Reserved decision

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S A Akbary	**v**	**Patsnap (Uk) Ltd**

Heard at: London Central
On: 18 January 2021 and chambers 19 January 2021

Before: EJ G Hodgson
Mr Ian McLaughlin
Ms Sandra Campbell

Representation

For the Claimant: In person
For the Respondent: Ms S Omeri

DECISION

The claimant shall pay to the respondent costs of £5,000.

REASONS

Introduction

1. Following a hearing which commenced on 6 October 2020, judgment was reserved and sent to the parties on 29 December 2020.

2. On 25 January 2021, the respondent applied for costs against the claimant. That application was considered on 18 January 2022, and the decision was reserved.

The costs hearing

3. The hearing proceeded by video. The claimant had difficulty joining. On his laptop, he was able to see all participants, but neither his audio nor microphone worked. Using his phone, he was able to hear and speak. It follows that the claimant had full video and audio access. We could hear the claimant, but we could not see him. It was agreed that there was to be no oral evidence. The respondent confirmed there was no disadvantage to it in not being able to see the claimant. All agreed that it was in the interests of justice for the matter to proceed.

The liability hearing

4. For the purposes of this decision, it is not necessary to record which claims were brought under which case numbers. At the first hearing, the following claims were withdrawn: indirect discrimination, and four specific allegations of direct discrimination. The four specific allegations were:
    a. training was not given for new role;
    b. failing to provide provision at social events for individuals who do not drink alcohol
    c. failing to have one to one meetings; and
    d. failing to invite the claimant was to management meetings.

5. The claims of unlawful deduction from wages, direct discrimination, and unfair dismissal were heard and dismissed.

The respondent's application for costs

6. We received a skeleton argument, bundle of documents, correspondence between the parties, witness statements from Mr Tiong and Mr J Douglas, a bill of costs, and some guidance on hourly rates.

7. The claim for costs was brought pursuant to rule 76 the respondent relied on four grounds:

    a. the claimant had acted unreasonably in bringing proceedings;
    b. the claimant acted unreasonably in the way the proceedings were conducted;
    c. the claimant brought claims that had no reasonable prospect of success; and
    d. the claimant breached a tribunal order.

8. We did not hear from the witnesses. The statements were to confirm that the respondent was required to pay the costs, and therefore the indemnity principle was not infringed. The claimant made no challenge to the indemnity principle, and we accept that the respondent had an obligation to pay the costs of the solicitor.

9. The respondent confirmed it was not alleged the claimant's behaviour was vexatious.

10. The submissions do not maintain a clear distinction between each of the grounds alleged. Several factual allegations are put in different ways in support of the various grounds advanced. For the purpose of our analysis, we will identify the main points relied on in relation to each of the four grounds.

The claimant acted unreasonably in bringing proceedings

11. This is not detailed as a separate heading in the submissions. It appears to be the respondent's submission that no claim had any prospect of success, and therefore, it was unreasonable to bring proceedings.

The claimant was unreasonable in the way the claim was conducted

12. It is alleged bringing and persisting with claims of indirect discrimination, and some allegations of direct discrimination, up to just before the hearing was unreasonable conduct of the proceedings.[1]

13. The respondent alleges the claimant persisted with the withdrawn claims until 2 October 2020, being four days before the final hearing. It is the respondent's argument that "It was unreasonable for the claimant to have persisted in advancing allegations which he must have known were weak or which he did not genuinely wish to pursue at final hearing until so late in the approach to the hearing."

14. It is also alleged that the claimant was in breach of his duty of disclosure. This may be seen as unreasonable conduct of the proceedings, but for convenience we will deal with it as breach of order.

The claimant brought claims that had no reasonable prospects of success

15. It is the respondent's case with all the claims had no reasonable prospect of success being those which were withdrawn and those which ultimately were decided. It is the respondent's contention the claimant ought to have known that the claims had no reasonable prospect of success.

16. The respondent observes that the claimant failed at all times to clarify his wages claim, despite being ordered to do so by EJ Burns, and despite the tribunal allowing the claimant to make two separate applications to amend at the liability hearing.

17. The respondent alleges the claimant should have known his unfair dismissal claim had no prospect of success because his arguments

[1] In its submissions, the respondent also groups the allegation of dismissal under this heading. We do not accept that the claimant did not persist without allegation, and we will consider it separately.

concerning the relevant pool of employees to be considered and his allegation of failure to consider suitable alternative employment has no prospect of success. It being the respondent's position that those were the only matters relied on. In particular, the respondent is critical of the claimant's failure to bring direct evidence concerning the need to widen the pool of employees and alleges he had no basis for advancing this argument. It is alleged he ought to have known there was no prospect of arguing there was a failure to consider alternative employment. Finally, it is asserted by the respondent that the "claimant must have known that his claim for ordinary unfair dismissal lacked any reasonable prospect of success." This submission is not supported by further argument.

18. In support of the contention that the discrimination claims had no reasonable prospects of success, arguments were advanced in relation to each of the five discrimination claims preceding dismissal. We will consider the detail in our conclusions. In addition, it is argued that the allegation the dismissal was an act of direct discrimination had no reasonable prospect of success. The respondent alleges the claimant "admitted in cross-examination that he was not alleging that either... Mr Tiong, who made the ultimate decision to dismiss... by reason of redundancy, or Ms Cassey, who determined [the claimant's] appeal against dismissal, had discriminated against him because of either his race or his religion." It is alleged it is clear the claimant never believed that either Mr Tiong or Ms Cassey discriminated against him because of his race or religion. Further, it appears to be alleged that he did not pursue his allegation that the dismissal was an act of discrimination because it was not put to either Mr Tiong or Ms Cassey in cross-examination and was inadequately dealt with during submissions.

19. In addition, it is alleged that the failure to particularise the wages claim, contrary to the order of EJ Burns, was a breach of order. This is also relied on as a supporting fact in the assertions that the wages claim had no reasonable prospect of success, it was brought unreasonably, and the pursuit of it was unreasonable conduct of the proceedings. We will consider the failure to particularise in that context.

The claimant breached a tribunal order

20. It is alleged the claimant failed to disclose two audio recordings and that this was a breach of the order for disclosure. We will consider the detail of this in our conclusions.

The law

21. Rule 76, insofar as it is applicable, states:

> **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.**
>
> **(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.**

22. The word "may" confirms that making the order is discretionary. However, the tribunal shall consider exercising that discretion in certain circumstances. The circumstances are often referred to as the threshold test or the gateway.

23. The threshold test is met in a number of circumstances which include: if either a party, or a party's representative, acts unreasonably in bringing or conducting proceedings (rule 76(1)(a)); if the claim had no reasonable prospect of success (rule 76(1)(b); and if there is a breach of order (rule 76(2)).

24. Once the threshold test has been met, the tribunal must consider the exercise of its discretion. Discretion will result in a tribunal making a number of decisions which can include the following: should costs be awarded at all; should the costs be awarded for a period; should the costs be limited to a percentage; and should the costs be capped. The order can be tailored to suit the circumstances.

25. In exercising its discretion, the tribunal should have regard to all of the relevant circumstances. It is not possible to produce a definitive list of the matters the tribunal should take into account.

26. We should be cautious about the citation of authorities on costs, albeit broad principles can be distilled from the relevant authorities.

27. We should not adopt an over analytical approach to the exercise of a broad discretion. The vital point is to look at the whole picture and ask whether there has been unreasonable conduct in the bringing and conducting of the case. In so doing, we should consider what was unreasonable about the conduct and what effect it had. In **Yerrakalva v Barnsley MBC [2012] ICR 420 LJ** Mummery said:

> **39. I begin with some words of caution, first about the citation and value of authorities on costs questions and, secondly, about the dangers of adopting an over-analytical approach to the exercise of a broad discretion.**
>
> **40. The actual words of Rule 40 are clear enough to be applied without the need to add layers of interpretation, which may themselves be open to differing interpretations. Unfortunately, the leading judgment in *McPherson* delivered by me has created some confusion in the ET, EAT and in this court. I say "unfortunately" because it was never my intention to re-write the rule, or to add a gloss to it, either by disregarding questions of causation or by requiring the ET to dissect a case in detail and compartmentalise the relevant conduct under separate headings, such as**

> **"nature" "gravity" and "effect." Perhaps I should have said less and simply kept to the actual words of the rule.**
>
> **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. The main thrust of the passages cited above from my judgment in *Mc Pherson* was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances.**

28. It is always the case that costs are compensatory; they are never punitive.[2]

29. We must recognise the difficulties faced by litigants in person (even if at some point they may have representation). The threshold test is the same whether parties are represented or not, but the tribunal should not judge a litigant in person by the same standards as it would a professional representative.[3] Lay people may lack the objectivity assumed in a professional adviser, and that is a relevant consideration when exercising discretion.

30. The case law does identify specific matters which may be relevant to the exercise of discretion, and we should consider some of the matters previous tribunals have found relevant to the exercise of discretion.

31. As it may affect the ability to analyse appropriately and reach objective decisions, Ill-health may be a factor.

32. When considering whether to award costs because of a party's conduct in bringing or pursuing a case the type of conduct which is considered unreasonable will depend on the facts of the case. This is particularly important when considering a case which is subsequently held to have lacked merit. In general, having regard **to Cartiers Superfoods Ltd v Laws [1978] IRLR 315** it is at least arguable that in order to substantiate an allegation of unreasonable behaviour, it is necessary to look and see what that party knew or ought to have known if it had gone about the matter sensibly.

33. We note, as a general principle, that we should approach with caution the question of what a party should be taken to have known at a particular point in time, otherwise parties could end up being penalised for not

[2] See, for example, *Lodwick v Southwark London Borough Council* 2004 ICR 884, CA.
[3] See *AQ Ltd V Holden* 2012 IRLR 648.

assessing the case at the outset in the same way as a tribunal may do following the hearing of evidence. We have regard to the comments of Sir Hugh Griffiths in **ET Marler v Robertson 1974 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 combatants once they took up arms.**

34. We can consider how a party has pursued a matter. We can have regard to **Beynon v Scadden [1999] IRLR 700, EAT**. We would note the following from Justice Lindsay.

> **A party who, despite having had an apparently conclusive opposition to his case made plain to him, persists with the case down to the hearing in the "Micawberish" hope that something might turn up and yet who does not even take such steps open to him to see whether anything is likely to turn up, runs a risk, when nothing does turn up, that he will be regarded as having been at least unreasonable in the conduct of his litigation.**

35. When considering whether a party should reasonably have realised there was conclusive opposition to that party's case, we should consider if there were clear statements setting out that opposition. Those statements may appear in the response or claim form, correspondence, and cost warning letters.

36. The tribunal should have regard to any deposit order. Deposit orders operate as a warning to a party that a particular allegation or argument may prove to be unsustainable. Further, failure to establish the allegation or argument engages rule 37(5)(a) and unreasonable conduct may be deemed. There is no requirement to apply for a deposit order.

37. Where evidence turns out to be false, it may be appropriate to consider whether the evidence was advanced dishonestly, particularly if it concerns a central allegation.[4] However, a lie, even about an essential allegation, will not necessarily lead to an award of costs.[5]

38. It may be appropriate to consider a party's motive in bringing a claim. This is particularly relevant where there are allegations of vexatious behaviour.

39. The manner of proceedings should not be limited to questions of vexation; conduct that disrupts or prolongs the claim may be relevant. This is part of the general consideration identified in **Yerrakalva**.

40. Rule 84 expressly provides that the tribunal may have regard to a paying party's ability to pay.

> **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.**

[4] See for example *Daleside Nursing Home Ltd v Matthew* (UK EAT/0 519/08).
[5] See for example *Arrowsmith v Nottingham Trent University* 2011 EWCA Civ 797.

41. The tribunal is not obliged to restrict the order to one the paying party could pay in **Arrowsmith v Nottingham Trent University** 2012 ICR 159 at paragraph 37 Lord Justice Reimer said the following.

> **37. …The fact that her ability to pay was so limited did not, however, require the ET to assess a sum that was confined to an amount that she could pay. Her circumstances may well improve and no doubt she hopes that they will.**

42. In **Vaughan v London Borough of Lewisham UKEAT 0533/12** the EAT also reiterated the tribunal was not obliged to have regard to the ability to pay at all.

> **26. We come finally to the question of the Appellant's means. The Tribunal was not in fact obliged as a matter of law to have regard to her ability to pay at all: rule 41(2) gave it a discretion.**

43. It may be desirable to consider means, and the tribunal should give reasons for why it has, or has not, taken means into account. The tribunal should set out its findings about ability to pay.[6]

Discussion and conclusions

44. We will first consider whether any of the grounds relied on as meeting the threshold are established. We will consider each of the grounds in turn.

45. First, the respondent alleges the claimant acted unreasonably in bringing proceedings. This ground relies on a finding that there were claims brought which had no reasonable prospect of success. We consider this below.

46. Second it is alleged the claimant was unreasonable in the way the claim was conducted.

47. The claimant withdrew, shortly before the hearing, the claims of indirect discrimination and four allegations of direct discrimination. A claimant is not required to explain the reason for withdrawal. There may be several reasons. A claimant may recognise that the claim has no prospect of success. A claimant may recognise that there is insufficient evidence to support the claim. There may be a tactical decision to focus on those claims for which there is most evidence.

48. It may be possible that a claim which is well-founded cannot be proved because of a lack of evidence. Further, it is common for claimants to make multiple allegations of discrimination. Litigants in person, particularly, may find it hard to distinguish between claims of indirect discrimination and direct discrimination.

[6] See *Jiley v Birmingham and Solihull Mental Health NHS Trust* UKEAT/0155/07.

49. Solicitors, when taking over conduct of claims, may be reluctant to withdraw claims that have been brought, even when the elements of those claims have not been adequately identified.

50. Indirect discrimination claims present particular difficulties given the need to identify the provision criterion or practice, and the particular disadvantage. In general clear, well pleaded, and focused claims are the exception and not the rule, whether the litigant is represented or not.

51. As a claim progresses, documents are considered and statements exchanged. However, focus increases as the hearing becomes imminent. A party may take a realistic view about the prospect of a claim succeeding, leading to a claim being withdrawn.

52. The case law recognises that cost orders should not be applied in such a way as to prevent reasonable litigation decisions being made. This can extend to whole claims being withdrawn immediately before the hearing. It cannot be assumed that such withdrawal should lead to a cost order.

53. It may be necessary to consider whether withdrawal is a natural conclusion of a hard-fought claim or a symptom of a claim unreasonably brought. It should not be assumed that withdrawal is evidence a claim was brought unreasonably. Equally, if there is evidence a claimant should have recognised there was no prospect of success from the outset, or there is evidence of some ulterior motives, such that the claim was vexatious, withdrawing should not prevent an order for costs.

54. In this case, the claimant never adequately identified the nature of the indirect discrimination claim. It is arguable, as is inevitable when claims are withdrawn, that he should have realised there was no prospect of success. Equally it is arguable that the claim has put the respondent to little extra expense, as the provision criterion practice and particular disadvantage, were never adequately identified. Therefore, it should not have occupied significant time, or led to significant expenditure. It is possible to argue that the claim was not well founded. It is possible to argue that with proper advice at the start, the claimant may not have brought this claim. However, withdrawing it before the hearing was a sensible litigation decision and therefore its pursuit and ultimate withdrawal is not in our view unreasonable conduct of the proceedings.

55. There were four specific allegations of discrimination withdrawn. For direct discrimination claims, it is common for claimants to include multiple allegations of discrimination. Events which at the time may have seemed trivial or unimportant may be reflected on and gain in the mind of the claimant significance. The claimant may, in the light of subsequent events, believe that such treatment was an act of discrimination. It is for the claimant to prove that the treatment occurred. Thereafter, the claimant must seek to point to some fact which would suggest the treatment was discrimination. Tribunals frequently see multiple allegations of historical treatment advanced as allegations of discrimination. Many of those claims

persist and are considered at a final hearing. Many fail as it is not possible to prove the treatment occurred at all, or there is no fact from which it could be concluded there was discrimination.

56. There is a strong argument, when the case is approaching trial, for reviewing multiple allegations of discrimination and taking a realistic view as to whether treatment can be proven at all and whether there is any fact form which it could be found that the treatment is an act of discrimination. It cannot be assumed that when such claims are withdrawn, either there was no reasonable prospect of success in the first place, or that there has been unreasonable conduct the proceedings.

57. There are four broad allegations in this case which were withdrawn. The allegations cover training, the provision for drinks at a social event, failure to provide one-to-one meetings, and failure to invite the claimant to management meetings. Those claims were weak and unparticularised. They lacked specific detail of specific events. They failed to set out who was responsible, what was the actual treatment, or when it occurred. That does not mean to say that treatment did not occur. However, in the absence of good evidence giving the specifics, those claims had limited prospect of success. There is no basis advanced to establish that the claimant should have understood these claims had no prospect of success from the beginning of the claim. Instead, it is said that withdrawing them demonstrates unreasonable conduct of the proceedings. We disagree. The process of review, leading to sensible litigation decisions, is common, it is to be encouraged, it is not unreasonable conduct of the proceedings. We cannot find withdrawal of those claims to be unreasonable conduct of the proceedings.

58. Third we consider whether any of the claims brought had no reasonable prospect of success.

59. Above, in the context of the conduct the proceedings, we have considered whether it can be said that any of the withdrawn claims had no reasonable prospect of success. There is insufficient evidence before us on which we could find the claimant ought to have known those claims which were withdrawn had no reasonable prospect of success at the point he brought proceedings.

60. The respondent alleges the claimant ought to have known the unfair dismissal claim had no reasonable prospect of success. In particular, it alleges the claimant's allegations that the pool was unfair and there was a failure to consider alternative employment had no prospect of success.

61. We do not find that the claimant ought to have known the unfair dismissal claim had no reasonable prospect of success. In our view, there were real arguments and it was reasonable for him to pursue the claim. There is suggestion that Mr Newman decided to dismiss before any consultation took place. It is also alleged that his motive was discriminatory. It follows

there was a challenge to the reason. Whilst we found against the claimant, that finding is based on evidence. There was a clear argument that the respondent had not established its reason.

62. Further, when considering the reasonableness of the respondent's action, here the burden being neutral, there were proper arguments to be advanced. Whilst the claimant's arguments were rejected, that does not mean he ought to have known they would be rejected when presenting his claim. Findings of unfair dismissal, where redundancy is alleged as the reason, frequently turn on the analysis of the procedure, including the respondent's reasons for selecting, or not selecting, a pool, and the respondent's reasons for refusing alternative employment. In this case there was a possibility of the claimant being employed in another role and the refusal to appoint the claimant to that role is an argument which had merit. We reject the respondent's contention that the claimant ought to have realised at at the outset that the unfair dismissal claim had no reasonable prospect of success.

63. The claim of unlawful deduction from wages was a substantial claim. Underpinning any commission or wages claim there must be a contractual provision requiring payment. Failure to pay must be a breach of that provision. It is not enough that the claimant believes he ought to have been given more money because of his previous performance and his general assertion of fairness. The claimant sought payment of commission as an unlawful deduction from wages. It was made clear to him by EJ Burns that he must give particulars. This involved identifying the contractual term. That remained the position before the tribunal at the final hearing. At that stage he was represented. There were two attempts made to particularise the claim, but the claimant fundamentally failed to set out any contractual terms. He failed to set out what the term was, whether it was written or oral, when it was agreed, or who agreed it. There was some vague evidence about meetings, but that fell far short of establishing a contractual term. Having regard to all of the evidence before us, we reached the conclusion that the claimant ought to have known that there was no contractual term underpinning his claim for commission. The unlawful deduction from wages claim had no prospect of success, as there was no agreement for the payment. This is not a case where the claimant identified a specific meeting, discussion, or document which created a contractual term, but which was rejected as a contractual term following evidence. The claimant set out no claim. In the circumstances, the claimant should have known before bringing the claimant he had no reasonable prospect of success and it was unreasonable to bring that claim. Moreover, in failing to clarify the claim at any stage, his persisting with it was unreasonable conduct of proceedings. It occupied significant time at the final hearing when we had to deal with two separate applications to amend, both of which the applicant should have known had no prospect of success. It follows, in relation to the bringing of and persisting with the wages claim, the claimant acted unreasonably and the threshold for costs is met in this case.

Reserved decision

64. Can it be said the claimant ought to have known the discrimination claims had no prospect of success? We must consider each.

65. Allegation one is that Mr Newman ,on 24 April 2019, said to the claimant "Your religion is backward ancient and you should enjoy yourself more." We found, on the balance of probability, that the words were not said. When a claimant alleges that specific words were said, it is for the claimant to prove that allegation. Where there is a conflict of evidence, the tribunal must decide, whether the allegation has been proved. However, finding on the balance of probability that words were not said, does not mean that a claimant has lied. It is possible that the words were said. As noted previously, conversations which may have seemed innocuous in context at the time can gain a greater significance when the parties are in conflict. Language may be misremembered, or the context is obscured. Where offence has been taken at the time, it is more likely there will be documentary evidence. However, when words gain importance at a later date, there may be little evidence. We are not satisfied that there is sufficient evidence from which we could find that the claimant has deliberately sought to falsify this allegation, or to mislead the tribunal. It is possible that the words were used, or that some similar conversation took place. We cannot find he should have known it had no reasonable prospects of success.

66. Allegation two is that Mr Newman prevented the claimant from attending Friday prayers. We consider this in detail at paragraph 7.29 – 7.32 of our liability decision. At paragraph 7.29 we stated the following:

> **7.29 We have found that Mr Newman did not prevent the claimant attending Friday prayers. The nature of this claim is unclear. The alleged factual circumstances have developed and changed over time. In its final form, the claimant alleges that he was prevented from attending prayers by being required to attend lunch breaks between 12:00 and 13:00. He has been inconsistent about how this was communicated. He appears to allege that there was documentation, but he could not point to any documentation which imposed the relevant constraint. He said that he discussed the matter specifically with Mr Newman, and Mr Newman specifically refused. However, there is no contemporaneous documentation in support, and the claimant's own witness statement does not set out any supporting evidence. In his oral evidence, the claimant was clear that there had been a discussion. He alleged he had specifically asked to attend Friday prayers, and that Mr Newman had refused to allow it. This is entirely inconsistent with his statement, and in particular paragraph 127. His written statement is to the effect that he continued to go to Friday prayers and Mr Newman did not notice.**

67. We went on to note that the claimant, during the hearing, referred to an email concerning the reduced lunch hour. We considered that email. In no sense whatever did it support his contention that he was required to take lunch from 12:00 to 13:00. The reality is the claimant continue to attend Friday prayers. He could point to nothing in writing. He could point to no meeting in which he was forbidden to attend Friday prayers.

68. Attending prayers is an important part of the claimant's religious observance. Preventing his attending prayers may be a serious matter, and is one which is sensitive. The allegation that he was prevented from attending prayers is a serious allegation of discrimination. The claimant failed, at any stage to particularise how he was prevented from attending. The reality is he was never prevented from attending. The evidence he sought to point to was unhelpful. We have reached the conclusion that the claimant could never have believed he was prevented from attending Friday prayers. This was an untrue allegation. We find that, at the time the claimant made the allegation, he knew this it was false and unjustified. In those circumstances, he should have known there was no reasonable prospect of this allegation succeeding.

69. Allegation three concerns the claimant not being invited to the Presidents club. The allegation was true. He was not invited. The respondent suggests that, as there was clear contemporaneous documentary evidence that the respondent invited "a number of other Asian and Muslim members of staff," that the allegation was "hopeless." We do not agree. What falls to be considered is the reason why the claimant was not invited. This allegation was arguable. It is not an argument the claimant ought to realise had no reasonable prospect of success.

70. Allegation four concerns his alleged removal from the forum. This was a poorly articulated claim the evidence was inadequate. It appears the forum was one which was not administered by the respondent. There is a distinction to be drawn between claims which are knowingly falsified, and those which are likely to prove weak, or unfounded. This is a weak claim based on poor evidence. However, it is not one which we can say had no reasonable prospect of success at the outset. It was dependent on the evidence.

71. Allegation five concerns the claimant being omitted from the office seating plan. He was omitted from the office seating plan. The allegation of treatment is made out. Part of his argument was that his selection for redundancy was discriminatory. Part of the explanation for omitting him from the seating plan revolved around his being selected for redundancy. It cannot be said it had no reasonable prospect of success when brought.

72. The final allegation is that the dismissal was an act of discrimination. The respondent alleges that it had no reasonable prospect of success, and that it was not pursued before the tribunal. In particular, the respondent says that the claimant made no specific allegations against Mr Tiong and Ms Cassey. The respondent characterises Mr Tiong as the "ultimate" decision-maker. This masks the fact that the process involved decisions by Mr Newman.

73. We found that Mr Newman did not discriminate when proposing the claimant should be made redundant. Had we found that he had discriminated in making that proposal, the fact that Mr Tiong did not intend to discriminate may not have been a defence. We do accept that it can be

argued the cross-examination by the claimant's representative was inadequate in the sense that the allegation was not put to Mr Tiong or Ms Cassey. However, it is not an absolute rule of law that all allegations must be put, particularly when the essence of the allegations is clear and understood by all. In any event, failure of an advocate tells us little or nothing about the claimant's understanding at the time the claim was brought. Any finding that the dismissal was discriminatory rested on the allegation that Mr Newman discriminated. It was clearly arguable. It cannot be said it had no reasonable prospect of success. It cannot be said claimant was unreasonable in bringing the allegation.

74. It follows that we find that the threshold has been met in relation to allegation two. This was an allegation the claimant should have known had no reasonable prospect of success from the outset.

75. Finally, we need to consider the allegation that the claimant breached a tribunal order. On day four of the hearing, the claimant sought to rely on a transcript of the recording. No recording had been disclosed to the respondent. The claimant made various allegations, and we consider this particularly at paragraph 4.29 and 4.30 of our decision.

> **4.29 On day four, the claimant sought to rely on a transcript of a recording. He alleged the recording had been undertaken by accident. He had disclosed two short clips of the recording itself. His initial representation was that the recording had been lost. The following day it was clarified that it had not been lost, but it could not be downloaded from the phone. There was also reference to a second recording. We do not need to record the full details. What is clear is the claimant was seeking to rely on transcripts of a recording which he had failed to disclose, and he had not adequately explained to the respondent either the existence of recordings, or any difficulties in providing them, and this despite specific requests from the respondent. The claimant elected to withdraw his application to rely upon the documentation.**
>
> **4.30 We noted that the position was unsatisfactory. These were relevant documents. It appeared the claimant had failed to disclose them and had not given any adequate explanation for that failure. It appeared he had failed to engage with the respondent's requests, and instead had sought to rely on an extract which clearly had been taken from a longer conversation. It follows the claimant appeared to be in breach of his duty of disclosure**.

76. The claimant had been able to take extracts from at least one recording. However, he maintained that he could not provide copies of the original recording. It became apparent there were two recordings. The claimant should have disclosed both those recordings as part of his ongoing obligation to disclose documents. He clearly believed the recording relevant, because he produced some form of incomplete transcript. The recordings were never given to the respondent. This was a clear ongoing breach. The claimant was in breach of order to give disclosure relation to an important document. He never rectified that breach. The threshold for costs is met.

Reserved decision

77. We do not need to consider separately whether the failure to particularise the wages claim is a breach of order. We found that the claimant's conduct in relation to the wages claim was unreasonable conduct of proceedings.

78. If follows that the threshold for making a costs order is met in three ways. First, the wages claim had no reasonable prospects of success, and its pursuit constituted unreasonable conduct of the proceedings. Second, the allegation that the claimant was prevented from attending Friday prayers had no reasonable prospect of success, and he ought to have known this when the claim was brought. Third, the claimant was in breach of his obligation to disclose two recordings.

79. Next we must consider whether we should exercise our discretion to make an order for costs. Even where the threshold is met, the tribunal may decline to order costs.

80. In considering whether to make any award for costs, it is necessary to consider all the circumstances. There may be claims which had no reasonable prospect of success because they are based on invented claims. In those circumstances, it is likely that a tribunal will find that it should order the full costs of the action. At the other end of the spectrum may be minor breaches of an order which, theoretically, could lead to a finding that the threshold for ordering costs has been met (see rule 76 (two); however, it may not be inappropriate to award costs where the breach is minor or excusable. If follows, that it is necessary to have regard to the nature of the conduct that meets the threshold. In this case, there are three ways in which the threshold has been met. We have found the claimant brought, and persisted with, one serious allegation of discrimination for which there was no foundation. The claimant should have known that there was no basis for arguing that he was prevented from attending Friday prayers. Whilst this may be seen as an isolated allegation, it was advanced, at least in part, in support of his allegation that Mr Newman discriminated against him when instigating the dismissal. If follows that the false allegation was pursued to bolster the claimant's prospects of succeeding on the dismissal claim. That is a serious matter. It is conduct which was deliberate and blameworthy.

81. Bringing the wages claim, when there was no contractual basis for it, and when the claimant ought to have known that it had no prospect of success, is also blameworthy.

82. Not all failures to disclose documents, even if they do technically meet the threshold for costs, should result in a costs order. The claimant made covert recordings. We do not accept that he was frank with the tribunal when he suggested they were made by mistake. We do not accept that the claimant could not have either sent copies of the recordings to the respondent or made other arrangements for disclosure. This was compounded by the fact that the claimant sought to produce transcripts of parts of the proceedings in support of his own claim, whilst not disclosing

the underlying document. These are serious breaches, with the potential to distort the relevant evidence.

83. If follows all the breaches are significant, serious, and blameworthy. It is appropriate for us to exercise our discretion to make some award for costs.

84. The final question is what is the appropriate amount. We have a broad discretion. The respondents seeks a detailed assessment against a bill of over £85,000. The respondent has had a formal bill drawn, albeit there is no obligation to do so and there is no order of the tribunal requiring it.

85. Not all of the grounds relied on by the respondent have succeeded. The respondent has not persuaded us that either the unfair dismissal claim or the discriminatory dismissal claim had no prospect of success.

86. We received little evidence about the claimant's means. It is clear the claimant was a high earner when employed. At the time he benefited from those earnings, he was able to afford luxuries, such as expensive cars and holidays. He has given no specific evidence at this hearing. In submissions, he says that he has little money and is supported by his family. He denies owning any house or flat. He denies having any property of any value. Given the lack of evidence, we cannot come to any final conclusions about his means. We are not obliged to take his means into account. We do not find his means be a relevant factor in our decision. Whilst the claimant alleges that he has anxiety and anxiety and depression, and has not been able to secure alternative employment, the evidence is incomplete and poor. We cannot assume that he will not obtain employment in the future. We do not assume that he has no means to pay. We are not obliged to take his means into account, and we have not done so in reaching our final decision.

87. There is no obligation on the tribunal to tailor the award for costs by reference to the increase in cost caused by the conduct which causes the threshold to be met. In a case such as this, it is very difficult to know what effect the unreasonable conduct has had on the total costs. We have found that there were claims of direct discrimination which were arguable. We have found the claim of unfair dismissal was arguable. If follows that significant costs have been incurred in any event.

88. Undoubtedly the wages claim has added to the expense. However, we are not convinced that it has added significantly to the preparation. The respondent alleged there was no contractual term. Whilst the claimant's schedule was significant, it is difficult to see how significant costs could be incurred in pleading that no sum was payable because the claim was not underpinned by a contractual obligation to make any payment. We acknowledge the attempt at clarifying the claim has incurred costs, both during preparation and at the hearing when two applications were made for amendment.

Reserved decision

89. The failure to disclose recordings, whilst being an important breach, has not added significantly to the cost of the claim, albeit it wasted time at the hearing.

90. The starting point is that costs do not follow the event in a tribunal claim. Normally, no costs are payable. When the threshold has been met, it is appropriate to consider whether the entirety of the cost should be paid. The main claims were claims for unfair dismissal and the alleged discriminatory dismissal. In addition, it was reasonable to pursue four out of the remaining five allegations of discrimination. Given that it was reasonable to pursue those claims, we do not accept that the total costs incurred should be awarded.

91. The allegation that the claimant was prevented from attending Friday prayers was not the only matter relied on in seeking to establish the dismissal was discriminatory. Had it been, it may have been appropriate to make a more substantial award. However, this was a limited allegation in context, and its effect on the litigation was not, ultimately, determinative of the central issue concerning dismissal. Nevertheless, the breach was serious because it involved fabrication.

92. This is a case where we should take a broad brush approach when exercising our discretion. It is neither possible not appropriate to seek to limit the order to the increase in cost caused by the unreasonable conduct. We have decided that we should make a substantial order, but one which reflects the significance of the unreasonable conduct in the overall context of the claim, much of which was brought and conducted reasonably. Applying a broad-brush approach, we consider the appropriate sum to be £5,000. We award the respondent costs of £5,000.

Employment Judge Hodgson

Dated: 3 March 2022

Sent to the parties on:

03/03/22.

For the Tribunal Office