Case Number: 2200417/2017

THE EMPLOYMENT TRIBUNALS

Claimant **Mr A Kuznetsov**

Respondent **Manulife Asset Management (Europe) Limited**

HELD AT: **London Central**

ON: **14 December 2018**

Employment Judge: Mr J Tayler **Members: Mrs J Cameron**
Mrs S Plummer

Appearances

For Claimant: **In Person**

For Respondent: **Mr S Purnell, Counsel**

JUDGMENT

The Claimant is ordered to pay the Respondent costs in the sum of £20,000.

REASONS

Introduction

1. By a Claim Form submitted to the Employment Tribunal on 3 March 2017[1] the Claimant brought complaints of automatic unfair dismissal for the reason, or principal reason, that the Claimant made protected disclosures, detriment done on the grounds of making protected disclosures and for holiday pay.

2. The Claim was heard by the Employment Tribunal from 19 February – 2 March 2018. The Claimant was represented by Mrs S Chan of Counsel until 27 February 2018 and thereafter represented himself.

3. By a Judgment sent to the parties on 2 March 2018 we held that the claims of automatic unfair dismissal for the reason, or principal reason, that the Claimant made protected disclosures, detriment done on the grounds of making protected disclosures and for holiday pay failed and were dismissed.

4. In the lead up to the hearing, on 16 January 2018 the Respondent sent the Claimant a without prejudice save as to costs letter offering not to pursue the Claimant for costs if he withdrew his claims. On 14 February 2018 the Respondent sent a follow up without prejudice save as to costs letter again offering not to pursue the Claimant for costs if he withdrew his claims and specifically contending that the claim had no reasonable prospects of success. The Claimant did not respond to the letters. Certainly, by the time he received the second letter, the Claimant was represented by Mrs Chan and could have sought advice upon the merits of his case. Although the Claimant contends that he was not told by Mrs Chan that his claim had no reasonable prospect of success he has not stated whether or not he sought an advice on the merits from Mrs Chan and has not waived privilege in respect of any advice he obtained.

5. The Judgement and Reasons was sent to the parties on 2 March 2018 dismissing the claims. On 9 March 2018 the Respondent wrote to the Claimant and offered not to pursue him for costs if he agreed not to take any further proceedings against them. The Claimant did not respond.

6. On 27 March 2018 the Respondent made its application for costs. The Respondent contended, first, that the claim had from its inception no reasonable prospect of success. Alternatively, the Respondent contended that the Claimant had conducting the proceeding in a number of respects in an unreasonable and vexatious manner. The Respondent limited the application to the sum of £20,000 although they contended that they had incurred costs in excess of £270,000.

[1] With a finalised version sent on 12 April 2017.

7. On 3 April 2018 the Claimant wrote to the Employment Tribunal contesting that it was improper for the Respondent to apply for costs but stating that the letter was “not a response”. There was an administrative delay in the letter being referred to me.

8. On 24 July 2018 a letter was sent on my instructions to the Claimant asking him to provide a response to the Respondent’s application.

9. On 6 August 2018 The Claimant provided his response and sought a hearing to determine the application.

10. On 22 August 2018 a letter was sent on my instruction stating that a cost hearing would be listed and ordering the Claimant to produce a statement of means with a statement of truth. Due to an administrative error a date for compliance was not included in the order. The Claimant did not respond to the order.

11. On 8 October 2018 a Notice of Hearing was sent for this hearing.

12. On 30 November 2018 an unless Order was sent by the Tribunal ordering that unless the Claimant produced a statement of means by 7 December 2018 he would not be permitted to rely on his means as a reason for not awarding or limiting an award of costs. The Claimant did not respond to the order and did not seek to rely on lack of means at this hearing.

Procedural Matters

13. Unfortunately, one of the members did not have a record of this cost hearing and was unable to attend the Tribunal until 11.30 am. Both parties had produced written submissions; in the Claimant’s case of very great length. We agreed that we would read the submission and have brief further oral submissions. We agreed to hear the submissions at 1.30 pm after we had read the submissions. We also agreed that we would first consider the issue of whether the claim had no reasonable prospect of success from the outset and, if so, we would hear any submissions on whether to exercise our discretion to award costs. This reduced the material for initial consideration as a considerable majority of the submissions went to the specific allegations of unreasonable conduct. We would consider these specific submissions if we decided in the first instance that the claim had reasonable prospects of success or decided to exercise our discretion against awarding costs even though the claim had no reasonable prospect of success. There was a further interruption in the afternoon when I was required to deal with an urgent postponement application on another matter. However, in the event we only needed to deal with the first ground of the application, and had the benefit of very detailed written submissions. We had to time limit the Claimant’s submissions, particularly as at times he seemed intent on reading irrelevant extracts from materials from the liability hearing with the apparent aim of filibustering rather than making submissions to augment his written submissions, or to reply to the Respondent’s submissions.

14. At the outset of the hearing the Claimant asked for permission to record the proceedings. The Claimant produced a document dated 13 December 2017 in which he made the application. It was received by the Employment Tribunal and the Respondent on the morning of the hearing. The Claimant contended that a recording was required to provide a reliable account of what was said at the hearing. The Claimant also relied on the fact he is not a native English speaker, creating a risk that statements might be misinterpreted. He contended that he could not keep a full note of the proceedings while being engaged in them. He contended that the recording would help put the parties on an equal footing in accordance with the overriding objective. The Claimant contended that keeping a reliable account of the hearing was in the general interests of justice. As a matter of course, proceedings before the Employment Tribunal are not recorded, although that may change in the future. We accept that there are significant advantages of having a record of proceedings. However, where court or tribunal proceedings are recorded it is generally recorded on a system operated by the court or tribunal. The court or tribunal has control of the recording. The Claimant attended with a small personal voice recorder. We were not satisfied that would be a suitable piece of equipment for making a recording. Furthermore, the recording would not be under the control of the Tribunal. The application should have been made well before the date of the hearing so that consideration could be given to whether effective arrangements could be put in place for tribunal controlled voice recording. Furthermore, the Claimant has represented himself previously and been able to deal with the proceedings without voice recording. He was able to take a written note of the proceedings or to take a note on his computer. It would have been open to the Claimant to arrange for someone to attend with him to take a note of the proceedings. In all the circumstances we did not consider it was appropriate to depart from the normal course in the tribunals and to allow a voice recording of these proceedings to be taken.

15. The Claimant also made a request for a private hearing because of references in the application for cost to previous cases in which he had been involved. This issue would only arise if we had to consider the specific examples of unreasonable conduct relied upon by the Respondent. We agreed that we would consider the application for a private hearing if we reached that stage.

16. After we had given out Judgment the Claimant asked whether I had any connection with Devereux Chambers. I stated that, as is a matter of record, I was a member of Devereux Chambers before I became a salaried Employment Judge on 1 October 2007. Mr Purnell is a member of Devereux Chambers, having joined after I left. I explained to the Claimant that if he had an issue to raise about my membership of Devereux Chambers he should have raised it during the hearing; but that there is nothing unusual about barristers from a set of chambers appearing before a judge that is a former member of those chambers.

The Law

17. The power to make an order for costs are set out in section 76 of the Employment Tribunal Rules 2013.

> 76.—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
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> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
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> (b) any claim or response had no reasonable prospect of success.

18. The rule includes a power to award costs where the claim had no reasonable prospects of success and where the Claimant is guilty of unreasonable conduct of the litigation.

19. The test of a claim having no reasonable prospect of success is high: see in the context of strike out applications **Balls v Downham Market High School & College** [2011] IRLR 217 in which Lady Smith held at para 6 in considering whether a claim has no reasonable prospect of success "no means no". However, a claim that is merely fanciful will be likely to be considered to have had no reasonable prospect of success.

20. If the claim had no reasonable prospect of success the threshold has been crossed allowing a costs order to be made. However, the Employment Tribunal still has a discretion as to whether the order should be made.

21. Cost orders are at the exception rather than the rule. That was emphasised in **Gee v Shell UK Ltd** [2003] IRLR 82 at paras 22, 35 and **McPherson v BNP Paribas** (London Branch) [2004] EWCA Civ 569, [2004] ICR 1398.

22. A significant feature in costs applications is the position of litigants in person. In **Gee**, Lord Justice Sedley, stated at para 35:

> "It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to people without the need of lawyers, and that – in sharp distinction from ordinary litigation in the United Kingdom – losing does not ordinarily mean paying the other side's costs. … the governing structure remains that of a cost-free user friendly jurisdiction in which the power to award costs is not so much an exception to as a means of protecting its essential character."

23. The Claimant has for significant periods of time been a litigant in person although he has taken advantage of the ELIPS program for some assistance in the preliminary hearings in the Employment Tribunal and ELAAS scheme in the Employment Appeal Tribunal and had a direct access barrister for the majority of the hearing and would have had to opportunity to obtain advice on the merits of the claims when Mrs Chan was instructed in January of 2018.

24. The significance of the position litigants in person was set out by His Honour Judge Richardson in **AQ Ltd v Holden** [2012] IRLR 648, EAT at para 32:

> "A tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals; and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent themselves. Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. As Mr Davies submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. Tribunals must bear this in mind when assessing the threshold tests in rule 40(3). Further, even if the threshold tests for an order for costs are met, the Tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice."

25. We also consider it is important to bear in mind that public interest disclosure claims, as has often been said of discrimination claims, are claims of particular public importance. They are claims of great significance and their fair determination is a very important aspect of the tribunal's jurisdiction.

26. The fact that a party lied about a material issue in the claim will not necessarily be sufficient to found an order for costs: In **Arrowsmith v Nottingham Trent University**, [2012] ICR 159, at para 32-33

> "In the recent decision of the Employment Appeal Tribunal in HCA International Ltd v May-Bheemul (unreported) 23 March 2011, Cox J, who delivered the judgment of the appeal tribunal, made the same point. She said:
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> 39. Thus, a lie on its own will not necessarily be sufficient to found an award of costs. It will always be necessary for the tribunal to examine the context and to look at the nature, gravity and elect of the lie in determining the unreasonableness of the alleged conduct.
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> 40. As this last case makes abundantly clear, no point of principle of general application is established in any of the cases being relied upon by Mr Beyzade [and they included the Daleside case]. In our judgment the employment tribunals reasoning in the present case, at para 12 of their judgment, is unimpeachable. Where, in some cases, a central allegation is found to be a lie, that may support an application for costs, but it does not mean that, on every occasion that a Claimant fails to establish a central plank of the claim, an award of costs must follow.
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> 33 I would respectfully endorse that approach. The question for an employment tribunal when considering whether or not the making of an order for costs is justified will always be whether, on the particular facts of the case, any of the circumstances referred to in rule 40(3) of the 2004 Rules have occurred. It will therefore be a fact-sensitive exercise and a

> decision in another case, in what might superficially appear to be circumstances similar to those of the instant case, will not dictate the decision in it."

27. The fact that a Respondent has given a costs warning is a factor that can be taken into account in deciding whether the discretion should be exercised to make a costs order, but is not a prerequisite of such an order being made.

28. The fact that a Respondent did not apply for strike out or a deposit order or that there has been no cost warning by the Employment Tribunal or the Respondent does not necessarily preclude an order for costs being made: **Vaughan v London Borough of Lewisham** [2013] IRLR 713:

> "17 We start with the fact that the Respondents never applied for a deposit order and that neither they nor the tribunal ever warned the appellant that in their view the claim was misconceived or gave a costs warning. We have already considered those facts from the point of view of what, if any, implication can be drawn from them about the arguability of the case; but the question here is whether the absence of any such warning made it unjust for the tribunal to exercise its discretion to award costs. (Theoretically it could also go to the quantum of the costs, but in practice this is an 'all or nothing' point.)
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> 18 We do not believe that as a matter of law an award of costs can only be made where the party in question has been put on notice, by the making of a deposit order or otherwise, that he or she is at risk as to costs. Nor, however, do we believe that the absence of such notice, or warning, is necessarily irrelevant: indeed it was expressly relied on in a recent decision of Mr Recorder Luba QC as one of the reasons for not exercising a discretion to award costs under the cognate jurisdiction in this tribunal – see *Rogers v Dorothy Barley School* [2012] All ER (D) 238 (Mar), at paragraph 9. What, if any, weight it should be given in any particular case must be judged in the circumstances of that case; and it is, as we have already observed, regrettable that the tribunal does not expressly address the question.
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> 19 In our view the fact that the appellant had not been put on notice was not in the present case a sufficient reason for withholding an order for costs which was otherwise justified. In the first place, we do not believe that it would be just to deprive the Respondents of an award of costs because they had not sought a deposit order: there may, as discussed above, be good reasons why a party may prefer not to take that course. If there is any criticism, it could only be that they did not write to her at an early stage setting out the weaknesses in her claims and warning that a costs order would be sought if they failed. But what is significant is that the appellant at no stage in her submissions to the tribunal or before us asserts that if she had been given such a warning she would have discontinued her claim; and nor in any event does it seem to us that any such assertion would have been credible. She was, as the tribunal emphasises, convinced, albeit without any rational or evidential basis, that she was the victim of a conspiracy and of a serious injustice, and it

> seems to us highly unlikely that a letter from the Respondents, however well-crafted, would have caused the scales to fall from her eyes."

29. Rule 78 makes provision as to the amount of any costs order:

> 78.—(1) A costs order may—
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> (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;
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> (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993(a), or by an Employment Judge applying the same principles;

30. Pursuant to rule 84 in deciding whether to make costs order and, if so, in what amount, the tribunal may have regard to the paying party's means. As set out above the Claimant did not comply with the unless order and provide any evidence of his means and did not at the hearing suggest that he lacked the means to pay the sum sought by the Claimant.

Conclusion

31. The threshold for costs being awarded is set high. No means no in the term "no reasonable prospect of success". However, it must be established that the claim had "no reasonable" prospect of success rather than "no" prospect of success. A claim that is merely fanciful will be treated as having no reasonable prospect of success and may properly result in an award of costs.

32. At heart this case was very straightforward. The principle reason for the dismissal of the Claimant was fact he sent the email of 15 June 2016.

33. We had the opportunity at the final hearing, unlike the judges dealing with the matter on the initial sift and preliminary hearings, to consider the email in great detail and to consider the Claimant's explanation of it. When we did so a number of points became apparent. Firstly, the Claimant doctored his email sign off to make it appear that he was a statutory director of Manulife Asset Management rather than an employee with the title of Director of Manulife Asset Management (Europe) Limited. In doing so the Claimant was acting dishonestly. He designed that email to make it look as if Manulife Asset Management might be interested in purchasing the Becton estate. He knew full well that they had no such interest. In making that representation he was acting dishonestly. The Claimant sent the email from work email account. The Claimant was not involved in property transaction himself and we held it was close to farcical to suggest that there was any possibility of the Respondent being interested in purchasing the estate. In such circumstances, we consider that the Claimant must have realised that there was no reasonable prospect of

him succeeding in the allegation that the principal reason for his dismissal was the making of protected disclosures. He knew full well that his own dishonest conduct had led to his dismissal and fully justified it. Thereafter, he searched for some disclosures that could support a claim that he was unfairly dismissed and subject to detriment leading up to his dismissal because of having made protected disclosures. There was no reasonable prospect of him establishing that his conduct was used as an excuse and that the principal reason for his dismissal was the making of the disclosures. We concluded that disclosure 1 did not occur and that disclosures to 2 to 7 were not protected, generally on the basis that the Claimant could not have had a reasonable belief that the disclosure of information tended to show a breach of a legal obligation or was made in the public interest. That was also fatal to the Claimant's claims. Overall this was a claim with no more than fanciful prospects of success.

34. We consider that it is clear that this is a claim that had no reasonable prospects of success. The threshold is passed so that the tribunal has the power to make an award of costs.

35. The Claimant throughout these proceedings has inundated the tribunal with huge amounts of material in an attempt to obscure the basic and simple truth at the centre of the case. His submissions at this hearing were very lengthy, involving him reading out lengthy sections of documentation relating to the original liability hearing, rather than addressing the fundamental point at issue as to whether the principal claim of dismissal for making protected disclosures was one that had a reasonable prospect of success. We consider that it did not. We next went on to consider whether we should exercise our discretion to award costs.

36. We accept the Claimant's submission that costs are very much the exception rather than the rule. We also accept that in considering an application for costs we must have regard to the position of litigants in person. The Claimant has been for much of the proceedings a litigant in person.

37. We note the importance of the Employment Tribunal being open to those who do not have access to lawyers. We note, Lord justice Sedley's statement in **Gee** that the governing structure remains a cost free, user-friendly jurisdiction, in which the power to award costs is not so much an exception to the rule as a means of protecting its essential character. We also bear in mind that public interest disclosure claims are of particular public importance and their determination is important in our society.

38. We also accept that even where there is dishonest conduct that does not necessarily lead to an award of costs.

39. We take account of the fact that on the initial sift by the Regional Employment Judge and at Preliminary Hearings the claim was not struck out, or subject to a deposit order. There was no application to strike out for a deposit order from the Respondents. Those are factors to be taken into account, but as was held in **Vaughan v London Borough of Lewisham**, there may be reasons why on an initial consideration of the papers the position that will be reached at the end of the hearing is not apparent and why it may be thought that it is not sufficiently likely that a deposit order or strike out will be granted to make the

application worthwhile. The fact that an application is not made does not preclude an award of costs being made.

40. We consider this is so exceptional a case as to merit an award of costs. We consider it is just that we should exercise jurisdiction to award such costs. While public interest disclosure claims are particularly important we consider that the protection of the essential character of Employment Tribunal proceedings requires that the tribunal should not sit idly by where a person is guilty of dishonest conduct as the Claimant was in sending his email of 15 June 2016 and then seeks to establish protected disclosures, detriment and alleged dismissal for protected disclosure as a smokescreen to cover his own gross misconduct. We consider that is conduct that should result in an award of costs.

41. When the dust settled in this case what becomes clear is that when the Claimant sent the email of 15 June 2016 he knew that he had doctored the email sign off and that the email was designed to make of the recipient believe that he was acting on behalf of the Respondent's American parent and to falsely suggest that they might be interested in purchasing the Becton estate. While that might not been clear to others at the interlocutory stages the Claimant knew what he had done and deliberately set out to establish protected disclosures and alleged detriments and to obscure the fact that he had been dismissed for his gross misconduct. Even, if it was not obvious to the Claimant's counsel prior to the hearing as the Claimant suggests, the Claimant knew what he had done. He did not need to be advised that his conduct was dishonest, that it clearly justified dismissal and there was nothing of substance to suggest that it was used as an excuse to dismiss him for making his alleged protected disclosures. Once the email of 15 June 2016 was properly analysed and the Claimant given an opportunity to explain himself it was obvious that the claim had no reasonable prospect of success.

42. The Respondent's solicitors have provided a cost schedule showing that they have incurred fees in the region of £270,000 in defending this claim. The schedule is not subject of a detailed breakdown. However, is perfectly clear that the Respondents in instructing solicitors and counsel have incurred vastly in excess of the £20,000 they seek, that being the maximum amount that the Employment Tribunal can award without the award being sent for taxation. The fees of counsel alone show legitimate expenditure well in excess of £20,000.

43. While we accept that the touchstone is to consider the lowest amount of costs that could reasonably be incurred in defending the claim. This claim could not possibly have been properly defended by solicitors and counsel without the expenditure of well over the sum claimed by the Respondent.

44. We consider that the Respondent, understandably, formed the view that until there was a detailed analysis of the material there was not sufficient chance of deposit order or strike out to make such an application. Even if they had done so they would have likely have incurred in excess of £20,000 of legitimate costs.

45. The Respondents instructed reputable solicitors. We do not accept there is anything in the suggestion that they were required to provide the Claimant with a practising certificate for each solicitor engaged in the matter. The case of **Ramsey & ors v Bowercross Construction Ltd** UKEAT/0534/07/DA dealt with the situation of a solicitor who did not hold a practicing certificate. We do not consider there is anything to suggest that the solicitors involved in this matter do not hold practicing certificates. Even if they did not, as pointed out above, Counsel's legitimate costs were in excess of £20,000.

46. We do not consider there is anything in the Claimant's contention that costs should not be awarded because there was a failure by the Respondent to engage in alternative dispute resolution through ACAS or through judicial mediation. The tribunal places great emphasis on alternative dispute resolution, and in an appropriate case might refuse to order costs, or limit costs awarded, on the basis that alternative dispute resolution should have been attempted and could have brought the proceedings to an end. The Claimant's conduct in this matter, including today, where he continues to argue that there was nothing wrong in the email that he sent on 15 June 2016, indicates that there was no realistic prospect of alternative dispute resolution leading to a settlement of these proceedings.

47. Once the litigation commences it was extremely hard fought. There are aspects of the Respondent's conduct that may have resulted in some unnecessary cost. However, the discount of any unnecessary costs would still leave the costs vastly over the £20,000 claimed by the Respondent. We do not accept that the Claimant has put forward convincing evidence to support his contention that Mr Purnell acted improperly.

48. We do not consider there is any question of these proceedings being used to impede at the right of the claimants to have access to the court to litigate their claims of public interest disclosure dismissal or detriment. To the extent that the Respondent has referred to other litigation that the Claimant has threatened, that is a matter that we have not taken into account in deciding whether to award costs. The award of costs is based on the Claimant's conduct of these proceedings.

49. In all the circumstances we consider it is appropriate to make an award of costs to the Respondent in the sum of £20,000.

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Employment Judge Tayler

Dated: 22 January 2019

Sent to Parties
24 January 2019