EMPLOYMENT TRIBUNALS

Claimant: Mr P Hodgkiss

Respondent: Travis Perkins Trading Company Limited

HELD AT: Liverpool **ON:** 26 November 2019

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimant: Mr J Halson, solicitor, by written submissions
Respondent: Ms R Dawson, solicitor

JUDGEMENT

The unanimous judgment of the Tribunal is that the claimant's application for costs is dismissed.

REASONS

1. This is a cost hearing following an application made on behalf of the claimant arising out of promulgation of the Judgement in favour of the claimant sent to the parties on 11 February 2019 in which the Tribunal unanimously found the claimant to have been unfairly dismissed and unlawfully discriminated against under section 13 of the Equality Act 2010 on the grounds of his age. The claimant's claim of indirect age discrimination was dismissed.

2. The Claimant seeks an order that the Respondent pay the Claimant the sum of £7,041.67 plus VAT for extra costs incurred as a result of its unreasonable failure to make proper concessions as regards the fairness of the dismissal. In

short, the claimant believes the respondent should have conceded he had been unfairly dismissed from the outset.

3. The Tribunal has before it the claimant's and respondent's written submissions dated 20 November and 26 November 2019 respectively together with the case law referred to, which the Tribunal has read and taken into account. It also heard oral argument from Ms Dawson on behalf of the respondent.

4. The basis of the claimant's application is the Response to the claim of unfair dismissal had no reasonable prospect of success and the way in which the defence was conducted was unreasonable in that the respondent defended the claim of unfair dismissal despite them being aware that the evidence showed management vacancies were offered to some of the staff facing redundancy from the Range Centre (the claimant's previous place of employment from which he was made redundant) without any fair and open selection procedure being applied, and product specialist vacancies which were not brought to the Claimant's attention during the consultation process.

5. Mr Halson submitted on behalf of the claimant that had the respondent conceded the claimant was unfairly dismissed the first liability hearing in this matter would not have been necessary and those points on which the Respondent had proper grounds to defend would be those which were aired at the one-day remedy hearing held on 15th February. The Tribunal did not fully understand this argument; a liability hearing was necessary to consider the claims of unlawful age discrimination and even had the respondent conceded it had unfairly dismissed the claimant a liability hearing would still have been necessary to determine a number of key issues as agreed between the parties at the outset, and it is the Tribunal's view that given the overlap between the claimant's dismissal and his allegations of age discrimination the liability hearing would not have been shortened to 1-day by a concession on the part of the respondent that it had unfairly dismissed the claimant.

6. The Claimant accepted that it was not unreasonable for the respondent to defend the allegation of age discrimination or deal with the issue of the "no difference rule" in Polkey and mitigation, and the Tribunal was satisfied, on balance, that the hearing time would not have been shortened.

7. Mr Halson submitted that it was unreasonable for the respondent to have defended paragraph 24 of the Grounds of Claim given the fact that the respondent had not carried out a fair and reasonable method of offering alternative opportunities for redeployment. Whilst his colleagues were given jobs in Maintenance Branches he was not. The Claimant had a statutory right to a 4-week trial period, however he was informed that he did not have this right and if he tried a job and it didn't work out he would have lost the right to a redundancy payment. Finally, the Claimant was not informed that there were Product Specialist vacancies with the Northampton Commercial team, and no

explanation was provided to him when he mentioned these vacancies. The respondent's primary evidence set out in the witness statements did not dispute these facts, namely, Michael Young at paragraphs 18, 20 and 22, John Gibson at paragraphs 4, 7, 8, 9 and 10 and Keith Wright at paragraphs 4 and 5. The Tribunal agreed with Mr Halson's submissions, concluding the respondent (a large employer with a HR facility) did or should have known at the time the Response was prepared they had not complied with a fair redundancy procedure and this had given rise to a substantive and procedural unfair dismissal. The facts could not have been clearer; a fair redundancy procedure was flaunted with the aim by managers of ensuring the claimant could not take up a branch manager position or produce specialist role. Instead, he was offered what managers recognised to be unsuitable alternative employment; a demotion whereby the claimant after a 6/9-month ringfencing of salary, would be earning the same salary paid 13 years previously when he had joined the company, with less benefits in kind.

8. The Tribunal, when it gave oral judgement to the parties (written reasons were not requested) found:

   8.1 There were issues of credibility in respect of the respondent's witnesses. For example, it found John Gibson's evidence to be less than credible, illogical and an exaggeration.

   8.2 The Tribunal found had the respondent not unlawfully discriminated against the claimant on the grounds of his age, and had the decision to dismiss him not been trained by age discrimination, the claimant would have been slotted in and the Tribunal found on the balance of probabilities there was a 100% chance of the claimant being offered and accepted the position of Northampton product specialist. It found he would not have been offered the position of branch manager for a number of reasons, not least the live final written warning.

   8.3 The Tribunal accepted the claimant's evidence that he had been taken by surprise, was in shock and giving the words used by Michael Young, their common sense and ordinary meaning, could not decipher any reference to the Northampton product specialist roles being made available for the claimant to apply for and compete against other produce specialists. The Tribunal found this was not surprising given Michael Young's incorrect view was that the claimant's substantive role was not that of a product specialist, he was a branch services manager with a small role as a product specialist. There was no reference by Mr Young to the possibility of the product specialist role being advertised.

   8.4 The Tribunal found group-wide vacancies were accessible online, it was not up-to-date and had not included the vacant position of two branch manager roles based in the North West including the role at Hyde that had offered to Chris Bradley without interview, and then given to

another employee who did not have apply, it was merely offered to him by John Gibson.

8.5 Michael Young offered the claimant an assistant branch manager role including a possible managed services branch with a reduced salary and ring-fencing the claimant's current package describing the alternative employment "it's not something I would call suitable. With this option we could ring fence your current package for a period and discuss what would happen when that runs out." Mr Young did not inform the claimant a trial period was possible.

8.6 Chris Bradley after the refusing the branch manager role offer at Hyde applied for and accepted the product specialist role in Northampton after being offered a favourable package that did not include relocation, and the claimant was treated differently and suffered less favourable treatment because he was older that Chris Bradley.

8.7 At the liability hearing the Tribunal found Michael Young told the claimant "the pace of life in the branches had moved on and he did not think I would be able to keep up." Michael Young disputed this, and the Tribunal took the view that the words were used as alleged by the claimant, they fit into what was being discussed at the time, why the claimant had not been offered the branch manager role unlike his colleagues, and the discussion about the claimant's health which Michael Young stated he had taken into consideration when the claimant raised the issue of the manual lifting required in the proposed new role.

8.8 The Tribunal found there was no formal selection criteria applied to the claimant and his colleagues, however, a decision was made early on that the claimant did not have the attributes to be offered the role of branch manager or produce specialist. The Tribunal took the view on the evidence before it the respondent should have carried out a selection exercise via objective selection criteria, it found there was no meaningful consultation, inadequate investigation into alternative employment, that the claimant as treated less favourably in the redundancy process in comparison to the named comparators, and the difference in treatment was because of the claimant's age. The redundancy dismissal leading to dismissal were inextricably linked, impossible to disentangle or separate.

9. Mr Halson submitted that on the Respondent's primary evidence it is clear that no system was adopted for offering vacancies to those facing redundancies, and senior managers used their own opinions to fill vacancies with no attempt to "red circle" them, adopt any system of selection or even to notify the Claimant of the existence of all vacancies. The Respondent also misled the Claimant on the trial period and did not inform him of that possibility even after they had found it was possible to offer this to the Claimant. The decision to create vacancies for National Product Specialists was part of the restructure and these had been discussed between Keith

Wright and Michael Young but the Respondent did not specifically inform the Claimant nor offer him any of the vacancies

10. It was submitted that the respondent "even taking their evidence at its highest" could not defend any of the 3 points on which the Claimant's allegation of unfair dismissal was based. The Tribunal re-visited the written reasons orally given to the parties at the liability hearing and following the remedy hearing, and concluded the response in respect of the unfair dismissal complaint had no reasonable prospects of success from the outset of this litigation. The Tribunal agreed with this submission as reflected in its findings of facts.

Basis of the retainer

11. The Claimant on 26th January 2018 signed a Damages-based agreement, and under this agreement had been charged fees of £14,004 including VAT. There was no indication in the client care letter of the same date as to which cost rate ranging from £150 to £250 was applicable in this case. The Tribunal concluded the contractual hourly rate applicable to the claimant was £175.00.

12. In the DBA dated 26th January 2018 between Mark Reynolds Solicitors and Claimant the following was set out:

10.1 Definitions: **Costs –** "our charges for the time we have spent on your case, calculated at an hourly rate of £175 plus VAT in accordance with paragraph 13 below"

13 Calculation of our costs

13. I If you are ordered to pay costs or we are entitled to claim costs from you under the terms of this agreement, those costs will be calculated in accordance with the information on our charges that was provided to you in our letter dated 26/01/18, a copy of which is attached to this agreement.

13.2 We have provided information on how you can request a review of the costs and expenses incurred under this agreement. We have attached a copy of our letter dated 26/01/18, to this agreement.

10.2 Clause 11 provided:

11 If **you win**

11.1 If you win, you agree to pay us a share of 35% of any money

and any non-monetary award or settlement received. This includes VAT but does not include the expenses that you are responsible for in accordance with the terms of this agreement.

11.2 You agree that we may receive any financial award the Respondent is ordered to pay to you. If the Respondent refuses to make payment to us and insists on paying you direct, you agree that a cheque will be paid or money transferred into a bank account in our joint names. We will take our payment and any outstanding expenses from that account and you will take the balance.

13. On behalf of the claimant the Tribunal was referred and took into account to the EAT decision in Taiwo v Olaiqbe (UKEAT/0254/12 and 0285/121 at paragraph 69 that "There is every good reason of policy why Parliament might provide in a Tribunal such as the Employment Tribunal for costs incurred by another to be recovered if the occasion were appropriate — for such Tribunals frequently hear claims brought by those who have lost their employment and are likely to be without income, who may well be in difficult social and financial circumstances as a consequence. They may need financial help if they are to access justice. It is not at all surprising that the legislature should recognise that, and make provision for reimbursement if the conduct of the other party sufficiently merits it…"

Apportionment of costs by the claimant

14. The Claimant's solicitors apportioned time 28 hours 10 minutes pursuing the claim on the points which it was reasonable for the Respondent to have defended on, namely the age discrimination, Polkey and mitigation. A total of 75 hours and 55 minutes was spent on the case and the proportion of time for which costs are claimed is therefore 37% of the total time spent on the case. The Tribunal considered the validity of Mr Halson's argument without the benefit of a cost breakdown and/or spreadsheet and it did not accept there would have been any meaningful time saved had the respondent conceded from the outset it had unfairly dismissed the claimant given the inextricable link between the dismissal and age discrimination coupled with adverse inferences that could be drawn from the substantially unfair redundancy procedure adopted by the respondent resulting in the dismissal.

15. Taking into account the agreed issues between the parties and its judgement and reasons, the Tribunal took the view the liability hearing would have taken 2-days and not one day as proposed by Mr Halson. The same witnesses would give evidence, and the Tribunal would still have heard a substantial amount of evidence interlinking the redundancy procedure, dismissal and age discrimination. It is difficult for the Tribunal to envisage how much time, if any, would have been saved by a concession of unfair dismissal and the burden

was on the claimant to persuade the Tribunal on this point with reference to cost figures rather then estimates. The issue of consultation and pool was relevant to both the unfair dismissal and age discrimination, and had unfair dismissal been conceded it would not have reduced the length of the remedy hearing in any meaningful way given the overlapping issues relevant to both claims.

16. Reference was made y Mr Halson to the EAT decision in Swissport Ltd v Mr A Exley & Others [UKEAT/007/16 & 0008/161 at paragraph 50, that where the Claimant is paying under a Damages Based Fee Agreement (DBA), the Claimant's liability does not have to be pro-rated to take into account the fact that no order was made against the Respondent in respect of part of the proceedings. He "estimated" the time spent at various stages where some of the time would have needed to be spent any way to deal with those parts of the claim which the respondent had reasonable grounds to defend, so that costs claimed reflected "as closely as possible" to the time which would have been saved had the Respondent made proper concessions. It was submitted that there was a 2-day liability hearing (28th and 29fr January 2019) and a 1-day remedy hearing (1 5th February) and had the respondent conceded the unfair dismissal claim a single day hearing would have been sufficient, and a proportion of the preparation time would have been saved.

17. Despite being requested by the respondent to provide a printout of the work carried out and the time it took, this information was not forthcoming from the claimant's solicitors. Instead, Mr Halson estimated the time spent dealing with issues of "unfairness" in the case without any supporting time recording or description of how the unfair dismissal was differentiated from the age discrimination complaint, for example, it was estimated that on the 20.08.18 out of 2 hours and 1 minute spent preparing the agenda and list of issues, approximately 40 minutes, and on the 21.08.18 out of 3 hours 24 minutes spent dealing with the Case Management Hearing and preparation following that, approximately 2 hours, and so on through to 1 hour 10 minutes dealing with the Respondent's postponement application, on 27.01.19 3 hours spent preparing for the liability hearing, on 28.01.199 the whole of the 8 hours 35 minutes spent at the liability hearing and on 29.01.19 4 hours spent preparing for and attending the second day of the liability hearing.

18. It was submitted that 28 hours and 10 minutes had been spent on that part of the case which should properly have been conceded by the Respondent totalling £8450 including VAT calculated at an hourly rate of £250.00. £250 was one of the hourly rates set out in a client care letter sent to the claimant dated 26 January 2018 referred to in paragraph 13.1 of the 26 January 2018 Damages Based Agreement. However, the costs paid by the claimant a set out in a bill of costs dated 21 June 2019 was £14,004.00 considerably less than £250 per hour in a case where the total time spent was 75 hours 55 minutes.

Law

19. It is common ground that the Tribunal has the discretionary power to make a costs order under the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. Rule 74 defines costs and rule 76 sets out when a costs order may or shall be made.

20. Rule 76(1)(A) 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 party (or that party's representative) has acted vexatiously, abusively, 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 any claim or response had no reasonable prospect of success.

21. A Tribunal must consider whether to make a costs order against a party where he or she has acted unreasonably in the bringing or conducting of proceedings”. Rule 76 of the Tribunal Rules 2013 imposes a two-stage exercise for a Tribunal in determining whether to award costs. First, the Tribunal must decide whether the paying party (and not the party who is seeking a costs order) has acted unreasonably, such that it has jurisdiction to make a costs order. If satisfied that there has been unreasonable conduct, the Tribunal is required to consider making a costs order and has discretion whether or not to do so. Fees for this purpose means fees, charges, disbursements or expenses incurred – rule 74(1) Tribunal Rules 2013. In Employment Tribunal proceedings costs do not ordinarily follow the event, unlike County Court and High Court actions.

Submissions made on behalf of the respondent

22. Ms Dawson clarified her written submissions giving oral argument as to why a costs order should not be made. The Tribunal, from its own knowledge of the case, were persuaded that given the claimant’s concession it was not unreasonable for the respondent to defend the claim of age discrimination. This issue was dealt with during the 2-day liability hearing on 28 & 29 January 2019 Mr Halson’s assertion that the second day of the hearing was totally unnecessary cannot be correct.

23. Ms Dawson recalled the Judgement of the Tribunal accepted the Claimant had a live final written warning for gross misconduct and that although the procedure was unfair the Claimant would not have been offered the role even if the procedure had been fair. Ms Dawson accepted this was a Polkey point, however the fact that the Respondent had genuine reasons for not offering the role and was held to have no liability in relation to this issue shows the Respondent was not acting unreasonably in defending this part of the claim.

24. Ms Dawson also submitted this issue could not have been dealt with without evidence from Mr Young and a one-day hearing would not have allowed sufficient time for evidence to be given by 3 witnesses of the Respondent and also from the Claimant. In short, the evidence given on 28thand 29th January

2019 was necessary to the overall determination of the case. It was both reasonable and necessary for Mr Young to give evidence both in relation to the claim of unfair dismissal and age discrimination. The case could not have been heard in one day. The Tribunal agreed with this assessment, accepting the validity of Ms Dawson's arguments in respect of the manager vacancy but the same cannot be said for the Northampton produce specialist role and her arguments were rejected in relation to this.

25. With reference to the trial period, Ms Dawson accepted the evidence given by Mr Young's was that when the Claimant asked if there could be a trial period, he did say that he believed that was only given in exceptional circumstances, but he would ask HR. He did ask HR but at the commencement of the following consultation meeting the Claimant had immediately said he wanted to accept the redundancy and so the subject was not addressed, and it is on this basis the Respondent was not unreasonable in putting forward this evidence. The Tribunal did not accept this argument, having made a finding of facts that giving the words used by Michael Young their common sense and ordinary meaning, it could not decipher any reference to the Northampton product specialist roles being made available for the claimant to apply for and compete against other produce specialists and there was no reference by Mr Young to the possibility of the product specialist role being advertised.

26. With reference to the product specialist vacancies Ms Dawson pointed out the claimant's evidence was that he did not hear this part of Mr Young's script as he was "overwhelmed" by the news of possible redundancy. Mr Young "simply" considered that as the Claimant did not ask about roles in what he had been informed was "an extended range category sales team based in Northampton" he was not interested. It was submitted that to rely on such evidence to defend the claim of unfair dismissal cannot be unreasonable. The Tribunal did not agree, and found the respondent did or should have bene aware at the outset an unlawful redundancy process had taken place to which there was no defence. In short, the respondent had no reasonable grounds for believing their defence to the unfair dismissal claim had any reasonable prospect of success, and there was no need for the "dust of battle to subside" before the respondent could make such an assessment. It was very clear from the outset that it had acted unreasonably, and this is one of those rare cases in the Employment Tribunal that theoretically could attract a costs order.

27. The Tribunal was referred to Scott v Commissioners of Inland Revenue [2004] IRLR 713 "8 *the relevant question in considering whether the pursuit, or defence, of a claim was misconceived was not whether the party in question thought they were right but whether they had reasonable grounds for so thinking (paragraph 46 at p.719)".* It was submitted Mr Young had reasonable grounds for believing the claimant was not interested in the new Product Specialist role and for considering he did not wish to pursue a trial period in the assistant branch manager role.

28. Reference was also made to Rodrigo Patrick Lodwick v London Borough of Southwark [2004] EWCA Civ 306 2004WL 960969 quoting ET Marler Limited v Robertson [1074] ICR 72 "Ordinary experience of life frequently teaches us that that which is plain for all to see once the dust of battle has subsided was far from clear to the contestants when they took up arms". "To order costs in the Employment Tribunal is an exceptional course of action and the reason for and basis of an order should be specified clearly..."

29. It was submitted the terms of the DBA override the client care except to the extent that the DBA refers to the Client Care Letter. Paragraph 13 is referred to in clause 7 which deals with early termination of the DBA by either party and the Claimant's liability for costs, payable to Mark Reynolds Solicitors, in the circumstances of early termination of the agreement. It is only where paragraph 13 comes into play that the costs in the Client Care letter become applicable. If the Claimant is successful in his claim then clause 11 of the DBA comes into play and the Claimant would have paid the same amount of legal fees regardless of the number of days the hearing lasted or indeed the number of hours worked by the solicitors in preparation and attendance. The Tribunal agreed with Ms Dawson's observations. Ms Dawson argued had the Respondent not defended the claim of unfair dismissal there is no reason to believe 40mins would have been saved preparing the agenda and list of issues. The time involved in such work is always in relation to the discrimination issues, issues in unfair dismissal are trite law. No reason is given why 2 hours would have been saved dealing with the case management hearing and preparation following that…The preliminary hearing was not extended because of issues relating to just unfair dismissal the clear majority of the discussion related to age discrimination. No reason is given for an alleged saving of 1 hour. The claim of age discrimination cannot be separated from the claim for unfair dismissal as they share the same facts, and this point applies to the hearing bundle (produced by the respondent), remedy bundle which the claimant would have to have produced in any event.

30. Finally, Ms Dawson submitted that as the DBA states a charge rate of £175 per hour + vat, this is what the Claimant agreed to and signed. There is no evidence that had an hourly rate been imposed it would have been £250+vat or that the Claimant had agreed to this. The Claimant agreed to £175+vat.She calculated Mr Halson's hourly rate was in fact £153 reminding the Tribunal that it remains a fundamental principle that the purpose of an award of costs is to compensate the receiving party, not to punish the paying party (Lodwick v Southwark London Borough Council [2004] IRLR 554). The Tribunal is aware that costs is to compensate and not punish, a principle relevant in Mr Hodgkiss's case given the substantial amount of costs he has had to pay and the toll this litigation has taken on his existing ill-health condition.

Conclusion

31. The Tribunal is aware that it is "rare" for costs orders to be appropriate in Employment Tribunal proceedings; they do not follow the event as in the

ordinary course of litigation. The claimant had two causes of action, unfair dismissal and direct and indirect unlawful age discrimination which were inextricably linked, and as stated above, they are incapable of being disentangled. Had this not been the case it is likely some form of costs order would have been made in the claimant's favour, the Tribunal being satisfied that the respondent was or should have been well aware it had no reasonable prospect of succeeding in its defence to the unfair dismissal claim given the Tribunal's findings and the incontrovertible facts in this case of a redundancy procedure that went to the heart of unfairness resulting in an act of unlawful age discrimination.

32. As indicated above, Rule 76 of the Tribunal Rules 2013 imposes a two-stage exercise for a Tribunal in determining whether to award costs. First, the Tribunal must decide whether the paying party has acted unreasonably, such that it has jurisdiction to make a costs order. In relation to the first stage of the exercise the Tribunal decided in the claimant's favour, satisfied the respondent had acted unreasonably in defending the unfair dismissal claim that was bound to fail form the outset given the facts known to the respondent before it submitted its Response. Even if the respondent held a genuine but wrong belief that the defence to the unfair dismissal had merit, this does not detract from the fact that it had no reasonable prospect of success from the outset of this litigation, and the respondent had no reasonable grounds for taking a view that it did. The respondent should have known it had no defence to the unfair dismissal claim, it was unmeritorious and the evidence put forward was found not to be credible by the Tribunal. The respondent's defence to the unfair dismissal complaint did not have any reasonable prospects of success either at the time of conception or during the course of their currency throughout this litigation to final hearing.

33. Satisfied that there has been unreasonable conduct, the Tribunal is then required to consider making a costs order and has discretion whether or not to do so. Ms Dawson informed the Tribunal Mr Halson has been asked on several occasions including at the hearing on 28th May to provide a full breakdown of his time and costs. He has given no evidence for his assertion that he has spent 75 hours in total on the case. Immediately, when the Respondent eventually received a copy of the Client Care letter and the DBA on 20th November 2019, he was asked again by email for a time print out of his work and the Respondent has not received a reply.

34. The Tribunal preferred the submission made on behalf of the respondent that the facts in relation to unfair dismissal needed to be put forward in evidence for the Claimant's discrimination claim as they related to the offering (or not) of alternative roles. Ms Dawson submitted that to have determined liability for discrimination, Polkey issues and mitigation in one day was totally unrealistic. Ms Dawson argued were the Tribunal to have considered the claims of discrimination and Polkey it was unrealistic for the case to have been heard oi one day, particularly so when the Tribunal would not have been aware of the background to the issues. The Tribunal agreed. This case was heard over a

total 2.5 days including remedy, not an unreasonable amount of time and at least 2 days would have been required even if liability for unfair dismissal had been conceded. Therefore, the Tribunal accepts Ms Dawson's submission that Mr Halson, the Claimant's solicitor, would not have saved the time he alleges as the issues of unfair dismissal and age discrimination were too interlinked on the facts.

35. In arriving at this decision, the Tribunal has considerable sympathy for the claimant. He has incurred substantial costs which have eaten into his damages. However, the Tribunal is required to look at the costs application objectively and apply the legal principles whatever the outcome.

36. In conclusion, the claimant's application for costs is dismissed.

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Employment Judge Shotter
29 November 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

16 December 2019

FOR THE TRIBUNAL OFFICE