (brief fee plus one refresher).

2 The application was made orally under Rule 76(1)(a) and/or (b) of the Rules (Schedule 1, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013) on the basis that the proceedings had been conducted unreasonably and that the claims stood no reasonable prospect of success. Those assertions had been made from the outset (including in the ET3) and had been repeated at intervals including, we understood, in a recent costs warning letter.

3 Following a short break, the Claimant's response to the application through his representative Mr Fray was that evidence emerged in cross examination which demonstrated the claims were unlikely to succeed and they were promptly withdrawn. It was his case that he was not and could not reasonably have been aware of the lack of prospects until cross examination of the Respondent's witnesses for the following reasons:

a) In relation to Ms Jensen, until Mr Fray saw the email of appeal that Ms Jensen had drafted for the Claimant and emailed to him and Mr Porter on 8 February 2023, he had not appreciated that the Claimant had changed the basis of the strategy formulated by Ms Jensen to progress his appeal against dismissal. That email had not been included by either side in the bundle and was produced by the Respondent as an additional item on the morning of day one of the Hearing;

b) In relation to the RMT's refusal to give legal assistance, until it was appreciated that the Tribunal would not be considering evidence relating to the period after 14.52 on 28 February 2023, the Claimant did not know that his claim against the Union was bound to fail.

4. In relation to the first point:

4.1 We observed at the beginning of the Hearing that it was apparent from the witness statements there was a single author of all three statements that had been exchanged on behalf of the Claimant. That is not to say that statements cannot be drafted by a representative or that there cannot be similarities between the evidence that different witnesses for a single party will have to give. The Tribunal is indeed very familiar with the concept and considered that it is entirely normal for a represented party to have assistance in drafting, to a greater or lesser degree.

4.2 Specifically however in relation to this application, we noted at paragraph 12 of the Claimant's witness statement, the following: "My appeal letter should be the one I have drafted and I have seen no letter drafted on my behalf by Sanna Jensen". This was clearly incorrect insofar as the Claimant was concerned. He was the recipient of an email in which Ms Jensen forwarded appeal wording for him to send Network Rail management on a holding basis while she was on annual leave.

4.3 Therefore it was clear that Mr Fray had drafted the witness statement from his own perspective and that if the Claimant read it at all before exchange, he did not do so thoroughly enough. Not only had the Claimant himself (and his witness Mr Porter) seen the draft he had been sent by Ms Jensen, he had used it, with alterations and sent it on to Network Rail. Those alterations were what had led to Ms Jensen responding that it was she and not Mr Porter who was running strategy, if she was to continue to represent the Claimant.

5. So far as the second point was concerned, on the morning of day one, the Tribunal had been at pains to understand the scope of the allegation against the RMT, and specifically the cut-off point at which the evidence should be considered. Notwithstanding that, we had invited Mr Fray to make an application on day two to

amend the list of issues to incorporate the subsequent review but he had declined (on instruction from his client).

6. We made the following observations:

6.1 Witness statements should contain all the evidence relevant to the issues in the case that a party can give. They should not contain speculation, hypothesis, opinion, directions to the Tribunal, details of legal advice given by the party's representative, submissions or facts that are irrelevant to the case before the Tribunal. Background evidence is of course relevant to a point, to establish context. The contents of these witness statements however went well beyond relevance, and because they were drafted by Mr Fray and imperfectly proof-read by their supposed makers, even in the relevant evidence that they did contain, there were errors.

6.2 The parties were equally to blame for not putting Ms Jensen's original email in the bundle or indeed in the supplementary bundle (for which there should have been no need). However, the fault for Mr Fray never having seen that email lay fairly with the Claimant or indeed with Mr Fray himself for never having procured a copy. It was clear from what Ms Jensen said in the follow-up email (and in her witness statement) that her original draft did not contain references to CCTV and/or discrimination and they did not form part of her proposed strategy; and this was what had provoked her response regarding the Claimant's ongoing representation.

6.3 Mr Fray now says that that original email from Ms Jensen was the factor that led him to conclude the claim against her stood no reasonable prospect of success. Since he was on notice from the outset that that email existed, this supported the Respondent's case that the claim against Ms Jensen was always bound to fail.

6.4 As for the claim against the RMT, it appears the question on day one (about the point at which the Tribunal would assess whether there had been discriminatory conduct by the Union) had been misunderstood by Mr Fray. On day two, he was under the impression that it was the entire process that fell for consideration. However, the Tribunal had specifically confirmed before starting to hear the evidence that it was only the initial decision of 28 February 2023 that was said to have been tainted by race discrimination; that is what is clear from the list of issues, it is what is clear from the ET1 and it was clarified with Mr Fray himself as well as the Respondent's representative. Mr Fray had also declined the invitation to make an application to extend the period under consideration even though we had given him time to formulate his arguments in that regard.

6.5 By the point the initial advice was sent to the Claimant on 28 February 2023, the comparator he relied on internally, a white colleague who was not only not dismissed but was only given a written warning for what is said to be similar or the same conduct, had not had her disciplinary hearing and therefore could not have been taken into account as a proper comparator by Ms Henderson in her analysis of the Claimant's prospects of success. To the extent that the same comparator <u>could</u> be taken into account, Ms Henderson had set out in her advice letter the possible permutations, which depended on outcome. There was, on the basis before us, no evidence to

suggest that the reason for the RMT's original refusal of legal assistance was race.

7. Therefore we accepted that the claims against both Respondents had no reasonable prospect of success and, further, that the manner in which the proceedings had been conducted was unreasonable. However the Tribunal cannot make a wasted costs award against a representative who is not acting for profit, as was the case here (Rule 80(2)).

8. We had considerable sympathy with the Claimant so far as his obvious dismay was concerned, that having paid his union dues and refused to cross picket lines during his long career with Network Rail, at the point when he, as he put it, put out his hand for assistance, he was rejected by his Union. He made, we accepted, a claim in good faith.

8. Nonetheless, as the Claimant should have been advised, dismay does not amount to a valid basis for a race discrimination claim. Nor does what he described as a "feeling" of race discrimination. The authorities are clear that there must be more than a difference in treatment and a difference in status. There must be an evidential basis for a claim, before the burden of proof will shift.

9. In the circumstances, we concluded that while there had been unreasonable conduct and no reasonable prospect of success in Claim B, the fault did not lie with the Claimant but with his representative. We were also mindful that costs in the Tribunal are exceptional rather than the rule and we took into account the Claimant's limited means. We therefore ordered that he pay a contribution to the Respondent's costs in the nominal sum of £10.

10. For the avoidance of doubt, nothing in this decision or reasons impacts directly on "Claim A", which has already been listed against the remaining Respondents (and case management directions made) for a Hearing in September 2024.

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Employment Judge Norris
8 March 2024

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Sent to the parties on:

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For the Tribunal:

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