Case Number: 3200222/2016
& 3200230/2016

CG

EMPLOYMENT TRIBUNALS

Claimants: **(1) Mr C Constandinou**
(2) Mr T Kakkoufa

Respondents: **(1) Supadance International Limited**
(2) Mrs M Free
(3) Mr D Free

Heard at: **East London Hearing Centre**

On: **22 January 2018**

Before: **Employment Judge Russell**
Members: **Ms V Nikolaidou**
Ms J Owen

Representation
Claimants: **Mr N Caiden (Counsel)**
Respondents: **Mr C Bourne QC (Counsel)**

JUDGMENT having been sent to the parties on **30 January 2018** and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. The Claimants were employed by the Respondent until their dismissals in November 2015. The matter came before this Tribunal on 7 to 11 August 2017 and the Claimants claims of direct age discrimination and unfair dismissal each succeeded. A claim for holiday pay was dismissed upon withdrawal. Full reasons were given.

2. In the Liability Judgment, the Tribunal accepted that in or about April 2015 there was a discussion in which Mr John Antoniou, on the instructions of Mr and Mrs Free, discussed with the Claimants the possibility of redundancies. During the course of that discussion Mr Antoniou made a number of comments from which we inferred that there had been age discrimination (paragraphs 10 and 11 of the Reasons). Further, there was a conversation between Mr Constandinou's son and Mr Antoniou on 25 May 2015 where the latter compared the factory workforce to a football team, saying old workers like old football players needed to leave so that it could bring in re blood otherwise the team would not be efficient (paragraph 16 of the Reasons). The Tribunal accepted that Mr Antoniou's comments reflected an ongoing belief by Mr and Mrs Free, as expressed to him, that the Claimants should be made redundant in part because of their age.

3. We accepted that there was a meeting on 18 August 2015 in which they were informed that they were being dismissed by reason of redundancy. They were given pre-prepared dismissal letters dated 17 August 2015. The Claimants had received no prior warning that they were at risk of redundancy, far less that they were to be dismissed by reason of redundancy at that meeting. No redundancy procedure had been followed and no consultation took place. There was no consideration of alternatives to the Claimants' dismissal, for example with regard to other administrative costs which could be saved (paragraph 21).

4. We drew inferences from the comments in April and May 2015 and concluded that age was a factor in the selection of the Claimants for redundancy by Mr and Mrs Free. We also drew inferences to the same effect from Mr Free's comment in the dismissal meeting on 18 August 2015 about the availability of a pension for the Claimants and from Mrs Free's evidence about previous redundancies which she regarded as "retirements". Furthermore, we drew inferences from the fact that in previous exercises voluntary redundancy had been offered to the workforce where it was not here and that the manner of dismissal was not only unreasonable but was also contrary to the earlier exercise where a fair procedure had been followed. Overall, from these primary facts, we accepted Mr Caiden's submission that we should draw the inference that age was a consideration in the Claimants' selection for redundancy. Whether on the reason why approach or alternatively looking at the Claimant's younger selves as their hypothetical comparators, we conclude that if the Claimants had been younger, they would not have been automatically assumed to be the appropriate redundancies and there would have been more consideration of ways in which they could have been retained (paragraph 45).

5. We found that this was an unfair dismissal as no fair procedure had been followed. As to the possible outcome of a fair procedure, we took into account the extent of the financial problems that the First Respondent was experiencing, the genuine need to make cost savings, the specialist nature of the work undertaken by the remaining workforce and the lack of need for the level of management performed by the Claimants. There was a possibility that if another worker had volunteered for redundancy, or if some limited managerial or training work was still required, the Claimants may have agreed to consider job sharing, lower wages or different work. Given that the primary driver for the redundancies was financial, the extent of the savings is likely to be relevant to whether or not such alternatives would have changed the outcome for the Claimants. During the 12 week notice period, neither Respondents nor Claimants considered any such alternatives, largely as dismissal was seen as a foregone conclusion by the meeting on 18 August 2015. For these reasons, we did not consider this to be a case in which a 100% **Polkey** reduction would be appropriate. There is a chance the consultation would have made a difference but realistically the Tribunal considered that the likelihood of continued employment was low even without the factors of age (paragraph 42). The level of the **Polkey** reduction was left for further consideration at this Remedy hearing.

Law

6. An award for injury to feelings is compensatory. It should be just to both parties: fully compensating the Claimant without punishing the Respondent. Awards for injury to feelings must compensate only for those unlawful acts for which the Respondent has been found liable. An award should not be so low as to diminish respect for the legislation; on the other hand, it should not be excessive. An award should bear some broad similarity to

the level of awards in personal injury cases. In deciding upon a sum, we should have regard to the value in everyday life of that money, being careful not to lose perspective.

7. We take as a starting point the guidance given in **Vento v Chief Constable of West Yorkshire Police (No.2)** [2003] IRLR 102, in which the Court of Appeal identified three bands for awards: the top being for the most serious conduct, such as a lengthy campaign of harassment; the middle band for those acts which are serious, but not within the top band; and the bottom band for those acts which are less serious, one-off or isolated. Recent Presidential Guidance takes into account the combined effect of inflation uprating and the **Castle v Simmons** uplift. The Guidance suggests an increase to the bands so that the bottom band now goes from £800 to £8400, the middle band to £25,200 and the higher band up to £42,000. Some adjustment may be required where the claim is presented before 12 September 2017.

Injury to Feelings

8. Both Claimants were long term employees of the Respondent who had given many years of good service and had limited experience outside of the Respondent's workforce. They were undertaking niche work in a highly specialist area. This was work that they thoroughly enjoyed in a stable workforce that was like a family, being particularly close to Mr Antoniou before these events. The comments regarding age were raised directly to them and that this was upsetting essentially making clear that their dismissal was a fait accompli because of age. This is not simply a 'one-off' case, as Mr Bourne sought to persuade us. There were the comments linked to threatened redundancy in April 2015, the comments made to the Claimant's son in May 2015 and the actual dismissal in August 2015. It had a significant impact upon the Claimants. We accepted their evidence as to the injury it caused to their feelings.

9. Whilst we did not find that dismissal was entirely or even principally caused by age, the decision to dismiss was significantly tainted because of age. At times, Mr Caiden appeared to suggest that we should apply a sort of 'tariff' approach, in other words because this was dismissal it automatically merited an award in the middle band of **Vento**. In this, he relied upon **Voith Turbo Ltd v Stowe** UKEAT/0675/04 in which HHJ McMullen QC agreed that dismissal on grounds of discrimination (there race) is surely a very serious incident and cannot be described as one-off or isolated. We consider that every case will depend upon its fact and, therefore, we took into account our findings of fact and the three discriminatory aspects occurring as they did over a period of four months and their material effect upon the dismissal even if not the sole or material cause. Viewed overall, we are satisfied that the act of discrimination as found was serious, not isolated, but not falling within the top band. For this reason, our starting point was the middle band.

10. The Claimants adduced no medical evidence of personal injury. Mr Constandinou was signed off sick for two weeks in August 2015 and describes being depressed. He was also suffering from other health problems, such as pain in his right knee and left shoulder which were unrelated to discrimination. He was worried about how to support his family following the loss of his job. We accept his evidence that he has found the whole situation particularly distressing. Mr Kakkoufa was very shocked and disappointed, felt depressed and in low spirits following his dismissal. He lacked enthusiasm, was very upset and did not know what to do next. Mr Kakkoufa has had to make the difficult decision to sell his family as he can no longer afford to live there. There was no further

evidence about the effect of the discrimination upon their enjoyment of family life, social activities and general well-being.

11. Whilst we accept Mr Bourne's submission that some degree of injury to feelings was inevitable due to their redundancy, this was made far worse for the Claimants because they knew that their age had played a factor. For those reasons therefore we find that this is a case that falls within the middle of the middle band and we award each Claimant the sum of £17,500 for injury to feelings.

Financial Loss

12. Section 123 of the Employment Rights Act 1996 provides that the amount of a compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained in consequence of dismissal, insofar as it is attributable to action taken by the employer. A compensatory award is subject to a maximum of £78,335 or one year's pay, whichever is lower.

13. Compensation under s.124(6) Equality Act 2010 is assessed on ordinary tortious principles. Its aim is to put the employee in the position he would have been in absent the tort so that the Tribunal must consider whether without the discrimination, the Claimant would have been dismissed then or at some future point, **Chagger v Abbey National** [2009] EWCA Civ 1202.

14. As for the duty to mitigate, it is trite law that the correct approach is that set out by Langstaff J in **Cooper Contracting Ltd v Lindsey** UKEAT/0184/15/JOJ. The burden of proof regarding failure to mitigate is on the wrongdoer and it is not for the Claimant to prove that she acted reasonably. The Claimant must be shown to have acted unreasonably, which is not necessarily the same as 'not reasonably'. Determination of unreasonableness is a question of fact taking account of the Claimant's views and wishes although the assessment must be objective. The Tribunal should not put Claimants on trial as if losses were their fault, but bear in mind that the central cause of loss is the act of the wrongdoer.

15. The Claimants made limited efforts to find alternative employment in the period following their dismissals. There has been a recent flurry of activity but we treat that with caution as we can see the force in Mr Bourne's submission that this was directly in response to the Tribunal's Judgment. However, the Claimants' work for the Respondent was highly specialist and the range of suitable alternative jobs which they could do is accordingly limited. There are very few firms producing dance shoes in the UK; two are within reasonable travelling distance of the Claimants' homes (Gina Shoes and Freed of London), the only other is International Dance Shoes Limited located approximately 66 miles away in Milton Keynes. The Respondent has not produced evidence of any actual other jobs available which they say the Claimants could have done.

16. The Claimants were on a relatively high salary and they were reasonably entitled, at least initially, to seek work which was commensurate with their skills and salary expectations. They did contact Gina Shoes and Freed of London but were told that there were no vacancies. At the time of their redundancies, Mr Free offered both Claimants his assistance in finding a new job. Both declined. Mr Free's evidence at this hearing did not identify any specific vacancy. His intervention, had it been accepted, would have been little more than an introduction. We accept Mrs Free's evidence of a recent conversation

at a dancing conventions that opportunities across the industry are generally low. It is a very challenging market for specialist dance shoe manufacturers. We took into account the limited jobs for specialist workers as the Claimants, the limited turnover of Respondent staff suggesting that in such niche work the likelihood of vacancies arising is low.

17. Overall, we are not satisfied that the Respondent has shown that the Claimants have acted unreasonably and failed to mitigate their loss. Nor do we think that it was safe for us to speculate or make an assumption (as Mr Bourne tried to persuade us to do) as to when the Claimants had a realistic chance of finding work had they made more strenuous efforts to do so. Both Claimants are entitled to compensation for loss to date (104 weeks), subject to the points considered below.

18. As set out in our Liability Judgement, we consider that was a three week period during which consultation should have taken place. The Claimants are entitled to compensation in full for that period. It is common ground that Mr Constandinou's net weekly pay was £667 and that of Mr Kakkoufa was £752.

19. Thereafter, we need to consider what we refer to as the **Polkey** or **Chagger** reduction. The Respondent bears the burden of proving that the Claimants could and would have been fairly dismissed in any event and/or dismissed without the taint of discrimination. Inevitably this will require a degree of speculation based upon the evidence heard and our findings of fact.

20. We had particular regard to the workforce figures included in the remedy bundle at page 337. The Respondent did not recruit any new employees between 20 October 2014 and 3 January 2017. The Claimants' evidence of employees being replaced addressed matters some 18 months after their employment terminated. In our Liability Judgment, we accepted that there was a genuine redundancy situation; an entire management layer was being removed and was not replaced. The Respondent needed to make significant financial savings. Mr and Mrs Free had already reduced their salaries as directors by essentially sharing one salary between them. What the Claimants referred to as 'overtime' was in fact piecework which was still required as before. The Claimants were on high salaries and there was nothing in their evidence to suggest that there was a realistic prospect that either would have accepted a less well paid, non-managerial job or that they would have job shared if offered.

21. The Respondent's workforce is highly specialist, with employees having their own specialist area of work such as heel covering or finishing. Whilst the Claimants could provide cover for absence, this was not the same as being a specialist in that area. It could not reasonably be expected that the Respondent should "bump" the dedicated skilled worker in favour of either Claimant.

22. Mr Antoniou was the only manager other than the Claimants. We considered the likely outcome had he been included in the pool for possible redundancy and the likely result of a fair selection process. We considered that it would be only superficially attractive to give each of the Claimants a one third chance of remaining, not least as each of the three men had different skill sets. Mr Antoniou had special skills as an engineer which the Claimants did not. Given the nature of the business, these skills were highly regarded by the Respondent. We consider it inevitable that even if all three managers had been pooled, Mr Antoniou was the most likely candidate to avoid dismissal. Whilst not as certain as Mr Bourne suggests, nor were the Claimants' chances so rosy as urged

upon us by Mr Caiden. Overall, we conclude even if there had been no discrimination and a fair procedure had been adopted, there was a 80% chance that the Claimants would have been dismissed in any event.

23. We considered the effect of Mr Constandinou's health and the likelihood that he would have been absent from work in the period for which compensation is to be awarded. Mrs Free's evidence was that Mr Constandinou would have been dismissed due to his ill health in the period following his redundancy as the Respondent could not afford to pay him. This did not seem to us to be likely or indeed to be fair. The Claimants' contracts of employment provides that sickness pay is at management's discretion. The financial situation of the Respondent was such that it was not awash with cash and could not have afforded to, nor would it have chosen to, exercise its discretion to pay Mr Constandinou his full pay for a lengthy period of time. Taking into account the length of Mr Constandinou's period of ill-health since his dismissal and the possibility that it may not have been quite so long if he had still been working, we conclude that the Respondent would have paid one month's full sick pay and then he would have had six months in which he would have been in receipt of sick pay only.

24. Finally, we had regards to the rates of interest we applied from the date of injury for the injury to feelings award and from the mid-point for the financial losses. The statutory rate currently stands at 8%. Whilst this may be a penal rate, as Mr Bourne submitted, and it is certainly more generous than one would get on the financial markets, it arises from a decision to apply an increase where the previous rate was 0.25% and to come in line with the County Court rate. We have heard nothing in this case that would suggest that justice or equity require an adjustment to that interest rate and accordingly we apply interest at 8%.

25. Having given our judgment on the principles as above, both Counsel assisted the Tribunal in the calculation of the appropriate sums. These are agreed as follows:

<u>Mr Constandinou</u>
Injury to feelings £17,500 & interest of £3,834 = £20,583.84
Financial loss: £12,006 & interest of £1,057.84 = £13,063.84
Total: **£33,647.68**

<u>Mr Kakkoufa</u>
Injury to feelings £17,500 & interest of £3,834 = £20,583.84
Financial loss: £17,446.40 & interest: £1,537.20 = £19,791.99
After grossing up effect, gives a total of: **£40,375.83**

Claimant's application for costs

26. Mr Caiden made an application for costs. He relied upon three allegations of unreasonable conduct of the proceedings by the Respondent which he says passes the threshold for an award of costs: (i) in connection with disclosure ordered to take place in June of 2016 (£1,528); (ii) failure to comply with Case Management Orders in respect of supplemental statements in November and December 2016 (£1,062) and (iii) an application to postpone a re-listed hearing correspondence in May or June 2017 (£1,088). To each of these figures must be added VAT.

27. In the alternative, Mr Caiden applies for costs on grounds that aspects of the Response had no reasonable prospects of success insofar as: (i) the redundancy was so clearly procedurally unfair that a concession ought to have been made thereby reducing the length of the main hearing and allowing the Tribunal to move straight to remedy and **Polkey**; (ii) the age discrimination defence was based upon a faulty and untrue premise that Mr Free was not part of the decision making process. Mr Caiden seeks his brief fee from today's hearing (£1,850) and his brief fee for previous hearings which would have been avoided or rendered shorter had liability been conceded (£3,000). Again VAT would have to be added to such figures if awarded.

28. Mr Bourne opposes both applications for costs. Dealing with prospects first, he submits that there were genuine issues to be litigated on both the **Polkey** "futility" argument and disputed facts in the discrimination claim. As such, the hearing would not have been materially shorter even if it were conceded that a fair procedure had not been followed. As for the procedural grounds for the costs application, Mr Bourne is in some difficulty as he is here without his solicitor today. Generally, he submits that the Claimants' advanced a case of fraud without proper foundation, disputed the genuine redundancy situation and made a number of allegations of personal misconduct against Mr Free. These issues took up most of the hearing time. The delay in providing disclosure was relatively short and was caused by a change in legal representatives and it was not necessary for the Claimants to seek an Unless Order. The supplementary witness statements arose out of the Claimants' unfounded allegations of fraud and the Respondent was under no obligation to provide statements having been given leave to do so (although he conceded that it did not meet the required date). When the case was re-listed for hearing in August 2017, the Respondent's witnesses were on holiday. Their application for a postponement was not successful. None of these matters, submits Mr Bourne, meet the test of unreasonable conduct.

29. Rule 76 of the Employment Tribunal Rules of Procedure 2013 provides that:

> "**A tribunal may make a costs order or a preparation time order and shall consider whether to do so where it considers that:**
>
> **(a) a party or that party's representative have acted vexatiously, feasible, 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."**

30. The making of a costs order is a two stage process: the first question has the relevant threshold been passed: The second, even if it had is a costs order appropriate?

31. The leading authority on costs in the Employment Tribunal is **Yerrakalva v Barnsley Metropolitan Borough Council** [2011] EWCA CIV 1255, in particular the judgment of Mummery LJ. The Tribunal should consider the whole picture of what had happened in the case and ask whether there had been unreasonable conduct by the Claimant in bringing and conducting the case. If so, it should identify the conduct, what was unreasonable about it and the effect it had. The Tribunal should also take into account any criticisms made of the employer's conduct and its effect on the costs incurred.

32. As for the prospects of the Response, on balance we prefer the submissions of Mr Bourne in particular with regard to the age discrimination cases. As is often said on strike out applications, discrimination cases with a disputed core of evidence require hearing. The fact that the Respondents were ultimately unsuccessful should not be equated with unreasonable conduct; costs do not follow the event in the Tribunal. We are more troubled by whether the **Polkey** futility argument had no reasonable prospects of success. It certainly had little reasonable prospects as we consider it hard to see how such an argument could reasonably have been sustained on the facts of the case. The failure at the very least to concede that the redundancy was procedurally unfair (absent futility), does seem to us to meet the threshold for an award of costs. However, we do not consider it appropriate to exercise our discretion to do so. We take into account, as Mr Bourne submits, that the largest part of the original Liability Hearing was dealing with the Claimants' serious challenges to the genuineness of the redundancy situation. It could just as easily be argued that if the Claimants had conceded that the genuine reason for dismissal was redundancy then the case equally would have been much shorter. Overall, we are not persuaded that the limited amount of time spent on the procedural aspects of the redundancy increased materially the time spent overall.

33. As for conduct of the proceedings, whilst we do not doubt that the Claimants have incurred some costs in dealing with these matters, we again bear in mind that the threshold for an order requires that the conduct of the Respondent be unreasonable when judged against the whole picture of what happened in the case. As for disclosure in June 2016, the case was in its very earliest stages, the overall delay was approximately one month. In our experience, such teething problems are not unusual nor necessarily unreasonable. Of course, the Claimant is entitled to take a robust response to the Respondent's delay and write numerous letters to chase matters and apply for an Unless Order if so advised. In the event, however, the delay was so short that disclosure had been provided before the application was considered. In our experience of proceedings generally in this jurisdiction and looked at in the round of the case as a whole, we are not satisfied that the Respondents met the test of unreasonable conduct.

34. As for supplemental witness statements, the Respondent was given leave to file such statements rather than ordered to do so but, having chosen to do so, can reasonably be expected to comply with a deadline given in an Order. The Respondent not only failed to do that, it also breached its own proposed deadlines. In principle, that appears to us capable of amount to unreasonable conduct. The Claimant could have applied for an Order that the Respondent be prevented from relying on such evidence or the Tribunal taken that view of its own motion. Looking at the case overall in the exercise of our discretion, we take into account that the purpose of the supplementary statements was to deal with the allegations of fraud made against the Respondent. These were very serious allegations which were not made out. We do not consider it appropriate to award costs against the Respondent for something which was caused by the Claimants' allegations.

35. We deal finally with the matter of the relisting in August 2017. Having read the correspondence, it appears from the solicitor's letters that a less experienced member of the Respondent's legal team failed to check properly the witnesses' availability on dates when the matter was relisted. That is unfortunate and irksome. The Respondent to some extent pay the penalty for the error because they were not given the postponement that they requested. Again however we prefer the submissions to Mr Bourne and find that this

is not the same as unreasonable conduct for the purposes of meeting the threshold for a costs order.

36. The Claimants' application for costs is refused.

Employment Judge Russell

19 March 2018