EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr A Manzoor	AND	Ministry of Defence

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol **ON** 18 August 2023

EMPLOYMENT JUDGE J Bax
MEMBERS Mrs D England
Mrs P Ray

Representation

For the Claimant: Mr Manzoor (in person)
For the Respondent: Mr A Lyons (counsel)

ORDER

The Respondent's application for costs is dismissed.

REASONS

1. These are the written reasons, following an extempore judgment on 18 August 2023, following the hearing on that day. The Claimant sought written reasons within the time limit as set out in the Employment Tribunal's rules.

2. In this case the Respondent sought its costs of defending this action against the Claimant. We were grateful for the helpful and detailed written and oral submissions by both parties. References in square brackets are references to pages in bundle for the costs hearing .

General Background

3. The Claimant presented the claim on 12 September 2020. In the claim form he ticked the box, 'I am making another type of claim which the Employment

Tribunal can deal with' and said, "Harassment and discrimination by way of victimisation and unfair treatment." He set out his complaints at box 8.2.

4. On 21 September 2020, Employment Judge Livesey directed that the Claimant state which protected characteristic was relied upon. On 28 September 2020, the Claimant confirmed it was race. He also attached details of the allegations.

5. On 26 October 2020, the Claimant provided the information in date order, at the start he referred to the treatment being on 'the grounds of race as I belong to an ethnic minority group.'

6. In its response, the Respondent applied for a deposit order on the basis that the claim had little reasonable prospects of success.

7. The claim was listed for a preliminary hearing to determine the deposit application. On 21 April 2021, Employment Judge Richardson dismissed the application. In dismissing the application it was said "there are sufficient incidences of what appear to be significant breaches of Civil Service policies and a failure to address those breaches at the appropriate time when the Claimant raised complaints." References was also made to sufficient incidences of overbearing management and lack of trust . It was considered that they could amount to harassment related to race. It was identified that although a bare assertion of race discrimination was insufficient, the sheer number of incidences and breach of policy which caused him to feel the environment was hostile meant it was not possible to say that the sustained treatment was nothing whatsoever to do with race.

8. On 10 September 2021 Employment Judge Fowell conducted a case management preliminary hearing. The Claimant withdrew his claims of victimisation and those claims were dismissed. The issues were identified, consisting of allegations of harassment related to race and direct race discrimination.

9. The final hearing was heard before us between 8 and 16 August 2022.

10. At the start of the final hearing the Respondent raised an issue about the Schedule of loss, namely that the Claimant had previously said he had not suffered a direct loss of earnings and in his schedule he was claiming financial losses of £142,000. This was objected to on the basis that the Respondent did not have the witness evidence to challenge it. It was determined a judgment would be given on liability and the Claimant would decide whether he wanted to purse the losses and the Respondent could make further submissions [p93].

11. At the final hearing the following matters also occurred. The Claimant applied to add an allegation about allocation of offices to the list of issues. The application was refused [p94-95]. During Lt Col McGregor's evidence, the Claimant applied to add an allegation that Lt Col McGregor's appointment as his line manager was an allegation of direct discrimination. The application was refused [p95]. The Claimant cross-examined Ms Hunt and after cross-examining her accepted that she had not discriminated against him and withdrew the claims against her [p95].

12. At the final hearing the Claimant accepted that he did not have direct evidence of discrimination or harassment. He relied upon the totality of allegations and said that an inference should be drawn that race was the cause. After considering all allegations the Tribunal was not satisfied that the Claimant had discharged the initial burden of proof. It was found that some of the Respondent's conduct had been unreasonable, however it was concluded it was insufficient to shift the burden of proof.

13. The Respondent drew our attention to a number of passages in the Judgment, in which it was found that the Claimant had not asserted that his complaints were race discrimination. Most notably in his grievance letter and grievance appeal letter.

14. There were also findings of unreasonable behaviour by the Respondent, in particular the allegation related to Mr Nash ignoring the Claimant's request to be allocated a different line manager, Lt Col Whitticase referring to the Claimant retrospectively booking time off and the destruction of the interview notes.

15. The interview for the C2 business manager role in July 2019 was an important element. There was an inconsistency between the civil service and MOD policies and who could chair the interview panel. The Claimant was ranked second. The notes of the interview were destroyed, when they should have been kept for 2 years. The notes of other candidates were also destroyed. The Civil Service Commission considered a breach of procedure had taken place. The destruction of the notes was unreasonable and it was noted that the retention of them enables people to see that interviews had been conducted fairly. After hearing the evidence the Tribunal concluded that the scores were accurate. The Tribunal considered this aspect of the case very concerning.

16. On 26 August 2022, the Respondent sought written reasons. In its letter, it applied for costs on the basis that the Claimant had acted vexatiously, abusively, disruptively or other unreasonably in bringing the claim and that the claim had no reasonable prospects of success. It said it would outline the basis on receipt of the written reasons. Unfortunately the written reasons were sent to the Respondent's former representative's rather than TLT. TLT

informed the Tribunal on 15 June 2022 that they were representing the Respondent. The notice of costs hearing dated 11 June 2023, was sent to the correct representative. TLT wrote to the Tribunal on 14 June 2023 saying that they had not received the written reasons. On 29 June 2023, the Respondent was ordered to send its final grounds for the costs application within 14 days. The final grounds were sent on 13 July 2023, i.e. within the deadline.

Findings of Fact Relevant to the Claimant's means

17. The Claimant gave evidence about his means. The witness statement was a snapshot as of August 2022 and did not include details of his wife's income. It was established that the Claimant's wife contributed to paying the bills. The Claimant's pay had increased since August 2022. He had about £6,000 in his bank account. There was approximately £85,000 of equity in the family home. Although the Claimant was not really saving money, his wife was saving about £1,000 a month. Due to a lack of current documentation it was not possible to be accurate in the amounts.

The Application for Costs

<u>The Respondent's submissions</u>

18. The Respondent made its application for costs on the basis that the Claimant acted vexatiously or otherwise unreasonably in the way in which the proceedings were conducted. The Respondent submitted that it would be content for an assessment to be limited to the Tribunal's jurisdictional cap of £20,000.

19. The Respondent submitted that the numerous times in which the Claimant did not say to the Respondent that he was being discriminated against, because of his race, showed that he did not think this was a race claim and that the claim was vexatious. It was further relied on that the race box had not been ticked on the claim form. It was submitted that that at the final hearing the Claimant struggled to articulate his claim and was reminded to put to the witnesses that it was discrimination. It was submitted that the claim was about not being appointed into the role he applied for and it grew by the time he appealed the grievance outcome and it turned into further grievances. There were allegations against multiple people and the allegations were outrageous. Further that it was found that the burden of proof was not shifted when considering the allegations individually and in totality. Specific reference was made to the inconsistency between the allegations and the lack reference to discrimination in the grievance and grievance appeal.

20. In relation to the rejection of the application for a deposit order, whilst it could not be said prima facie there were no reasonable prospects of success at that time, once the claim was fully heard and considered it was clear the claim was vexatious and unreasonable. The hearing did not have the benefit of evidence and the totality needed to be looked at. The application was not put on the basis of no reasonable prospects of success due to the finding at the deposit hearing.

21. It was irrelevant that a costs warning had not been made, and if one had been made the Respondent could be called oppressive.

22. The following matters were specifically relied upon:

    a. It was submitted that it was vexatious or unreasonable for making a claim for victimisation which was withdrawn on 10 September 2021. This was because the Claimant accepted that the grievance dated 2 September 2019 did not include an allegation of discrimination and was therefore not a protected act.

    b. Filing a schedule of loss for £142,000, after previously saying there were no financial losses.

    c. Attempting to amend the claim to include an allegation, about the allocation of offices and Lt Col McGregor being his line manager, was an act of direct discrimination. This was not an attempt to reduce issues but to increase them.

    d. Withdrawing the allegations against Mrs Hunt after cross-examining her, on the basis that he could not really challenge her,.

    e. There were a number of grounds effectively saying the same thing, namely that allegations were made of harassment and discrimination against various people without a proper basis and did so without direct evidence. The allegations did not satisfy the initial burden of proof. This was based on the general submissions outlined above.

    f. Brought claims which were out of time against Lt Col McGregor.

    g. Being inconsistent in why he said the discrimination occurred, when in correspondence he said it was caused by challenging managers.

23. It was submitted that the Claimant had the means to pay £20,000.

<u>Claimant's submissions</u>

24. The Claimant submitted that he did not have any legal advice when he brought the claim, in that he could not afford it. The Respondent had not applied to strike out the claim and the deposit order application had been refused.

25. The Claimant said that when he had challenged the various people they had taken offence because of his race. Further when he made his first complaint, in his grievance, he did not intend to charge them with racism. When it took more than a year he started comparing himself and considered he was not being treated the same as others. He did not think he could change his grievance retrospectively. It was not a vexatious claim. There was something serious there and there were unreasonable acts, in particular the destruction of notes.

26. He withdrew the victimisation claim after discussing the matter at the hearing on 10 September 2021, after discussing the issue with Employment Judge Fowell. When he brought the claim he thought he could base the victimisation on his grievance. When he realised it lacked merit, he withdrew it and that showed his conduct was not vexatious.

27. In relation to the schedule of loss he had gathered new information and realised that he had sustained financial loss.

28. The amendment application in relation to the allocation of offices had been referred to in his claim form. He considered it could further evidence discrimination. The amendment application in respect of his line manager was not an entirely new incident and inferences could be drawn.

29. The withdrawal of the allegations against Mrs Hunt showed he listened and objectively assessed the evidence.

30. In relation to having a proper basis for making the allegations and sufficient evidence. The findings of fact did not mean he brought the claims in bad faith or unreasonably. Discrimination is often implicit and evidence by patterns and behaviours over time, rather than isolated incidents. He had formed a legitimate perception of the treatment.

31. In relation to the matters found to be out of time, connected acts continuing over time are part of an ongoing situation and their actions were intertwined with the others.

32. In relation to inconsistency, discrimination can be caused by multiple factors.

33. He did not submit that he could not pay a costs order, but said he had not been asked to provide his wife's pay details and he thought he needed to provide the information as of August 2022.

The Rules

34. The relevant rules are the Employment Tribunals Rules of Procedure 2013 ("the Rules").

35. Rule 76(1) provides: "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. Or (c) a hearing has been postponed or adjourned on the application of party made not less than 7 days before the date on which the relevant hearing begins.

36. Under Rule 77 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.

37. Under Rule 78(1) a costs order may – (a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party; (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles …"

38. Under Rule 84, in deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

The Relevant Legal Principles

39. The correct starting position is that an award of costs is the exception rather than the rule. As Sedley LJ stated at para 35 of his judgment in Gee v Shell Ltd [2003] [2003] IRLR 82 CA "It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to people

without the need of lawyers, and that in sharp distinction from ordinary litigation in the UK, losing does not ordinarily mean paying the other side's costs …" Nonetheless, an Employment Tribunal must consider, after the claims were brought, whether they were properly pursued, see for instance NPower Yorkshire Ltd v Daley EAT/0842/04. If not, then that may amount to unreasonable conduct. In addition, the Employment Tribunal has a wide discretion where an application for costs is made under Rule 76(1)(a). As per Mummery LJ at para 41 in Barnsley BC v Yerraklava [2012] IRLR 78 CA "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." However, the Tribunal should look at the matter in the round rather that dissecting various parts of the claim and the costs application, and compartmentalising it. It commented that the power to order costs is more sparingly exercised and is more circumscribed than that of the ordinary courts, where the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. There is no need for the tribunal to find a causative link between the costs incurred by the party making the application for costs and the event or events that are found to be unreasonable, see McPherson v BNP Paribas [2004] ICR 1398 CA, and also Kapoor v Governing Body of Barnhill Community High School UKEAT/0352/13 in which Singh J held that the receiving party does not have to prove that any specific unreasonable conduct by the paying party caused any particular costs to be incurred. it is unnecessary to show a direct causal connection, (McPherson-v-BNP Paribas [2004] ICR 1398 and Raggett-v-John Lewis [2012] IRLR 911, paragraph 43), but there nevertheless has to have been some broad correlation between the unreasonable conduct alleged and the loss (Yerraklava-v-Barnsley MBC [2010] UKEAT/231/10). Regard had to be taken of the '*nature, gravity and effect*' of the conduct alleged in the round.

40. When considering an application for costs the Tribunal should have regard to the two-stage process outlined in Monaghan v Close Thornton [2002] EAT/0003/01 by Lindsay J at paragraph 22: "Is the cost threshold triggered, e.g. was the conduct of the party against whom costs is sought unreasonable? And if so, ought the Tribunal to exercise its discretion in favour of the receiving party, having regard to all the circumstances?"

41. The threshold to trigger costs is the same whether a litigant is or is not professionally represented, although in applying those tests, the EAT has held that the status of a litigant is a matter which the tribunal must take into account – see AQ Ltd v Holden [2012] IRLR 648 EAT in which Richardson J commented: "Justice requires the tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. As [counsel] submitted, lay people are likely to lack

the objectivity and knowledge of law and practice brought about by a professional adviser. Tribunals must bear this in mind when assessing the threshold tests in [rule 76(1)(a)]. Further, even if the threshold tests for an order of 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." However, Richardson J also acknowledged that it does not follow from this "that lay people are immune from orders for costs: far from it, as the cases make 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". These statements were approved by Underhill P in Vaughan v London Borough of Newham [2013] IRLR 713.

42. The Respondent referred us to Barton v Wright Hassall LLP [2018] UKSC 12 and that the Supreme Court stated that litigants in person should not be granted special status in civil proceedings. The appeal related to a claim brought in the County Court the Civil Procedure Rules in respect of service of the claim and a discretion to waive compliance. Paragraph 18 was of particular relevance:

"*Turning to the reasons for Mr Barton's failure to serve in accordance with the rules, I start with Mr Barton's status as a litigant in person. In current circumstances any court will appreciate that litigating in person is not always a matter of choice. At a time when the availability of legal aid and conditional fee agreements have been restricted, some litigants may have little option but to represent themselves. Their lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules: CPR r 1.1(1)(f). The rules do not in any relevant respect distinguish between represented and unrepresented parties. In applications under CPR 3.9 for relief from sanctions, it is now well established that the fact that the applicant was unrepresented at the relevant time is not in itself a reason not to enforce rules of court against him: R (Hysaj) v Secretary of State for the Home Department [2015] 1 WLR 2472, para 44 (Moore-Bick LJ); Nata Lee Ltd v Abid [2015] 2 P & CR 3. At best, it may affect the issue "at the margin", as Briggs LJ observed (para 53) in the latter case, which I take to mean that it may increase the weight to be given to some other, more directly relevant factor. It is fair to say that in applications for relief from sanctions, this is mainly because of what I have called the disciplinary factor, which is less significant in the case of applications to validate defective service of a claim form. There are, however, good reasons for applying the same policy to applications under CPR r 6.15(2) simply as a matter of basic fairness. The rules provide a*

framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent. Any advantage enjoyed by a litigant in person imposes a corresponding disadvantage on the other side, which may be significant if it affects the latter's legal rights, under the Limitation Acts for example. Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take."

43. The current proceedings were not civil proceedings under the civil procedure rules and did not involve how a rule should be applied to the Claimant, but the way in which the claim was brought. The threshold is the same for whether an order for cost should be made. The Respondent submitted that if representation is going to be taken into account it should be on the margins of consideration and we accepted that submission.

Unreasonable conduct

44. 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). When considering making an order under this ground, account should be taken of the 'nature, gravity and effect' of a party's unreasonable conduct (McPherson v BNP Paribas [2004] ICR 1398 CA). It is important not to lose sight of the totality of the circumstances and when exercising the discretion it is necessary to look at the whole picture. We had to ask whether there has been unreasonable conduct by the paying party in bringing, defending or conducting the case and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had. We reminded ourselves to be careful not to label conduct as unreasonable when it could be legitimate in the circumstances.

Vexatious conduct

45. In Marler Ltd v Robertson [1974] ICR 72, it was held conduct was vexatious, "if an employee brings a hopeless case not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive." Being misguided is not sufficient. Further it was said, *"Ordinary experience of life frequently teaches us that that which is plain for all to see once the dust of battle has subsided was far from clear to the contestants when they took up arms"* and that statement is apposite here.

46. In Scott v Russell [2013] EWCA Civ 1432, the Court of Appeal approved the definition of 'vexatious' given by Lord Bingham in Attorney General v Barker [2000] 1 FLR 759, namely, 'the 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'.

No reasonable prospects of success

47. Under rule 76(1)(b) the focus is on the claim or response itself had reasonable prospects of success. In Radia v Jefferies International Ltd EAT 0007/18 the EAT gave guidance on how tribunals should approach such costs applications. The test is whether the claim *had* no reasonable prospect of success, judged on the basis of the information that was known or reasonably available at the start. The tribunal must consider how, at that earlier point, the prospects of success in a trial that was yet to take place would have looked. In doing so, it should take account of any information it has gained, and evidence it has seen, by virtue of having heard the case, that may properly cast light back on that question, but it should not have regard to information or evidence which would not have been available at that earlier time. The EAT clarified that the mere existence of factual disputes in the case, which could only be resolved by hearing evidence and finding facts, does not necessarily mean that the tribunal cannot properly conclude that the claim had no reasonable prospects from the outset, or that the claimant could or should have appreciated this from the outset. That still depends on what the claimant knew, or ought to have known, were the true facts, and what view the claimant could reasonably have taken of the prospects of the claim in light of those facts.

Costs warnings

48. With regard to costs warning letters, while it is good practice to warn a claimant of the weakness of his or her case where the respondents may be minded to apply for costs should they succeed at the end of the case, the failure to do so will not, as a matter of law, render it unjust to make a costs order even against an unrepresented claimant.

49. With regard to the paying party's ability to pay, Rule 84 allows the tribunal to have regard to the paying party's ability to pay, but it does not have to, see Jilley v Birmingham and Solihull Mental Health NHS Trust [2008] UKEAT/0584/06and Single Homeless Project v Abu [2013] UKEAT/0519/12. The fact that a party's ability to pay is limited, does not, however, require the tribunal to assess a sum that is confined to an amount that he or she could pay, see Arrowsmith v Nottingham Trent University [2011] ICR 159 CA, which upheld a costs order against a claimant of very

limited means and per Rimer LJ "her circumstances may well improve and no doubt she hopes that they will." One reason for not taking means into account is the failure of the paying party to provide sufficient and/or credible evidence of his or her means. The authorities also make it clear that the amount which the paying party might be ordered to pay after assessment does not need to be a sum which he or she could pay outright from savings or current earnings. In Vaughan v LB of Newham [2013] IRLR 713, the paying party was out of work and had no liquid or capital assets and a costs order was made which was more than twice her gross earnings at the date of dismissal. Underhill P declined to overturn that order on appeal because despite her limited financial circumstances, there was evidence that she would be successful in obtaining some further employment. Per Underhill P: "The question of affordability does not have to be decided once and for all by reference to the party's means at the moment the order falls to be made" and the questions of what a party could realistically pay over a reasonable period "are very open-ended, and we see nothing wrong in principle in the tribunal setting the At a level which gives the respondent's the benefit of any doubt, even to a generous extent. It must be recalled that affordability is not, as such, the sole criterion for the exercise of the discretion: accordingly, a nice estimate of what can be afforded is not essential."

50. Insofar as it does have regard to the paying party's ability to pay, the tribunal should have regard to the whole means of that party's ability to pay, see Shield Automotive Ltd v Greig UKEATS/0024/10 (per Lady Smith obiter). This includes considering capital within a person's means, which will often be represented by property or other investments which are not as flexible as cash, but which should not be ignored.

51. Under Rule 78(1)(a) a costs order may order the paying party to pay the receiving party a specified amount not exceeding £20,000. Under Rule 78(1)(b) a costs order may order the paying party to pay an amount to be determined by way of detailed assessment, carried out either by the County Court or by an Employment Judge applying the principles of the Civil Procedure Rules 1998. Where the receiving party does not regard the limit of £20,000 to be sufficient an order for summary assessment should not be made in those circumstances, see Kovacs v Queen Mary and Westfield College [2002] IRLR 414 CA.

Assessing the amount

52. The purpose of the award is to compensate the party in whose favour the order is made and not to punish the paying party (Lodwick v Southwark London Borough Council [2004] ICR 884). It is necessary to determine what the loss is to the receiving party and the costs should be limited to what is reasonably and necessarily incurred (see Yerrakalva). In the case of a

preparation time order it is necessary to assess what is a reasonable and proportionate amount of time for the party to have spent.

53. The Tribunal is permitted to take into account the paying party's ability to pay, but if it does not it should say why. If it does take it into account the effect must also be stated. (Jilley v Birmingham and Solihull Mental Health NHS Trust and ors EAT 0584/06)

54. The Tribunal does not have to determine whether there is a precise causal link between the unreasonable conduct in question and the specific costs being claimed, but that is not to say causation is irrelevant. It is necessary to look at the whole picture of what happened and consider the conduct, what was unreasonable about and what effects it had (see Yerrakalva).

Conclusions

55. The Employment Tribunal is a jurisdiction in which costs do not automatically follow the event. The circumstances when costs are awarded are restricted. The fact that a claim was dismissed in full does not mean that the bringing of the claim was vexatious or unreasonable. It is necessary to look at the whole picture.

56. The main thrust of the Respondent's submissions was that the Claimant, by not suggesting he had been discriminated against until he brought his claim, demonstrated that he was vexatious in bringing his claim. We took into account that being vexatious involves deliberately harassing a party without expectation of recovering compensation. The lack of reference to discrimination was something which the Tribunal considered and noted that it tended to be inconsistent with his assertions before the Tribunal. The Claimant was clearly aggrieved and upset by what had occurred, particularly after not being appointed to the role he applied for. The lack of reference to discrimination was something which would be properly taken into account, however it was also relevant that the Respondent had behaved unreasonably in its actions, most seriously in relation to the interview notes. The destruction of the interview notes raised the legitimate and serious question of why it had happened.

57. The content of the grievance and the appeal and the other occasions when the Claimant had not mentioned discrimination, needed to be taken into account with the totality of the allegations and conduct of the Respondent, including those matters found to be unreasonable. With direct discrimination, the thought process of the alleged discriminator is what is analysed. The letters may cause the Claimant difficulty at a final hearing, however we did not find the Claimant to be untruthful or dishonest. We did not find that he did not hold the belief that he had been discriminated against or harassed contrary to the Equality Act.

58. In Sharma v New College Nottingham [2011] UKEAT/0287/11, it was recognised that it was unusual to find direct evidence of discrimination. In discrimination cases it is unusual to find a smoking gun or that alleged perpetrators accept that they have discriminated against someone. Discrimination cases are often based on inference. In Law Society v Bahl [2004] EWCA Civ 1070, it was held that unreasonable treatment per se could not of itself found an inference of discrimination, but the worse the treatment, particularly if unexplained the more possible it is for such an inference to be drawn.

59. The Claimant relied on the totality of the events, including incidents which we found were unreasonable. The most serious and very concerning incident was that the interview records had been destroyed. The Respondent submitted that the failure to secure the post was the crux of the case. Notes of interviews, as recognised in the written reasons, are something which are retained so that applicants and other people can see that the interviews were conducted fairly, and in an even handed way in accordance with procedures and that no ulterior matters were taken into account. The destruction of them meant that what was discussed in the respective interviews was not before the Tribunal. The Respondent needed to call evidence to explain what had happened and to seek to persuade the Tribunal that the scores were genuine and properly reached. That evidence was ultimately accepted. However, it was always a significant issue and when considering the case before the final hearing was something which could have been a significant matter from which an inference of discrimination could have been drawn. There were many allegations and some the things which happened were concluded as being unreasonable, they were matters which could have enabled an inference to be drawn. It is relevant that Employment Judge Richardson dismissed the application for a deposit order. Such an order can only be made if there are little reasonable prospects of success, which is different to no reasonable prospects of success, which can be made as part of a costs application.

60. We accepted that a costs warning does not need to be made and the lack of one is no bar to a costs order being made. The Claimant was entitled to rely on the dismissal of the application for a deposit as indicating that there was some merit to his claims. On that basis it was difficult to see how pursing them could be unreasonable.

61. We accepted that the Claimant considered that there had been race claim which formed over time. There was a background of allegations which the Claimant thought were motivated by his race.

Making a claim for victimisation which was withdrawn

62. The Claimant presented his claim on 12 September 2020, he withdrew his claim of victimisation at the case management hearing at which the issues in the case were identified. The Claimant recognised that he had significant difficulties in the claim. Withdrawing a claim at an early stage is the opposite to pursuing an allegation with the intention to harass or with improper motive. Being misguided is not the same as being vexatious.

63. Further the Claimant initially thought that it would be sufficient to rely on his grievance, but when he realised it would not he withdrew the claim. That tends to evidence that he was being reasonable in the way that he was pursuing the allegations.

Filing the schedule of loss

64. The Claimant had previously said he had not suffered financial losses, equating to loss of earnings, however on reflection he considered he had and submitted the schedule. This was raised as a preliminary point at the start of the final hearing. At the start of the hearing the Claimant said that because he did not have a loss of earnings he did not think he had a financial claim. It is not unreasonable in itself for a party to realise that they had undervalued their claim and to seek to increase the amount claimed in a schedule. The Tribunal, when considering remedy, is concerned with how to adequately compensate the injured party, without imposing a penalty on the losing party. Whether the Schedule could be relied upon was to be determined after deciding the liability aspect of the hearing and the Claimant was warned about the possible consequences if remedy was postponed as a result. The Claimant was unsuccessful in his claims at the liability stage. Other than the potential of facing a larger claim than expected there was no real effect on the Respondent. We did not consider that this was done to harass the Respondent. We were not satisfied that this tended to show that the Claimant had been unreasonable in bringing his claims.

Attempting to amend his claim at the final hearing

65. A party can apply to amend their claim at any stage of the proceedings. The Claimant was relying on the totality of events as something which tended to show that he had been discriminated against or harassed. The Claimant believed that the matters were relevant. It was further relevant that Employment Judge Richardson refused the deposit application on the basis that the totality of the matters alleged could be sufficient to discharge the burden. The Claimant made the applications and they were refused. this involved very little time at the hearing and would not have resulted in any real cost to the Respondent. We were not satisfied that the Claimant did this to harass the Respondent or its witnesses. Further on the basis that the matters had been vaguely referred to in the claim form it was not something

which was unreasonable. We did not accept that this was an attempt to harass the witnesses.

Withdrawing the claims against Mrs Hunt

66. Before the hearing started the Claimant thought that Mrs Hunt had contravened the Equality Act. He questioned her and listened to and considered her answers. After questioning her, he promptly and fairly said that she had not discriminated against him and withdrew the claims. This is not indicative of someone pursuing claims with the intent to harass or for some improper purpose. Instead it is the actions of a reasonable litigant who has assessed what has been said and decided that the argument should not be pursued.

Inconsistency

67. The Respondent had behaved unreasonably. The Tribunal needed to stand back and look at the totality of what had occurred. Although it was decided that the burden of proof was not shifted, that is different to assessing the prospects when the claim started and when the final hearing started. There were a number of issues in which the Claimant thought he had been treated poorly, he put that down to his race. The Respondent had not sought to argue that there were no reasonable prospects of success, but said the behaviour was vexatious or unreasonable. This was really saying that there was no reasonable prospect of success. The test is not to wait for the dust to settle after the end of the claim and look back. The time to examine is at the start of the claim and the time running up to the start of the final hearing. The totality and the unreasonableness of the alleged behaviour were matters for which there was some prosect of success in shifting the burden of proof and could be factors for drawing inferences in relation to all allegations.

68. The Claimant did not have the benefit of legal advice and therefore was not given an opinion on the prospects of success. However ,the application for a deposit was refused which indicated to the Claimant that there was some prospect of success. Whilst parties might be expected to research law and procedure, there is a difference with being able to weigh evidence. To some extent it was relevant that the Claimant was unrepresented. He did not have the experience of weighing evidence and did not have professional detachment. The Claimant considered that something had caused the treatment of him and thought it was motivated by his race, the confirmation came after he presented his claim, however we did not accept that it was unreasonable to bring the claim, given the number of incidents and the unreasonable behaviour of the Respondent. We were further satisfied that the Claimant was not bringing the claim vexatiously. He brought the claim because he believed he had been wronged and that the cause was his race.

We were not satisfied that the Claimant behaved vexatiously. Further for reasons outline we were not satisfied that the Claimant behaved unreasonably.

69. We were not satisfied that the threshold for a costs order had been met in respect of either being vexatious or unreasonable.

70. In any event, even if the threshold had been met we would not have exercised our discretion to award costs. Costs are the exception and not the rule. The Employment Tribunal is a forum where costs are the exception and ordinarily they do not follow the event. Discrimination claims are serious and there is rarely direct evidence upon which they can be founded and people generally do not accept that they have discriminated against someone. This was a case in which a deposit order was refused and the Claimant interpreted it as an indication that there were reasonable prospects of success. There were also a serious questions raised about some aspects of the Respondent's conduct from which inferences could have been drawn. There is a difference between making a mistake and something which means that the transparency of an interview process is removed.

71. The application was dismissed.

Employment Judge J Bax
Date: 13 November 2023

Written Reasons sent to Parties:
05 December 2023

FOR THE TRIBUNAL OFFICE