EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr C Palmer	**AIMS Markets Limited**

Heard at: London Central (By CVP) **On**: 28 November 2023
In chambers: 29 November 2023

Before: Employment Judge Lewis
Ms G Carpenter
Mr R Miller

Representation

For the Claimant: Representing himself

For the Respondent: Mr E Hammer, Branch Austin

RESERVED JUDGMENT ON COSTS

The unanimous decision of the tribunal is that no order for costs is made.

REASONS

Costs application

1. The claimant brought claims for direct race and sex discrimination in the failure to select him for the position of People Lead. By a reserved judgment sent to the parties on 11 August 2022, the claims were not upheld.

2. By letter dated 6 September 2022, the respondent applied for costs under Sch 1 rules 76 and 77 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The respondent applies for its total costs of £42,850 + VAT plus its further costs of £5000 + VAT in making the costs

application + the cost of purchasing official copy entries relating to the value of the claimant's property. The tribunal is asked to order a detailed assessment of the respondent's costs or alternatively to order a sum it thinks fit up to £20,000.

3. The claimant provided no evidence of his financial means and did not wish the tribunal to take these into account.

4. The respondent argues that the claimant has:
   4.1. Behaved unreasonably and vexatiously throughout the case.
   4.2. Brought a sex discrimination claim that was extremely weak.
   4.3. Brought a race discrimination clam with no reasonable prospects of success.
   4.4. Brought an unreasonable and vexatious application for a default judgment with no prospect of success.

5. The alleged unreasonable or vexatious behaviour (in addition to bringing weak claims and the application for the default judgment) was:
   5.1. Continuing to argue that he should be treated as the common litigant in person, despite his employment tribunal knowledge and experience.
   5.2. Recording the second interview without permission and then putting the respondent to the trouble of transcribing it.
   5.3. Not setting out his stall in 'without prejudice save as to costs' ('WPSATC') correspondence.
   5.4. Engaging in poor arguments, eg arguing that the greater burden to engage in WPSATC correspondence lies with a respondent.
   5.5. Submitting a grossly exaggerated schedule of loss when he was already in a higher paid role than had he been successful with the respondent.
   5.6. Using his informal lawyer as a witness.
   5.7. Aggressive, argumentative, haughty and at times insulting conduct. The two examples given were (i) telling Mr Hammer in an email that his argument was 'nonsense'; (ii) in his submissions, saying R's CEO had 'contempt not just for my claim, but the whole tribunal process'.

6. The respondent referred to the fact that it had made various costs warnings or references to the weakness of the claimant's allegations on various occasions.

Procedure

7. We were provided with the following documents: the respondent and the claimant each provided their own costs bundle [R1 and C1 respectively]; the claimant provided a supplementary costs bundle [C2]. The respondent provided an Authorities bundle [R2]. Each party provided a written skeleton. There was also a written costs application and reply by the claimant (both contained in R1). Finally, there was the claimant's schedule of loss.

8. Each side was given the opportunity to speak at the costs hearing. Mr Hammer did not seek to cross-examine the claimant.

Law

9. The power to award costs is set out in the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. Under rule 76(1) a tribunal may make a costs 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.

10. The tribunal decides first whether these 'gateway' conditions are met, eg did the claimant act vexatiously? Did the claim have no reasonable prospect of success? The tribunal then decides whether to exercise its discretion to award costs. If so, the tribunal goes on to decide how much to award.

11. Rule 77 says that a party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

12. Under rule 84, in deciding whether to make a costs order, and if so in what amount, the tribunal may have regard to the paying party's ability to pay.

13. The tribunal's power to order costs is more sparingly exercised and is more circumscribed by the tribunal's rules than that of the ordinary courts. There the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the tribunal, costs orders are the exception rather than the rule. (Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78, CA.)

14. In exercising its discretion to award costs, the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct. However, its discretion is not limited to those costs that are caused by or attributable to the unreasonable conduct. The unreasonable conduct is a precondition of the existence of the power to order costs and is also a relevant factor to be taken into account in deciding whether to make an order for costs and the form of the order, but that is not the same as requiring a party to prove that specific unreasonable conduct caused particular costs to be incurred. (McPherson v BNP Paribas [2004] EWCA Civ 569.)

15. The judgment in McPherson was never intended to rewrite rule 40, or to add a gloss to it, either by disregarding questions of causation or by requiring the tribunal to dissect a case in detail and compartmentalise the relevant conduct under separate headings, such as "nature" "gravity" and "effect." The relevant thrust of that judgment was to reject as erroneous a submission to the court that, in deciding whether to make a costs order, the 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 the court had not intended to imply that causation is irrelevant. (Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78, CA.)

16. 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 was 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. (Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78, CA.)

17. In AQ Ltd v Holden [2012] IRLR 648, the EAT said this about unrepresented litigants by reference to the previous rules:

> 'The threshold tests in rule 40(3) are the same whether a litigant is or is not professionally represented. The application of those tests, however, must take into account whether a litigant is professionally represented. A tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent themselves. Justice requires that tribunals do not apply professional standards to such people, who may be involved in legal proceedings for the only time in their life. They are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. Further, even if the threshold tests for an order for costs are met, the tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice. This is not to say that lay people are immune from orders for costs: far from it, as case law makes clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity.'

18. Both parties referred extensively to case-law in their written skeletons. They do not disagree over the law. We have taken this content into account although we do not reproduce it all here.

Facts and conclusions

19. There are a number of interrelated points, and although issues were discussed separately, we have also looked at the whole picture.

20. One preliminary matter concerns communications made through ACAS. When making its application to be allowed to serve a late ET3, the respondent disclosed an email from ACAS to Ms Brauer dated 27 January 2022. The claimant took that to be a waiver by the respondent of all the 'without prejudice' discussions which had taken place through ACAS. He therefore referred to the fact that during Early Conciliation he had on 30 November 2021 offered through

ACAS to settle his claim for £30,000. The respondent did not wish to negotiate. The claimant subsequently reiterated his offer. On 9 February 2022, the respondent told ACAS that it did not wish to engage or conciliate.

21. The respondent's position is that it did not waive privilege because the ACAS letter was exclusively to the respondent. However, it did not wish to take up time arguing whether or not there was a waiver and it was content that the tribunal was told about the £30,000 offer which was not accepted.

22. Indeed, the respondent seeks to make a point about the £30,000 offer by the claimant. Mr Hammer places emphasis on the time-line. Filling out the details, the notable dates are as follows. On 20 August 2021, Mr Jones informed the claimant his application was unsuccessful. The claimant sought further explanation. On 18 September 2021, having been on holiday, Mr Jones said the role was less senior and salary in the £80,000 range. On 4 October 2021, the claimant started a 6-month job paid pro rata at the rate of £80,000 / year. On 19 November 2021, the claimant wrote to Mr Jones alleging sex discrimination and attaching a questionnaire. Mr Clover provided a substantive answer on 25 November 2021. The claimant notified ACAS under the Early Conciliation procedure on 19 November 2021. On 30 November 2021, the claimant offered through ACAS to accept £30,000 in settlement of his claim. On 14 December 2021, ACAS issued its Early Conciliation certificate. On 12 January 2022, the claimant presented his ET1. On 27 January 2022, ACAS emailed Ms Brauer regarding the employment tribunal claim. On 9 February 2022, the respondent told ACAS that it did not wish to conciliate. No ET3 had been lodged by the due date of 22 February 2022. On 21 March 2022, the claimant applied for a default judgment, providing a schedule of loss in the sum of £125,729. As we set out below, this schedule of loss was carefully calculated and not unreasonable. At that point, the claimant was employed on a 6-month contract. The application for a default judgment was refused on 30 March 2022. On 7 April 2022, the claimant started a new permanent role paying broadly £143,000 / year. At the date of submitting his schedule of loss, the claimant did not know that he was about to be offered this new job.

23. Mr Hammer's point appears to be that, given that the claimant had secured well-paid future employment, the claimant should not have brought a flimsy discrimination claim and also that he overvalued the claim.

24. There is a separate point about whether the claims had reasonable prospects of success, but we cannot see what there is about this timeline which makes the claimant's conduct unreasonable or vexatious. We have dealt separately with the calculation of the schedule of loss. Since both sides want us to consider the £30,000 offer, we would observe that it is not unusual for a claimant to offer to settle for a figure which is much lower than their schedule of loss. As for the fact that the claimant obtained new well-paid jobs, this does not mean he was not entitled to bring reasonable (if they were) discrimination claims. As well as the right to a finding of discrimination, there are also awards for injury to feelings which are separate from awards for loss of earnings.

Litigant in person

25. The claimant asks us to take into account that he is a litigant in person. The respondent says this is misleading because, although not a lawyer, the claimant is an experienced HR professional who talks in his CV of his experience managing employment tribunal cases and partnering / coaching senior department managers and executives in employment law. The claimant says, and we accept, this meant administrative management of cases, not raising and discussing legal arguments, which would be left to internal and external legal advisers. The claimant's coaching work around employment law was on matters such as statutory holidays, and the necessity of conducting fair disciplinary and grievance hearings.

26. We consider that although the claimant will have had some knowledge of legal procedures and arguments, and be familiar with the idea that matters are not clear-cut, he did not have the level of legal knowledge of a professional legal adviser. It is one thing to be aware of the scope of the Equality Act and definitions of discrimination; it is another thing to understand complex issues such as the burden of proof and the subtleties of the type of evidence from which inferences might be drawn. Indeed, the claimant's argument about how the burden of proof and comparators would work in his race discrimination claim (see below) illustrates to us that lack of understanding, as did certain other mistakes he made. As Oni says, a litigant in person may be intelligent and articulate (as the claimant obviously is), but nevertheless he is a lay representative and not a lawyer. Legal experience and knowledge is a very specific thing. Moreover, as AQ Ltd says, lay people are likely to lack the objectivity brought by a professional adviser. It is very difficult to assess the merits of your own case.

27. Unless we specifically say so below, we have not made any specific allowance for the fact that the claimant was a litigant in person. Where we do take it into account, we will take into account that he has a level of knowledge and is clearly an intelligent person, but also that he is not an objective professional legal adviser.

28. The respondent argues that it is a ground for unreasonableness in itself that the claimant continues to argue that he was a common litigant in person. However, the claimant accepted he knew more than 'the butcher, the baker or the candlestick maker' as Mr Hammer put it. We have set out our views. There was a point to be made. The claimant was not unreasonable to raise this.

Application for default judgment

29. The deadline for the ET3 Response was 22 February 2022. After chasing the tribunal a couple of times as to whether it had been submitted, the claimant wrote to the tribunal on 21 March 2022 applying for a default judgment in the sum of £125,729 set out on an attached schedule of loss. The application was dealt with at the preliminary hearing which had already been fixed for 30 March 2022.

30. The claimant copied his email requesting the default judgment to Mr Jones and to Mr Clover. On 22 March 2022, the respondent's solicitors wrote to the

tribunal saying the respondent had only become aware of the claim from being copied in to this email. The letter said that the registered office was 'c/o TC Group, Level 1' Devonshire House etc. It said that TC Group were the respondent's accountants and that if correspondence was incorrectly addressed, it would be returned to sender.

31. In fact, the address noted by the claimant on his ET1 form was incorrect in that it omitted the words 'c/o TC Group, Level 1'.

32. On 29 March 2022, the respondent's solicitors emailed the claimant to say he had the wrong address and inviting him to withdraw the application for a default judgment. If not, the respondent would refer to the correspondence on the issue of costs. The claimant responded on the same date, referring to the different way the respondent noted its address in different places and contending that it was also a trading address. He said that if the respondent was correct that wrongly addressed post would be returned to sender, the question was whether the tribunal had received its letter back. The claimant told the tribunal that if it found the ET1 (the claimant wrongly called it ET2) had been returned undelivered, he would withdraw his application for a default judgment.

33. In the event, the tribunal was unable to trace that the ET1 had been returned.

34. On 30 March 2022, the respondent's solicitor disclosed an email from ACAS to Ms Brauer on 27 January 2022 referring to an employment tribunal claim.

35. EJ Burns dealt with the respondent's application for an extension of time at the preliminary hearing on 30 March 2022. He noted that ACAS had contacted Ms Bauer but she had not responded to the email. He noted that the tribunal had been unable to find the ET1 had been returned, but said that was not conclusive. He said the ACAS email did not remove doubts about whether the ET1 had been correctly served. On the balance of probabilities, the incorrectly addressed ET1 had not been delivered to the respondent and a late Response would be allowed.

36. The respondent argues that it was unreasonable for the claimant to have pursued his application for a default judgment once it was drawn to his attention that the address was wrong and indeed that he was the person who had made the mistake on the address (albeit unintentionally). We do not agree. There was sufficient doubt over the matter for the respondent to be required to give an explanation and for a Judge to make a decision. The address on the ET1 was sufficiently close to the correct address and resembled the way the address was put elsewhere. It was the correct building. The tribunal had not found any returned ET1. ACAS's email of 27 January 2022 had not been responded to. EJ Burns weighed this and other evidence and made his decision.

37. Employers cannot be allowed just to assert they have not received an ET1 without some level of supporting evidence. This was not a situation of an entirely wrong address. On these kind of facts, there is nothing unusual about a default application, and there is nothing unusual about a claimant saying the respondent must explain why it has not submitted an ET3 on time.

38. We see no basis whatsoever for saying that the claimant was unreasonable or vexatious in his conduct over this matter. We add that the claimant had not rushed to make his application. He had waited a month to see if there had been a reply, chasing the tribunal in the interim. He copied in Mr Jones and Mr Clover on his default application.

39. The respondent invited the claimant to withdraw his application for a default judgment as it had poor prospects of success, and that if he did not, the respondent would refer to this correspondence on the issue of costs. We do not think that this warning means the claimant was unreasonable to continue. There were sufficient arguments to be made in both directions regarding whether the ET1 had in fact been received and ignored, or not received. It was a matter legitimately for a Judge to look at and decide.

The secret recording and the transcript

40. The claimant secretly recorded his first interview with the respondent. Mr Hammer referred to this as the second interview, but for consistency with our original judgment, we are using the formal nomenclature under the respondent's policy. Prior to this first interview was the pre-screening interview.

41. The respondent says it was unreasonable to have put the respondent to the trouble of transcribing the secret recording and that this should also be seen in the context that making the recording in the first place was unreasonable.

42. We do not generally favour secret recordings of conversations between employer and employee, or employer and job applicant. It shows a lack of trust and a lack of candour. It strikes us as not a good way to start a possible employment relationship. Having said all that, technological advances mean it is not uncommon for secret recordings to be made. We can understand that if a job applicant has serious concerns about whether they were being discriminated against because of comments made by the employer in an initial interview, they may think they need to secretly record any follow-up interview by way of evidence. There is no suggestion that the claimant manipulated the conversation for the benefit of the tape. Having chosen to record the interview, the claimant was correct under the rules of disclosure to disclose it.

43. The respondent's application originally stated that the claimant 'put the respondent's legal team to the burden of transcribing lengthy audio recordings. This was unreasonable behaviour and should attract a costs order, at least for the amount incurred in that respect'. The respondent also alleged that the claimant had asked the respondent to transcribe the podcast interview. Mr Hammer accepted at the costs hearing before us that this was his mistake and the claimant had transcribed the podcast.

44. Regarding the first interview transcript, on 19 May 2022, Mr Hammer asked the claimant whether he would confirm by return that he would prepare a first draft. The claimant replied the same day, saying that he would do so and 'I will endeavour to have this completed sooner than later'.

45. It was a lengthy recording and the claimant was working full-time. He was carefully working his way through the recording. On 9 June 2022, out of the blue, the respondent emailed the claimant as follows: 'Please see attached our draft transcript of the recording. Please note we are still currently reviewing this transcript and will provide a final copy in due course'. The respondent's solicitors had not chased the claimant for his draft at any stage. They had not asked how far he had got.

46. A couple of times following this, the respondent asked the claimant for his comments / amendments on the transcript, and he did not get back to them. He had started to compare his part transcript with the respondent's transcript but it had proved to be a time-consuming and difficult exercise and he had given up on it.

47. Looked at overall, we cannot see anything unreasonable or vexatious in the claimant's conduct over this. The respondent's solicitors chose to jump ahead and prepare the transcript, having first asked him to do so.

48. We add that it would not necessarily have been unreasonable for the respondent's solicitors, with their professional resources, to have been asked to prepare the transcript from the outset. There was no suggestion that the claimant was asking for an irrelevant document to be needlessly transcribed. Indeed, the transcript was relevant evidence which the respondent ultimately used to its advantage. But anyway, this is not what happened. What happened was that the claimant agreed to transcribe the recording as soon as he could, and the respondent's solicitors decided not to wait, without alerting him in advance.

Not setting out his stall in 'Without Prejudice Save as to Costs' correspondence

49. Neither party at any stage wrote any 'Without prejudice save as to costs' letters to the other. In our experience, it is invariably the party who is seeking costs who tells the tribunal about some WPSATC letter which it has written, and complains that the other party has ignored it and/or failed to heed the warnings in such letter regarding the weakness of its case. This is not what has happened here. The respondent never sent the claimant a WPSATC letter. It has made a separate argument about the ignoring of open warnings to the claimant about him being vexatious and unreasonable. But it is not saying it made any open offer or any offer in any WPSATC letter which the claimant unreasonably refused.

50. The respondent's argument is simply that the claimant failed to 'set out his stall in WPSATC and say why any of his claim was likely to win'. The respondent goes on to say that 'parties are supposed to enter dialogue, either open or WPSATC so that the details of the arguments that will be deployed at trial are considered and can be argued in that forum, rather than at the trial. The claimant did neither, despite being aware of the concept from his management of Employment Tribunal claims'.

51. We find this a strange argument. The first thing to say is that the respondent did not write a WPSATC letter either. Second, we are aware of no general obligation for any party to 'set out their stall' in WPSATC letters. Parties set out their legal position in their pleadings and can be asked for particulars and further information if needed. More detailed evidence is provided at a later stage when they exchange witness statements. There is no general requirement to argue the case in writing or indeed orally outside the tribunal forum.

52. In conclusion, we can see nothing unreasonable in the claimant's failure to write any WPSATC letters.

Engaging in poor arguments, eg arguing that the greater burden to engage in WPSATC correspondence lies with a respondent

53. Whether the claimant engaged in poor arguments is essentially covered by the separate heads of bringing allegedly very weak claims for sex and race discrimination and a default judgment. We deal with the issue of the WPSATC correspondence in the previous section, but the respondent's argument was hardly self-evident and the claimant was entitled to defend himself against it. Indeed, we feel it is the respondent who was engaging in a poor argument on this point.

Submitting a grossly exaggerated schedule of loss

54. We do not agree that the claimant submitted a grossly exaggerated schedule of loss. On the contrary. In general, the schedule of loss is carefully calculated and indeed it is modest in several respects. A schedule of loss does not usually contain a costs estimate, but the claimant may not have been aware of this. As at 4 October 2021, the claimant had a new job on a 6-month contract paying £80,000 /year pro rata. His job application had been rejected by the respondent on 20 August 2021. The calculation is made on the basis that the claimant would have been earning £100,000 which is what he had asked for and what he believed he would have been paid had he been appointed and not discriminated against. This is a reasonable figure to put in the schedule of loss. The claimant noted in the schedule of loss that he had received paid employment from 4 October 2021. At this point, he had not been offered a new job. He sought future loss of 4 months while he obtained further employment, which is a modest period. We accept the share options claim of £25,000 was a guess. The estimates of £9100 for injury to feelings and £5000 aggravated damages are modest. The Schedule is clearly set out and the respondent, being professionally advised, could easily estimate the likely award under each heading. Had a default judgement been issued, the tribunal would have wanted to be satisfied on each item. The claimant later obtained a very well paid permanent job, sooner than he had anticipated. However, that would have emerged at any negotiations or in the claimant's witness statement, which was ordered to cover financial losses. No Order was made at the preliminary hearing on 30 March 2022 that the claimant serve an updated schedule of loss at any

point or that he keep the respondent informed regarding the latest position on his employment.

55. In our experience, it is common for claimants to submit a schedule of loss which values their case more highly than is likely ultimately to be awarded, and it is not unusual for unrealistic and exaggerated sums to be set out. In this case, the claimant's schedule is far from unreasonable, and certainly not a matter in respect of which we would order costs.

Using his informal lawyer as a witness

56. The respondent says it was unreasonable for the claimant to use a witness (Mr Butler) who had acted as his informal lawyer. The respondent says the claimant did not need this witness as he had two others.

57. We cannot see that it was unreasonable for the claimant to have used Mr Butler as a witness. Mr Butler happened to be present only because he was on holiday with the claimant when the interview took place. All three of the claimant's friends heard some part of the pre-screening interview and discussed it with him afterwards. Mr Butler was there. As he was a lawyer, he gave the claimant some informal legal advice. But he was a witness of fact. His witness statement was made in a personal capacity. He did not hide that he was a lawyer. The tribunal was in a position to take that into account, if it thought relevant, in assessing the evidence.

Aggressive, argumentative, haughty and at times insulting conduct

58. Most litigants are argumentative, because it is a litigious process, and they are arguing a case which they are emotionally invested in. This occasionally descends into a level of hostility. We do not see anything egregious in the claimant's manner which we would describe as vexatious or even unreasonable. He was professional in how he handled matters before us and in the correspondence we were shown. Mr Hammer was unable to show us very much at all to support his argument.

59. We were shown an email responding to one from Mr Hammer stating that he (Mr Hammer) did not think certain documents were relevant to include in the trial bundle and that the respondent would need to amend witness statements to cover one of such documents which the respondent would include even though not relevant. The claimant responded 'Your email is nonsense. If you do not see the relevance of the documents I have disclosed, why would any of the existing witness statements need to be amended?'

60. The word 'nonsense' in this context is rude, but we have seen a lot worse. The claimant would have been better to say 'contradictory', but we do not think there is anything very terrible about the email. We were not shown repeated use of such language. There is no course of conduct involved in this.

61. As for the statement in the claimant's submissions that the CEO has 'contempt not just for my claim but the whole tribunal process', the claimant added 'inclusive of disclosure'. This was referring back to failure to disclose or late disclosure of certain key documents. The claimant had a reason for making this statement. Partly because of his frustration about disclosure. And partly because, despite the respondent's own policy, Mr Clover had not carried out a formal investigation into the claimant's allegation of discrimination. We do not think the claimant's observation is outside the sort of comments which are made in litigation, and we would not describe it as unreasonable or vexatious.

Extremely weak sex discrimination claim

62. The respondent says the claimant was unreasonable in bringing his sex discrimination claim because it was extremely weak and/or that the claim had no reasonable prospects of success.

63. As the claimant frequently points out, his claim was that he was told the respondent wanted 'fewer' white men, not that it wanted 'no' white men. That distinction would potentially affect the nature of the analysis of the statistics and inferences drawn from the sequence of events. Our finding was that Mr Jones said something to the effect that the company hoped to achieve a position where there were fewer white men as a proportion of the workforce.

64. This was not the strongest of cases, but we would not go as far as saying that it had no reasonable prospects of success. From the claimant's point of view, he had been told that the respondent wanted fewer white men in the workforce. He was a white man. We suspect Mr Jones did not express himself very well. Despite the claimant's experience and seniority, and interviews which he felt went reasonably well, he had not been offered the job. Instead, a woman had been offered the job. He was told that the respondent, after interviewing him, had decided to change the remit of the role and the level of desired seniority. This looked like moving the goalposts.

65. There were matters which had to be considered and discussed at a tribunal hearing. We had to make a fact-finding regarding exactly what Mr Jones had said. Mr Jones could not remember the exact words and Miss Hopper did not remember the comment at all. We then had to make a decision regarding what Mr Jones meant in the particular context. The fact is that a woman was ultimately appointed, a woman who had not initially applied, and that Mr Jones had made a comment referring to 'fewer white men'. We had to consider why the company had changed course, downgrading the role after having interviewed the claimant. We had to consider the process by which Ms Brauer was appointed and what it signified. We had to consider whether the statistics were significant. These were not clear-cut and we do not feel that, as the respondent contended in its ET3, the statistics showed the claim was unreasonable and vexatious. There are many ways of interpreting statistics, and the claimant never suggested that the respondent was not employing any white men at all; he said the desire was to employ fewer white men.

66. The fact that the claimant was interviewed twice was a point against him, but did not in itself mean his claim must fail. The respondent might still have preferred to appoint a woman and be looking for one to appoint. It did change its ostensible requirements mid process as we have said. At the end of the day, we looked at all the evidence and reached a view. We gave our reasons in our decision on liability for rejecting the sex discrimination claim. We feel confident in those reasons. But that was a decision after hearing and considering the evidence. The claimant was unsuccessful. That does not mean he was unreasonable bringing the claim or that the claim at any point had no reasonable prospects of success.

Race discrimination claim with no reasonable prospects of success

67. The race discrimination claim is a different matter. Most strikingly, the successful candidate was also white, which at some stage before the hearing, the claimant knew. On the face of it, a claim that you have not been recruited because you are white is unlikely to succeed if the successful candidate is white. That does not automatically follow, of course, because there can be an explanation. For example, the successful candidate might be appointed for reasons which override the employer's desire not to appoint a white person. Or things might have changed between the claimant's rejection and the appointment of the successful candidate. One can also think of other possibilities. Including as described below.

68. In this case, the only evidence which could be directly suggestive of race discrimination was Mr Jones' comment about having fewer 'white men' in the workforce.

69. The claimant was far more focussed on the sex discrimination aspect. The questionnaire which he sent only dealt with sex discrimination. He did not discuss race discrimination much during the hearing. He accepted there was less evidence of race discrimination.

70. Mr Hammer argues that, as there is no provision for combined discrimination in the Equality Act 2010, a claim based on discrimination against a 'white man' was bound to fail. We disagree. Such a claim can be brought separately as sex discrimination and as race discrimination. It is not necessary for the protected characteristic to be the exclusive reason for the less favourable treatment. It is only necessary for, for example, 'race' to be an effective cause of the decision not to appoint the claimant.

71. This legal debate was clearly one with which the claimant, as a litigant in person, was reasonably entirely unfamiliar. Also, it appears that EJ Burns at the preliminary hearing did not raise any concerns about how the claimant put the case and having a hypothetical comparator for the race discrimination claim even though a white woman had been appointed. As far as the claimant was concerned, the respondent thought that being a 'white man' was an undesirable category, so that he was less likely to be appointed than if he was outside that category by being a woman or black. The evidence for race discrimination is one

element weaker than it is for sex discrimination, because there is no actual black appointee as a comparator, but much of the rest of the evidence still applies, ie the evidence concerning the original remark, the claimant's experience, the downgrading of the post after interviewing the claimant, the failure to appoint a white (man).

72. For reasons we have already explained, we did not think it unreasonable to have brought the sex discrimination claim and we did not think it had no reasonable prospects of success. Although the chances of proving that race was an effective cause of the claimant's non-appointment were even weaker given that the appointee was white, given the nature of the argument we do not think it was unreasonable for the claimant to have brought and run the claim and we do not go as far as saying the race discrimination claim had no reasonable prospects of success.

73. Even if we were wrong about this, we would not exercise our discretion to award costs. We believe the claimant could afford a costs award. Certainly he did not ask us to take his means into account and we are aware of his current earnings. So that is not our reason. However, we can see why the claimant did include a race discrimination claim. The remark was about 'fewer white men'. The claimant, as a litigant in person with the level of knowledge we described above, reasonably did not appreciate the legal arguments around combined discrimination and the nature of the comparison he would have to make. We also note that there was very little extra evidence or time involved in defending the race discrimination claim. The respondent had not been monitoring the ethnicity of its workforce, so there could be no sensible discussion of statistics. The matter scarcely arose as a separate issue in the questioning and evidence.

74. Finally, this is not a case where we find the claimant has been generally unreasonable. We reject the respondent's arguments of unreasonableness, both looked at individually and taken together. Indeed, several of the arguments for costs were poor ones. The claimant clearly believed that he had been discriminated against because of sex and because of race. He brought his claims and conducted himself overall in a measured way. He was entitled to bring his claims and he was entitled to fight his corner. It is simply that, after closely analysing the evidence, it was our view that his analysis and conclusions were wrong. We do not consider it appropriate to make any costs order against him.

Employment Judge Lewis
29th Nov 2023

Judgment and Reasons sent to the parties on:

29/11/2023

For the Tribunal Office