EMPLOYMENT TRIBUNALS

Claimant: **Mr M Miah**

Respondent: **FIS Capital Markets UK Limited**

Heard at: **East London Hearing Centre (by video)**

On: **13 October 2022**

Before: **Employment Judge P Klimov (sitting alone)**

Representation
For the Claimant: In person
For the Respondent: Mr T Welch (Counsel)

JUDGMENT having been sent to the parties on **18 October 2022** and written reasons having been requested by the Claimant on **30 October 2022**, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Delay in providing written reasons

1. Unfortunately, the Claimant's email of 30 October 2022 and his follow-up email of 13 December 2022 have been forwarded to me only on 3 February 2023, hence the delay in providing these written reasons, for which I apologise. I have asked the Tribunal staff to notify the Claimant that there would be a delay in providing the written reasons.

2. Although the Claimant's email does not specifically say that he is asking written reasons for my Judgment, I accepted it as a request for written reasons pursuant to Rule 62(3) of the ET Rules, because the Claimant says in his email that he "*expected a little more than simple statements*" and asks for "*[t]he judge's explanations*".

The Claimant's claim and procedural background

3. The Claimant lodged his claim form on 10 December 2021. His claim form was unclear. He set out some factual background and made general allegations of "*unfair and discriminatory behaviour*" by the Respondent but did not specify what kind of complaints he was bringing. He did not tick the unfair dismissal box or

any of the discrimination boxes. Instead, he indicated that he was making another type of claim and called it "*some form of whistle-blower discrimination*". He said that his complaint was about the Respondent's decision not to rehire him despite initially telling him that he was eligible to be rehired after 4 months.

4. On 1 February 2022, the Respondent presented a response giving the factual history of the matter, pleading a general denial of the claims, and seeking to strike out the claims as being presented out of time and/or as having no reasonable prospect of success, and in the alternative, applying for a deposit order.

5. On 6 April 2022, the Tribunal listed the case for a case management preliminary hearing on 25 July 2022 and for a full merits hearings on 15 and 16 October 2022.

6. On 7 April 2022, the Respondent's solicitors wrote to the Claimant with a request for further information to understand his claims, enclosing a draft list of issues based on their understanding what type of complaints the Claimant was bringing.

7. On 21 April 2022, the Claimant replied enclosing various documents and witness statements. However, he did not clarify what type of complaints he was pursuing.

8. On 25 April 2022, the Respondent's solicitors wrote to the Claimant again seeking to clarify the precise legal claims he was pursuing against the Respondent. In their email they provided a brief explanation of the purpose of a list of issues and encouraged the Claimant to seek legal advice.

9. On 26 April 2022, the Claimant replied stating that he "*did not claim a straightforward case of whistle-blower, sex/race discrimination, unfair dismissal etc*.", and that his claim was "*one of fairness that does not seem to easily fit into any existing criteria*". He said that he believed that:

> "...*the ET understands that not all questions of fairness fits into rigid definitions, which is why they allowed for an "other" option, and I hope they will give me a chance to explain it*".

10. On 4 May 2022, the Respondent's solicitors wrote to the Tribunal explaining the history of the matter and stating that in light of the Claimant still not explaining his complaints they were not able to finalise a list of issues, and that a further judicial intervention may be necessary to assist the parties to finalise a list of issues.

11. On 20 May 2022, Employment Judge Goodrich ordered the Claimant to provide further information about his claims. In particular to state:

> "*Whether you are contending that your dismissal was unfair and, if so, give brief reasons why:*
> *Of your complaint of whistleblowing discrimination, to whom you made your whistleblowing complaints, when you did so and how (e.g. in an email, or*

meeting, or telephone call, or however this was done); and who it was that treated you unfavourably, when it happened and a brief summary of what happened;

Whether you are complaining of race and/or sex discrimination and, if so to state what type of unlawful discrimination you are saying took place, who did it, when it happened and a brief summary of what happened".

12. On 31 May 2022, the Claimant replied again reiterating that his claim was in the "*another type*" category about the unfairness of the withdrawal of the job offer by the Respondent. He said that his "…*claim does not quite fit the easily identifiable situations of "discrimination", "unfair dismissal", or a case of breach of contract which ET would not be in a position to deal with.*"

13. At the preliminary hearing on 22 July 2022, Employment Judge Salter sought to clarify the Claimant's claims and explained to the Claimant the restricted scope of employment tribunals' powers and jurisdiction, and, as the Judge recorded in the Case Summary, "*most notably that we do not have a power to assess general fairness unless it can be linked to one of the jurisdictions we can hear such as discrimination*".

14. The Judge recorded in the Case Summary the Tribunal's limits on adjudicating on matters that are not included in the claim form and how, under the Equality Act 2010, a discrimination claim must be based on one of the protected characteristics, and the burden of proof provisions under the Act.

15. The Judge recorded that:

"*The Claimant:*

(a) appeared to believe the tribunal had a power to consider fairness in the abstract;

(b) accepted there was no mention of race discrimination in the claim form

(c) thought it was for the tribunal to hear the evidence and then discern what the claim was from that evidence.

The Employment Judge explained it was for the Claimant to tell the tribunal and Respondent what his claim was; for the issues to then be identified and the Final Hearing to determine whether on the evidence, those claims had been established and proven as a result of this misunderstanding of the tribunal's jurisdiction and power the Claimant had difficulty in formulating his claims."

16. The Judge encouraged the Claimant to obtain legal advice.

17. The Judge relisted the final hearing for January 2024 and ordered an open preliminary hearing on 13 and 14 October 2022 ("**the OPH**") to determine:

(i) A potential amendment application by the Claimant;

(ii) *relevant time limit jurisdictional issues (as the Judge conducting the preliminary hearing deems appropriate) that relate to whether it is just and equitable to extend time;*
(iii) *whether it was reasonably practicable for the Claimant to have presented a claim in time and, if not, was the claim presented within a reasonable time thereafter;*
(iv) *whether the Claimant's case should be struck out as demonstrating no reasonable prospect of success;*
(v) *any other applications the Respondent identifies it wishes to be determined at this hearing*
(vi) *case management as appropriate, including finalising the list of issues, and making case management orders for the final determination of remaining matters.*

18. The Claimant was ordered to provide further information about his claims. Other directions were given to the parties in preparation for the OPH.

19. Between 8 and 22 August 2022, there were several emails sent to the Tribunal by the Claimant and the Respondent. In those communications, the Claimant abandoned his "whistleblowing" detriment claim and sought to introduce new claims of direct race discrimination and harassment related to race with respect to historic events going back to 2017. None of these historic events formed part of his original claim. Furthermore, and significantly, he was not alleging that the decision not to re-hire him (which was the subject matter of his claim from the start) was in any way motivated by his race.

20. The Respondent objected to the Claimant's application to amend. It also contended that even if the amendment were allowed, the Claimant's claim for race discrimination had no reasonable prospect of success. The Respondent also asserted that the manner in which the proceedings had been conducted by the Claimant had been scandalous, unreasonable or vexatious. The Respondent applied to have the Claimant's race discrimination claim struck out or made subject to a deposit order (if the Claimant's application to amend succeeded), and for costs under Rule 76(1)(a) and (b) of the Employment Tribunals Rules of Procedure 2013 ("**the ET Rules**").

The OPH

21. The Claimant appeared for himself, and the Respondent was represented by Mr Welch. The parties prepared an agreed bundle of documents of 172 pages. The Respondent submitted a bundle of authorities of 216 pages and its costs schedule. Both parties presented skeleton arguments.

22. There were two witnesses, the Claimant and Ms J Smith for the Respondent.

23. I started the hearing by confirming with the Claimant my understanding that he had withdrawn his complaint of "whistleblowing" detriment under s.47B ERA. The Claimant confirmed that. I dismissed that complaint upon withdrawal.

24. The Claimant then proceeded to make his application to amend. As part of making his application the Claimant gave evidence and was cross-examined.

25. In essence, the Claimant argued that his application should be allowed because he did not know that he could link the past events from 2017 - 2019 to the Respondent's decision not to re-hire him. The Claimant said that he now thought that those past events were discriminatory on the ground of his race, which ultimately resulted in his past performance rating being assessed as "needs improvement", which in turn resulted in him becoming ineligible to be re-hired under the Respondent's policy. This was inconsistent with his earlier submissions to the Tribunal on 6 August 2022, where he wrote that "needs improvement" rating was used by the Respondent "*only as a means to control people's pay rise*".

26. The Claimant accepted that in the past he never raised a complaint of race discrimination in relation to any of those past events, including with respect to the disciplinary actions against him by the Respondent and his performance appraisal and rating. In fact, he did not raise a complaint of any kind and did not dispute the disciplinary sanctions applied or the performance rating given. That is despite the Claimant being well familiar with the Respondent's internal complaints procedure and using it to report suspected violations in September 2019.

27. The Claimant also said in his evidence that he had legal degree and consulted practising lawyers about his claim. They refused to take on his claim. The Claimant evidence was that if he "*had listened to any lawyer [he] would not be making this claim.*"

28. He also admitted that the Citizens Advice and his home insurance provider both declined to take on his case. He said that he thought he could just take it to the Employment Tribunal, and the Tribunal would then decide whether he had a claim or "*throw it out*".

29. The Claimant also accepted that his complaint was not that the decision not to re-hire him was an act of race discrimination by HR, but a mere application of the Respondent's policy by HR, which policy stipulated that the Respondent could not rehire him because of his unsatisfactory performance rating.

30. Mr Welch submitted for the Respondent that applying the principles in *Selkent Bus Company Ltd v Moore* [1996] IRLR 661 the application must be refused because it was a new cause of action. At no time before 22 July 2022 did the Claimant mention anything about his race as being the reason for alleged bad treatment by the Respondent. Even with the application being made, his complaint remained unclear and no more than a hunch. All the matters the Claimant complains about are significantly out of time. The application was made very late. The Claimant had access to legal advice and himself was a trained lawyer. There will be a significant prejudice to the Respondent if the application was allowed. On the contrary, there will be no prejudice to the Claimant because his complaint of race discrimination was "obviously hopeless" (*Herry v Dudley Metropolitan Borough Council* UKEAT/0170 at [81]).

31. I refused the Claimant's application to amend essentially for the reasons advanced by the Respondent. It was clearly a speculative claim made by the Claimant in the hope to keep the proceedings against the Respondent alive, when it was (or at any rate should have been) obvious to him that his race discrimination claim was hopeless.

32. The Claimant is an educated person with a legal degree. Before lodging his claim, he consulted several skilled advisers. He went against their advice. Having discussed his claim with legal advisers and having decided to lodge a claim despite them not being willing to represent him, the Claimant still did not mention anywhere in his claim form and in subsequent exchanges with the Respondent and the Tribunal that there was a compliant of race discrimination in his claim.

33. In fact, as late as 31 May 2022, in responding to the Tribunal's direct question whether he complained of race discrimination, he replied that his "*claim [did] not quite fit the easily identifiable situations of "discrimination""*. Six weeks later the Claimant performs a volte face and now claims that he always thought he had been discriminated against because of his race.

34. Even at this stage, and having made his application to amend, the Claimant could not clearly explain what exact acts of the Respondent he alleges to be acts of race discrimination and why, beyond making some general allegations of "*prolonged period of inconsistency, miscommunication, toxic management.*"

35. The highest the Claimant puts his case is that he "*sincerely doubt[s] it (the "needs improvement" rating) would have been used against me to refuse the contract had it not been for some element of racial and whistle-blowing prejudice at some stage of the last few years of my employment with [the Respondent]*" (email to the Tribunal dated 6 August 2022)

36. His complaint of race discrimination relates to the events in 2017-1019, and as such more than two years out of time. He did not provide any explanation as to why he could not present such complaints earlier.

37. Allowing the amendment would mean putting the Respondent at a significant prejudice of having to investigate matters going back to 2017, incur further costs and waste legal and management time. The prejudice to the Claimant is that, using his words, this "long-short" race discrimination claim will not be allowed to proceed. However, his "long-short" was always going to fail, considering the time limit issue, and that his complaint, as presented by him with the application to amend, does not disclose anything that could get him over the initial hurdle of showing that the alleged less favourable treatment by the Respondent could be because of his race.

38. Therefore, the balance of injustice and prejudice tests resoundingly lies in favour of the Respondent.

Dismissal of the Claimant's claim

39. Having announced my decision on the Claimant's application to amend, I asked the Claimant whether he accepted that with his application failed, and him withdrawing his complaint of "whistleblowing" detriment, there were no other complaints in his claim for the Tribunal to adjudicate on.

40. The Claimant accepted that. I dismissed his claim on that basis.

Respondent's Costs Application

41. I then heard the Respondent's application for costs. Mr Welch argued that the Claimant's claim had no reasonable prospect of success, and his conduct of the proceedings was unreasonable. He advanced the application on those two alternative basis based on six grounds:

    (i) The Claimant actively pursued claims he knows have no prospect of success.
    (ii) The Claimant failed to clarify his claim despite repeated attempts by the Respondent to obtain further information and the Tribunal orders for him to do that.
    (iii) The Claimant was in breach of two Tribunal orders.
    (iv) He did not withdraw his hopeless claim earlier, which resulted in the need to hold this hearing.
    (v) At the hearing the Claimant gave under oath evasive and inconsistent answers.
    (vi) The Claimant sought to change his race discrimination claim again from how he had presented it in his 22 August 2022 email to the Tribunal.

42. I asked the Claimant whether he understood the basis for the Respondent's application and explained the test I would be applying in deciding the costs application. The Claimant confirmed that he had understood all that.

43. The Claimant said that he accepted that he was wrong but was not disingenuous in believing that there were some problems in how he was treated by the Respondent. He said that if he had involved lawyers, they would have got it right.

44. The Claimant confirmed that at the first preliminary hearing it was explained to him the extent of the Tribunal's jurisdiction and that discrimination claims could only be advanced by reference to a protected characteristic. He said that he thought he had enough information to show less favourable treatment but did not appreciate that the Tribunal required more details to put his claim into legal framework.

45. The Claimant said that he exhausted other ways and rhetorically asked what the Employment Tribunal had to offer. He said that it was not a way a person should be treated.

46. The Claimant also argued that the Respondent was trying to put as much costs on him as possible.

47. I enquired about the Claimant's means to pay. The Claimant said that he would be able to afford the claimed costs. The total costs claimed by the Respondent was £16,819.

The Law

48. Rule 76 of the Employment Tribunals Rules of Procedure 2013 (the "**ET Rules**") provides:

> *(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*

49. Rule 78(1) of the ET Rules gives the Tribunal various options of assessing costs, including making an "*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*".

50. The following key propositions relevant to the tribunal's exercising its power to make costs orders may be derived from the case law:

    a. Costs awards in the employment tribunal are still the exception rather than the rule. The tribunals should exercise the power to order costs more sparingly than the courts (*Yerrakalva v Barnsley Metropolitan Borough Council and nor* 2012 ICR 420, CA)

    b. There is a two-stage exercise to making a costs order. The first question is whether a paying party has acted unreasonably or has in some other way invoked the jurisdiction to make a costs order. The second question is whether the discretion should be exercised to make an order. Only if the tribunal decides to exercise its discretion to make an award of costs the question of the amount to be awarded comes to be considered (*Haydar v Pennine Acute NHS Trust* UKEAT/0141/17).

    c. While the threshold tests for making a costs order are the same whether or not a party is represented, in the application of the tests it is appropriate to take account of whether a litigant is professionally represented or not. Litigants in person should not be judged by the standards of a professional representative (*AQ Ltd v Holden* [2012] IRLR 648).

    d. For term "vexation" shall have the meaning given by by Lord Bingham LCJ in *AG v Barker* [2000] 1 FLR 759: "*[T]he hallmark of a vexatious proceeding is … that it has little or no basis in law (or at least no*

discernible basis); that whatever the intention of the proceedings may be , its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process." (*Scott v Russell* 2013 EWCA Civ 1432, CA)

e. "Unreasonable" has its ordinary English meaning and is not to be interpreted as if it means something similar to 'vexatious' (*Dyer v Secretary of State for Employment* EAT 183/83).

f. In determining whether to make a costs order for unreasonable conduct, the tribunal should take into account the "nature, gravity and effect" of a party's unreasonable conduct — (McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA), however the correct approach is not to consider "nature", "gravity" and "effect" separately, but to look at the whole picture.

g. While a precise causal link between unreasonable conduct and specific costs is not required, it is not the case that causation is irrelevant. However, the tribunal must look at the entire matter in all its circumstances – (*Yerrakalva v Barnley* MBC [2012] ICR 420). Mummery LJ gave the following guidance on the correct approach: "*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 McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment Tribunal 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*".

h. Whether a claim had reasonable prospects of success is an objective test. It is irrelevant whether the claimant genuinely thought that the claim did have reasonable prospects of success – (*Scott v. Inland Revenue Commissioners* [2004] ICR 1410 CA, at para.46).

i. In considering whether a claim or defence had no reasonable prospects of success, the tribunal is not to look at the entire claim, but each individual cause of action – (*Opalkova v Acquire Care Ltd* EAT/0056/21), unreported, at para.17.

j. Whether a claim had no reasonable prospects of success from the outset is to be judged by reference to the information that was known or was reasonably available at the start of the proceedings – (*Radia v. Jefferies International Ltd* EAT/0007/18, unreported, at para.65). The tribunal should be wary of being wise with hindsight. But *Radia* is not authority for the proposition that, as long as a claim has reasonable prospects of success at the outset, pursuing it after it has become clear that it does not have reasonable prospects of success will not engage the costs jurisdiction. *Radia*, at para.62, is also authority for the proposition that there may be an overlap between unreasonable conduct under rule 76(1)(a) and no reasonable prospects of success under rule 76(1)(b).

51. Costs awards are compensatory, not punitive – (*Lodwick v Southwark London Borough Council* [2004] ICR 884 CA).

52. The fact that a costs warning has been given is a factor that may be taken into account by a tribunal when considering whether to exercise its discretion to make a costs order, however a warning is not precondition to the making of an order — (*Raveneau v London Borough of Brent* EAT 1175/96)

53. Under Rule 84 of the ET Rule, the tribunal may, but is not required to have regard to the paying party's ability to pay.

54. However, where the costs award may be substantial, the tribunal must proceed with caution before disregarding the paying party's means – (*Doyle v North West London Hospitals NHS Trust* [2012] ICR D21, EAT, at paras.14-15).

55. The Presidential Guidance on General Case Management state:

> "*17. Broadly speaking, costs orders are for the amount of legal or professional fees and related expenses reasonably incurred, based on factors like the significance of the case, the complexity of the facts and the experience of the lawyers who conducted the litigation for the receiving party.*"
>
> *18. In addition to costs for witness expenses, the Tribunal may order any party to pay costs as follows: 18.1 up to £20,000, by forming a broad-brush assessment of the amounts involved; or working from a schedule of legal costs; or, more frequently and in respect of lower amounts, just the fee for the barrister at the hearing (for example);*
> *….*
>
> *21. When considering the amount of an order, information about a person's ability to pay may be considered. The Tribunal may make a substantial order even where a person has no means of payment. Examples of relevant information are: the person's earnings, savings, other sources of income, debts, bills and necessary monthly outgoings*."

Conclusion on the Costs Application

56. I find that the Claimant's claim had no reasonable prospect of success from the start. I also find that the lack of reasonable prospect of success was, or at any rate should have been clear to him from the start, and certainly after the preliminary hearing on 22 July 2022, when EJ Salter explained to the Claimant that his case, as he was attempting to advance it, was simply not recognised as a valid claim, which the Tribunal had the power to adjudicate on. That made the Claimant to abandon his "whistleblowing" detriment claim. However, instead of withdrawing the proceedings, he lurched onto a new race discrimination claim, which until that point he had not even mention. His discrimination claim was also doomed from the start for the reasons explained above.

57. For the same reasons, I also find that the Claimant's conduct of the proceedings was unreasonable, and indeed bordering on being vexatious. Instead of withdrawing his claim after the preliminary hearing in July, when it should have become abandonly clear to him that he had no claim to pursue, he doubled down by inventing a race discrimination claim. Even then he would not properly articulate his claim despite repeated requests for information by the Respondent and in breach of the Tribunal's orders.

58. The Claimant is an intelligent person with legal education. He had access to legal advice. His lawyers refused to take on his case. He himself said that if he had listened to them, he would not be running his claim. He was encouraged by EJ Salter to seek legal advice. Considering that the Claimant told me that he would be able to afford to pay the Respondent's legal costs, if ordered, it would appear that consulting a specialist employment lawyer about his claim was well within his means.

59. I, therefore, find that my powers under Rule 76(1)(a) and (b) are engaged. Considering the nature, gravity and the effect of the Claimant's conduct, which resulted in the Respondent being dragged through this process, incurring legal costs and wasting management time, I find it will be just and fair to make a costs order against the Claimant.

60. I find that the Respondent's costs incurred in defending the claim are reasonable.

61. For these reasons, I order that the Claimant must pay to the Respondent the sum of **£15,619** with respect to the Respondent's costs. I reduced the claimed amount by £1,200 because the Respondent's costs schedule was prepared on the basis of a 2-day OPH. However, since all the issues were decided on the first day of the hearing, the Respondent would not incur Mr Welch's refresher fee of £1,000 + VAT for the second day of the hearing.

Employment Judge Klimov

28 February 2023