EMPLOYMENT TRIBUNALS

Claimant: **Mr S Lane**

Respondent: **SIP Limited**

JUDGMENT ON COSTS

It is the judgment of the Tribunal that the Respondent's application for costs is refused.

REASONS

1. The Respondent has made an application for an order that the Claimant pays the Respondent's costs pursuant to Rules 76(1)(a) and (b) and 76(2) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

2. This application was made upon the Claimant's withdrawal at a Preliminary Hearing dated 01 December 2017 of his claims of unfair dismissal and a failure in the duty to inform and consult pursuant Regulations 7 and 15 of the TUPE Regulations. The application is in respect of costs incurred by the Respondent in defending those claims from the date of the Preliminary Hearing.

3. The Claimant's claims of disability discrimination and ordinary unfair dismissal remain to be pursued at a full merits hearing.

4. The parties agreed for this matter to be determined on the papers and to that end the parties have submitted detailed written submissions with accompanying documents.

5. There is a two-stage process to an assessment of costs, first for the Tribunal is to conclude whether or not the circumstances fall within Rule 76 and, if so, to consider whether or not to exercise its discretion and make an order for costs.

6. Well-established main principles are that an order for costs is the exception rather than the rule and costs do not follow the event (see **Gee –v- Shell UK**

Ltd [2003] IRLR, 82, CA). An award of costs should be compensatory, not punitive. Ordinary experience of life frequently teaches us that which is plain for all to see once the dust of battle has subsided was far from clear to the combatants once they took up arms. (See **Marler –v- Robertson** [1974] ICR 72, NIRC).

7. Tribunals have a wide discretion to award costs where they consider that there has been unreasonable conduct in the bringing or conducting of proceedings. Every aspect of the proceedings is covered. Unreasonable conduct includes conduct that is vexatious, abusive or disruptive.

8. When making a costs order on the ground of unreasonable conduct, the discretion of the tribunal is not fettered by any requirement to link the award causally to the particular costs incurred as a result of the unreasonable conduct (See **McPherson –v- BNP Paribas (London Branch)** [2004] ICR 1398, CA).

9. 'No reasonable prospect of success' is given a similar meaning to that used in strike out considerations under Rule 37.

10. Where a party makes an offer to settle a case, which is refused by the other side, costs can be awarded if the tribunal considers that the party refusing the offer has thereby acted unreasonably (**Kopel v Safeway Stores plc** [2003] IRLR 753*, EAT*). In **Kopel***,* it was held that a tribunal must first conclude that the conduct of a party in rejecting the offer was unreasonable before the rejection becomes a relevant factor in the exercise of its discretion.

11. A costs warning letter will not necessarily result in an order for costs being made, even where the party giving the warning is ultimately successful in obtaining a judgment in their favour. A failure by a party to engage properly with the points raised in a costs warning letter may amount to unreasonable conduct if the case proceeds to a hearing and the other party is successful for substantially the reasons contained in the letter. Whether it will do so will depend on the facts.

12. The Claimant's claim to the Tribunal in part argued that he was dismissed for a reason connected with a TUPE transfer and that there was a failure in the duty to inform and consult the Claimant as someone affected by a TUPE transfer.

13. The Claiamnt argued that there was a TUPE transfer from the Respondent to EMH Technology Ltd ("EMH"). Rather surprisingly the Claimant has not joined EMH as a second Respondent to this action.

14. The Respondent argued in its Grounds of Response that there was no relevant transfer and/or no service provision change as required for the TUPE Regulations to apply to the Claimant.

15. By a case management Preliminary Hearing on 27 June 2017 and after discussion with the parties, this matter was listed for an open Preliminary Hearing on 01 December 2017 to consider whether there was a service provision change affecting the Claimant and if so, whether the proper Respondent to all claims save for a failure to consult is the putative transferee,

together with consideration of whether the claims should be struck out, or a deposit payable, having regard to the respective prospects of success. Preparatory directions were made for the future Preliminary Hearing.

16. Mr Bertin, Head of Commercial and Employment for Manak Solcitors, represented the Claimant at the Preliminary Hearing and in the subsequent *inter partes* correspondence. Although a solicitor between 2001 to 2013, Mr Bertin ceased being a solicitor in 2013 and operated as a consultancy regulated by the Claims Management Regulator.

17. The Respondent sent a costs warning letter to the Claimant dated 13 July 2017 relating to the Claimant's TUPE claims, where the Respondent stated it would not seek its legal costs if the Claimant withdrew his claim within 7 days. The Respondent's position was further confirmed in letters dated 18 and 24 July 2017.

18. Disclosure documents were provided by each party on 26 July 2017. That exchange of documents was completed a day after the date ordered by the Tribunal and appears to have been completed by agreement and without dispute.

19. On 08 August 2017, the Respondent provided the Claimant with a suggested index for the Tribunal bundle for the preliminary hearing, that being the day the Tribunal ordered it was to be agreed.

20. On 25 October 2017 there is correspondence between Mr Bertin for the Claimant and Mr Kiernan, a Partner at Loch Employment Law, for the Respondent. It was identified by Mr Bertin that the bundle would need updating due to additional e-mail disclosure. It was also presumed by Mr Bertin that the Respondent would call a Mr Hughes of EMH as a witness and if not an application would be made for a Witness Order.

21. Mr Kiernan replied on 31 October 2017 suggesting that Respondent would meet the costs of preparing a witness statement for Mr Hughes if the Claimant met the cost of his attendance The letter states: "In light of the above, and given that we still have some time prior to the 01 December 2017 hearing, we suggest that the exchange of witness statement be postponed to close of business on Friday 10 November 2017"

22. The Respondent's received no immediate reply to that suggestion and wrote again to Mr Bertin on 02 November 2017 confirming the Respondent was proceeding on the basis Mr Hughes was not to give evidence and witness exchange would occur as suggested.

23. There are no documents presented before the Tribunal to show any subsequent correspondence sent by Mr Bertin to contradict that presumption.

24. There followed correspondence over photographic evidence, computer records and disclosure in respect of which Mr Kiernan wrote on 09 November 2017:

"Despite this, I do not object to a further short extension for the filing of witness statements".

25. On 15 November 2017 Mr Bertin wrote to Mr Hughes asking for specific information and enquiring whether or not he would be willing to attend at the Tribunal hearing. It is not certain to the Tribunal whether or not Mr Hughes responded.

26. The next piece of correspondence before the Tribunal is a letter from Mr Kiernan to Mr Bertin confirming that exchange of witness statement was agreed to take place at 5.00pm on 17 November 2017. That was further delayed to 20 November 2017 due to "pressure of work" for Mr Bertin.

27. Mr Kiernan replied stating that the date for witness statement exchange had been repeatedly extended and "Please confirm that you will be ready to exchange witness statements by Monday 20 November 2017. If you are not ready to exchange we will be forced to make representations to the Employment Tribunal on the issue". Exchange did take place on that date.

28. Although the Tribunal directions for disclosure, bundle preparation and witness exchange were only made in respect of the Preliminary Hearing TUPE issues, the Claimant produced a detailed, twenty-page, 66 paragraph statement addressing his claim as a whole. The Claimant's statement addresses the TUPE issue in around five of those paragraphs, which relate to the Respondent's IT function and EMH Technology Ltd.

29. By an e-mailed letter to the Tribunal at 14.22 on 28 November 2017, the Claimant's solicitors informed the Tribunal: "Now that there has been full disclosure and an exchange of witness statements on this matter the Claimant will not be proceeding on the TUPE related claims" and requested the open Preliminary Hearing to be vacated.

30. As a consequence, the Tribunal converted the open Preliminary Hearing to a case management hearing by telephone to address the remaining claims and from that hearing the Respondent's application for costs arose.

31. The Tribunal has fully taken into account the content of the written submissions of the parties and also the law cited.

32. It was accepted in the Claimant's submissions that: "the Claimant was at all times acting pursuant to legal advice, and if any costs are imposed, then Manak solicitors accept full liability for any such costs".

33. The Tribunal concludes that with regard to Regulation 76(1)(a) on balance the Claimant and/or his representative did not act vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing or conducting of the proceedings.

34. The Tribunal concludes that it was not unreasonable for the Claimant to withdraw his TUPE based claims once in receipt of disclosure coupled with the

content of the exchanged witness statements from the Respondent. That is not an unreasonable time to reassess the strength of the case.

35. It is surprising that the Claimant did not pursue claims against both the putative transferor and transferee if he considered that a TUPE transfer had been effective. Had it been found at the Preliminary Hearing that there had been a TUPE transfer, the Claimant would have lost the opportunity, subject to any application to amend, to pursue any of his claims, including disability discrimination, save for the Regulation 15 failure of the duty to inform and consult.

36. Also, the Tribunal acknowledges the Respondent's submission that the Claimant had no intention of pursuing a TUPE based claim, particularly with regard to the Regulation 7 issue and the content of the witness statement provided for the Preliminary Hearing.

37. However, even though the Regulation 7 complaint clearly had no reasonable prospect of success as against the Respondent as the putative transferor (as addressed below), the issue pursuant to Regulation 15 relating to a failure in the duty to inform and consult would still be contingent upon an assessment of whether or not there was a TUPE transfer, which was the subject of the Preliminary Hearing. Therefore irrespective of the Regulation 7 complaint, the TUPE transfer issue would have to have been assessed in any event.

38. It was reasonably open for the Claimant to review and be advised upon his position upon exchange of witness statements. The Claim was withdrawn. The attendance at the hearing was not wasted as there were case management orders to be made with regard to the remaining claims of unfair dismissal and disability discrimination.

39. Although the claims could have been withdrawn earlier than 28 November given exchange was effective on 20 November, there was still a period of two clear days before the hearing and it is unlikely to have made any material difference if the claim had been withdrawn a few days earlier.

40. The Tribunal concludes on balance that the Claimant did intend to pursue a TUPE based claim. Also, it was not unreasonable conduct in those circumstances to reject the offer of a total withdrawal in exchange for no application for costs.

41. The Tribunal concludes that having regard to the overriding objective that it would have been a greater waste of time and resources for the Claimant to argue dogmatically the TUPE issue at a Preliminary Hearing where the advice on the merits of success indicated differently.

42. Therefore, on balance, the Tribunal concludes that the circumstances do not fall within Rule 76(1)(a) and there shall be no order for costs on this issue.

43. The Tribunal concludes with regard to Regulation 76(b) that, even on the Claimant's submissions, the Regulation 7 claim was misconceived and could

not have been pursued against the Respondent as the putative transferor. Therefore the Tribunal concludes that the circumstances fall within Rule 76(b) and moves on to consider whether or not to exercise its discretion and make an order for costs.

44. An award for costs should be compensatory not punitive. Although the Reg 7 point clearly had no reasonable prospect of success, the claim of a failure in the duty to inform and consult was contingent on their being a TUPE transfer. That matter was still live and subject to determination. The same facts and circumstances would need to be reviewed by the Tribunal with regard to that issue irrespective of whether or not the Regulation 7 matter was pursued.

45. Accordingly, whether the Regulation 7 claim is considered under subsections (a) or (b) the Tribunal arrives at the conclusion that in the circumstances it will not exercise its discretion and make a costs order.

46. With regard to regulation 76(2), the parties did not strictly comply with the dates contained in the Tribunal Orders for directions and the alternative dates were reached by agreement. It was available to a party to decline to agree any suggested new dates and apply to the Tribunal for an unless order. No application was made. In the circumstances the Tribunal concludes that the grounds have not been met for an order for costs to be made and further the Tribunal does not exercise its discretion and make an order.

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Employment Judge Freer
Date: 02 May 2018