EMPLOYMENT TRIBUNALS

Claimant: Mr N A Ashraf

Respondent: SGL Co-Packing Ltd

Heard at: Manchester (in chambers) **On:** 26 July 2021

Before: Employment Judge Phil Allen
Ms M T Dowling
Mr D Lancaster

COSTS JUDGMENT

The unanimous judgment of the Tribunal is that:

1. A costs order will not be made. The respondent's application for a costs order does not succeed.

REASONS

Introduction

1. The claimant was employed by the respondent from 10 April 1989 until the termination of his employment by reason of redundancy on 7 August 2019. The claimant was employed as a Warehouse Supervisor. He was given notice on 16 May 2019. The claimant alleged that his dismissal was unfair. He also alleged that he was subjected to less favourable treatment because of his race in 18 specified ways in the period between 23 July 2004 and 7 August 2019. The claimant also alleged that he was not allowed reasonable time off to seek new employment during his notice period in breach of sections 52 and 54 of the Employment Rights Act 1996, and that he did not have a statement of terms and conditions of employment.

2. The respondent defended all of the claims and contended that the dismissal was fair by reason of redundancy.

3. Following a Judgment sent to the parties on 23 March 2021 which did not uphold any of the claimant's claims, the respondent made an application for a costs order. The claimant opposed the application. This Judgment and reasons record the Tribunal's determination of the costs application.

Claims and Issues

4. The unanimous Judgment of the Tribunal sent to the parties on 23 March 2021 was that the claimant's claims for direct race discrimination, unreasonable refusal to be permitted to take time off as required by section 52 of the Employment Rights Act 1996, and breach of section 1 of the Employment Rights Act 1996 (written terms), were not successful and were dismissed. By a majority, the claim for unfair dismissal did not succeed and therefore was dismissed. The minority found the dismissal was unfair for reasons explained in detail in the written reasons (and in particular paragraphs 182 and 184 of those reasons), which, in summary, related to Ms Dowling's view that the respondent did not do as much as was reasonably possible to mitigate the impact on the claimant of the proposed redundancy by not proactively exploring with the claimant his reasons for not accepting the alternative role available which had been earmarked for him.

5. The respondent applied for costs in a letter of 20 April 2021. Costs were sought on the grounds that: the claimant had allegedly acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing the proceedings and in the way that the proceedings had been conducted; and that the claims advanced by the claimant had no reasonable prospects of success. The application enclosed a copy of a letter sent to the claimant on 26 June 2020 which was headed "without prejudice save as to costs" in which the claimant was informed that no application for costs would be pursued if he withdrew his claims by 3 July 2020 (but why an application for costs would be pursued if he did not do so). A schedule of costs was also enclosed, claiming total costs of £26,637.72 (which were stated to be plus VAT).

6. The claimant objected to the respondent's application in a letter of 23 April 2021. After a request from the Tribunal for comments, the claimant provided more detailed grounds of objection on 3 July 2021, both in a letter and in a separate document. He also provided some limited evidenced regarding his means.

7. The issues determined in this Judgment are those put forward in the respondent's costs application of 20 April 2021.

Procedure

8. In its application of 20 April 2021, the respondent requested that the Tribunal dealt with the application on paper. In the document attached to his response of 3 July 2021, the claimant stated that he agreed that the application could be determined in writing.

9. Accordingly, the Tribunal has reached this decision based on the documents provided by the parties and without having a separate hearing attended by the parties. The panel has met in chambers to reach its decision (meeting remotely by CVP remote video technology).

10. The claimant has conducted the proceedings without legal representation. The respondent has throughout been represented by solicitors and, at the final hearing, was represented by counsel.

Relevant facts and findings

11. The Tribunals findings of fact are recorded in detail in the Judgment sent to the parties on 23 March 2021. The Tribunal reminded itself of its Judgment and reasons when considering this application and will not reproduce the majority of that Judgment in this decision.

12. There were four preliminary hearings in this claim prior to the final hearing on: 3 October 2019; 16 March 2020; 5 May 2020; and 9 November 2020. Following the first of these preliminary hearings, Employment Judge Dunlop had identified a proposed List of Issues. The claimant had subsequently made applications to amend the claim, but those applications had been refused. Accordingly, the List of Issues to be determined at the final hearing remained the list which had been appended to the Case Management Order following the hearing on 3 October 2019.

13. For the purposes of this application, the Tribunal considered the case management order made by Judge Brian Doyle following the fourth preliminary hearing which had been conducted by CVP on 9 November 2020. That order contained an account of the previous hearings and what was considered at the 9 November hearing, which has been considered (which it is not necessary to reproduce in its entirety). In summary and as relevant to this application:

a. At the first preliminary hearing on 3 October 2019 Employment Judge Dunlop had summarised the case and dismissed a breach of contract claim on withdrawal. She refused an application for reconsideration of that decision;

b. An application to amend his claim made by the claimant (recorded as being to amend quite extensively) on 20 and 23 January 2020, was refused by Employment Judge Dunlop at the preliminary hearing on 16 March 2020;

c. At the third preliminary hearing on 4 May 2020, necessitated by the Covid-19 pandemic, it was apparent that the claimant was attempting to expand his claim through the contents of his witness statement and Employment Judge Dunlop put the claimant to the task of applying to amend his claim if he so wished. An application to amend was made on 29 May 2020;

d. The application to amend was heard by Judge Brian Doyle on 9 November 2020. At the hearing, the claimant narrowed his application to amend his claim to a single matter (a complaint of victimisation). The application was refused. A factor noted as part of the reasons for refusal was that the case was otherwise ready for hearing and there would be prejudice to the respondent in needing to amend its response and to revisit its documentary and witness evidence if the amendment was allowed. The remaining applications to amend were not pursued; and

e. It does not appear that an application for costs was made at the 9 November 2020 hearing, nor was there any record of an application

that the claimant's claims be struck out as they had no reasonable prospects of success or for a deposit to be required as they (or any part of them) had little reasonable prospect of success.

14. At the start of the final hearing the respondent made an application to exclude certain paragraphs of the claimant's witness statement as they were not relevant to the issues to be determined. The Tribunal (on the first day of hearing) granted the application for some (but not all) of the paragraphs identified.

15. In the Tribunal's findings of fact and decision from the liability hearing the following was recorded (as they were of particular note to this application):

a. That there was some confusion and lack of clarity in the evidence heard about what happened in 2013 and what the claimant was offered. The Tribunal found that the claimant was verbally offered the role of Warehouse Manager, but the written offer was only for the role of Warehouse Supervisor (his existing role) (see paragraphs 23-31);

b. That it did appear that the treatment of the claimant in 2013 was somewhat unfair. It appeared to be the case that the 2013 decision was the backdrop to the claimant's feelings of grievance in relation to later decisions (paragraph 124);

c. That Mr Kovacs evidence was that he had not previously identified the reason provided by the claimant in his letter of 29 April 2019 for declining the alternative roles offered (see paragraphs 50 and 51);

d. The issue which the Tribunal found the most difficult to determine (and indeed on which the panel did not agree), was whether the consultation undertaken, and the exploration of alternatives, went far enough to mean that the dismissal was fair in the circumstances and in accordance with equity and the substantial merits of the case (paragraph 178);

e. The claimant was an employee with 30 years service who was placed at risk of redundancy. Whilst the respondent offered the claimant the alternative roles available in the warehouse, it did not proactively explore with him his reasons for rejecting the alternative roles which were available and, in particular, the role of Warehouse Coordinator which the respondent had expected him to accept. Mr Kovacs, in answer to questions, confirmed the absence of exploration with the claimant about pay, or the hours when he would be expected to work, if he accepted the role. Mr Kovacs evidence was that, for both of these issues, the respondent could have been flexible. He explained to the Tribunal that, had he understood that the hours were a sticking point for the claimant, he would have been able to put in place an alternative shift pattern for the claimant, as he said he had done in other cases. As Mr Kovacs overlooked the reason given by the claimant in his letter of 29 April 2019 for rejecting the roles, this was never actively discussed with the claimant. Mr Kovacs said in evidence that, with the benefit of hindsight, he could have done things differently. No trial period was

actively offered in the alternative roles, nor was the claimant encouraged to accept any of them on a trial basis – something the Tribunal would expect to see (paragraph 182);

f. Ms Dowling, as the minority, disagreed that the respondent did genuinely conscientiously consider the consultation and the issues raised by the claimant. She felt there was an onus on the respondent to proactively explore with the claimant the role which had been earmarked for him and to discuss why exactly he was rejecting that role and whether the factors which were stopping him from accepting it could be addressed. The letter of 29 April 2019 was taken by the respondent as a rejection of the roles, when in practice it was an invitation to explore the issues and (hopefully) to find a mutually agreed solution. In practice, in the decision meeting, her view was that the respondent appeared to have gone through the motions rather than to have genuinely, softly and empathetically explored with the claimant why he was rejecting the role which would be the best fit for him, and what more could have been done to persuade him to accept it. During the notice period no further efforts were made to remove any blockers to the claimant being able to accept the role, even after the claimant re-stated his wish to remain in employment with the employer in his claim form. Her view was that the respondent did not do as much as was reasonably possible to mitigate the impact on the claimant of the proposed redundancies (paragraph 184)

16. In submissions at the liability hearing, the respondent's counsel emphasised that, whilst the respondent did not agree with the claimant's evidence on a number of factual issues, it was not putting forward the argument that the claimant had deliberately lied under oath. Rather, it was the respondent's position that the claimant saw everything through the prism of his case and that his evidence was therefore incorrect on occasion on that basis (this was recorded at paragraph 133 of the Judgment).

The Law

17. Costs in the Employment Tribunal are very much the exception and not the rule. Costs do not simply follow the event. The power to award costs is limited to the specific reasons provided in the Employment Tribunals Rules of Procedure.

18. Rules 74, 75, 76, 77, 78 and 84 of the Rules of procedure are relevant to the award of costs.

> *Rule 76. (1) 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) 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 (b) any claim or response had no reasonable prospect of success…*

> *Rule 78. (1) A costs order may - (a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the*

> *receiving party; (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles ...(3) for the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.*
>
> *Rule 84. In deciding whether to make a costs, preparation time or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.*

19. Also relevant is the costs section of the Employment Tribunals (England & Wales) Presidential Guidance – General Case Management. The Tribunal has considered that Guidance (and, in particular, paragraphs 1, 13-15 and 19) and will not reproduce them in their entirety here, save for highlighting the first line of paragraph 1:

> *The basic principle is that employment tribunals do not order one party to pay the costs which the other party has incurred in bringing or defending a claim.*

20. It follows from these rules as to costs that the Tribunal must go through a three-stage procedure. The first stage is to decide whether the power to award costs has arisen, whether by way of unreasonable conduct or otherwise under rule 76. If so, the second stage is to decide whether to make an award. If so, the third stage is to decide how much to award. Means or ability to pay may be taken into account at the second and/or third stage

21. In *Yerrakalva v Barnsley MBC* [2012] IRLR 78 Mummery LJ said at paragraph 41:

> *The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the Claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had.*

22. Neither party has referred to any particular points of law or case law in their written application and/or response. The respondent has relied upon a letter sent to the claimant approximately eight months prior to the hearing which explained to him that costs would not be sought if he withdrew his claim at that time, and explained the basis upon which costs might be sought/ordered in the future. Such a letter can be taken into account by the Tribunal where it is relevant to the reasonableness of the claimant's conduct and/or the prospects of success and/or in determining the amount of any costs order to be made.

Conclusions – applying the Law to the Facts

Vexatious, abusive, disruptive or otherwise unreasonable conduct?

23. In its application for costs based upon alleged unreasonable conduct, the respondent relied upon the claimant's attempts to amend his claim and, in particular, the amendment application made on 31 May 2020 and determined by Judge Brian Doyle on 9 November. It also highlighted the Tribunal's decision not to admit some paragraphs in the claimant's witness statement as they were not sufficiently relevant to be admitted.

24. The Tribunal has reminded itself that costs are the exception and not the rule. The claimant was a litigant in person with no experience of Tribunal claims. The Tribunal is obliged to take into account the overriding objective. An unrepresented claimant may struggle to understand the procedure and what is required. The Tribunal finds that this claimant endeavoured to pursue his claims as he was best able. He certainly strongly believed in the merits of his claims and, on occasion, appears to have struggled to understand or accept arguments made against him, but the way he pursued his claims was not vexatious, abusive or disruptive.

25. As explained in relation to the facts, the Tribunal has carefully considered the order made by Judge Brian Doyle following the hearing on 9 November 2020. The claimant's application to amend was not successful. Notably, the application was narrowed at the hearing (something which is not, of itself, indicative of unreasonable conduct). The application was addressed at a preliminary hearing conducted by CVP. Part of the reason for rejection of the application was that the respondent would otherwise be put to additional cost if the amendment was allowed. Judge Brian Doyle did not record any particular criticism of the claimant for pursuing the application at the hearing. In those circumstances, the Tribunal finds that the making of the application to amend, and pursuing it at the preliminary hearing, was not of itself unreasonable (even though it was not successful).

26. The Tribunal does not find that any of the matters raised by the respondent with regard to the claimant's applications to amend his claims, amounted to unreasonable conduct of the claims.

27. For an unrepresented claimant, the fact that elements are included in a witness statement which are not relevant to the issues to be determined, is not necessarily indicative of unreasonable conduct of a claim. It is relatively common for unrepresented claimants to struggle to identify what may be relevant to the issues and what is not, when drafting a statement. In this case, the inclusion of such elements was not unreasonable conduct of the claim.

28. The Tribunal finds that the claimant pursuing his claim, and/or the manner in which he did so, was not vexatious, abusive, disruptive or otherwise unreasonable.

No reasonable prospects of success?

29. In terms of the claimant's claim for unfair dismissal, as is highlighted in the elements cited from the liability Judgment above, it certainly had reasonable prospects of success. The minority of the Tribunal found the dismissal to be unfair

for the reasons given. Whilst the majority did not find the dismissal to be unfair, it was a decision which the Tribunal highlighted it found difficult to determine (at least in respect of one element). It was certainly not the case that the unfair dismissal claim had no reasonable prospect of success.

30. The claimant's discrimination claims included the contention that his dismissal was direct race discrimination. The Tribunal has not found the dismissal to have been discriminatory. Nonetheless, for the same reasons as have been identified for the unfair dismissal claim, it cannot be said that the claim had no reasonable prospects of success, where the Tribunal has found that it had concerns about the process followed and the proactivity with which the respondent explored with the claimant alternative roles and his reasons for rejecting it/them.

31. The application made itself did not highlight any particular part of the claims brought which it was specifically contended to have had no reasonable prospects. The application relied upon pages 5 and 6 of the 26 June 2020 letter (that is the letter seeking to persuade the claimant to withdraw his claim). As a result, the Tribunal has considered carefully points (i)-(viii) made in that letter on those pages.

32. Points (i)-(iii) related to the redundancy and dismissal, which are claims for which it cannot be said that the discrimination claim had no reasonable prospect of success for the reasons already given. As recorded above, the respondent's acknowledged a failure to consider the reasons given in writing by the claimant for rejecting the alternative roles. Whilst the Tribunal has not found the reason for that failure to be discriminatory, the Tribunal finds that such failures (amongst other things) show that the claim had some prospect of success. The letter places reliance upon the absence of the claimant specifically alleging race discrimination at the time, but the absence of such an assertion does not show that the claims had no reasonable prospects of success, where there were failures and a lack of proactivity in the way the exercise was conducted (as was found by the Tribunal).

33. Issues (iv) and (v) related to the older discrimination allegations. As explained, the Tribunal did find that the claimant was treated somewhat unfairly in 2013 in relation to one aspect of his assertions and found that the decision made in 2013 was the backdrop to his sense of grievance. In those circumstances, it is also not found that the claims had no reasonable prospect of success, albeit they were not successful.

34. The argument that the claimant's claims had no reasonable prospects of success is stronger for issues (vi), (vii) and (viii). These related to: the failure to offer training; reduced working hours; and refusal of time off during the notice period. However: the claimant was not given the training when a comparator was; and he did have his hours reduced for a period, when at least one of his comparators did not. Whilst the Tribunal did not find this to be due to race, the differential in treatment and the difference of race, do mean that the claims were not ones which had no reasonable prospects of success.

Whether to exercise the discretion?

35. As the Tribunal has determined that the claimant did not act vexatiously, abusively, disruptively or otherwise unreasonably in bringing the proceedings or his

conduct of them, and has also found that his claims did not have no reasonable prospect of success, it is not strictly necessary to also consider the other elements of the test on costs.

36. Nonetheless, even had the Tribunal needed to do so, it would not have exercised its discretion to make a costs award in any event.

37. The claimant genuinely believed the case he was advancing, as the respondent accepted during the submissions made by its counsel. She contended that whilst his evidence was not correct in some respects, this was a result of him having given evidence through the prism of the proceedings, not because he deliberately lied under oath. He was a long-serving employee who was dismissed in circumstances where the respondent was not proactive in exploring why he rejected a role which was apparently suitable for him. Historically he had been treated somewhat unfairly. Accordingly, the Tribunal finds that It would not have exercised its discretion to award costs in this case, even had the Tribunal found that it had the power to do so (whether by way of unreasonable conduct or otherwise under rule 76).

38. For the question of costs based upon the alleged lack of merit in the claims pursued as raised as issues (vi), (vii) and (viii) from the letter of 26 June 2020, those were relatively minor issues which did not add materially to the length of the hearing or the evidence required from the respondent's witnesses. None of those allegations were central to the claims brought. Indeed, it would appear to the Tribunal that all three of the respondent's witnesses would have needed to have given evidence to defend the unfair dismissal claim in any event, irrespective of whether the claimant had pursued any other claims in addition (and the respondent does not state otherwise in its application). Whilst the extent of the evidence required would have been greater the more claims which were pursued, the additional evidence required to address the matters referred to as issues (vi), (vii) and (vii) in the 26 June 2020 letter was not such as to make an award for the costs for those elements alone (in the view of the Tribunal) to be one which should be made. In particular, the claim for alleged failure to allow time off during notice, did not materially impact upon the length of the hearing at all. Had the Tribunal needed to consider exercising its discretion for those issues/claims only, it would not have done so.

Means

39. As a result of the decisions reached, the Tribunal has not needed to go on to consider the claimant's means, or what impact his means may have upon whether an award should be made, or the amount of such an award.

Summary

40. For the reasons explained above, the Tribunal does not make any order for costs.

Employment Judge Phil Allen

26 July 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

27 July 2021

FOR THE TRIBUNAL OFFICE

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