Case Number: 2209509/2023

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MR S McLAUGHLIN**
MS T SHAAH

BETWEEN:

Mr A Ikeji

Claimant

AND

(1) Westminster City Council
(2) Ms V Piquet

Respondents

ON: **28 and 29 November 2023**
Appearances:
For the Claimant: **Mr L Betchley, counsel**
For the Respondents: **Mr F McCombie, counsel**

JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The claim for victimisation fails and is dismissed
2. The claimant shall pay the respondent's costs in the sum of **£3,000** to be paid by 29 February 2024.

REASONS

1. This decision was given orally on 29 November 2023. The claimant requested written reasons.

2. By a claim form presented on 26 May 2023, the claimant Mr Adrian Ikeji brings a claim of victimisation.

The issues

3. The issues were identified at a case management hearing before Employment Judge Nicolle on 23 August 2023 and confirmed with the parties at the outset of this hearing as follows:

Victimisation - Equality Act 2010 section 27

4. Did the claimant carry out a protected act or acts for the purposes of section 27(2) of the Equality Act 2010? The claimant relies upon the protected acts as set out at paragraph 19 of the particulars of claim, namely:

    a. The Employment Tribunal Proceedings against his former employer MTR Crossrail (and another) under case number 2208063/2017;
    b. The Employment Tribunal Proceedings against his former employer Morden College (and others) under case number 2307542/2020; and
    c. The Employment Tribunal Proceedings against his former employer ORR (and others) under case numbers 3201367/2022 and 3204202/2022.

5. On day 1 of the hearing we were told by the respondent that it was not disputed that these were protected acts.

6. In particular, in respect of any such act relied upon:

    a. Did the claimant bring proceedings under the Equality Act 2010?
    b. Was any such evidence, information or allegation false?
    c. If so, was that evidence or information given, or allegation made, in bad faith?

7. Did the respondents have knowledge of these acts at the time of the alleged detriment?

8. Did the respondents subject the claimant to a detriment because he engaged in a protected act by:

    a. Withdrawing the conditional offer of employment on 23 February 2023; and
    b. Not giving the claimant the opportunity to comment on the alleged disparities before the conditional offer was withdrawn on 23 February 2023.

Remedy

9. What, if any, declaration should be made?

10. What, if any, compensation should be awarded?

Witnesses and documents

11. There was a bundle of documents of 276 pages. On the claimant's application copy of an unredacted version of page 190 was introduced by the respondent after the lunchbreak on day 1.

12. On the claimant's side the tribunal heard from the claimant.

13. For the respondent the tribunal heard from two witnesses: the second respondent Ms Victoria Piquet, Facilities Management Lead in Corporate Property, the Hiring Manager and Mr Ivano Spiteri, Head of Facilities Management and Workplace Property in the Corporate Property Department.

14. There was a cast list and chronology from both parties.

Findings of fact

15. It is not in dispute that the claimant brought the tribunal claims listed above and that these were Equality Act claims and protected acts.

The job application

16. On 29 November 2022 the claimant applied for the role of Facilities Manager with the first respondent. The Job Description and Person Specification as at page 113 of the bundle. The second respondent Ms Victoria Piquet, Facilities Management Lead in Corporate Property was the hiring manager and responsible for administering the recruitment process. The application was acknowledged on 21 December 2022 and an interview scheduled for 12 January 2023.

17. The claimant's job application was at page 117 of the bundle. It consisted of an application form and a CV both of which set out his employment history. The claimant gave his current employer as the Office of Rail and Road (ORR) from January 2022 "*to Present"* as a Senior Executive Office/HM Inspector of Railways and details of his role prior to that at Morden College as '*Works Manager/Asset Management Consultant*' from 1 January 2020 to 31 December 2021 (page 122).

18. The application form contains the following declaration to which the claimant answered "*Yes"* (page 121):

> *"The information that I am submitting in this application is true and correct.*
> *If it is found that I have provided false or misleading information during the recruitment process, I understand that any offer of employment may be withdrawn, or if I am subsequently employed, I may be dismissed. I authorise that my educational, professional and past employment history and references can be looked into, as required, to research my suitability for this position. I hereby give my consent to any former employer to provide employment-related information about me*."

19. The claimant also noted on his application form that there appeared to be a technical problem with the recruitment website so this was the reason that he had uploaded his CV as well as submitting an application form (page 122).

The interview

20. On 12 January 2023 the interview took place. The claimant was interviewed by the second respondent and Mr Ivano Spiteri, Head of Facilities Management and Workplace Property in the Corporate Property Department and the former Property Information Manager. Mr Spiteri is the second respondent's line manager. The claimant performed well at interview, to such an extent that during the interview Mr Spiteri asked him if he wished to be considered for a more senior role. The claimant declined.

21. The second respondent's notes of the interview were at pages 127-132.

The conditional job offer

22. On 19 January 2023 the second respondent called the claimant to make an offer of employment on a conditional basis subject to "*onboarding checks*" (page 138).

23. On 24 January 2023 the first respondent confirmed this by letter (page 142).

Discovery of two past ET claims

24. As the second respondent had previously contacted the claimant by phone, his contact information was available to her. On 29 January 2023 whilst using WhatsApp, she noticed the claimant's WhatsApp profile picture which showed his book. A Screenshot of this was at page 169. The second respondent said she was intrigued by this so she did a google search of the claimant's name to see what the book was about. The google search also revealed the claimant's property company AI Realty Ltd and judgments for two ET claims the first against MTR Crossrail Ltd and the second against Morden College.

25. The second respondent's evidence (paragraph 10 of her witness statement) was that she did not spend a great deal of time on this search and did not read the tribunal judgments other than looking at the first page. She said she did not really understand them having never previously been involved in ET proceedings. She agreed that she could tell from the front page that they were discrimination claims. As she was unsure as to whether she should be concerned about what she had discovered she spoke to Mr Spiteri and he advised her to check with HR. The second respondent emailed Ms Claire Weeks, Head of Operational People Services on 30 January 2023 to seek her views. She forwarded a copy of

this email to Mr Spiteri on 31 January 2023 with a link to the book and screenshots of the tribunal claims. The email to Ms Weeks said (page 171):

> *"Hi Claire*
> *I don't know if I am worrying and I shouldn't be but we have a vacancy for a facilities manager of which we have offered to this candidate. His interview was superb and I called him to offer the role and he was delighted. However something wasn't quite right for me and I carried out a quick google search. It turned up a book that he has written, he is obviously upper intelligent. I found a couple of tribunals which he had instigated and he is also an active director on Companies House.*
> *See attached.*
> *Should I be concerned? Thoughts?"*

26. The second respondent said that in terms of what did not seem quite right was the fact that in the interview, the claimant had not appeared interested in the more senior role and that this had played on her mind since the interview. She did not understand why he was not interested in a higher grade better paid job and they have done this a number of times in interviews where they have said, we have got a better suited role for you. In oral evidence she also said that it was the existence of the book that caused her to make the search.

27. Whilst the second respondent had some initial concerns about the claimant's directorship of his own company in case there was a conflict of interest, she noted that he had declared this on the first respondent's Declaration of Interests form (page 160) and she had no further concern about this.

28. On 31 January 2023 the first respondent received a reference from the claimant's former employer Morden College and this was sent to the second respondent who received it on 1 February. This reference (page 178) said that the claimant had been "*Employed by Morden College from 13 January 2020 to 18 September 2020 as a Works Manager".* The application form stated that he had been in the role from 1 January 2020 to 31 December 2021 which was 15 months longer than stated in the reference.

29. The claimant explained that in terms of the job title he had given in his application, of Works Manager/Asset Management Consultant, he had worked in two separate roles. As Works Manager he had been employed and as Asset Management Consultant he had been self-employed. The claimant had not said in his application form that his period of employment with Morden College ended in September 2020 and that he then became a self-employed contractor.

30. On 8 February 2023 the second reference was received from ORR. It was dated 3 February 2023 (page 184) and said that the "*Length of Employment"* was from "*05/01/2022 – 12/07/2022*." This did not line up

with the information given in the application form which said that the claimant was employed with ORR to the present, which at that time was late November 2022. The second respondent said that at the interview the claimant gave the impression that he was still working for ORR. She referred to the claimant speaking about his current role at ORR (statement paragraph 6). The reference from ORR also gave the claimant's job title as "*HM Inspector of Railways – Trainee*."

31. The claimant said in evidence that although his job title was given by ORR as "*Trainee*" he was not a trainee but a fully competent Inspector of Railways. He put forward his warrant card and business card in support of this (pages 107 and 109). He said that there was training that he needed to complete. The claimant also referred to his contract and we saw his offer of employment, which he had signed, stating his job title at page 101 as "*HM Inspector of Railways – Trainee".*

32. In relation to his termination date, the claimant's evidence was equivocal and he suggested to the tribunal that he was in a period of redeployment. We saw emails dated in April and May 2022 that talked about redeployment. The claimant was at the date of this hearing currently in Employment Tribunal proceedings with ORR and he said that the question of his termination date had not yet been determined. We do not agree.

33. The claimant brought a claim for unfair dismissal with a claim form presented on 15 July 2023 relying on a dismissal on 12 July 2023. This was an interim relief application and the claimant was aware that the claim had to be brought within 7 days of termination. There was a finding of fact by Employment Judge Russell at paragraph 20 of her decision (bundle page 245) that the claimant was informed by letter dated 13 July 2022 that he was being dismissed with five weeks' pay in lieu of notice. We find that there is a determination that the claimant had been dismissed in July 2022, that he knew this because it was the basis upon which he presented a claim for unfair dismissal and made an application for interim relief and he was not giving accurate information to the respondents when he told them in January 2023 that his employment with ORR was ongoing.

34. In an email to the second respondent on 8 February 2023, the claimant said: "*My employment contract has ended with ORR, following the notification to them of my acceptance of the WCC conditional offer*. *The substantive work there had ended since July last year, and redeployment or a clean break were fast becoming a real prospect there, in any event. I can afford to remain available for a couple of weeks at least or until I hear from you or the onboarding team again.*" (page 187).

35. The second respondent was concerned about these discrepancies and sought further advice from HR.

36. On 3 February 2023 at 12:46 the claimant emailed the second respondent telling her that he was available to start work and wanted to know when he could expect the final contract (page 187). The second respondent

replied on 8 February at 13:21 apologising because she had been out on sites and said that the Hampshire onboarding team, as part of their shared services, were dealing with the process and she would find out what was happening. She said "*You are no further forward than my other candidates who are also going through the same process".*

The correspondence on 8 February 2023

37. On 8 February 2023 at 1:28pm the recruitment team emailed the second respondent to ask if she had the claimant's right to work documents (page 185). The second respondent replied immediately at 1:30pm saying that she had done the right to work check for the claimant twice and asked if it was a standard email or whether she needed to submit it again. We find that the second respondent was progressing with the claimant's application and "*onboarding*" process as at 8 February.

38. The recruitment team told the second respondent in that email of 8 February they had received a reference and it was the hiring manager's responsibility to check it and make sure that she was satisfied with it. They said that unless they heard from her they would assume it was satisfactory.

39. It was at this point at 2:38pm on 8 February, as set out above, that the claimant emailed the second respondent to say "*My employment contract has ended with ORR, following the notification to them of my acceptance of the WCC conditional offer*. *The substantive work there had ended since July last year, and redeployment or a clean break were fast becoming a real prospect there*". As we have found above, this was not correct.

40. At 3:06pm on 8 February Mr Spiteri asked the second respondent whether there had been any update on references (page 190) and at 3:31pm she replied that the second reference had come in that day. Mr Spiteri responded at 3:39 "*super, keep me posted".*

41. It was on receipt and consideration of both of the references that the second respondent became "*extremely concerned"* about the disparities in the claimant's two references (her statement paragraph 16). The second respondent did not have an opportunity to discuss her concerns with HR before she went on holiday. Her last day in the office was Friday 10 February and she returned on Monday 20 February 2023.

The withdrawal of the job offer

42. On or about 20 February the second respondent spoke to Mr Spiteri about the discrepancies in the references. Mr Spiteri was of the view that the conditional job offer should be withdrawn as he was of the view that the claimant had deliberately misled the first respondent.

43. Mr Spiteri spoke with his line manager Claire Barrett, Director of Corporate Property to tell her about the situation. He told her that he felt strongly that

the claimant had deliberately misrepresented his employment history in an attempt to mislead the first respondent and potentially gain an unfair advantage over other candidates. He told his line manager that subject to HR advice he believed that they should withdraw the offer. Mr Spiteri's evidence was that Ms Barrett agreed with this approach.

44. On 21 February the claimant contacted the second respondent for an update.

45. On 23 February at 11:48 the claimant was told by Ms Murray an administrator in the Corporate team that the second respondent was back from leave and "*she is now in the process of dealing with the matter and will get back to you accordingly."* (page 205).

46. Also on 23 February the second respondent had a Teams call with a member of the HR team. She did not keep notes of that call. The advice given by HR was that the conditional offer could be withdrawn and that the letter should come from herself as the hiring manager. HR assisted with the drafting of the letter.

47. At 17:05 on 23 February the second respondent sent an email to Mr Spiteri saying "*Just to let you know that we are going to be withdrawing an offer made for one of the FM posts".* Mr Spiteri replied "*please proceed*" (page 206). The second respondent accepted in evidence that it was her decision to withdraw the offer and her decision was supported by Mr Spiteri.

48. It is admitted that on 23 February 2023 the second respondent withdrew the conditional offer of employment.

49. At 11:14 on 24 February the second respondent sent a letter to the claimant (page 207) as follows:

> *"As you are aware we offered you an appointment of Facilities Manager subject to the receipt of successful references. Since that time we have received your reference's (sic) in which there are disparities with your application.*
> *On this basis, we are unfortunately in a position of withdrawing the offer of appointment.*
> *I am sure you will find this disappointing, however I wish you the best of luck in your future."*

50. The claimant immediately sent an email back to the second respondent requesting feedback on the reason for withdrawing the offer, "*so I may rule out any unlawful impropriety and benefit from legal advice as I am out of work now*" (page 208). He repeated his request for a copy of the reference from ORR.

51. The second respondent was on leave on Friday 24 February due back on Monday 27 February. On receiving her out of office response, the claimant

contacted Mr Spiteri to ask for a response. Mr Spiteri did not respond to the claimant.

52. The claimant made a subject access request in relation to the job application and a freedom of information request.

53. The first respondent's HR Relationship Lead emailed the claimant on 27 February 2023 declining to provide copies of his references on the basis that they were confidential and exempt from disclosure (page 216).

54. The respondents accept that they did not ask the claimant for an explanation for the disparities between the references and his job application. Mr Spiteri said that the reason they did not was because the disparities were serious, spanned two separate references and in his view the claimant had "*clearly misrepresented his employment history*" (statement paragraph 25).

What was the reason the respondents withdrew the job offer?

55. On the evidence of both the second respondent and Mr Spiteri we find that the decision maker was the second respondent. Her decision was supported by Mr Spiteri as her line manager and it had been checked with Mr Spiteri's line manager Ms Barrett.

56. We have considered what was the reason why the second respondent made the decision to withdraw the job offer. In submissions the claimant said that this is not a case in which he alleges that the decision makers deliberately decided to withdraw the offer of employment as soon as they found out about his ET claims.

57. On 29 January the second respondent found out about 3 matters; The claimant's book, his ET claims and his directorship of his own company. Her email to Ms Weeks on 30 January was "*Should I be concerned?"* and not "*I am concerned*". This is in contrast to her reaction to the discrepancies she saw in the two references, which gave her "*extreme concern*".

58. Following the discovery of the ET claims, the recruitment process continued, including the second respondent on 8 February checking whether she needed to do anything else in relation to the right to work checks. We find that it was the receipt and review of the references that led to the placing on hold of the recruitment process and the second respondent having a Teams call with HR and raising it with her manager Mr Spiteri.

59. The concerns in their view not minor, they were significant. This was as to the job titles with both former employers and the dates of service and most significantly the fact that the ORR reference revealed that the claimant was no longer employed by them.

60. The claimant had given the interviewers, who included the second respondent and Mr Spiteri, the impression that he remained in ORR's employment. This impression was supported by his CV which said "*Jan 2022 to Present*" (pages 117) and his application form which gave no end date to this employment (page 122). The "*present*" as at the date of the application was 29 November 2022. The claimant confirmed in evidence and we find that this was not an old CV that he had uploaded, it was his current CV.

61. The claimant had continued to assert that he remained in employment with ORR when he said in his email of 8 February at 2:38pm (page 187) that he had given notice upon receipt of the conditional offer from the first respondent. This was not a correct representation of the facts, including the facts that he presented to the London East Employment Tribunal on 15 July 2023 when he maintained the position that he was dismissed on 12 July 2023. This was a finding made by the Employment Tribunal at paragraph 20 of the decision of Employment Judge Russell on the claimant's interim relief application. It is a prerequisite of an interim relief application that the claimant has been dismissed.

62. Whilst we accept that the respondents did not know about this in February 2023 when they made their decision, we find that the discrepancy revealed was one which they were entitled to regard as serious and significant. A significant discrepancy as to dates of service and the impression the claimant had given them at interview and backed up in his 8 February email that he had been in employment with ORR at the date of the interview on 12 January, had not been confirmed by ORR.

63. It was not a case of a simple discrepancy but of four discrepancies. In relation to Morden College, the claimant omitted to mention a material change in circumstance from employed to self-employed consultancy. That had a knock on effect on his statement as to his dates of employment with Morden. In terms of ORR he relied on his job grade as a Senior Executive Officer which is not the same as his Job Title, which gave Mr Spiteri the view that the claimant was giving himself an advantage over other candidates. On his own evidence there was more training that he needed to complete. Most significantly in the respondents' mind was the effective date of termination with ORR, which showed them that at the date of his interview he had been out of employment with ORR for exactly 7 months.

<u>Not giving the claimant the opportunity to comment on the disparities</u>

64. We have also considered whether the respondents failed to follow up with inquiries of the claimant or the referees because he had done protected acts. We accepted the claimant's submission that all sorts of mistakes can be made by the individuals who put together a reference. This was not a case of a single discrepancy but a number of discrepancies across two employers. We also accepted the claimant submission that it would have been a reasonable step to make some enquiries.

65. The question for us was the reason why they did not do so? We find that it was because of their view of the number and seriousness of the errors and it was not because of any protected act. Neither employer had confirmed his dates of service and there were issues regarding his job titles. Mr Spiteri's evidence was that had there been a single discrepancy, or less serious discrepancies, he would have asked the second respondent to seek clarification from the claimant before making a decision to withdraw the offer, but that was not the case. His evidence, which we accepted, was that he found the disparities serious, that the spanned two separate employments and in his view the claimant had clearly misrepresented his employment history.

66. In oral evidence Mr Spiteri said that during the interview the claimant said that he was still employed. We were taken to the typed notes of the interview (page 137) which recorded that the claimant said "*Currently employed, 7 days notice"* and "*Currently working with the railways*". The reference contradicted this.

67. We were also taken to the second respondent's handwritten interview notes. She had made a note (page 132) of the date "*12th July*" and "*ORR*" and we now know that 12 July 2022 was his dismissal date with ORR. The second respondent could not recall why she had written that date. We find on a balance of probabilities that this was not the claimant informing them that he was dismissed on that date. Both the second respondent and Mr Spiteri said and we find that he told them he was still in employment with ORR and the typed notes support this.

68. We find that it was the discrepancies and not the ET claims that operated in the minds of the second respondent and Mr Spiteri. In the knowledge of the ET claims they had progressed the recruitment process and only halted it once they had seen the references.

The relevant law

<u>Victimisation</u>

69. Section 27 Equality Act provides that a person victimises another person if they subject that person to a detriment because the person has done a protected act or because they believe that the person may do a protected act.

70. Each of the following is a protected act:

> *(a) bringing proceedings under this Act;*
> *(b) giving evidence or information in connection with proceedings under this Act;*
> *(c) doing any other thing for the purposes of or in connection with this Act;*

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

71. It is for the claimant to prove that he or she did the protected acts relied upon before the burden can pass to the respondent - see ***Ayodele v Citylink Ltd 2018 ICR 748 (CA)***: "*Before a tribunal can start making an assessment, the claimant has got to start the case, otherwise there is nothing for the respondent to address and nothing for the tribunal to assess.*"

72. In ***Scott v London Borough of Hillingdon 2001 EWCA Civ 2005***, the Court of Appeal held that knowledge of the protected act on the part of the alleged discriminator is a precondition to liability. The burden of proving knowledge lies on the claimant.

73. In ***Nagarajan v London Regional Transport 1999 IRLR 572 (HL)*** the claimant had a history of bringing race discrimination claims against his employer. In this case he complained of discrimination following an unsuccessful job application and the respondent was found not to be liable on the ground that conscious discrimination had not been established. The House of Lords disagreed, the majority view was that conscious motivation was not needed to establish victimisation. It was enough to find that it occurred "*consciously or subconsciously*" in the minds of the interviewers and that they had been influenced by the fact that the claimant had previously brought proceedings. Motivation is not relevant, it is a question of causation.

74. In ***Page v Lord Chancellor 2021 IRLR 377 (CA)*** the claimant was a Magistrate who had sat on a case involving an adoption of a child by a same-sex couple. He expressed objections to this based on his Christian beliefs and was disciplined for this. After further public expression of these views he was found guilty of misconduct and was removed as a Magistrate. He brought a victimisation claim based on his complaints that what he had done was an expression of his religious beliefs and a complaint of discrimination. The Court of Appeal upheld the decision of the ET holding that this was not a case of a kind where the reason for the detriment was that the claimant did a protected act, but where the employer asserted that the real reason was some separable feature. They held that the true reason for the decision to remove the claimant was not that he had complained about discrimination but his misconduct in what he had said publicly about the way in which he would perform his duties relating to same-sex adoption. It was held that the claimant was removed as a Magistrate because he declared publicly that he would not deal with same-sex adoption cases according to law but based on his beliefs about such adoptions.

<u>The burden of proof</u>

75. Section 136 of the Equality Act deals with the burden of proof and provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision

concerned, the court must hold that the contravention occurred. This does not apply if the respondent can show that it did not contravene that provision.

76. One of the leading authorities on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

77. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

78. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden does not shift to the respondent simply on the claimant establishing a different in status and a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "*could conclude*" means that "*a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination*".

79. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc***. The judgment of Lord Hope in ***Hewage*** shows that it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other

80. More recently in ***Efobi v Royal Mail Group Ltd 2021 IRLR 811*** the Supreme Court confirmed the approach in ***Igen v Wong*** and ***Madarassy***.

Conclusions

81. We find that the burden of proof passed to the respondent because the claimant showed that there were protected acts and detrimental treatment.

82. Our finding above is that it was not the discovery of the previous ET proceedings that caused the respondents to withdraw the job offer. We have also found above that it was not the knowledge of the ET proceedings, but the number and extent of the discrepancies which in their view made further enquiry unnecessary.

83. Our finding is that it was the number and seriousness of the discrepancies

and under ***Nagarajan*** and ***Page*** we find that this was a genuinely separable matter from the past ET claims. The respondents were not subconsciously influenced by the ET claims.

84. In the knowledge of those protected acts, they continued to progress the onboarding process and it was only upon receipt of the references that the position changed. The references led them to believe that the claimant had significantly misrepresented his employment history and this was enough for them to withdraw the offer under the terms of the declaration in the application form.

The respondent's costs application

85. At the end of the hearing the respondent made a costs application. The costs application took counsel for the claimant by surprise as he was unaware that the respondents had sent a costs warning to the claimant on 3 October 2023.

86. We gave an opportunity for counsel to take instructions from the claimant and for the respondents to provide copies of the papers. We were provided with a copy of the costs warning and a copy of a Schedule of Costs. Having taken instructions in a break of half an hour, the claimant said he was prepared to deal with this application at this hearing. No postponement was sought.

87. The claim for costs was in the sum of £18,180 and was exclusive of VAT.

<u>The respondent's application</u>

88. The respondent said that the claimant had lied in his job application and there was "*no escaping that*". It was submitted that this was especially in view of his ET claim in London East in which he said he had been dismissed on 12 July 2023. The respondent said it was a lie in respect of a central fact related to liability in the case and not a lie about something procedurally in the litigation. The respondent said it made it unreasonable from the outset to pursue the claim.

89. The respondent sought costs under both Rule 76(1)(a) and 76(1)(b) although submitted that Rule 76(1)(a) on unreasonableness was better suited to the situation. In the costs warning of 3 October 2023 the respondent said they had clearly stated why they sought costs and were more specific than with many costs warnings.

90. The parties and the tribunal took account of the decision of the Court of Appeal in ***Arrowsmith v Nottingham Trent University 2012 ICR 159.*** The respondent submitted that the claimant had lied in respect of a central fact within the case.

The claimant's response

91. The claimant said that under Rule 76(1)(b) the suggestion that the claim had no reasonable prospect of success was not made out because there were protected acts and the respondent knew about them. The existence of the protected acts was shared internally and the job offer was withdrawn. The respondents did not explain to the claimant why his offer had been withdrawn and in those circumstances it was reasonable for the claimant to issue proceedings alleging that there had been victimisation.

92. Under Rule 76(1)(a) the claimant said that he had been clear that what was in his mind, in terms of his dates of employment with ORR. The claimant submitted that he was "*unclear in his own mind as to whether his employment had come to an end*". For the reasons we have set out above, we do not accept this.

93. It was submitted that following ***Arrowsmith***, costs should not automatically follow.

94. It was suggested by the claimant that his effective date of termination in the ORR proceedings in London East remained a "*live issue*" and that the tribunal had made no finding of fact on this. He relied on paragraph 41 of the decision on interim relief. We noted that this said that the Judge had made no finding of fact as to the reasons for dismissal and not that she had made no finding as to the date of dismissal. We did not have the benefit of the ET1 in that case, as to what the claimant had pleaded as to his termination date.

95. The claimant did not believe that he has lied about anything. The claimant submitted that the threshold for costs in Rule 76 had not been met.

The claimant's means

96. We heard from the claimant as to his means. Our findings are as follows: He is not in work but he does have his own property company as set out in our findings on liability. His company owns 4 properties and he also owns his own home with a mortgage and runs a car. He has a lodger and this just about covers his mortgage. He is not in receipt of any State benefits. He has a dependent young child who lives with him part time. He has credit card debts in the sum of about £4,500.

97. The claimant accepted that he has made interest free loans to his property company in the sum of £163,630. He has equity in those properties and his home. He said he has savings of around £1,000.

Decision on costs

98. The effect of our decision on liability is that the claimant did not tell the truth to the respondent when telling them in his job application and at interview that he remained employed by ORR. He knew and brought a

claim in London East on the basis that he had been dismissed on 12 July 2022. This was a central fact in the case and it was the most significant of the discrepancies that weighed in the minds of the respondents when they withdrew the job offer. We agree with what was stated in the respondent's costs warning of 3 October 2023, that he provided false or misleading information during the recruitment process which resulted in the conditional job offer being withdrawn.

99. Both sides agreed that the decision on ***Arrowsmith*** holds that a lie on its own will not necessarily be sufficient to found an award of costs. It will always be necessary for the tribunal to examine the context and to look at the nature, gravity and effect of the lie in determining the unreasonableness of the alleged conduct.

100. We find unanimously that there was a lie in respect of a central fact related to liability which made that it unreasonable to pursue the claim. The respondent had a firm basis for the withdrawal of the offer, as they explained in the withdrawal letter of 23 February 2023 (page 207) in terms of there being disparities with the application. We find that the claimant knew or ought reasonably to have known that in maintaining to the respondents that he remained in ORR's employment, this was untruthful. We do not accept his submission that he was unclear as to whether he had been dismissed. He maintained in his claim against ORR that he had been dismissed. The declaration he made in the application form was clear as to the consequences, that if he provided false or misleading information an offer may be withdrawn (page 121).

101. Our finding is that the threshold test in Rule 76(1)(a) is met.

102. In terms of quantum took account of the claimant's ability to pay. The respondent sought to claim for the time taken out of the first respondent's business by 3 employees as being chargeable in the sum of £3,736. Whilst we accept that under Rule 78(1)(d) there is power to order a paying party to pay a witness in respect of necessary and reasonably incurred expenses under Rule 75(1)(c), this is not such a case. We make no award in respect of that amount.

103. The respondents have used their in-house legal team and claim for 248 hours at £50 per hour. Whilst we found the hourly rate charged to be low we agreed with the claimant's submission that 248 hours in relation to a relatively straightforward two day case was excessive. The claimant took no issue with counsel's fee in the sum of £1,850.

104. The claimant's evidence was that he is not cash-rich but we find that he has equity in his properties.

105. We have taken broad brush approach, taking into account the claimant's ability to pay and all the other factors. We make an award of costs of **£3,000** in favour of the respondents.

106. The respondents conceded that the claimant could have a reasonable amount of time to pay, rather than the standard 14 days. The claimant asked for 3 months and this was agreed.

Employment Judge Elliott
Date: 29 November 2023

Judgment sent to the parties : 30/11/2023

For the Tribunal