**Case No. 1400334/2018**

# EMPLOYMENT TRIBUNALS

**Claimant:** Mr E Dewing

**Respondent:** Luscombe Drinks Limited

**Heard at:** **Exeter** **On: 30 October 2018**

**Before:** **Employment Judge Fowell**

**Representation:**

Claimant: Ms T Barsam, instructed by Michelmores Solicitors

Respondent: Mr N Siddall, instructed by Stephens Scown Solicitors

# JUDGMENT

1. The respondent's application for costs following withdrawal of the claim is dismissed, each of the complaints having had reasonable prospects of success.

2. The claimant's application for costs of the application is also dismissed, in the exercise of the Tribunal's discretion.

# REASONS

**Introduction**

1. This an application for costs by the respondent following the withdrawal of the claim on 15 June 2018. The claimant, Mr Dewing, was the Managing Director of the company, and was dismissed with less than two years' service. His employment came to an end on 27 May 2018. He claimed that this was because he was a whistleblower; also, that he ought to have been paid his notice pay, a bonus and holiday pay.

2. The alleged disclosure concerned a related company, of which the respondent's Chairman was a director. It was his decision to withdraw funding from this other company, consigning it to insolvency, that Mr Dewing complained of, alleging that it was

a breach of the Chairman's duties as a director.

3. The power to award costs is set out at Rule 76 of the Employment Tribunal Rules of Procedure, and the respondent claims that costs should be awarded as the complaints had no reasonable prospects of success, or that it was unreasonable of him to bring them.

4. The proceedings were keenly fought. At this hearing each counsel strove to raise before me all of the arguments which might have been raised had the case come to a final hearing. I was presented with a preliminary hearing bundle of 72 pages, a separate bundle for a previous preliminary hearing of 60 pages, and 59 pages of extra material from the claimant. I was also referred to numerous cases on the merits of the rival cases, had they progressed to a final hearing. It is not possible to do justice in the time available to all of the arguments presented and so I will deal with the main points only.

5. The claim was withdrawn by Mr Dewing's solicitor in an email on 15 June 2018 to the respondent's solicitor in the following terms:

> "My client has today instructed me to withdraw his ET claim.
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> Whilst as indicated yesterday, our Counsel has advised positively on the merits, the stresses, (and indeed acrimony) it's engendering is taking its toll, & he now wishes to cut his losses & move on & I am therefore emailing you now, to give you maximum notice, & to avoid further preparations for 22nd June & will notify the ET on Monday."

6. On that day witness statement were due to be exchanged ahead of a half day preliminary hearing to decide whether there had been a protected disclosure. It was less than four months since the response form was submitted.

*Prospects of Success*

*The General Approach*

7. In considering whether any of the complaints had reasonable prospects of success, the first point is that none of them has been decided. It is not therefore quite the same exercise as assessing costs at the end of a contested hearing. It is perhaps closer to the exercise carried out in an application to strike out a complaint on the grounds that it *has* no reasonable prospects of success, under Rule 37. The language is very similar in each case, although a strike out application is entirely forward looking, aiming to assess the future prospects. Here, I am concerned with the prospects at the time at which it was withdrawn.

8. There may have been many reasons for that decision: it might be a recognition that it lacked merit; the financial cost or strain of pursing it; reputational risk; or changed circumstances such as obtaining another job, making it less worthwhile to press on. I have to bear in mind those possible motives and assess the prospects on the merits, assuming that Mr Dewing had the means, motive and determination to see it to a conclusion. It is also important to have in mind the stage of proceedings. It was withdrawn before disclosure had taken place or witness statements had been exchanged, so all of the cards were not on the table. Mr Dewing had made a subject access request, yielding some further information before he withdrew, and his case is that it was reasonable for him to wait for that, to see what it turned up.

9. The company points to guidance in *Vaughan v Lewisham LBC [2013] IRLR 713* to the effect a claim may have had no reasonable prospects of success even where (as here) there was no application for a deposit order or costs warning, no judicial warning or where commercial offers were made. Further, the fact that the claimant genuinely believed in his case was no defence. There has to be a critical examination of the merits: *Exley v Swissport [2017] ICR 1288.*

10. *Swissport* and *Vaughan* involved such an examination after a final merits hearing, when all was known, and as noted above the exercise is slightly different here. The burden of showing that there were no reasonable prospects of success remains on the respondent.

*Whistleblowing*

11. The central allegation here concerns the alleged protected disclosure. Mr Dewing points to the surrounding circumstances, i.e. that:

    a. after raising this issue, his relationship with the Chairman "soured noticeably";

    b. the dismissal letter referred to him as disruptive;

    c. the Chairman made the connection in a meeting between the disclosure and the dismissal; and that

    d. disciplinary proceedings were begun against him and then abandoned before his dismissal.

12. These points were not of course tested in evidence, but the main criticism of his account was that it was too vague. It was accepted that Mr Dewing described the withdrawal of funding as "unethical, unlawful and contrary to his duties as a director" but it was submitted that this was this was merely an allegation, not information; that it did not show the breach of a legal obligation and that it was not in the public interest – that it was in fact just to protect someone else - LB – who worked in the other company. Nor was there anything to show that he genuinely believed that it was in the public interest.

13. Mr Siddall, for the respondent, also pointed to the decision in *Chandhok v Turkey [2015] ICR 527* on the importance of the initially pleaded case. It was not, he submitted, clear enough from the outset about the nature of the breach and there had been no mention of public benefit or reasonable belief.

14. Against this, Mr Dewing submitted that the question of providing information was no longer the correct test following *Kilraine v London Borough of Wandsworth [2016] IRLR 422;* rather the allegation had to have sufficient factual content and be specific enough. The obligation was clearly described as a breach of a director's duty, which is a breach of the duties in the Companies Act 2006. Further, *Chesterton Global v Nuromohammed* established that mixed motives may suffice in meeting the public benefit test. Here there was an immediate risk of insolvency and jobs were put at risk.

15. Reviewing these competing arguments, the claimant's arguments are compelling. The risk of job losses, which was not disputed, appears ample to satisfy the public benefit test regardless of other motives. Belief in the public interest has to be derived from the surrounding circumstances and there seems no reason to doubt that Mr Dewing

genuinely believed this. The allegation itself identifies the legal obligation with reasonably clarity, without specifying the sections of the Act in question, and it is no longer a defence to argue simply that no information was provided, following *Kilraine.* In any event, there was information provided: it may not have been news to the Chairman but that was never the correct approach.

16. Whether or not this disclosure was the principal reason for the dismissal is inevitably fact sensitive and I bear in mind the guidance in *Romaneska* v *Aspirations Care Ltd UKEAT/0015/14 (25 June 2014) (unreported)*, that it would be very rare indeed to resolve this question without hearing evidence from the parties.

17. The fact that all points were not set out in the original claim form is no real bar to success either, since further particulars or amendments are commonly provided in such cases, and may have been provided at any stage. The failure to plead a genuine belief in the public benefit test being met does not mean that the complaint would not ultimately have succeeded and is of little relevance to the prospects of success. In this context I note again that there was no application to strike out the complaint or for a deposit, despite the imminent preliminary hearing.

*The money claims*

18. There was criticism too of the other claims. It was suggested that there was no merit in the dispute over the effective date of termination as Mr Dewing was told in person of his final date and the contract of employment did not require written notice. Further, the alleged bonus was purely discretionary, and the company was entitled to insist on him taking any outstanding holiday during his garden leave. Although there was no such clause in his contract, the employer had this power to notify when leave be taken under the Working Time Regulations 1998.

19. Against this the claimant disputed any such oral notice and the dismissal letter was silent about it. The contract of employment was also wrong as it provided for 3 months' notice, yet the company agreed that six months was due. The bonus was discretionary but was paid to other senior managers. And the power under the Working Time Regulations 1998 required the employer to specify the dates in question, which was not done.

20. None of these arguments appears to me decisive either way, in the absence of evidence. The discretionary bonus may have been the most difficult to argue, but discretion cannot be exercised "arbitrarily, capriciously or unfairly" and if awarded to other managers may have been sustainable. I find that they had reasonable prospects of success. In any event, these money claims are clearly ancillary to the main dispute.

*Unreasonable conduct*

21. The alternative argument is that it was unreasonable to bring the proceedings or that Mr Dewing has acted unreasonably in withdrawing them when he did. Given my findings above, it cannot be unreasonable conduct of proceedings to bring a claim that has reasonable prospects of success; nor can it be unreasonable to withdraw it while it still has those prospects – doing so is entirely for the benefit of the respondent.

22. I have also considered the negotiations which took place between the parties. It is not

necessary to relate them in any detail but it is fair to say that the respondent negotiated hard from the outset. Although it maintained that none of the complaints had any reasonable prospects of success, it did not say why in any detail. Offers of settlement were made by the claimant but the respondent was only willing to drop hands, an offer which lapsed on 16 May 2018, about a month before the withdrawal. The subject access request material was obtained on 13 June, the conference with counsel followed the next day, and the day after that the claim was withdrawn.

23. In all the circumstances this appears to have been the result of a recognition by Mr Dewing that he would need to pursue his claim to a hearing, and that despite those prospects of success no agreement was not going to be reached. Cases are often embarked on in the hope of a settlement rather than a day in court. Employment Tribunals are required, at Rule 3 of the Rules of Procedure, to encourage the parties to settle. Here, as explained in the email withdrawing the claim, the emotional and financial cost of pressing on was too great. That may be regarded, on this occasion, as a successful outcome for the respondent which prevailed through maintaining an uncompromising position and perhaps too having deeper pockets. To say that the claimant was acting unreasonably in continuing his arguable claims in these claims is itself, in my view, misconceived and without merit. The application for costs is dismissed.

24. Given those findings I have also considered an application by the claimant for the costs of this hearing. Since I find it misconceived, the threshold for such an award is met. However, I remind myself that costs are exceptional in this jurisdiction. My ultimate view about the merits of this application was only reached after extensive argument from both sides and may not therefore have been apparent to the respondent when they embarked on it. The abandonment by the claimant of the positions he had been occupying may have tempted them to advance further than was wise, but despite that element of opportunism and the antagonism which has unfortunately marked these proceedings I do not consider it appropriate, in the exercise of my discretion, to make any award of costs against them either.

25. For all of the above reasons the applications for costs on each side is dismissed.

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Employment Judge Fowell

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Date 30 October 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE