EMPLOYMENT TRIBUNALS

Claimant: Mr P Bailey

Respondents:
1. The Chief Constable of Greater Manchester Police
2. Dermot Horrigan
3. The Chief Constable of Lancashire Police

Heard at: Manchester **On:** 7 August 2018

Before: Employment Judge Feeney
Ms C S Jammeh
Ms V Worthington

REPRESENTATION:

Claimant: Mr S Lewinski, Counsel
Respondents: Mr S Gorton QC

JUDGMENT ON COSTS

The unanimous judgment of the Tribunal is that the respondent's application for costs succeeds in part in relation to the claimant's whistleblowing claims.

REASONS

1. The claimant's claim of race discrimination was unsuccessful as set out in a judgment promulgated on 6 October 2017. On the morning of the hearing the claimant's representative on his behalf withdrew his protected disclosure claims. Deposit orders had been made in the claimant's claims of protected disclosure detriment and victimisation under the Equality Act 2010 following a hearing on 29 March 2017. The claims subjected to a deposit order were:

(a) The claimant's removal as Disclosure Officer from Operation Holly was an act of detriment on the part of the first respondent for having made a protected disclosure;

(b) The claimant's removal as Disclosure Officer from Operation Holly was an act of victimisation on the part of the first respondent for having done a protected act relating to his protected characteristic of his race;

(c) The claimant's removal as Disclosure Officer from Operation Holly was an act of detriment on the part of the second respondent for having made a protected disclosure;

(d) The claimant's removal as Disclosure Officer from Operation Holly was an act of victimisation on the part of the second respondent for having done a protected act relating to the protected characteristic of race;

(e) The claimant's removal as Disclosure Officer from Operation Holly was an act of detriment on the part of the third respondent for having made a protected disclosure;

(f) The claimant's removal as Disclosure Officer from Operation Holly was an act of victimisation on the part of the third respondent for having done a protected act relating to his protected characteristic of race.

2. The facts were that the claimant was acting as a disclosure officer on Operation Holly when he was removed the claimant says because the counsel to Operation Holly became aware that he had brought successful claims against the respondent, and that the respondent also was content to remove him for the same reasons. Indeed the decision was made soon after press reports regarding his first claim which was successful before Judge Holmes.

3. The respondent stated the reason for his removal was that the claimant had been served with a Regulation 16 because of concerns he had "leaked information given to him by the Police Federation, which should not have been given to him, to the press. Because the issue could potentially reflect badly on his role and leave him vulnerable to attack by the defence, potentially leading to the prosecution's collapse, it was necessary to remove him". (The claimant had a separate claim regarding the Regulation 16 matter). The respondent argued the Claimant's removal was following advice from CPS based on the regulation 16 matter and not on the claimant's discrimination claims against the respondent. An argument which was not developed in the preliminary hearing.

4. It was said, in the preliminary hearing held by Judge Holmes when the deposit orders were made, in relation to these proceedings:

> "In relation to this claim whilst the Tribunal agree that the claimant may appear to have a hill to climb it may not be a mountain. Whilst appreciating Ms Connolly's points the fact that 'something may turn up' seems very much to be the basis of the claimant's prosecution of this claim. There is certainly nothing at present which would appear to assist him greatly. All the indications from the evidence thus far are indeed that the decision to remove him from this position was instigated by the advice of counsel advising on the conduct of the operation with a view to securing a successful prosecution. In the absence of any suggestion of any evidence that this was not the reason for his removal

> the claimant may well struggle in this claim. That said the evidence, as Ms Connolly submits, is far from complete."

5. We note that in fact because of the advice of counsel was redacted, as required by CPS, the evidence in our hearing regarding what counsel's advice was had to come via the oral and written evidence of Mr Horrigan and others. It was not clear, and seemed unlikely to us, that at the time of the preliminary hearing Employment Judge Holmes anticipated that this would be the case; rather he would have envisaged that counsel's advice would be disclosed and that it would show the true reason for his removal was the Regulation 16 matter.

6. Employment Judge Holmes continued:

> "One aspect of the claimant's submissions, however, remains unanswered: that is the contention made that Detective Inspector Dean, a Cheshire Officer engaged in Operation Holly, was also subject of a regulation 15 notice but was not removed from the operation. The contention is made, again unchallenged and highly likely to be the case, that this officer does not share the claimant's protected characteristic (being white) nor had be done any protected act. He, however, appears to have been treated differently. It is appreciated that he is a Cheshire officer and to that extent the GMP had no role in his potential removal or what would then become of him, but this is a potentially relevant factor in examining the reasons why the claimant was removed. This officer was not, and the extent to which that decision was in any way influenced by the claimant's race or his doing of any protected act. It is further, the Tribunal considers, a potentially relevant factor that one of the respondents, Detective Chief Inspector Horrigan, gave evidence in the claimant's previous Tribunal claim for the respondents to that claim though he was not a respondent himself. He and ACC Shewan for the GMP, also a witness in that case, are highly involved in the decision and its ramifications."

7. Employment Judge Holmes also went on to point out that Detective Inspector Dean might not be a proper comparator because he was not possibly a Disclosure Officer as was the claimant. Indeed this is what we decided at the full hearing.

8. On the first day of our hearing the whistle-blowing claims were withdrawn with no explanation. Today Mr Lewinski (who did not appear for the claimant at the preliminary or substantive hearing) ventured an explanation but without specifically saying he had instructions or without producing any evidence to substantiate the reason. He submitted that they added very little and it was simply a different legal way of saying the same thing as the victimisation claims, and that establishing whistle-blowing was more "legalistic", accordingly it was appropriate to withdraw them. Other explanations were possible such as a view was taken by the counsel instructed on the substantive hearing that the claimant was unlikely to be able to establish that his disclosures were protected. However we have no verifiable explanation.

The Law

9. Rule 75(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2003 read with rule 76 gives the Tribunal the power to make a costs award against one party to the proceedings to pay the costs of another party.

10. The grounds for awarding costs are as follows:

(1) That a party or a party's representative has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing or conducting of proceedings or part thereof…The Employment Tribunal decides an allegation or argument for substantially the reasons given in an earlier deposit order – rule 39(5).

11. Rule 39 in relation to deposit orders states that:

"It an Employment Tribunal decides that any specific allegation or argument in a claim or response has little reasonable prospect of success it may make an order requiring a party to pay a deposit not exceeding £1,000 as a condition to advance that allegation or argument."

12. Rule 39(5) provides that:

"If the Tribunal decides the specific allegation against a party for substantially the same reasons given in the deposit order then that party shall be treated as having acted unreasonably in pursuing the specific allegation or argument for the purposes of rule 76 unless the contrary is shown."

13. In **Dorney & others v Chippenham College [1997] EAT** the EAT said:

"There should not be a fine tooth comb approach to a comparison between the reasons for making the order at the pre hearing review and the reasons leading to a finding against the claimant. This equates to a presumption of unreasonableness but that does not mean the Tribunal will automatically make an order because of rule 76(1)."

14. Rule 76(1) requires the Tribunal to make a decision as to whether the conduct was unreasonable:

"The decision on costs is a two stage process. The Tribunal must ask itself whether a party's conduct falls within rule 76(1)(a) and if so it must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against a party."

15. In **Barnsley MBC v Yerrakalva (2011) CA** the court was considering the previous rule 40 and said:

"A 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."

16. The case of **Kesker v Governors of All Saints Church of England School [1991] EAT** stated there was a fundamental obligation on a party to proceedings to have regard to the merits of their claim not form a legal perspective but from the perspective of what they were alleging could be correct:

> "The question of whether a person against whom an order for costs is proposed to be made ought to have known that the claim he was making had no substance is plainly something which is at the lowest capable of being relevant."

17. In **Khan v Heywood & Middleton Primary Care Trust [2006] Court of Appeal**, the Court of Appeal stated that:

> "Whether conduct could be characterised as unreasonable required an exercise of judgment about which there could be reasonable scope for disagreement amongst Tribunals properly directing themselves."

18. In **Health Development Agency v Parish [2004] EAT**, the EAT stated:

> "Where a Tribunal has found a party has conducted proceedings unreasonably it must examine carefully what costs are attributable to that unreasonable conduct."

19. Although this was refined in **McPherson v BMP Paribas [2004]** Court of Appeal by Judge Mummery stating that this was not authority for the proposition that costs must be specifically attributable to specific incidents, he had since clarified it in **Yerrakalva**: that the unreasonable conduct must be identified.

20. In respect of quantum, a Tribunal should consider the means of a funding party when considering the ability to pay (**Benyon v Scadden [1999] EAT**). The Employment Tribunal has the power to make indemnity costs also as referred to in **Benyon v Scadden**, and the ability to pay may be relevant but it is not a decisive factor.

21. In respect of deposit orders, if the reason the claimant lost his case is the same as the reason given by Employment Judge Holmes this is, as referred to above, deemed unreasonable conduct unless the claimant can demonstrate the contrary. The Tribunal still has the ability to exercise its discretion; **Oni v Unison [2014] EAT** provided guidance on this.

22. In **Hamdan v Ishmail [2017] EAT** it was said that:

> "A deposit order has two consequences. First a sum of money must be paid by the paying party as a condition of pursuing or defending a claim. Secondly, if the money is paid and the claim pursued it operates as a warning rather like a sword of Damocles hanging over the paying party that costs might be ordered against the paying party (with the presumption in particular circumstances that costs will be ordered). Where the allegation is pursued and the party loses there can accordingly be little doubt in our collective minds that the purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by

requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails. That, in our judgment is legitimate because claims or defences with little prospect of success cause costs to be incurred and time to be spent by the opposing party which is unlikely to be necessary. They are likely to cause both wasted time and resources and unnecessary anxiety. They also occupy the limited time and resources of Courts and Tribunals that would otherwise be available to other litigants and to do so for limited purpose or benefit."

23. In summary, the procedure is to identify whether the claimant comes within section 76(1) or the deposit order presumption applies so that the Tribunal does have the power to award costs, and the second to decide, the power having arisen, whether it is appropriate costs in the particular case.

24. In relation to a costs order, rule 78(1) states:

"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 a 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…

(c) Order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;

(d) Order the paying party to pay another party or a witness as appropriate a specified amount in respect of necessary and reasonably incurred expenses;

(e) If the paying party and the receiving party agree as to the amount payable it will be made in that amount."

25. Rule 78(3) states:

"For the avoidance of doubt the amount of a costs order under subparagraphs (b)-(e) of paragraph (1) may exceed £20,000."

Respondents' Submissions

26. The respondents submitted that the reason for the deposit order was the same reason as the Tribunal found against the claimant; the reason being that the service of the regulation 16 notice rendered the claimant remaining on Operation Holly as Disclosure Officer untenable, and that was borne out by the communications between the relevant employees.

27. In respect of discretionary factors, the respondents submitted that Employment Tribunal should exercise its discretion and make an award as that was the purpose, and if a costs order was not made in this case there would be little point in having a deposit order regime and spending the time at a preliminary hearing deciding the matter. The respondents submitted that it was clear:

(1) The claimant knew the reason for his removal from Operation Holly was his regulation 16 notice and confirmed and corroborated that in his own email on 19 May 2015.

(2) The claimant was able to view and digest counsel's opinion as to the reason for his removal and expressly refers to this in his ET1 paragraph 19.

(3) The contemporaneous document made it overwhelmingly clear why he was removed, and this commenced in January 2015. All this was flagged up to the claimant and his advisers through the pleadings, at the preliminary hearing in October 2016 and set out in a letter of 12 December 2016.

28. The respondents sought a detailed assessment of their costs under rule 78(1)(b).

29. The respondents pointed out that the last minute withdrawal meant the claimant avoided the cost consequences of having a deposit order made in relation to his whistle-blowing claim, and it had to be assumed that the claim had no merit or else he would not have withdrawn it. The same thinking applied in relation to the whistle-blowing claim as the victimisation claim in respect of Employment Judge Holmes' decision at the deposit hearing.

30. In addition, the respondents pointed out the following:

(1) That Greater Manchester Police had always argued the decision maker did not take the decision to remove the claimant from Operation Holly and therefore could not possibly be held in respect of the claimant's claims. This was always reflected in the contemporaneous evidence, particularly the documentary evidence from ACC Copley resisting the claimant's removal from Operation Holly.

(2) The claimant's argument that the email correspondence was a sham was unconvincing.

(3) Greater Manchester Police could not be held legally liable or responsible for the acts of Mr Horrigan, who was not acting on their behalf as he was acting for TITAN and therefore Greater Manchester Police should never have been a party to the proceedings.

(4) As regards Lancashire Police and Mr Horrigan, legally neither could be held responsible for the claims of the claimant even if he had succeeded with his claim of victimisation, as he was employee of Greater Manchester Police and was never an employee of Lancashire

Constabulary. They should never have been party to these proceedings either.

Claimant's Submissions

31. The claimant's representative submitted that it was not unreasonable to pursue either case as the matter was complex; it was not clear what the QC had said due to the extensive redaction of documents and other emails, so that oral evidence had to be relied on and it was possible that cross examination would clarify things in the claimant's favour. If the Tribunal had formed a different view of Ms Jenkins the outcome may have been different. Her evidence, the Tribunal suggested, was not wholly reliable. Discrimination cases are fact sensitive in any event.

32. At the heart of the discrimination was the opinion of the QC and no written advice was ever available, and although the claimant had seen it on one occasion he was not allowed to keep it. With the redactions it was not clear how far his view was informed by the fact that the claimant was bringing claims against his employer or purely the regulation 16 matter. Some of the individuals who gave evidence to the Tribunal had previously been involved in the claimant's Employment Tribunal proceedings and therefore there was a possibility that knowledge of his actions and their involvement could have influenced their actions. Their evidence needed to be tested and the timeline needed to be tested also given the redactions. Findings in discrimination cases are highly based on credibility and inferences rather than simply the primary evidence. The claimant also had a good claim in respect of Mr Dean, who was a reasonably good comparator albeit the Tribunal drew a difference sufficient for him not to stand up as a comparator.

33. In respect of the deposit order it was agreed that the reasons for the final judgment were broadly similar to the reasons for the deposit order being made. It was submitted that it was still reasonable to go ahead for the reasons given above and because although the claimant was clearly cognisant of the reasons being put forward by the respondents, he was entitled to take the view that the email correspondence was a sham, either in whole or in part, in order to protect the parties against a discrimination claim.

34. There was evidence as well pointing to the claimant's Tribunal proceedings having some influence on the minds of those he was interacting with, for example the reference to the difficulties of managing him.

35. It was also pointed out that if the Tribunal sent the costs order assessment it would have no control over the percentage of the costs incurred to be awarded, as it is often the case the Tribunal might indicate costs should be awarded from X date or 50% of the costs should be awarded because X reason. For example, should costs be awarded just from witness statement exchange if the position was clear from that point, particularly in view of the redaction in the documentation?

36. It was submitted in respect of the whistle-blowing that the whistle-blowing added very little to the claim; it was a different way of saying the same things but was more legalistic and took the claim no further, neither did the respondents incur additional cost to a large extent in relation to whistle-blowing as all the same

evidence was given; there was no removal of any of the paragraphs from the witness statements.

37. It was submitted that the fact that it was difficult to ascertain who was legally responsible if there was any discrimination should not count against the claimant. It was unfair on the claimant that it was not easy to identify who was responsible for any discrimination, etc. Surely someone should be liable? In fact, it was an appealable point but the claimant had chosen not to appeal.

Reply

38. The respondents replied saying that the redaction had never been challenged and this had been known since the exchange of documents, and that there was no verification of the reasons given for the withdrawal of the whistle-blowing claim.

Conclusions

Whistle-blowing withdrawal

39. We are satisfied that it was unreasonable conduct within the meaning of rule 76 for the claimant to withdraw his whistle-blowing claim so late. We cannot make this decision on the basis of the deposit order as pointed out by the respondents, however we make it on the general provision of unreasonable conduct and in doing so refer to the hearing on the deposit order as detailed guidance was given by Employment Judge Holmes on how he saw the weaknesses in the claimant's claim at that point in time. The claimant should have been aware that if he had formed the view with legal advice his claim was weak on the morning of the hearing this view could have been formed many months earlier following the deposit order hearing. The claimant was legally advised throughout.

40. Having established the power to award costs arises, therefore, we have considered secondly whether it is appropriate to award costs and we find that it is given the content of the preliminary hearing in March, the claimant's access to legal advice and the failure to provide a verifiable reason for the late withdrawal..

41. As to what those costs in respect of whistle-blowing comprise of, we have no guidance. The respondents' position was they wanted a wholesale referral for assessment. Accordingly we are not able to make a decision as to whether an assessment should take place as we do not know whether whistle-blowing associated costs are over £20,000.

Victimisation discrimination claim

42. Whilst a presumption arises that the claimant's conduct is unreasonable where a deposit has been made and the reasons for the claimant's claims being unsuccessful are broadly similar as was conceded here, we have decided not to award costs in this case because we do not think it was unreasonable of the claimant to proceed to a hearing on the following grounds:

(1) The extensive redaction in the documentary evidence meant that although the respondents asserted the regulation 16 matter was the reason for the claimant's removal, there was no documentary proof of that from any of the emails from the QC and there was some timing element which suggested that it may well have been a decision that crystallised after the claimant's Tribunal hearing judgment came out. (it was very soon after the claimant's case had been reported in the press)

(2) Whilst ultimately we found it was not GMP's decision, there was a great deal of evidence of very careful positioning by GMP to ensure that they did not make or influence the decision and it was a reasonable view to take that under cross examination GMP's witnesses may resile from this position.

(3) It was reasonable of the claimant also to submit that the fact that he had not been removed earlier when the regulation 16 matter had first been mooted showed that it was not as important an issue as the respondents were submitting, and that the real reason was, when it came to the QC's notice, that the claimant was bringing claims against his employer.

43. One of the most significant factors for us was Dermott Horrigan's email of 15 May which clearly referred to counsel's advice rather than CPS's advice being the reason for the claimant's removal. Mr Horrigan had to be reminded at the time by Mr Shewan that it was CPS's advice. Although he clarified this it was an email which would have been it reasonable for the claimant to believe that he could rely on to undermine the Respondents 'stated position as developed, i.e. that it was CPS's decision ultimately that the regulation 16 matter was the whole reason for the claimant's treatment and not his Employment Tribunal proceedings. It had the potential to undermine Mr Horrigan's evidence that his decision was based entirely on CPS's advice rather than on counsel's advice. Ms Jenkins from CPS gave evidence that her advice was based on regulation 16 matter and not a consideration of the fact that the claimant had brought proceedings against the respondent, but it was not unreasonable of the claimant to consider her evidence may be undermined during cross examination.

44. All of the above matters are more or less summarised in paragraph 150 of our decision, and although we were able to reconcile these matters with the evidence we heard it was not unreasonable of the claimant to think there was a possibility that that would not occur.

45. It was also reasonable to consider that Mr Dean was a viable comparator even though ultimately he was distinguishable.

46. In addition the claimant had a reasonable argument that although it was extremely inconvenient to remove a Disclosure Officer, at the time it was mooted the respondents' officers thought that the work he had already done would not need to be re-done. Again that was a reasonable point to make to assist his case to cast doubt on the respondents' position that under no circumstances did they want to remove him because of the extra work it would involve – ultimately two people had to

be deployed to undertake the claimant's work and re-assessing the work he had already done.

47. Finally, in relation to the legal position regarding the liability of the three respondents we did point out in our decision it was wholly unsatisfactory that there was no obvious legal entity responsible for any discrimination if it had occurred. Again it was not unreasonable of the claimant to pursue his claim against these Respondents as there as case law which suggested it might be possible to make out such a claim against the respondents following the **Weeks** and **McGlennon** decisions again referred to in our decision, and also following the authorities referred to under European law (**Jessemey**).

48. Therefore, as a result of all the matters referred to above we find it was not unreasonable of the claimant to pursue his claim against these Respondents and that although we came to the same conclusion in the end the evidence that Employment Judge Holmes was looking at was more simplistic than the evidence we ultimately had to look at, and that clarification of the reason for the claimant's removal required oral evidence and cross examination of the respondents' witnesses.

Summary

49. Accordingly, as referred to above, as we have only awarded costs in relation to the whistle-blowing claim. We do not know how much those costs are and therefore we are unable to make any order as to how the costs should be assessed, as it may well that the costs which relate to whistle-blowing are under £20,000.

50. The respondents should advise the Tribunal within 28 days of this Judgment being promulgated of the costs involved and whether it might be possible to resolve the outstanding matters by written representations rather than hold a further hearing and incur further costs.

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Employment Judge Feeney

Date: 15th November 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

21 November 2018

FOR THE TRIBUNAL OFFICE