mf

EMPLOYMENT TRIBUNALS

Claimant: **Mr W Khan**

Respondent: **Laker Mechanical Ltd**

Heard at: **East London Hearing Centre** **On: 19-20 January 2017**

Before: **Employment Judge Prichard** **Members: Mrs S Jeary**
Mr G Tomey

Representation

Claimant: Mr R Bailey (counsel, instructed by MartynsRose Solicitors, London E8)

Respondent: Mr C Bourne (counsel, instructed by Gateley plc, Manchester)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

(1) The claimant was unfairly dismissed. There is no basic award.

(2) Under the principle in *Polkey* the claimant will be awarded 2 weeks net pay by way of compensatory award.

(3) The claimant is entitled to recover £1,200 tribunal fees paid from the respondent.

(4) The claimant's claim for race discrimination fails and is dismissed.

(5) By consent the claimant's claim for breach of contract (extra notice pay) succeeds. The claimant is awarded £1,124.16.

(6) Also by consent under section 87 of the Employment Rights Act 1996 the claimant is awarded £1,454.83 (difference between statutory sick pay and notice pay payable).

The above totals are net.

REASONS

1 The claimant, Mr Waheed Khan is currently 36 years old. He is a part qualified accountant. It appears from his CV he was educated to GNVQ level in Business Studies in East Ham College (near where he still lives) at the age of 19. He bas a BA in Accounting and Finance from the University of Greenwich and he is part exempted by reason of that BA from papers required for the Association of Chartered and Certified Accountants - ACCA. He had various posts as an accounts assistant until he was employed by the respondent.

2 The respondent's predecessor was one of the several Birchcroft companies. He joined on 15 February 2010 as the company's accountant with a salary of £24,000 but was rapidly promoted. He proved himself. He had to work particularly hard. Ever since he has been with the company the company has been in deficit, financially. They were carrying phenomenal debts. There was a £350,000 overdraft with HSBC. £625,000 was owed to HMRC for unpaid VAT and PAYE. Creditors were owed approximately £425,000. Subcontractors were owed over £300,000.

3 Originally the company's turnover had been in the region of £6m per annum; at the time it was taken over by the present respondent it was only £2m.

4 This was interesting evidence given by the claimant. It explained why he had become such a skilled and highly paid accountant at £50,000 per annum. He had developed a specialism in deficit financing. There is no question the claimant must have been highly competent at juggling all the necessary needs of Birchcroft, from invoicing, pursuing aged debt, and paying subcontractors.

5 The Director Linda Curtis and her partner John Bishop were extremely grateful to the claimant for clearing up an ugly financial situation, guiding them through the closure of a plc company in 2011, and then through HMRC VAT and PAYE / P11D inspections. The claimant touchingly described Ms Curtis as a mother figure to him.

6 However, in late 2015 and early 2016 Birchcroft was communicating with insolvency practitioners culminating in a deal under which Laker Mechanical Ltd purchased them from a pre-pack insolvency on Tuesday 23 February 2016.

7 Laker Mechanical Ltd runs similar business services. Their head office is near the NEC in Birmingham. They provide building management and maintenance work services in England, Wales, London, and the South East - to the commercial and private sectors with a strong emphasis on social housing, health care, emergency services. They ran a call centre where repair jobs are raised on property, particularly in social housing. The 2 companies had dealt with each other in the past but not any great extent.

8 The take-over was a substantial risk for the owners of Laker Mechanical Ltd. The 2 company directors who gave evidence to this tribunal, Mr Chris Cheshire and Mr James Lakey, were guarantors under the sale agreement of 23 February 2016. As usually happens with a pre-pack insolvency they knew little about the company that

they were taking over at the time.

9 Previous to the takeover on 11 February, the claimant had sent them a list of the full Birchcroft Integrated Services Ltd payroll. There were 32 names there including his own, stating job titles, date of birth, national insurance number, holiday entitlement, start date, salary and address.

10 The respondent, as we have been told, has an extremely slimmed down accountancy function. Mr James Lakey is himself a part qualified CIMA accountant, similar to the claimant. He has a BA in Accounting and Financial Management from Loughborough University.

11 Laker Mechanical is a family company. The name Laker derived from two names. One was Lakey, Mr James Lakey's father. Mr James Lakey took over from his father when his father's health was failing. Mr Cheshire came into the company through running a company himself called Pro Team. He is qualified as a Charted Building Surveyor and he has owned companies for the last 20 years. Apart from his business interest in Laker he is a non-executive board member of ASRA, a Leicester based Asian social housing provider.

12 As this is a race discrimination claim it is also relevant to mention he, a white UK individual, is married to a Sikh woman. At one stage during the hearing he mentioned he was to be unavailable for a certain period because he was going to spend 2 weeks in the Punjab attending his brother-in-law's wedding.

13 The claimant is of Pakistani origin and from his description he sounds to be first generation in the UK.

14 The respondent's directors had discussed a role going forward for Mr Khan with the Laker directors. The respondent's accountancy function was slimmed down. They had James Lakey who was sole in charge, as well as being an Area Director for the Midlands. Under him worked Michelle Sykes and Sophie Murray two administration assistants who were both paid an annual salary of £22,500. Other than those, the majority of other senior managers in Laker have trades backgrounds. That is important when it comes to considering the needs of corporate and individual clients.

15 Laker Mechanical now has a payroll of approximately 180 which includes the 30 or so from the merged Birchcroft business from Laindon in Essex. There are many independent subcontractors as well.

16 The respondent's IT system is Summit 3000 which is bespoke to them. It enables that slimmed down accountancy function to work. It interfaces with clients and subcontractors electronically and automatically. The Birchcroft IT systems were nothing like as sophisticated or suitable for the task. Therefore the accounting function, carried out by the claimant, was far more labour intensive.

17 Mr James Lakey lives near Rugby as does Mr Darren Newman the Director who heard the claimant's appeal against redundancy. Mr Chris Cheshire lives in Brentwood. Therefore he was nearest to the Laindon/Basildon office of Birchcroft.

18 As the sale approached Mr Khan described how he was getting cold feet as there had been meetings including the directors John Bishop and Linda Curtis with some of the Laker people in which he was not being involved. In the past when the company had had considered insolvency he had been closely involved in the process. Despite the fact that Ms Curtis had personally assured him they would never let him down, he was apprehensive. In a familial way she had said that she, the claimant, her life and business partner Mr Bishop, and her daughter with her ex-husband would stay together. (Her daughter is Lucy Curtis who worked as Contracts Liaison Manager within Birchcroft).

19 That used to reassure him in the past but this time it did not. We accept the evidence that he had been pressing her for some time as to what the prospects were for him when the company was sold in the insolvency, particularly if the company was sold to a business that was reasonably buoyant and solvent. His well-honed skills in deficit-financing would no longer be needed.

20 His fears were confirmed when on 23 February, the same day as the purchase, he had what we consider to be a “meeting” in which Mr Cheshire informed the claimant that he would be redundant. The claimant not given his notice at that stage but the statement seems to have been categorical and not as provisional as it should have been.

21 The claimant has, since the occasion, denied that the discussion or “meeting”. “Meetings” are notoriously relative. The whole debate during this hearing about whether it amounted to a meeting or not was semantic and unhelpful. Mr Cheshire stated that it was 45 minute; the claimant says it was less than 2 minutes. Their estimates varied throughout the tribunal hearing.

22 The claimant was subsequently sent a letter dated 23 February by Chris Cheshire. It was written by Chris Cheshire but it was in the form of a template that was supplied to the respondent by their HR Consultancy Service EHSP. Present at the hearing was Linda Curtis.

23 The claimant states that the letter of 23 February is substantially untrue and completely mis-portrays the discussion they had. It had not been formal and did not merit the description of a “meeting”. The letter states that:

> “We will consult with you for one week as from the date of this letter and the consultation will end on 1 March 2016 … If no alternative proposals are agreed I will invite you to a meeting to be held … Laindon … at 9am on 2 March to discuss the details of your termination package and notice period.”

No formal consultation meeting was proposed and it is not clear from this letter how that consultation was to take place, if at all.

24 We have heard much fiercely contested emotionally charged evidence about the process. The letter seems to say it all. This is just the sort of case where there should have been a formal consultation meeting. A meeting, after the event, to spell out details of the termination package and notice period is a complete waste of time. These things can be set out on paper. There is no point in having a meeting, and little point in minuting it because it is a <u>post</u> decision meeting not a decision-making

consultation meeting. It is clear from the timings in the letter, even though they shifted later; the consultation period was to end on the day before the announcement meeting.

25 In evidence both Mr Lakey and Mr Cheshire stated that the meeting on 2 March (which was reschedule from 1 March) was essentially a consultation meeting but that is certainly not the way the letter put it.

26 The respondent may wish to have a word with their HR consultants about this. Generally in redundancy unfair dismissal law there should always be a consultation meeting, whatever the situation. Sometimes thee is little to say in consultation, but the present case is a good example of one where consultation was definitely called for. There was potentially a lot to discuss, and a lot of unknowns. The respondent knew next to nothing about Mr Khan and Mr Khan knew next to nothing about their wider business and opportunities within it.

27 To the claimant's mind, and we agree with him, he was told, not provisionally, that he was redundant. There might be some semantic distinction between a role being redundant and a person being redundant. Connoisseurs of employment law might appreciate that distinction but not employees. This was the first experience the claimant had had of redundancy. It was a sudden introduction.

28 He says he was shocked and we are not surprised to hear that. It was emotional. He stated that he was crying in his office. Linda Curtis came into his office and she was crying as well. He also stated that his blood pressure shot up. It was 175 / 105. Considering he is athletic (he played cricket at County level), it was frightening. Ultimately 2 weeks later he was prescribed Ramipril.

29 Following that meeting the claimant never sought to challenge the content of this letter of 23 February stating that it misrepresented the nature of the meeting and asking the respondent to consider putting the brakes on this process which had been set at a remarkably speedy pace. The respondent knew perfectly well the options they had for accommodating Mr Khan into their organisation, given his specialist skill set. The claimant did not know that as well. It may have seemed obvious and a virtual certainty to the respondent that they would not need his services, particularly when after a week they had established what business they had left of the Birchcroft work in progress and whether, as often happens, they needed the accountant to stay on for a while to achieve continuity, or to explain the workings of various of the Birchcroft contracts. It was clear to them that they did not need the claimant beyond the period of notice to which the claimant was entitled. He had been working there for 6½ years.

30 Following the meeting we accept as a fact, contrary to the claimant's contention, that Mr Cheshire did not go back to the Laindon office before his next visit on 1 March when the final meeting in the redundancy process took place and the claimant was given his notice of termination. However Mr Lakey was there on 25 and 26 February. We accept Mr Lakey's evidence that there was discussion between him and the claimant specifically about his redundancy. We would have been astonished if the claimant, had not pressed him on the redundancy question and what it meant and what roles might be available for him. Possibly in his shock he has either forgotten or blotted out these memories. He remembers expressing admiration to Mr Lakey for his Ferrari (which is in fact a Porsche). The claimant seems to have assumed that Mr

Lakey was a fully qualified CIMA Chartered Accountant. Again perhaps he has remembered that wrong. These encounters were of some significance because they are put forward by the respondent as evidence of "consultation". They were not in any formal sense "meetings" they were just casual encounters and discussion in the open plan office.

31 The next "meeting" was 1 March when Mr Cheshire was coming to the office. It had been brought forward because Mr Cheshire was due to fly to the Punjab on 4 March and wanted to deal with this outstanding part of the process. In his evidence to the tribunal he has characterised that meeting prospectively as a consultation meeting but that was not how it was described in the letter of 23 February. It was clear from their witness statements there was a good deal of pre-decision on the "role" over the telephone before the face-to-face meeting between Mr Cheshire and the claimant.

32 Mr Cheshire said he may have been slightly off his guard because the claimant was so agreeable and they talked about cricket and other things. However, as part of the meeting, as well as giving him outline details of his entitlement (not calculations), he offered a copy of the claimant's CV to a friend and connection of his in a social housing organisation – One Housing Group – Mr Trevor Lawrence. We have seen the email thread where he did that.

33 It is worth mentioning that in the meeting Mr Cheshire explained that they had previously done something similar during the Pro Team merger with Laker. A Financial Controller's role had become redundant. That was one of the "synergies" (often used in business as a euphemism for redundancies). Mr Cheshire confirmed that the meeting lasted about 45 minutes and they did also talk in a friendly way about the Punjab because the claimant's family comes from over the border in Pakistan.

34 Subsequent to that meeting when the claimant sent his CV, he attached it to an email that reads:

> "Hi Chris
>
> Many thanks for your time today, as per our conversation earlier please find attached my CV. Have a great time in Ludhiana."

35 The claimant in this hearing has said that the meeting was about 30 seconds. The tribunal cannot accept his account. Again, the discrepancy may be explained by the claimant's shock over the alarming speed of this whole process and the way in which his employment of 6½ years had come to a very abrupt end, apart from his notice period which he worked. It is unlikely that he would have thanked Mr Cheshire for his "time" if it was a 30 second encounter.

36 Doing the best we can we consider the claimant could easily have muddled the times when Mr Cheshire asked him if he was looking for other work. We consider it is far more likely to have been after this date, sometime in April, than in the week between 23 February and 1 March when Mr Cheshire says he was not in the office (Punjab). We do not read anything into his question. It was a perfectly pleasant and concerned question to ask.

37 On 26 February the claimant had been given a copy of the respondent's redundancy policy. It is refreshingly short and to the point and easy to read.

38 We state, without any hesitation, that the right to time off to seek alternative employment is conditional upon the claimant requesting such leave, particularly when they have been informed of that right in a readable, short, and comprehensible policy. It needs to be usually for specific reasons rather than general but it might be more general say a day off to register with agencies. This complaint of the claimant's has no legal traction at all. Unfortunately the claimant has not found employment since. We have been informed he plans to set up business on his own.

39 The claimant's health, which was not good then, deteriorated badly to the point that he was absent from work because of his raised blood pressure between 1 and 18 April. There was a hitch with the termination letter. The letter was sent to the claimant following the meeting of 1 March and was dated 4 March.

40 Because the respondent's systems were down for a week the letter was not eventually sent until 14 March by email with an apology for the delay. This was one of the agreed facts, and concessions. Because the claimant was not given definite notice on 1 March. It was only 14 March he was told that his notice would expire on 15 April 2016 and therefore he was owed an extra amount notice pay.

41 That concession was rightly made.

42 The other concession was that during the period of the claimant's sickness he was paid statutory sick pay which was his contractual entitlement. In a period of notice under section 87 of the Employment Rights Act full pay has to be paid in full for the statutory minimum notice period, regardless of whether the employee is at work or off sick. That concession was legally correct.

43 Subsequently the claimant asked for an extension of the appeal deadline. He obtained it and appealed by email of 21 March 2016. Mr Darren Newman, another director with a technical background was charged with conducting the appeal. In the tribunal's view he conducted the appeal conscientiously and well. He tried to cover certain aspects of the process that had not been covered previously. There was discussion with the claimant about the options within Laker. Mr Newman questioned the claimant about his skill set and where he might be of use in the Laker organisation.

44 Despite it being a good appeal process, in the tribunal's view it was too late to have had a reasonable chance of reversing the decision which had been made, even if they had discovered a feasible role for the claimant. The dismissal process had gathered too much momentum.

45 There were questions about pension which took up a lot of time and were ultimately not answered by the claimant. We need spend no time on that. The respondent, once again, was poorly advised by their HR consultants. Pensions are not an issue after a TUPE transfer because of Regulation 10 of the Transfer of Undertakings etc Regulations 2006. The claim was not pursued here at the tribunal for that reason.

46 The claimant stated Ms Curtis had promised him 2 weeks extra paid holiday and a £2,000 bonus for his work on steering Birchcroft through the HMRC investigations, which had finished in September 2014. This claim seems to have been withdrawn during the course of this tribunal hearing.

47 There were two emails from Linda Curtis linking this payment to a once in the lifetime trip to Mecca. The claimant was planning to go on Hajj. In the end the claimant did not go because his wife had a caesarean and he had to stay at home.

48 The claimant states that it was wrong to equate this bonus for the HMRC investigations with the Hajj trip of a lifetime. But he stated that he did not want to go behind the emails of Linda Curtis as it might make her position difficult. The tribunal does not understand the claimant's stated position on this at all. It was bizarre. However, nothing hangs on that as the claimant elected not to pursue this particular money claim, and so he effectively withdrew it.

49 Unlike the previous meetings, Darren Newman's appeal hearing was fully minuted and the claimant was sent a set of those minutes. Although the claimant in his statement says the appeal process was worse than the original process the tribunal does not see it that way.

50 The claimant was offered a vacancy as an administrative assistant at £18,000 per annum, unsurprisingly he did not take it and he confirmed in evidence that he would not have taken it. He also says that if he knew then what he knows now and how long he would be unemployed for, he might have considered taking that role to tide him over while he searched for work. Many claimants have said this same thing before tribunals.

51 At his appeal the claimant was represented by the person who is his solicitor in these proceedings – Mr Aina of MartynsRose. The respondent knowing that he was legally qualified did not object to that. In our experience most employers do object, particularly to lawyers, or anyone who is not either a trade union rep or a work colleague, which is the only representation right guaranteed by statute.

Race Discrimination

52 It was only latterly, at the appeal hearing, that the claimant suggested that his termination might be due to race discrimination. The first mention of it was in a letter he sent to Darren Newman on 20 April. There he only said: "I felt discriminated as to the way I was selected for redundancy and treated by the whole team and the process." And this is more or less what Mr Aina submitted on behalf of the claimant at the conclusion of the appeal hearing. In other words he linked the discrimination to the process, rather than the outcome, his dismissal. Note that no protected characteristic was mentioned. It might have been a colloquial everyday use of the word "discriminated".

53 Mr Bourne has taken a pleadings point on this stating that criticism of the process as an act of discrimination is not the pleaded case and therefore the claim must fail. This is an over-technical "pleading" argument, even if he might be right as to the way the list of issues and the ET1 are worded.

54 Mr Bailey argues that you cannot decouple the process from the outcome; we disagree. In any event this is an academic argument. We consider that the claimant has come nowhere near raising a *prima facie* case of race discrimination such that the burden of proof might be displaced. There is overwhelming evidence that the reason the claimant was dismissed as quickly as he was, was that it was clear to the respondent that there was no role for a specialist accountant in the merged organisation. Even if there had been a pool the other person in that pool was Mr James Lakey, a person of similar qualification but he, as the owner of the company, could not have been chosen, as a matter of fact and law.

55 The claimant at one time in this tribunal hearing, in our view mistakenly was saying that his dismissal itself was an act of discrimination and that a white accountant would not have been terminated but would have been retained. In the final analysis he stopped short of saying that. We had sympathy with him that the process was rightly seen as abrupt and too brief. It is not clear to the tribunal that that speed was necessary or justified (unless it was Mr Cheshire's trip to the Punjab). The matter could have been dealt with more sympathetically and more enquiringly. There were things to discuss.

56 As background evidence, the respondent is obliged to keep annual statistics on the ethnic composition of its workforce. They do this as a result of duties to social housing clients they have who like to know who they are dealing with. This is similar to local authority clients. Mr Lakey's witness statement gave the full statistics current at the time of this hearing.

57 The Birmingham office is in an area of high Asian population in Sparkfields and Small Heath. They advertise in local job centres. Notwithstanding that the proportion of white British is remarkably high. That may be to do with this particular sector – construction – where BAME workers are generally under-represented.

58 The claimant was asked personally if he considered that any of the 3 decision-makers Chris Curtis, James Lakey or Darren Newman were themselves guilty of conscious or subconscious race discrimination against him. He said no. We can find no reason to think that they were influenced as decision-makers by the fact that the claimant was Pakistani rather than that he was an accountant clearly surplus to requirements in the integration of the two businesses.

59 We make no findings of credibility on either side. We do not need to. We consider, having spoken to the claimant, that the race discrimination complaint was a lawyer-derived complaint, and an afterthought which was never owned by the claimant.

60 The race discrimination case fails on the racial grounds aspect, not the unfavourable treatment. That the treatment was unfavourable is why the tribunal is upholding the unfair dismissal claim, despite a careful appeal. We consider as a point of substance that this was a 100% clear redundancy situation and that the claimant was the one who's employment had to be terminated. There was no credible alternative.

61 The tribunal was told that one other person had been made redundant following

the aquisition. That that was not a Birchcroft person. That was Ms Sam McCausland who managed a call centre in Laker's Brentford office. The respondent had decided that the call centre activities would now be taken over by Birchcroft's call centre at Laindon.

Polkey

62 We have a choice between a percentage and time limited *Polkey* determination. This is a classic *Polkey* situation. This is not a percentage situation because it was a 100% likely that the claimant would be fairly dismissed for redundancy, soon after he was. It was a pool of one. Every redundancy situation is different. Some involve no selection, some involve no part-time working, some involve no voluntary pay cuts / part-time working, some involve no volunteers for redundancy. This looks like such a redundancy.

63 Consultation started far too abruptly and apparently casually and was unsettling. It should have been more gradual, more staged, more provisional. It may well be that the respondent has been badly advised on this or, if they had advice, they cannot have followed it. We consider the situation was not complex and that the necessary consultation to have made this fair, reasonable, and sympathetic would have been 2 weeks longer than it was i.e. a total of three weeks from 23 February. Hence the above award. There is no other compensatory award. The claimant has already received a statutory redundancy payment which cancels the basic award.

Employment Judge Prichard

08 March 2017