EMPLOYMENT TRIBUNALS

Claimant: **Mr R. Sidhu**

Respondent: **Your.MD Limited**

Heard at: **London Central** **On:** **30 April 2019**

Before: **Employment Judge Goodman**
Mrs J. Cameron
Mr. D.L. Eggmore

Representation

Claimant: Mr A. Hochhauser QC
Ms J. Russell

Respondent: Mr G. Mansfield QC

RESERVED JUDGMENT

No order for costs on the respondent's application.

REASONS

1. This was the hearing of an application by the respondent for an order that the claimant pay their costs in this claim.

2. In a reserved decision sent to the parties on 5 February 2019 this tribunal found, after a 7 day hearing, that the claimant had been unfairly and wrongfully dismissed, but we dismissed his claims for discrimination and harassment because of race and sexual orientation, and of whistleblowing detriment and dismissal.

3. The parties have since agreed remedy for the successful claims.

4. In the employment tribunal, unlike in the courts, costs do not follow the event, but under rule 76 a tribunal may make a **costs order**, and shall

consider whether to do so, where it considers that -

(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

(b)any claim or response had no reasonable prospect of success.

5. If it decides to make an order, the tribunal may order payment of a specified amount not exceeding £20,000 by way of summary assessment, or it may order a detailed assessment of an unlimited sum, which maty be assessed in the County Court or by an employment judge.

6. In deciding whether to make a costs order, and if so, in what amount, the tribunal may regard to a paying party's ability to pay.

7. Both sides cited much case law. We paid heed to this, but do not recite it all. We pick out **Dyer v Secretary of State for Employment UKEAT 183/83,** on the test of "unreasonable", **Sahota v Dudley MBC UKEAT 0821/03** on the effect of such claims on costs incurred defending them, and **Hamilton-Jones v Black, UKEAT 0047/04** on whether the claimant had any rational basis for believing his own claims. Being misguided does not establish improper conduct – **AQ v Holden (2012) IRLR 648**. The tribunal must look at the totality of the circumstances – **Yerrakalva v Barnsley MBC (2012) ICR 429.**

Submissions

8. The respondent argues of the claims that failed, that in fact the claimant had no genuine belief in the truth of these claims. They were advanced as a ploy to increase the amount he could achieve in a settlement when the respondent entered into negotiation in December 2017, prior to termination. The unfair dismissal claim had a limited value because of the statutory, but the unsuccessful claims could achieve unlimited awards. Further, while an unfair dismissal claim involves limited dis closure and witnesses, claims for whistleblowing or under the equality legislation require detailed examination of evidence, with many more documents and witnesses. This increases the costs of defending such claims and provides an added incentive to settlement. Had it not been for the addition of these spurious claims the case is likely to have settled. Costs were then unreasonably increased, they say, by repeated fishing expeditions for further document searches after initial disclosure.

9. The respondent asked the tribunal to order all their costs or paid, or, on the basis that some may have been incurred in the successful claims, to order payment of 70%. The total schedule comes to £345,900, of which £90,900 is counsel's fees.

10. The claimant replies that he succeeded factually on very many parts of his claim, such as many detriments alleged, and he was not lying. If the claim was without merit, the respondent could and should have applied to strike out at a preliminary stage. He then points to the respondent's conduct when they sought to settle: at a preliminary hearing they told the judge that

they did not intend to settle, and their only proposal, responding to the claimant's offer to settle for £65,000, was that the claimant receive nothing and pay £30,000 for their costs.

11. The claimant further argues that in effect the respondent is looking for an issue based costs order which may not have succeeded under the CPR, still less so in a jurisdiction where costs orders are the exception.

12. As for the allegation of fishing, the claimant points out that some very relevant documents were not disclosed until very late: it was a necessary exercise.

13. As to ability to pay, the claimant has found alternative well paid employment and while his savings were much reduced by being out of work for the best part of a year, he does not set up ability to pay in resisting the application for costs.

Discussion and Conclusion

14. The tribunal recognises that in respect of the protected disclosures it found that they were not in fact made. To make an order, we must be clear that the claimant knew or must have known that the claims had no reasonable prospect of success, or that he knew they were false and brought them abusively, to secure negotiating advantage. We were not clear that the claimant had consciously and deliberately falsified events. Our impression was that it was more that he was careless, or less than scrupulous, about what had happened, what he actually remembered happening, and what he thought or wished he had said, turning "I must have" to "I did", and so on, in that regrettable but only too human border zone between truth and deliberate lying. He was genuinely angry about some parts of his treatment, such as the docking of holiday. He also believed that the respondent was guilty of regulatory breaches or of lying, though his belief may not on all matters have been reasonable. He would not be the first whistleblower to confuse belief in wrongdoing with a belief that he had told his employer they were doing wrong. Looked at as a whole, he spent much time telling others the respondents were doing wrong, but little or none telling the respondent. That was the message of his witness statement, which stated at length what his employers did wrong, but next to nothing about what he actually said on any occasion. It is telling that in our findings his errors (save in the case of Ms Scales, which was evidently wishful thinking) were about what he said to them, not about what other people said. His inability to state in evidence what he had said to his employer tends to show he was mistaken, confused, or guilty of wishful thinking, but not obviously a deliberate liar.

15. The race harassment and sexual orientation harassment claims were founded on slender facts. That is not to say that he made them up. In the shopping incident he picked up on the real aggression. Sometimes discrimination claims are used for tactical advantage, which is improper, but it is not always easy for members of disadvantaged groups to be certain whether they are being targeted, or are reading in something that was not intended, or have misunderstood the cause of the unpleasant conduct, and they can be wrong without being insincere. It is not possible to be clear that this is what happened in the race claim brought on the

"grow up" episode. It seems improbable he really believed this was an allusion to his ethnic background.

16. Having said that, we recognise the temptation to throw in whistleblowing and equalities claims to promote a better settlement, for the reasons outlined by the respondent. We also considered it was possible, in the alternative, that in the period when the claimant had less than 2 years service and feared the respondent intended to dismiss him, he may have deliberately tried to set up whistleblowing episodes (for example when trying to get HB to record conversations, as that would give him access to an employment tribunal. In our view he did so defensively, not so as to "engineer is exit" as the respondent argued in their offer letter of 6 November 2018.

17. Whether that is what occurred, must be placed in a wider picture of conduct after termination, because we must consider the bringing or conducting of proceedings.

18. In this picture we must include the respondent's own conduct. They started negotiation prior to termination in order to obtain an advantage for themselves, namely restrictions on working for competitors which they had inadvertently (we assume) omitted from the claimant's contract. They then, whether by oversight, or to secure some leverage of their own, omitted to pay the claimant for his notice period, and when proceedings began, they set up defences to the claim for unpaid notice by asserting later discovered misconduct, defences which were not accepted by the tribunal. They then made no proposal to settle even the successful claims, save for the proposal many months later that the claimant pay them a substantial sum. This was not realistic. It was an offer that the claimant was almost certainly going to refuse. Only three days was allowed for acceptance. Had the respondent paid the notice and made some offer on unfair dismissal, they would be on stronger ground.

19. We do not accept the claimant's point that if the claims were hopeless the respondent should have applied to have them struck as having no reasonable prospect of success. It is hard for tribunals to strike out fact sensitive claims, as these were, without hearing the evidence. They could more usefully have sought deposit orders. It is not clear they would have been made. It is easier to tell in hindsight and after evidence that claims were of little merit. There must be some sympathy for respondents put to the expense of having to defend whistleblowing and discrimination claims that prove without merit. It does tend to show however there were arguable claims that were ultimately unsuccessful.

20. We did not conclude the claimant acted unreasonably in bringing the whistleblowing or harassment claims, nor that he acted abusively in deliberately falsifying evidence of what happened. Even if we had concluded that the claimant knew that at least some of them were poor (as for example the race harassment claim) and were makeweights to the unfair dismissal, at best this was borderline abusive or unreasonable. If we had concluded the bringing of the claims was abusive or unreasonable, we would not, in view of the conduct of the respondents at that stage, have exercised discretion to make an order for costs. Had they called his bluff (as they see it) by paying his notice, perhaps with a real additional

payment too, we may have taken a different view.

21. There is no order on the respondent's application.

Employment Judge Goodman

Date 5 June 2019

JUDGMENT SENT TO THE PARTIES ON

17 June 2019

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FOR THE TRIBUNAL OFFICE

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