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EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Mr I Soanes	**AND**	R1 Stobart Capital Limited R2 William Andrew Tinkler

Heard at: London Central (By CVP videolink) **On**: 23 April 2021

Before: **Employment Judge Brown**

Members: **Mrs M B Pilfold**
Mr S Soskin

Representation:
For the Claimant: Ms A Mayhew, Counsel
Mr S Way, Counsel
For the Respondent: Mr N Bacon, Queen's Counsel

COSTS JUDGMENT

The unanimous judgment of the Employment Tribunal is that:

1. **The Tribunal does not make any award of costs against the Claimant in favour of the Respondents.**

REASONS

Preliminary

1. The Claimant had brought complaints of automatic unfair constructive dismissal contrary to *s.103A Employment Rights Act 1996* against the First Respondent, the Claimant's former employer, and protected disclosure detriment complaints against both Respondents, pursuant to *s.47B Employment Rights Act 1996*. All the complaints were dismissed by judgment dated 27 April 2020.

2. This hearing was listed to determine the Respondents' application for costs.

3. The Respondents made their costs application on 21 May 2020, p200-209. The Claimant gave a written response to the application on 1 September 2020, p345-362.

4. For this costs hearing, the Tribunal was provided with: an indexed Bundle of documents (page references in these reasons are to pages in that Bundle); an indexed Authorities Bundle; skeleton arguments by both parties; witness statements from the Claimant and from Mr Tinkler.

5. The Claimant objected to the witness statement from Mr Tinkler being considered in evidence. He said that it sought to go behind and reargue the Tribunal's findings of fact. He said that, insofar as the statement sought to make submissions, submissions should properly be made by the Respondents' representative.

6. The Tribunal indicated that the facts stated in its liability judgment were the relevant facts for the purposes of this hearing. Insofar as Mr Tinkler's statement made submissions, or referred to documents which were not available to the liability hearing, or arose after the relevant events, Mr Bacon, for the Respondents, could instead make appropriate submissions on those.

7. The hearing was conducted by CVP videolink. It proceeded without difficulty. The parties and representatives were able to hear what the Tribunal heard. Members of the public were entitled to attend the hearing but none did.

Law

8. The Respondent makes this application under *Rule 76 Employment Tribunal Rules of Procedure 2013*. Rule 76 provides as follows:

"*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:*
(a) a party … has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that proceedings or part have been conducted; or
(b) any claim or response had no reasonable prospect of success."

9. The Tribunal must consider making an order for costs where it is of the opinion that any of the grounds for making a costs order has been made out.

10. Following *Hayden v Pennine Acute NHS Trust* UKEAT/0141/17, the Tribunal should take two-stage approach:

a. Consider whether any of the grounds in *r76(1)(a)* have been established;
b. Consider whether, in all the circumstances of the case, a costs award is merited, *Ayoola v St Christopher's Fellowship* UKEAT/0508/13.

Unreasonable Conduct

11. "The 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." (Per Mummery LJ in *Yerrakalva v Barnsley MBC* [2012] ICR 420 at para 41.

12. Withdrawal of an entire claim is not, in itself, unreasonable and "the Tribunal should not adopt a practice on costs which would deter applicants from making sensible litigation decisions, *McPherson v BNP Paribas (London Branch)* [2004] ICR 1398 at para 28.

13. The failure by the Claimant to "address their minds to [the prospects]", or to engage with a Respondent's costs warning letter, which would have led them to an earlier assessment of the merits of their claims, can justify a costs award, *Peat v Birmingham City Council* UKEAT/0503/11/CEA.

14. Where a party makes an offer to settle a case, which is refused by the other side, costs can be awarded if the tribunal considers that the party refusing the offer has thereby acted unreasonably *Kopel v Safeway Stores plc* [2003] IRLR 753, EAT.

15. Where allegations are made and shown to be "baseless" or that things alleged to have been said "were never said" or "never done", then such conduct will be viewed as "manifestly unreasonable" justifying a costs order, *Daleside Nursing Home Ltd v Mathew* UKEAT/0519/08, [2009] All ER (D) 99 (Aug).

Vexatious Conduct

16. The classic description of vexatious conduct is that of Sir Hugh Griffiths in *ET Marler Ltd v Robertson* [1974] ICR 72 at 76, NIRC: "If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously, and likewise abuses the procedure. In such cases the tribunal may and doubtless usually will award costs against the employee …".

Respondents' Contentions

17. The Respondents' application is made on the basis of both limbs under *Rule 76 ET Rules of Procedure 2013*:

a. "Vexatious….disruptive or otherwise unreasonable conduct", and
b. That the Claim had no reasonable prospect of success.

18. The Respondents say that the Claimant had made serious allegations against the Respondents without any proper factual foundation. The Respondents say that, in reality, the claim was a construct, put together as part of the Claimant's conspiracy with Mr Brady to remove the Second Respondent from having control over Stobart Capital and significant influence over Stobart Group and marked a deliberate attempt to portray the Claimant's own intended resignation from the First Respondent as an unlawful dismissal. The Respondents say that the Claimant brought proceedings for unfair dismissal based on allegations that he knew or ought to have known he could not be made out.

19. The Respondents rely on the fact that, when dismissing the claim, the Tribunal concluded that at least one of the alleged protected disclosures was based on mere assertion and that the Tribunal found that some alleged conversations underpinning some alleged protected disclosures did not happen.

20. The Respondents say that the Claimant knew, when he brought the claim, that it was not genuine. The Tribunal's process has been used for ulterior purposes and the Respondents have been put to considerable financial expense in unearthing the Claimant's failed strategy to remove the Second Respondent.

21. The Respondents highlight that the Claimant was warned by Judge Deol on 16 November 2018 that "the proper recourse for the Respondent if any of these arguments are pursued unreasonably is through costs, rather than pursuing a premature, but otherwise reasonable, strike out application", p307. The Respondents say that this is why the Respondents make the application they do.

22. The Respondents contend that is case is akin to the approach taken to the failed protected disclosure case of *Tan v. Copthorne Hotels Ltd* 2200986/2017: The Tribunal accepted Mr Tinkler's evidence that he believed the Claimant was working with Mr Brady "behind his [Mr Tinkler's] back" (para 78). This led to the "thermonuclear device" being detonated in Carlisle (para 87). The Claimant was always intending to resign, and to put in place measures that would cause Mr Tinkler to relinquish control of Stobart Capital.

23. The Respondents say that the Tribunal proceedings were disclosed to the media before being served on the Respondents. The Claimant did not seek genuine relief and the Claim was orchestrated to put pressure on Mr Tinkler to fall into line with the Claimant's behind the scenes conspiracy to gain control over Stobart Capital.

24. The Respondents also say that the proceedings, alleging constructive unfair dismissal based on his making protected disclosures, were baseless and should never have been brought; they say that the claim had no reasonable prospect success.

25. The Respondents rely on the following chronology: The Claimant resigned on 19 February 2018. The Claimant had drafted his resignation email on 17 February 2018. Shortly before this, and in particular between 6 – 8 February 2018, the Claimant corresponded with Mr Brady proposals which would remove Mr Tinkler from Stobart Capital , p444 - 451. The Notice of Claim was sent to Mr Tinkler on 31 July 2018. Four days later, on 4 August 2018 the Claimant messaged Mr Brady showing that the Claimant was intending to "bring enough pressure to bear to persuade [Mr Tinkler] to sell his shares" to the Claimant so as to establish "a successor business" p487. There is a WhatsApp message from the Claimant on 2 May 2018 referring to "when does AT get the news" which is a reference to the receipt of the Employment Tribunal claim p489. The Claimant sought to apply pressure through the media (The Sunday Times) where the report of the Claim was revealed even before it had been served on Mr Tinkler p481 - 482.

26. The Respondents say that it is very difficult to come to any other conclusion than the Claimant's Employment Tribunal proceedings were deliberately designed to put pressure on Mr Tinkler to relinquish control of Stobart Capital and remove him. The proceedings were supported by Mr Brady, p487 - 488 and they were part of a wider plan involving Mr Brady and the Stobart Group, which potentially included the financial support of Mr Soanes' claim; and the Claimant has refused to deny that the costs of these proceedings were financed by the Stobart Group. They say that this Claim did not involve the genuine pursuit of justice or the legitimate pursuit of an Employment Tribunal claim and, as such, was an abuse of the Tribunal process. They say that it is an abuse which has caused Mr Tinkler and Stobart Capital a significant amount of money, which should be the subject of a full indemnity (subject to questions of reasonableness) by the Claimant.

27. The Respondents also rely on costs warning letters. In a letter dated 29 August 2018, the Respondents wrote to the Claimant's representative at the time to warn the Claimant that if he did not withdraw his claim, the correspondence would be drawn "to the attention of the Employment Tribunal in respect of our clients' intended costs application", p210.

28. In a letter dated 7 January 2019, the Claimant's attention was drawn to the statement made by Employment Judge Deol at paragraph 42 of his Judgment on 16 November 2018, and the fact that the Respondents costs would significantly increase in preparation for the hearing. The letter said that "if [the Claimant] chooses to continue to pursue his claims" the Respondents would "apply for a costs order" p212, and that the letter would be referred to as part of such application. The Claimant was represented at the time both those letters were sent.

29. On 14 November 2019, the Respondents wrote to the Claimant pp398 - 399. In this email, the Claimant was referred to Rule 76(1) Employment Tribunal Rules 2013 and informed that he was on notice that the Respondents may apply for a costs award against him should his claim be unsuccessful.

30. The Respondents also relied on the Claimant's conduct in relation to some discreet matters.

Unsuccessful Application for Strike Out and Deposit Order.

31. Earlier in the proceedings, the Respondents had applied for a strike out and/or deposit order in relation to the Claimant's whistleblowing claims. On 2 January 2019 EJ Deol dismissed the applications for the following reasons:

"(i) It is difficult to conclude that the Claimant has no or little reasonable prospect of success in relation to the communication of 7 February 2018 (sms message from the Claimant to Andrew Tinkler). [Page 82 bundle]. The Claimant sets out some detail of his concerns and flags that there are contractual and regulatory obligations in play. The question of whether this particular allegation meets the statutory threshold must be determined in context, considering the Claimant's insight and the surrounding circumstances. This can only be done through considering the evidence.

(ii) It is equally difficult to how the alleged disclosures set out at pages 39/40 of the Bundle in which the Claimant says that he set out his concerns regarding the new group structure can be properly assessed without considering any evidence. The alleged disclosures are made in discussions and the content of, and reaction to, those discussions will be highly probative of the issue of whether there has been a protected disclosure.

(iii) I have some sympathy for the Respondent's arguments as regards the communication of 20 November 2017. This communication does seem to simply contain the Claimant's views, with no information that shows, or tends to show, any impropriety. The challenge for this Tribunal, is that this communication needs to be considered in context of the conversations that took place between 12-19 November and around 20th November, which may then provide some background to the more generalized written concerns expressed by the Claimant in his e-mail of 20 November 2018. This background evidence is perhaps even more important in cases based on an argument of constructive, rather than actual, unfair dismissal. Ultimately these are issues that can only be properly assessed through evidence, particularly the evidence of the Claimant, not a simple reading of e-mails in isolation at a preliminary stage.

(iv) In reaching my conclusion I have relied heavily on the guidance of the Court of Appeal in the *Kilraine v London Borough of Wandsworth* case in particular that the concept of "information" as used in s 43B(1) ERA is capable of covering statements which might also be characterized as allegations and whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a Tribunal in light of all the facts of the case, taking into account the issue of "reasonable belief" and "context". Without any evidence I feel ill equipped to take a view on these matters, supporting the Claimant's argument that this case is indeed too fact sensitive for a strikeout/deposit order at this preliminary stage. In coming to this conclusion, I am comforted by the guidance in the Western Union case that a disclosure of information can sometimes be found from a statement of position and that this assessment will always be fact sensitive.

(v) The fact that the Claimant was aware that the proposed deal structured by Mr Tinkler had to go through further checks and the approval of the Value Committee does not detract from the possibility that he was raising genuine and legitimate concerns about that deal. The Claimant's knowledge may go to the issue of whether he had a "reasonable belief" of the alleged wrongdoing but that should be properly tested through evidence.

(vi) The Claimant's evidence in parallel High Court litigation will no doubt feature in these proceedings when the Claimant is cross examined, but at this stage I agree with the Claimant's submissions that it is premature to rely upon a few entries in the transcript of a case that has yet to conclude and in which the 2nd Respondent to these proceedings has yet to give evidence, particularly without reference to the pleadings and issues in that case.

(vii) The context and the reasons for the Claimant's attestation to the FCA will also need to be assessed in evidence, and may undermine the Claimant's arguments,

certainly in relation to any alleged disclosures before the 8 February 2018. The Claimant may face a significant hurdle to show that he did any more than comment on the structure of a business deal before this date. He would be well advised to take advice on whether these comments meet the required statutory threshold for a protected disclosure. That said, the proper recourse for the Respondent if any of these arguments are pursued unreasonably is through costs, rather than pursuing a premature, but otherwise reasonable, strike out application."

Discussion and Decision
No Reasonable Prospect of Success / Vexatious or Unreasonable Conduct in Pursuing Claim

32. The Tribunal did not decide that the Claimant's claim had no reasonable prospect of success, or that the Claimant was vexatious or unreasonable in pursuing his claim.

33. At the liability hearing, the Claimant had succeeded in establishing that he had made protected disclosures and that he had subsequently been constructively dismissed, the Respondent having committed a fundamental breach of contract, Judgment paragraph [173]. The Tribunal also found that the Claimant had been subjected to detriments after he had made protected disclosures. The burden of proof shifted to the Respondent to show that the protected disclosures were not the reason that he was subjected to the detriments, Judgment paragraph [159].

34. In the event, the Tribunal decided that the reason that the Respondents subjected the Claimant to detriments was not, in any way, connected to his protected disclosures. It also decided that they were not the reason he was constructively dismissed. However, the Tribunal found this having taken into account all the documentary evidence and the witness evidence at the Tribunal. It did not accept the Respondents' case in doing so.

35. It was open to the Tribunal to draw an adverse inference against the Respondents when it rejected the Respondent's case. It was open to the Tribunal to find that the real reason for the detriments and the constructive dismissal was that the Claimant had made protected disclosures. The Tribunal did not ultimately decide in that way. However, the Tribunal agreed with the Claimant's submission, at this costs hearing, that the Claimant was not unreasonable in failing to anticipate that the Tribunal would reject his claims on that basis.

36. The Tribunal made a careful decision, taking into account all the evidence available to it. This was quintessentially a case where the outcome was only known – and could only have been known by the Claimant - once the Tribunal had pronounced its judgment.

Protected Disclosures

37. The Respondent relied on the Claimant having failed to establish some of his protected disclosures. It relied on the Tribunal finding that some of his alleged disclosures amounted to bare assertions.

38. The Tribunal noted that, at the liability hearing, the Claimant's explained his failure to pursue protected disclosures 2 and 5. He said that they were oral disclosures and were not documented. The Tribunal agreed with the Claimant's contention, at this hearing, that this was a concise approach on his part. It was also a sensible litigation decision; focussing on those disclosures which the Claimant considered had the best chance of establishing. This litigation decision was not unreasonable conduct.

39. Indeed, the Tribunal considered that the Claimant appeared, at the original liability hearing, to be scrupulously truthful about his recollection of his verbal protected disclosures. Where he could not recall further details, he was honest about this. He did not, in any way, seek to embellish his evidence. Far from finding that the Claimant was untruthful in his approach to his protected disclosures, the Tribunal considered that the Claimant was transparent about his inability to recall further details of verbal conversations which had occurred some time previously.

40. The Tribunal was required to adjudicate upon protected disclosures 1, 3, 4 and 6. It upheld 3 and 4. In doing so, the Tribunal held that the Claimant had a reasonable belief that the information that he was disclosing was made in the public interest and that it tended to show that Mr Tinkler was failing, or was likely to fail to comply, with a legal obligation to which he was subject. It accepted that the Claimant had those beliefs. It did not find that the Claimant was in any way dishonest or misleading in what he said.

Alleged Improper Motive

41. The Tribunal did not accept that the Claimant acted unreasonably in pursuing his claims because he did so for an ulterior motive. It was correct that the case was brought in the context of a breakdown in the business relationship between the Claimant and Mr Tinkler, on the one hand, and between Mr Tinkler and the Stobart Group, on the other. The Tribunal observed that the factual background to the claim included the various machinations of Mr Tinkler, who sought to remove the Chairman of Stobart Group, and of the Claimant, who sought to preserve the value of Stobart Capital Limited.

42. The Tribunal agreed with the Claimant's submission, at this hearing, that the Claimant was in an extremely difficulty position at the time when he resigned. He had been excluded from the First Respondent business. His business relationship with Mr Tinkler had broken down. He perceived that he was at risk of losing the value of his shareholding, as well as his job. It was not surprising that some of his actions would have been strategic, with a view to preserving his employment and the value of his shareholding.

43. However, those very difficult circumstances, and the fact that the Claimant may have acted strategically, did not mean that the Claimant used the Tribunal proceedings for an improper motive. The Tribunal concluded that the proceedings may have coincided with the Claimant's other strategic aims, but they were not improperly brought. The fact that the Claimant very substantially succeeded in his claim – and that the Respondent's pleaded case was not successful –

demonstrated that the Claimant had brought his proceedings on a reasonable basis.

44. The Claimant resigned in response to a fundamental breach of contract. The Tribunal did not find at the liability hearing, and it does not find now, that the Claimant's resignation and subsequent Tribunal claim was a construct.

Costs warning letters

45. The 29 August 2018 costs warning letter focused on the Claimant's draft email of 17-18 February 2018 and contended that it was part of wider plan by the Claimant to enter into new arrangements with the Stobart Group. However, the Tribunal found that the Claimant resigned as a result of his removal from business. This was a fundamental breach of contract. The Respondent put forward an explanation in their costs warning letter for the Claimant's removal from the Company which was not upheld by the Tribunal. The Claimant was not unreasonable in pursuing a claim in the face of a costs warning letter setting out the basis of a defence which was not established.

46. In their costs warning letter of 7 January 2019, the Respondents referred to EJ Deol's comments on 2 January 2019, that the Claimant "may face a significant hurdle" in establishing that he made any protected disclosures before 8 February 2018 because of the Claimant's attestation to the FCA on that date that he was not aware of any conflicts of interest. However, the Claimant succeeded on this issue. The Tribunal found that the Claimant had made qualifying disclosures on 20 November 2017, despite his later FCA attestation.

EJ Deol's Comments

47. The Respondent relied on the comments of EJ Deol, in his judgment of 2 January 2019, on the Respondents' strike out and deposit order applications, ".. the proper recourse for the Respondent if any of these arguments are pursued unreasonably is through costs, rather than pursuing a premature, but otherwise reasonable, strike out application."

48. The Tribunal concluded that EJ Deol did no more than restate the basis for awarding costs under *r76 ET Rules of Procedure*. His words were not in any sense a warning to the Claimant. EJ Deol declined to strike out the claims, or make a deposit order, for the very sound reasons he gave at the time.

49. Indeed, the Tribunal found that the Claimant's email 20 November 2017 email was a protected disclosure, when EJ Deol had expressed some reservations about this. If EJ Deol had made a deposit order in relation to the 20 November 2017 email, the Respondent would not have the benefit of the presumption of unreasonableness. The eventual Judgment would not have been made for substantially the same reasons as the deposit order. See also paragraph 46 of these reasons in this regard.

No Unreasonable Conduct Leading to an Increase in Costs

50. The Tribunal accepted the Claimant's submissions at this costs hearing that the Claimant acted reasonably in relation to the following matters:

51. Argument concerning privilege. A hearing was listed on this point. The Claimant asked for it to be vacated. The Claimant took a point regarding privilege, but did not pursue it, avoiding costs. This was part of the normal conduct of legal proceedings.

52. High Court Proceedings. The original ET hearing was set down in February 2019. The ET ordered postponement in the circumstances that parallel Hight Court proceedings had not been concluded. At the time. The Respondents did not make the argument that the High Court proceedings were not admissible in any event, At the time, all parties accepted the premise that the Hight Court judgment was relevant and should be considered. The Respondents then instructed new solicitors, who said that the High Court action was between different parties and was therefore not admissible. The argument had not previously been raised. It was considered by this Tribunal at the start of the liability hearing and resolved. It was not unreasonable of the Claimant to be cautious about the effect of linked High Court proceedings on these Tribunal proceedings.

53. Valuation of claim. The Respondents alleged that the Claimant improperly exaggerated the value of his claim. The Claimant prepared 2 schedules of loss and an explanatory note – p55. The schedule was reasoned. Put simply, the Tribunal observes that an employee who is paid a high salary will suffer substantial losses if he loses his job and does not obtain alternative work.

54. Mr Elliot . The Tribunal and the parties devoted very little time to Mr Elliot. Mr Elliot formed no part of the Tribunal's decision making.

Conclusion

55. For all these reasons, the Tribunal concluded that there was no basis for ordering the Claimant to pay any of the Respondents' costs.

Employment Judge Brown

Dated: …26 April 2021……

Sent to the parties on:

26/04/2021

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For the Tribunal Office