EMPLOYMENT TRIBUNALS

Claimant: Mr M Mubin

Respondent: Walker's Nonsuch Ltd

Before: Employment Judge Hindmarch

Lay Members: Mr D McIntosh
Mrs J Malatesta

JUDGMENT

The Claimant is ordered to pay the Respondent's costs in the sum of £6,500.

REASONS

1. The Final Hearing of this complaint of direct race discrimination was listed before the Tribunal and conducted by CVP from 23 – 25 October 2023. After the evidence had concluded, on the evening of 24 October 2023 at 22:47, the Claimant emailed the Tribunal, copied to the Respondent's solicitors, seeking to withdraw the claim. The email stated: -
   "Dear Tribunal,
   I the Claimant would like to withdraw the claim, as such the 28th of October 2023 can be vacated. I request that a judgement be issued dismissing the claim in due course. I can confirm that the Respondents have been copied in for completeness."

2. On the morning of 25 October 2023, at 09:29, the Respondent's solicitors wrote to the Tribunal opposing the vacation of the hearing and asking that it proceed. The Claimant replied at 09:51 to say he was no longer available to attend and that he objected to the hearing going ahead in his absence. At 10:22, the Respondent's solicitor sent a further email stating that the Respondent wished to make an application for costs.

3. The hearing on 25 October 2023 began at 10:30, this being the time agreed with the parties at close of business the previous day. The Claimant was not in attendance. The Tribunal decided to write to the Claimant and give him a chance to attend later that day at 13:00 when we would hear the Respondent's costs application. An email was sent to the Claimant by the Tribunal office explaining that, 'The Tribunal will hear the Respondent's costs application

starting at 13:00PM and the Claimant should attend if he wishes to resist that application or give evidence as to his means.'

4. At 12:29, the Claimant emailed the Tribunal in reply objecting to the costs application being heard at short notice and referring to the fact he had dyslexia, did not have access to Wi-Fi and would only be able to attend by telephone. He stated he would need time to consider and respond to the application for costs.

5. At 12:50, the Respondent's solicitor emailed the Tribunal and the Claimant with some caselaw and a schedule of invoices, which showed costs incurred of circa £43,000.

6. The hearing resumed at 13:00. The Claimant was present by telephone. After discussion it was agreed that Mr McPhail, Counsel for the Respondent, would make an oral application for costs. The Claimant agreed he was in a position to give evidence about his means. We would then allow the Claimant to respond to the costs application in writing. This was a sensible and fair way to proceed in that it meant the Respondent was not incurring the additional costs of making any written application and/or attending another hearing, and the Claimant would have time to consider matters and respond fully and take legal advice if he wished to do so. Once the Tribunal had given the Claimant time to send in his written arguments it would meet and decide matters, without the parties needing to attend, which we did on 22 January 2024. The Claimant's written arguments were sent to the Tribunal on 22 November 2023.

7. The decision reached on 22 January 2024 was a unanimous one.

8. When the claim came before us for the Final Hearing there was one matter to be decided. The Claimant is British Pakistani. Following a period of ACAS Early Conciliation from 29 May 2022 to 16 June 2022, the Claimant issued his ET1 on 26 June 2022. He indicated he was claiming race discrimination concerning the Respondent's rejection of his job application and regarding the Respondent approaching a previous employer of his for information.

9. The ET3 was filed on 26 July 2022. The Respondent is a manufacturer of toffee and employs around 95 people in Stoke-on-Trent. As regards the first allegation the Respondent accepted it had placed an advertisement for the role of Food Auditor/Technical Manager on the recruitment website Indeed.com on or around 14 March 2022. The Respondent stated it received 51 applications including that of the Claimant who had submitted his CV. The Respondent contended that none of the 51 applications were progressed, and that the Claimant's CV was not progressed as it showed an employment history of a number of short-term posts, when the Respondent was looking for someone reliable, and because the Claimant's home address was 75 miles away from the Respondent's premises and it suspected he would not wish to re-locate. Having not appointed anyone using Indeed, in April 2022 the Respondent

engaged a recruitment consultant to assist in recruiting to the role. That Agency put forward a candidate who was interviewed and was offered and accepted the role, by the name of Katarzyna Okolowicz. The Claimant was not involved in this recruitment exercise. On 26 April 2022, the Claimant emailed the Respondent directly concerning the role, and attaching his CV. The Respondent did not progress this application. The Respondent denied that the Claimant's race had anything to do with its decision-making.

10. On 5 October 2022, the Respondent's solicitors wrote to the Tribunal requesting a strike out and/or a deposit order in respect of the claim.

11. There was a first Case Management Preliminary Hearing on 10 January 2023 before Employment Judge Coghlin KC. He listed a Public Preliminary Hearing for 12 July 2023 to deal with the strike out application. The Judge stated in the Case Management Summary: -

    "Further Information
    The Respondent shall by 24 January 2023 write to the Claimant responding to the Claimant's requests for information…for the avoidance of doubt this is not an order that the Respondent comply with these requests, merely that it sets out its response to each request, either by agreeing or refusing to provide the information requested, and if refusing, providing reasons for that refusal."

12. There followed various email exchanges between the Claimant and the Respondent's solicitors regarding such information. The Claimant was dissatisfied with the responses be received and on 4 March 2023 Employment Judge Gaskill wrote to the parties stating any application for further information could be dealt with at the Public Preliminary Hearing listed for 12 July 2023.

13. On 1 February 2023, the Claimant produced a Schedule of Loss showing that he was claiming 12 weeks loss of pay at £541.20 a week so a total of £7033.20, as well as an award for injury to feelings.

14. At the Public Preliminary Hearing on 12 July 2023, Employment Judge Connolly struck out the second allegation 'that the respondent directly discriminated against the claimant because of race by communicating with a previous employer without his permission' on the basis that this had no reasonable prospects of success. She allowed the claim 'that the respondent directly discriminated against the claimant by rejecting his application(s) for the role of Food Auditor/Technical Manager' to proceed to a Final Hearing. As regards this allegation she recorded at paragraph 8 – 10 of her Judgment as follows: -

    "8. The claimant's complaints are of direct race discrimination. He identifies his race as his Pakistani national origin. He asserts the respondent would have been aware of his race or that he was not 'Caucasian', as the Claimant puts it, by reason of his name.

9. He contends that the respondent treated him less favourably than they treated Ms Okolowicz… by (a) deciding not to progress or by rejecting his application on 2 occasions.

10. He invites the Tribunal to infer that the reason why his application was rejected was his race…the Claimant asserts that his qualifications and experience, were more than adequate for the role and that he was better qualified than Ms Okolowicz whose qualifications and experience, he says, fell short of what was desirable for the role holder. In those circumstances, he invites the Tribunal to find that the reason why he was rejected, and she was appointed, was not on merit that because of race."

15. In terms of the Respondent's position, Employment Judge Connolly noted at paragraph 12 "(the respondent firstly) asserted that Ms Okolowicz was not an appropriate comparator because she was not directly competing with the claimant in the same recruitment exercise. The respondent says the 50 other candidates that were rejected are the appropriate comparators and they were all of mixed ethnicity or race as far as one can tell. Secondly, it asserted that the reason why the claimant was rejected was his employment history which revealed that, in the 6 years prior to April 2022, he held some 15 different roles and lived a significant distance from the respondent's site."

16. Employment Judge Connolly made Case Managements Orders for the Final Hearing. She stated that if the Claimant wanted any further information from the Respondent he should request it by 27 July 2023. She ordered both parties to send each other lists and copies of documents relevant to the issues and to 'injury to feelings and financial losses' by 9 August 2023. The Claimant provided no documentary evidence to support his Schedule of Loss.

17. On 30 July 2023 the Claimant emailed the Respondent's solicitors asking for 9 items of 'further information.' The Respondent's solicitors replied on 30 August 2023 providing some information and explaining that some information would be provided in witness statements due for exchange in September 2023.

18. On 2 August 2023, the Respondent's solicitors wrote to the Claimant informing him they were aware of other Tribunal claims brought by him and asking him to provide information about all claims brought by him in the last 5 years including the name of the Respondent, the nature of the claim and the conduct complained of. They also asked him to provide evidence of all work he had undertaken since his job application made to the Respondent to include pay received. They also asked him to provide details of any monies earned by his company Helpful Panda Ltd.

19. The Claimant responded on 2 August 2023 to say this was a 'fishing expedition' and the information sought was not relevant. There followed inter-party

correspondence about relevance, and this resulted in the Respondent creating a 'disputed' bundle containing Judgments in other claims made by the Claimant and the aforementioned correspondence. The Claimant did not provide the information requested. In his reply to the Respondent's solicitor on 2 August 2023 (page 19 of the disputed bundle) he stated "Unfortunately, for the Respondents, I am not as naïve as I once was, and fully aware of the inherent prejudice in all people not sharing my protected characteristics, and the preferential treatment readily extended to Caucasians daily, especially in recruitment and short-listing." On 8 September 2023 (page 32 of the disputed bundle) in a further email to the Respondent's solicitors, the Claimant stated, "There is no monopoly in discrimination, all companies do it, some just hide it better whereas some are so arrogant that they don't care."

20. As already noted in this Judgment, the Claimant withdrew his claim late on 24 October 2023. The Final Hearing had commenced on 23 October 2023, and we heard evidence from the Claimant on this date. The Claimant's evidence continued into the morning of 24 October 2023 and in the afternoon we heard from the Respondent's sole witness Jonathan Rae. We concluded at 15:30 PM and agreed that we would hear submissions on 25 October 2023. The Claimant withdrew the claim before we heard submissions and before we gave any Judgment on liability.

21. We had heard the totality of the evidence, but we did not make any findings. The Respondent relied on 6 grounds for its costs application, and we must make some observations about the evidence, and our likely conclusions had the case continued, in order to adjudicate on these.

22. We had a bundle of documents running to 360 pages and the aforementioned disputed bundle running to 33 pages. We had witness statements from the Claimant and Jonathan Rae, Operations Manager for the Respondent.

23. It was not in dispute that on or around 7 March 2023 the Respondent advertised a vacancy for a 'Technical Manager – Food Quality' on Indeed.com. A copy of the advertisement was at page 98 of the main bundle. The Respondent took the view a different job title might attract better candidates and so placed an advertisement for the role of 'Food Auditor/Technical Manager' on the same platform about a week later on or around 14 March 2022, page 98A.

24. The Claimant applied for both positions by submitting his CV. The Claimant lives in Darwen and is married with 4 children all of which are in schooling local to his home address.

25. In cross-examination, Mr McPhail took the Claimant to pages 250 – 258 of the main bundle and put to him that was the CV he had used to apply for the posts advertised on Indeed.com. The Claimant denied this was the CV he had used. I did however raise with the parties that the Claimant had said in his witness

statement, at paragraph 2, his CV was that which appeared at pages 250 – 258. In his witness statement, the Claimant stated that at the time he made his applications via Indeed.com he was 'operating as an auditor specifically within food safety, retailer brand standards and health and safety.' Mr McPhail asked the Claimant about page 250, the first page of his CV, and the fact this did not mention him working as an auditor, but rather as a 'technical consultant' for 'Pro Sapient' a role he had undertaken since January 2020. The Claimant accepted the roles were not the same and contended that it was his choice as to what he listed in his CV.

26. It was the Respondents case that it received 51 applications via Indeed.com. The applications were all in the main bundle and there was a list of all applicants at pages 100 – 102. Jonathan Rae gave evidence that he rejected all 51 applicants against 4 criteria – employment history, location, experience and education. He decided that no-one was suitable, and all were rejected. The Claimant agreed he had no way of contesting this point and we accept it.

27. It was put to the Claimant that, as all Indeed applicants were rejected, no-one was treated more favourably than him and he replied, "I don't know…I have no inside knowledge." When asked "Were they (the other applicants) treated more favourably?", the Claimant answered, "They were treated the same as me." We conclude there was no difference in treatment between the Claimant and other applicants who applied via Indeed.

28. Jonathan Rae's evidence was that he rejected the Claimant because he had concerns about the Claimant moving jobs frequently when he wanted someone reliable to take the Respondent through its Brand Reputation Compliance accreditation/certification process. He was concerned the Claimant's CV showed him having 15 different roles since 2016. The Claimant accepted that he had moved roles relatively frequently and argued that was common with consultancy roles. The CV set out a number of roles described by the Claimant as 'interim', which he said in cross-examination he viewed as synonymous with 'consultant.'

29. Jonathan Rae also said he was concerned that the Claimant lived in Lancashire and that was some 80 miles/a 2-hour journey away from the Respondent's site. The CV did not say the Claimant was willing to relocate. It did state, "I am now seeking a permanent appointment due to family commitments." In cross-examination the Claimant said if he had secured the job with the Respondent he would have commuted or stayed away from home initially and then looked to relocate in the medium term in 3-6 months.

30. On 18 April 2022, the Claimant sent an email to a generic 'hello@' email address of the Respondent asking for feedback on why he had been rejected. Jonathan Rae's evidence was that he never had sight of this email and the Claimant agreed that he could not contest this.

31. In April 2022, Jonathan Rae decided to instruct a recruitment agency to assist him in filling the post. He agreed terms of business with the agency on 25 April 2022, pages 276 – 277 of the main bundle.

32. On 26 April 2022, the Claimant emailed Jonathan Rae directly attaching his CV and expressing interest in the role of Technical Manager. Mr Rae said he remembered the CV from the Indeed exercise and having found it unsuitable at that earlier stage he did not engage further.

33. On 5 May 2022, the recruitment agency emailed Jonathan Rae with details of five potential candidates for the role, page 276 of the main bundle. The Claimant was not on that list as he had not applied to or registered with the agency. Jonathan Rae selected 2 people from this list for interview. Of the 2 candidates interviewed, Ms Okolowicz was offered the post. She had not made any application via the Indeed exercise.

34. In evidence, the Claimant was critical of Ms Okolowicz's CV calling it 'embellished' and arguing that she lacked the experience and qualifications to do the role. He further contended she left the role after 'barely 12 months, she stepped up, she could not cope and ran away.' Jonathan Rae's evidence was that the Respondent was happy with her performance and that she left the employment of the Respondent for personal reasons.

35. In cross-examination of the Claimant Mr McPhail took him through an exercise of comparing the employment history revealed by his CV with the various other employment tribunal claims he had made. In the disputed bundle at pages 3 – 10 was a Judgment of Employment Judge Morgan dated 16 October 2020 who dismissed the Claimant's complaints of disability and religion or belief discrimination on the grounds of there being no reasonable prospects of success. The Respondent in that claim was WM Morrison Supermarkets PLC. The Judgment recorded that the Claimant was employed by that company for 4 weeks in July 2017. The Claimant's CV did refer to a role at Morrisons from 'June 2017 to June 2017.' The Claimant said this was a move from consulting to a permanent/employed role that had not worked out so he returned to consulting with a role at Iceland, which lasted from July 2017 to September 2017.

36. The CV then had a gap from September 2017 to February 2018. The Claimant said he did no work in this period.

37. Mr McPhail took the Claimant to a Judgment at pages 1 – 2 of the disputed bundle dated 5 December 2019. This was a Judgment of Employment Judge Leach dismissing a claim by the Claimant for unfair dismissal as the Claimant did not have the required 2 years' service. The Respondent was Kendal Nutricare Ltd. Mr McPhail asked the Claimant when he had been in employment

with Kendal Nutricare Ltd and the Claimant said he could not recall. He was asked why his CV did not reveal any employment history with Kendal Nutricare Ltd and the Claimant then said his contract 'did not commence – no work was done.' This explanation is nonsensical given the Claimant had made a complaint of unfair dismissal.

38. The CV appeared to show a gap in employment between March 2018 and October 2018, and the Claimant said he could not recall whether he had worked during this period. The CV showed that the Claimant worked in an interim position from October 2018 to January 2019 for Alpha LSG Ltd. After that assignment ended on 25 February 2019 (page 299D of the main bundle) the Claimant had emailed Alpha stating that he was interested in a permanent position with them. Alpha responded on 7 March 2019 (page 299B) saying that if the Claimant wished to be considered he should let them know. The Claimant accepted he did not pursue this further but could not remember why.

39. Having expressed the view that he was interested in a permanent, rather than a consultancy interim role, the Claimant was again taken to his CV which revealed that after the interim role with Alpha ended in January 2019, he took another consultant role in July 2019 to August 2019, with Cadbury, and then a consultant role at Vale Royal Fresh Foods from October 2019 to December 2019. It was put to the Claimant that his preference was in fact these short-term consultant roles rather than any permanent roles. The Claimant resisted this contention stating that he was actively applying for permanent roles.

40. There was a gap in the Claimant's CV from February 2020 to September 2020. He said he was not working due to the COVID-19 lockdown.

41. The Judgment in the claim against WM Morrison Supermarkets PLC recorded that the Claimant had applied for another post with that company on 15 July 2020 and was unsuccessful. The Claimant lodged his Tribunal claim asserting that the decision to reject his application was discriminatory. Mr McPhail referred the Claimant to paragraph 20 of the Judgment which said, "the claim of direct race discrimination may properly be classified as having little reasonable prospects of success…the Claimant was not short-listed or called for interview. In many cases, this may be attributable to the fact that other candidates were considered to have greater prospects than the Claimant. The Claimant is unable to identify the qualifications or expertise of the other applicants, or, the candidate who was ultimately appointed." Mr McPhail put to the Claimant that he had filed that claim without knowledge of the other applicants and that fit with the contention he had made in emails to Mr McPhail's instructing solicitor that all employers discriminate.

42. Mr McPhail returned to the Claimant's CV which showed him working for Stockley's Sweets from September 2020 to July 2021. The Claimant said this was not a permanent post but a fixed term post covering maternity leave. The

CV then showed the Claimant working more consultancy roles – one for Ambient Seasoning and Sweets from July 2021 to October 2021, then for Bakery from October 2021 to January 2022.

43. At page 319 of the main bundle, was an email to the Claimant dated 2 February 2022 concerning an interview for a role at First Milk (The Lake District Creamery). The Claimant was asked whether he attended the interview and he said he had and that he 'got the job.' He was asked whether he had brought an Employment Tribunal claim against this entity. He was hesitant in his answer, but did eventually say "no."

44. At page 320 of the main bundle, was an email dated 8 March 2022 to the Claimant regarding an interview with David Wood Baking Ltd. The Claimant was asked if he attended that interview and said he could not recall. He was asked if he had attended any interviews since March 2022 and he said it was plausible that he had attended one and it was this one. He was asked if he got the job, and he said no. He was asked if he had issued Employment Tribunal proceedings and his answer "I don't recall" was evasive.

45. The Claimant was taken to an email sent to him by a recruiter on 14 March 2022, asking whether he was interested in a role at £50 - £60,000 per annum plus bonus 'based on the W.Mids/N.Wales border – so it would require either staying away from home during the week, or relocation', page 326 of the main bundle. The Claimant said he could not recall whether he pursued that role. What we did have was his reply to the recruiter on 16 March 2022 when he mentioned a different role 'based around Manchester' that he was interested in, page 326 of the main bundle. When questioned about this role he twice said he 'didn't have a clue' what it was.

46. The Claimant was taken to an email regarding an interview with The Flava People on 25 March 2022, page 327 of the main bundle. He agreed he attended this interview. He was then taken to pages 13 – 18 of the disputed bundle which was a Judgment in his claim against Manchester Rusk Company Ltd t/a The Flava People and dated 27 March 2023. He confirmed that claim of disability and race discrimination arose out of the interview on 25 March 2022. The Judgment dismissed the claim of disability discrimination and Mr McPhail asked what had happened to the remaining complaint of race discrimination. The Claimant was reluctant to answer at first saying "it's outside the scope of this case" and later said "it's been withdrawn." He was asked whether he received a financial settlement and agreed he had but said he could not recall the sum involved. He was then asked how many financial settlements he had received and again said he could not recall and was unable to give even a rough estimate.

47. The Claimant was taken to his witness statement at paragraph 5 where he stated he was working as an auditor at the time he applied to the Respondent.

He said this was on a consultancy basis where he was allocated work, but he was in training at the time he applied to the Respondent and was not allocated any work until `around September 2022' hence his claim in the schedule of loss for 12 weeks' pay. The Claimant accepted in cross-examination that he did not provide any documentary evidence to support his schedule of loss.

48. Mr McPhail took the Claimant to page 328 of the main bundle which was an email sent to the Claimant on 5 April 2022 regarding an interview for a role at Farmhouse Biscuits. The Claimant said he did not attend that interview and did not bring a Tribunal claim concerning it. He was then taken to page 329 which was an email to him on 25 April 2022 regarding an interview for a post in Wensleydale. The Claimant said he did attend that interview, but he did not get the job. He said that travelling to Wensleydale would not have been difficult for him.

49. The Claimant was taken to pages 304 A-E in the main bundle which were a series of emails in May 2022 between him and a company in Devon. He said he was offered a job but did not take it and he did not bring a Tribunal claim. He said he could not recall why he turned down the role.

50. Mr McPhail took the Claimant to page 11 of the disputed bundle. This was the Judgment of Employment Judge Ross in the Claimant's claim against ARLA Foods UK Plc. dated 6 March 2023. The Claimant was asked when he applied for the role that this claim concerned, and he replied that he couldn't recall. The role in question was in Lockerbie in Scotland and it was put to him that he had no genuine interest in the role. The Judgment was on a preliminary issue and the Claimant was asked what was happening with that claim. Again he was evasive in his answers, eventually saying he withdrew the claim and did not receive any settlement monies.

51. The Claimant was taken to 3 more interviews for roles he had secured in September 2022 and June 2023. He said he had attended all of the interviews but had not received job offers and had not brought any Tribunal claims.

52. Jonathan Rae gave evidence for the Respondent. He said he reviewed all 51 applications received via Indeed. He did not speak to any of the applicants. The Claimant put to him a number of the names of the applicants asking him to agree they were `typical British names.' One such name was Mohammed Assad. One of the lay members at this point asked for clarity on the page number the Claimant was referring to. The Claimant asked Mr Rae several times about name based prejudice. Mr Rae repeatedly said he did not make assumptions about an individual's ethnicity and his role was to find someone for the advertised job, not to worry about their name. Mr Rae's position was that the Respondent had a diverse workforce.

53. Under cross-examination Mr Rae explained that he had reviewed the Claimant's application via Indeed and rejected it because it showed a lack of consistently in a role `I just thought this guy is jumping from job to job…there was no evidence (he) could stick with one job for a long period of time.' He also had concerns about the distance from the Claimant's home address to the Respondent's site.

54. On 25 October 2023 the Claimant gave evidence about his means. He gave very detailed figures about his income and outgoings. He said his monthly income was £2200 net and that the family received child benefit of £208.43 a month. He listed monthly outgoings as follows; mortgage £793, council tax £172, TV licence £12.54, energy bills £320, water £45, car insurance £120, car tax £35, petrol and diesel £300, building insurance £27, life insurance £26, MOT and breakdown cover £20, mobile phone £60, home phone and internet £40, school meals £59, clothing £60, haircut £10 and food £300. In cross-examination he confirmed he had a mortgage of £102,000 on a 3 bedroomed house he had purchased in 2009 for £147,000. He said he did not know the current value of his house but agreed that it had increased in value since purchase. When asked who he was currently working for he said `I'd rather not answer' but said he had been working as an employee since mid August 2023 on a gross annual salary of £40,000. He said he did not know how much money he had received in settlement of Tribunal claims and that he had spent that money and had no savings. He said he was actively looking for a better paid job and that he owed £3000 in energy bills.

55. We heard oral submissions from Mr McPhail in relation to the Respondent's application for costs. We allowed the Claimant to respond in writing. We set out below each of the six arguments relied on by the Respondent and the Claimant's response.

<u>No genuine interest in the role</u>

56. The Respondent's first contention was that the Claimant had no genuine interest in the role with the Respondent. In taking the Claimant through the documents, and as set out above, Mr McPhail had sought to demonstrate that the Claimant's preference was to work short term consultancy type roles and that he was not in fact interested in permanent employment. The Claimant's family live in Lancashire and the children attend school local to their home address. The Respondent's contention was that the Claimant had no intention of relocating to Stoke-on-Trent. The Claimant had been approached by a recruitment agent in March 2022 regarding a highly paid role on the West Midlands/North Wales border and had not shown any interest in it. This was around the same time that the Claimant applied via Indeed for the role advertised by the Respondent which was in the West Midlands and at considerably lower pay.

57. The Respondent invited the Tribunal to consider the Claimant's credibility in considering this post. It referred to his evasiveness when answering questions about his CV, roles he had applied for, other Tribunal claims he had made and settlement sums reached. The Respondent referred to the cases of Berry v Recruitment Revolution & Ors UKEAT/0190/10/LA and Keane v Investigo & Ors UKEAT/0389/09/SM.

58. We had a written `response to costs application' by the Claimant. The Claimant contended he did meet the criteria for the role advertised by the Respondent and that he was genuinely interested in applying. He argued he had worked for confectionery makers in a similar role previously, referencing Stockley's Sweets and Cadbury's. He referred to his CV which stated he was `now seeking a permanent role.'

Causation

59. The Respondent's position was that the claim was predicated on the basis that Ms Okolowicz got the job rather than the Claimant and such an assertion was never going to succeed. Mr McPhail referred to Madarassey v Nomura International plc (2007) EWCA Civ 33 where it was established it was not sufficient to point to a protected characteristic and a difference of treatment; there must be 'something more'. Ms Okolowicz was not the appropriate comparator having herself been appointed through a different and separate process. All candidates who applied via indeed were treated the same. In the Respondent's submission the claim was never going to shift the burden of proof. The Claimant was aware of Mr Rae's concerns about his CV. There was no reason for the Claimant to contend that his race played a part in this.

60. The Claimant argued he did have `something more' namely the fact he applied directly to the Respondent, his request for feedback was ignored and the Respondent had approached a previous client of the Claimant for information about him.

61. He argued Mr Rae was lying when he said he was not aware of name-based prejudice and when he said he did not consider the Indeed applicants names to make deductions about their race or ethnicity.

Part of the claim was struck out at the Preliminary Hearing on 12 July 2023

62. The Respondent contended the threshold for costs should be met on the struck out element of the claim. The Claimant argued the strike out of part of his claim was not a bar to him proceeding with the rest given the allegations were based on separate factual matters.

Failure to comply with orders in particular disclosure orders

63. The Respondent contended the Claimant had failed to comply with the order for disclosure made by Employment Judge Connolly as set out at paragraph 16 of this Judgment and failed to comply with the Respondent's request for information as dealt with at paragraphs 18/19 of this Judgment.

64. The Claimant accepted he had failed on both counts. He contended the Respondent's request for information was unreasonable and it was a fishing expedition.

The Claimant misled the Tribunal in his witness evidence

65. The Respondent contended that the Claimant had only provided a partial picture of his work history with his CV, only covering some of the work he has done. The Respondent said the Claimant had been evasive in relation to the Tribunal claims he had pursued and their outcomes including settlement sums he had received. In Mr McPhail's submission, if the Claimant had only received 1 or 2 settlements he must recall that and his inability to recall is suggestive that there were many.

66. The Respondent argued the Claimant was making job applications, not with a genuine interest in roles, but to pursue claims. The Respondent pointed to the Claimant's evidence where he had displayed a lack of judgment. He had refused to accept that page 250 was the CV he used when applying to the Respondent, despite the fact he said that it was in his witness statement. He would not accept that the Respondent had rejected all 51 of the Indeed applicants.

67. In his written argument the Claimant said he had not misled the Tribunal and that his dyslexia had caused problems with short-term and working memory.

68. The Claimant argued that Mr Rae's evidence was vague on the issue of the key qualities for the role.

The Claimant pursuing the claim up to and including the hearing of evidence, and then withdrawing before submissions with no reason being proffered

69. The Respondent referred the Tribunal to the case of McPherson v BNP Paribas (London Branch) EWCA Civ 5692. He said the Claimant had not given a reason for withdrawing when he did. The Claimant had confirmed he had withdrawn other Employment Tribunal claims. There was no reason to run this claim `to the wire.' The Claimant, after disclosure and exchange of witness statements, should have withdrawn at that stage as the Respondent's position was clear to him.

70. The Claimant contended he was a litigant in person and had a genuine belief his application for the role was rejected due to his race. He said he only heard that his CV was the problem at the final hearing. The Claimant contended he withdrew the claim because Mr Rae had lied under oath under cross-examination, meaning that the Claimant was unable to advance his case.

Discretion

71. The Respondent's position was that the threshold for costs had been met, but it recognised the Tribunal still had a discretion as to whether to make an order. The Respondent invited the Tribunal to make an order.

Means

72. The Respondent asked the Tribunal to consider whether it actually had the full picture of means from the Claimant. It contended the Claimant had failed to disclose evidence of income and had been evasive regarding settlement monies received. If the Tribunal were minded to take means into account Mr McPhail made the point that it appeared the Claimant had plenty of equity in his house.

The Law

73. Costs orders are dealt with under Rules 75 and 76 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1. Rule 76 provides `(1) A Tribunal may make a costs order…, and shall consider whether to do so where it considers that –
    a) A party 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…had no reasonable prospect of success;

    (2) A Tribunal may also make such an order where a party has been in breach of any order.'

74. Rule 84 provides `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.'

75. If the grounds for making a costs order are made out the Tribunal is not mandated to make an order. Whether or not to do so is discretionary and costs orders are the exception, not the rule, Costs are to compensate the receiving party and are not to be punitive in respect of the paying party.

76. In the McPherson case cited by the Respondent the EAT said all circumstances relevant to a party's conduct needed to be considered when determining whether a party had conducted the proceedings unreasonably. At paragraph 29

of the Judgment it was noted `tribunals should not follow a practice on costs, which might encourage speculative claims, by allowing applicants to start cases and to pursue them down to the last week or two before the hearing in the hope of receiving an offer to settle, and then, failing an offer, dropping the case without any risk of a costs sanction.' The EAT said `the reason for withdrawal was a relevant circumstance in deciding whether there had been unreasonable conduct.'

77. There is no general rule that withdrawing a claim is tantamount to an admission that it is misconceived Yerrakalva v Barnsley Metropolitan Borough Council UKEAT 0231/10. Pursuing a claim with little or no reasonable prospects of success may also be seen as unreasonable conduct.

78. The Tribunal should make a brief statement about whether it has taken ability to pay into account and if it has not, it should say why Jilley v Birmingham and Solihull Mental Health NHS Trust and others UKEAT/0584/06.

Conclusions

79. The Tribunal does not agree that the Claimant had no genuine interest in the role with the Respondent. We accept that he has held a number of different roles, mainly as a consultant but some employed roles too, and that he had made clear in his application to the Respondent that he was seeking a permanent role and that he had a real interest in working with confectionary. We therefore do not accept the Respondent's fist contention.

80. We do however agree with the Respondent on causation. The Claimant did suffer a detriment in that his application was unsuccessful, however everyone who applied via Indeed, irrespective of their race, was rejected. The Claimant did not suffer any difference in treatment compared to anyone else involved in that exercise. Comparing himself with Ms Okolowicz was patently flawed. She was recruited via an entirely different process; a process in which the Claimant was not a participant. The Claimant was never going to shift the burden of proof. The claim had no reasonable prospect of success.

81. Part of the claim was struck out at an earlier preliminary hearing and so clearly had no reasonable prospect of success; however part of the claim was allowed to procced with no deposit order made and we do not find that an order for costs should be made on these ground.

82. We accept that the Claimant failed to comply with an order for disclosure in support of his schedule of loss. We do not however find this was sufficiently serious so as to justify a costs order. In relation to refusing to provide information when requested by the Respondent's solicitor, the Claimant did so refuse but there was no Tribunal order to comply.

83. We agree that the Claimant was evasive in his evidence and that he was unreasonably stubborn in accepting some obvious points put to him. We note however what he says about his dyslexia and the effect this may have on him. We do not agree this behaviour is grounds to make a costs order.

84. We do agree with the Respondent that the Claimant behaved unreasonably in the way the proceedings were conducted, by continuing with the claim after exchange of witness statements at which time the Respondent's position was clear and the Claimant should have been aware he would struggle on the causation point. The Respondent was put to the unnecessary cost of a 3 day hearing.

85. Having determined that the threshold for a costs order has been met in relation to two of the grounds put forward by Mr McPhail, we then had to consider whether to exercise our discretion whether to make such an order. We have taken into account the fact that the Claimant is a litigant-in-person however he does have experience of Tribunal litigation as evidenced by the other claims he has pursued. He should have known when the trial bundle was prepared, and statements were exchanged, that the claim had no reasonable prospects of success. Despite this he continued to trial, only withdrawing after he had cross-examined Mr Rae. He argued that he had withdrawn because he was unable to solicit answers helpful to his case from Mr Rae and when cross-examining him. He knew what Mr Rae's evidence-in-chief was going to be when he saw his written statement. That was the time to withdraw. He has conducted these proceedings unreasonably from the stage of exchange of witness statements. The Claimant has withdrawn other claims, as confirmed in his evidence, and should have withdrawn this claim at an earlier stage. We are of the view that we should exercise our discretion to make an order for costs.

86. We now turn to means. Whereas the Claimant was evasive in answering a number of questions put to him by Mr McPhail, he gave very precise expenditure figures. We accepted his evidence as to his current income and expenditure given the detail he set out. We note he has little disposable income however he does have equity in the house he owns, and we are doubtful as to his evidence about savings, particularly given his evasive evidence about the number of settlements he has received. We have taken ability to pay into account. We have concluded that we should make a costs order in the sum of Counsel's fee for the final hearing. We say this in light of our finding that it was unreasonable for the Claimant to pursue the matter to the final hearing when, after exchange of witness statements, it should have been plain to him that the claim had no reasonable prospect of success. We make a costs order therefore in the sum of £6500.

Employment Judge Hindmarch

26 February 2024