RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr W Khan**

Respondent: **Laker Mechanical Limited**

Heard at: **East London Hearing Centre**

On: **Monday 31st July 2017**

Before: **Employment Judge Prichard**

Members: **Mr G Tomey**
Mrs S Jeary

Representation

Claimant: No appearance and written representations

Respondent: Mr C Bourne (counsel, instructed by Gateley Plc Manchester)

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal under Rule 76(1) the claimant shall make a contribution to the respondent's costs in the sum of £3,000.

REASONS

1 This is a case where we consider the claimant has been poorly legally advised. We remind ourselves of paragraph 59 of our judgment where the tribunal described the claimant's race discrimination complaint as a "lawyer-derived complaint and an afterthought which was never owned by the claimant". The facts are quite extreme as far as the race case is concerned. Although the claimant was contending originally that his redundancy was a sham, a well know lawyer's cliché, this was not made out in any way.

2 However, following the case of *Langston –v- Cranfield University* [1998] IRLR, 172, EAT, there is a duty on tribunals to proactively investigate all aspects of a redundancy process, and the dismissal of an employee in a redundancy unfair dismissal case, regardless of how the claimant's case is pleaded and which aspects of the redundancy are challenged, including the genuineness of the redundancy situation itself.

3 We can make no criticism of the claimant for bringing and persisting in a claim for unfair dismissal. He won his claim. A race discrimination case was always most unlikely to succeed against this respondent. In particular Mr Christopher Cheshire was married to a Sikh woman. He was travelling to the Punjab for his brother-in-law's wedding. He is a non-executive board member of ASRA, a Leicester based Asian social housing provider. These are striking facts. In the claimant's oral evidence to the tribunal at the hearing he did not impute any racial motivation or bias to any of the decision-makers in this case. That is why the tribunal stated that this race discrimination complaint appeared to be lawyer-derived.

4 A discrimination claim certainly affects tribunal litigation. For instance the case will then be heard by a tribunal panel of 3. If this had just been an unfair dismissal claim with other money claims, it would have been heard by a judge alone. Discrimination claims also raise the stakes considerably for the party accused of discriminating. Race discrimination is seen as one of the worst. The stigma of losing such a case far outweighs that of losing an unfair dismissal case.

5 2 points on which the tribunal awarded sums to the claimant were not, and never were pleaded claims in the ET1 and probably had not even been noticed by the claimant's solicitor. It was only when the 2 barristers came together at the hearing it was realised that the claimant was paid statutory sick pay during his section 87 ERA notice period. See paragraph 42 of the judgment. This resulted in a shortfall of £1,454.83.

6 It was only at the hearing that it was noticed that the letter of termination was delivered late due to an IT systems failure. That resulted in under calculation of the correct notice period, and notice pay by £1,124.16 net. See paragraphs 40-41. It was the duty of the claimant's solicitors to talk to him and find out about his potential claims.

7 These 2 payments exceeded what the claimant would have been paid for unfair dismissal. 2 weeks' net pay would have come to £1,361.54.

8 During his disciplinary and appeal hearings the claimant did not identify any particular role within Laker Mechanical which would have been remotely suitable. A role was identified for him which was considerably below his salary expectation. At appeal he was offered a purely administrative job at a salary of £18,000 per annum. He had been earning £50,000 per annum as an accountant with the Birchcroft company from whom Laker took him on. He is a part qualified accountant therefore that is not an unreasonable salary expectation, amounting to £680.77 net per week.

9 Breaking it down the claimant had a declaration that he was unfairly dismissed. He must have been awarded £1,361.54 loss of earnings and, despite losing the discrimination claim, he was awarded his full £1,200 tribunal fees which he would have had to pay just to bring an unfair dismissal case. Overall, with the extra claims which the two barristers discovered, the claimant would have been paid £5,140.52 by the respondent under the judgment, of which he then had to pay £3,900 for his barrister's attendance (inclusive of the VAT).

10 We note that the respondent's final schedule of costs for the purposes of this hearing includes VAT. That is a basic error. A VAT registered party should never claim VAT in party and party costs. The claimant is not VAT registered and it was a personal

claim for him, so his position is different.

11 It has been a matter of surprise and disappointment that the claimant has not attended this hearing. The tribunal would have had many questions to ask him. These are questions which are not answered in the two witness statements his solicitors now put before the tribunal. Mysteriously, if he is so hard up, the claimant has continued to instruct MartynsRose, to defend the costs application, and draft these statements for the costs hearing.

12 Paragraph 11 of the main witness statement is false. It states:

> "It is the respondent who I say acted unreasonably by not being willing to settle the matter before the hearing, and the excuse that they had instructed counsel already".

13 We have been shown a letter dated 6 January 2017 from the respondent to the claimant "without prejudice as to costs" where the respondent offered to settle the case for £8,000, considerably more than he has recovered from proceedings. The hearing started on 19 Jaqnuary, so no briefs would have been delivered at this stage. The respondent said they would draw it to the tribunal's attention, as is their right. Tribunals do consider such letters. It is relevant to the exercise of such discretion as we have. See Kopel v Safeway Stores [2003] IRLR, 753, EAT. This practice is not formal in the sense of a *Calderbank* offer, or payment into court in litigation in the courts.

14 The respondent's offer was rejected. On 8 January 2017 MartynsRose sent to Gateleys solicitors a brief email rejecting the offer and making a counter offer of an agreed factual reference, and a payment of £30,000. Unhelpfully, the letter did not give any reasoning for this at all. Guessing, it is possible that what the claimant's solicitors had in mind was to repeat an offer that Mr Aina made at the appeal hearing before Mr Newman (he asked for one year's salary (sic)). We do not consider that the claimant was reliably advised as to the way this case was likely to play out. If the claimant had focused properly, with his solicitor, on the likely way this would play out, (which was highly predictable), he would have accepted the £8,000 offer, or at least come back with a lower counter offer.

15 In the respondent's 6 January without prejudice save as to costs letter, the *Polkey* case was mentioned. However, the letter does not mention the important procedure / substance *Polkey* distinction which would have been much more helpful. If a claimant is successful he might get little or no compensatory award. It often happens in a redundancy case where the consultation is defective, as should be well-known to experienced employment lawyers. It is what happened here. But the important thing was there was some reasoning in the respondent's letter. The respondent was trying to have a dialogue. The reply from the claimant's solicitor closed down that dialogue. There was no written justification for the £30,000 counter offer.

<u>The claimant's means</u>

16 We have no idea why the claimant has no work. We find it a matter of a surprise that a part-qualified accountant in London has no work. Accountants are in demand.

17 The claimant has exhibited 2 pages of bank statements from May and June this year. They reveal an overdraft. They also reveal that he has what seems to be a direct debit for a mortgage to the Bank of Ireland £795 per month. This is likely to be a mortgage on his home at 22 Ladysmith Avenue, East Ham. It must be a house of some size in order to accommodate the claimant, his wife and his three children aged 8, 5 and 2, as he tells us. The claimant's council tax payment indicates that it may be a house of some value. The claimant gave us details of his rate of council tax. It seems likely the claimant has a good amount of equity in the house. However, the tribunal has been left to speculate.

18 The claimant's bank statements tell us a certain amount about the claimant's receipts. If he had attended the tribunal would have asked him about his house, his mortgage, the amount of equity he has in his house and when he bought it, if he had help, whether he receives benefits (it appears from this bank statement he is not receiving benefits, and he probably has no housing benefit or council tax rebate). He receives child benefit into this account, but it is not means tested.

19 He appears to have had several sizeable payments in from W Khan (himself??). How this money has come to him we have no idea. Receipts are 7 June £400, 9 June £500, 20 June £270, 27 June £192.40 child benefit. That is £1,170.00 from W Khan plus £192.40 child benefit for June. There is 8 May £900, 16 May £500, 22 May £200 plus the same child benefit of £192.40. There is therefore £1,600 from W Khan in May.

20 That the claimant should put these before us leaving us to speculate is utterly unsatisfactory.

21 We consider that some costs are payable by the claimant. This conduct meets the threshold condition in Rule 76(1) It is not reasonable to pursue a lawyer-derived claim in which you yourself do not believe, if we are correct in thinking it is lawyer-derived. Certainly nothing in the claimant's latest witness statements has sought to challenge paragraph 59 of the tribunal's reasons.

22 Further the claimant's conduct at this hearing for not attending, at the last minute, was quite wrong.

23 The claimant purports to be unemployed. He says he has set up a company in May 2016 and states that he cannot find any work for other companies or individuals. The tribunal would have asked the claimant about that. It sounds unlikely. We know the claimant has an overdraft at the bank (on the one account we have been shown). He states he is living off credit cards. He has not provided his credit card statements. We are not told if he is paying the high rates of interest charged on credit card debt. We do not know how many bank accounts he has.

24 And yet the tribunal is making some concession under Rule 84 on the basis that the claimant is not well off. As stated above this costs award should be made on the basis of the claimant's race discrimination claim.

25 We consider that the race discrimination was unreasonable from the start and had no reasonable prospect of success for the purposes of Rule 76(1)(a) & (b) of the

Employment Tribunals Rules of Procedure 2013.

26 Personally the claimant hit it off well with Christopher Cheshire having friendly conversations about that part of the world, because Pakistan is just across the border from the Punjab. We do not know what the claimant was thinking when he put his name to that claim, and we never shall.

27 The duration of the hearing was not considerably affected by the presence of a race discrimination claim. This might have been a 2 day unfair dismissal hearing. The judgment was reserved within that 2-day time slot. For that reason too we consider that we should not apportion a great deal of the costs to the claimant. There had to be a hearing. The respondent did not admit unfair dismissal, and the claimant was successful on liability but only successful to a small extent on remedy.

28 We have decided, in our discretion, that the best we can do, to do justice to the claimant's means and to apportion the costs of the tribunal proceedings is to order that the claimant pay the respondent's counsel's fees, brief fee and refresher for the 2-day hearing in January 2017 (£2,000 + £1,000).

29 Oddly the respondent's original application for costs included a bill of costs for £5,188 today we are shown that that is just page two of a four page schedule where the grand costs total is £14,945.40. The original costs schedule was therefore wrong. The costs seem to be trebled since the application in March 2017. Mr Bourne was at a loss to explain how that could have happened. It looks like an error on the respondent's solicitor's part. Although he actually drafted the costs application, Mr Bourne was never shown the original costs schedule.

Employment Judge Prichard

3rd August 2017