EMPLOYMENT TRIBUNALS

Claimant: Mr P Watson

Respondents: 1. Hilary Meredith Solicitors Limited
2. Hilary Meredith

HELD AT: Manchester **ON:** 7 May 2021 and 21 June 2021 (in chambers)

BEFORE: Employment Judge Slater
Mrs C Linney
Mr A J Gill

REPRESENTATION:

Claimant: Mr N Roberts, counsel
Respondents: Mr S Brochwicz-Lewinski

JUDGMENT

The unanimous judgment of the Tribunal is that the respondent's application for costs is refused.

REASONS

The application for costs

1. This hearing was to determine the respondent's application for costs, made following a judgment, reasons for which were sent to the parties on 16 April 2019. The Tribunal's judgment, which was that the claimant's complaints of unfair dismissal, contrary to section 103A of the Employment Rights Act 1996 and of detriment on the grounds of making protected disclosures were not well founded, was the subject of an unsuccessful appeal to the Employment Appeal Tribunal.

2. The respondent set out its application for costs in a letter to the Tribunal emailed on 13 March 2019. The application was made under rule 76(1)(a) and/or (b) of the Employment Tribunals Rules of Procedure 2013 on the grounds that: in bringing and/or continuing to pursue these proceedings, the claimant acted unreasonably; alternatively or additionally, the claim brought had no reasonable prospect of success.

3. The respondent argued that the claimant acted unreasonably in bringing and/or continuing to pursue the proceedings on the basis that they asserted the claimant must been aware that the claim had no reasonable prospects of success.

4. The respondents sought an order that the costs of the proceedings be assessed. The respondents' costs sought exceeded £20,000 and they were not willing to limit their claim for costs to £20,000.

5. The claimant opposed the application. Mr Roberts, on behalf of the claimant, produced a written skeleton argument.

6. Mr Brochwicz-Lewinski made extensive oral submissions, including responding to points in Mr Roberts' skeleton argument.

7. Mr Roberts made additional oral submissions.

8. There was an electronic costs bundle of 140 pages. Page references in these reasons are to pages in that bundle. We refer to paragraphs in the Tribunal's reasons sent to the parties on 14 April 2019 by "J[number]".

Facts

9. We rely on the facts found in our reasons sent to the parties on 14 April 2019. In addition, we make findings of fact, based on the documents in the costs bundle.

10. There was the following "without prejudice save as to costs" correspondence between the parties.

11. By letter dated 8 February 2018 (p.6), the respondents' solicitors wrote to the claimant's solicitors. They expressed the view that the claimant's claims had no reasonable prospects of success and that he was acting unreasonably in pursuing the proceedings. They referred to factual disputes relating to the protected disclosures. (At the hearing, these were conceded or found to be as asserted by the claimant). They asserted that there was a lack of a causal link between any alleged disclosure and the conduct complained of. (This was found to be the case by the Tribunal). They referred, in particular, to their client swiftly taking appropriate steps to address the potential disbursement deficit as soon as this was raised. They asserted that they were sure that the Tribunal would accept that the reasons provided by the client were the reason for dismissal and not due to any protected disclosure he may have made. The respondents offered the claimant an opportunity to withdraw his claim within seven days from the date of the letter.

12. By an email dated 25 October 2018, the claimant's solicitors proposed a roundtable meeting with the intention of trying to resolve all outstanding disputes.

They wrote that their intention would be that both the Tribunal and the shareholder issues were considered at this roundtable meeting with the intention that both were capable of being resolved (p.54).

13. The respondents' solicitors replied on 30 October 2018 (p.10). They wrote that their client had no interest in participating in a roundtable meeting as proposed. They wrote that the respondents' position was that it considered the claim to be without merit and an abuse of the Tribunal process. The respondents restated the offer of a "drop hands" resolution of the claim in return for the respondents not pursuing an application for costs against the claimant.

14. On 19 December 2018, the respondents' solicitors wrote to the claimant's solicitors (p.15). They wrote that their client considered the proceedings to be an entire abuse of the Tribunal process and an attempt by the claimant to litigate a shareholder dispute in the Tribunal. They wrote: "my client does not consider that your client can, or does, reasonably believe that any of the matters complained of occurred due to him raising concerns regarding the financial position of the firm. As my client's actions demonstrated, she was entirely above board with the SRA regarding these issues and has at no time sought to hide these matters. Further, far from seeking to punish or penalise your client for raising these issues, she sought to convince him to stay with the firm and not leave." They wrote that their client was prepared to give the claimant a final opportunity to withdraw his claim without cost consequences, provided it was withdrawn by 21 December 2018. They wrote that, if it was not, and it either failed at Tribunal or was struck out for non-compliance with the Tribunal's directions, the respondent would make an application for recovery of the costs it had incurred in the proceedings.

15. The claimant's solicitors replied on 21 December 2018 (p.56). They wrote that they did not have instructions to withdraw the claimant's claim before the Tribunal. They repeated the proposal for the respondents to engage on resolving globally all outstanding matters between the parties, including the resolution of issues relating to the claimant's position of shareholder in the respondents' company.

16. There followed a period in which the respondents were not instructing solicitors. Hilary Meredith wrote to the claimant solicitors on 7 January 2019 in reply to the email of 21st December (p.59). She wrote that they were not prepared to engage in such discussions and would continue to defend the claim; the only offer they would make at that point was that both sides walk away and pay their own costs.

17. The respondents then instructed Weightmans, solicitors, to act for them.

18. On 17 January 2019, the respondents' new solicitors wrote to the claimant's solicitors, inviting the claimant to withdraw his claim within the next seven days (p.17). They asserted that the claim had no reasonable prospects of success and set out in some detail why they considered this to be the case. This included that the reasons for dismissal were clearly set out in the dismissal letter of 17 October 2017. It also included that, by the time of the dismissal, the respondents had made a full disclosure of relevant issues to the SRA; the respondents were, openly and appropriately, taking all other steps to deal with and resolve the accounting issues disclosed; and the respondents had attempted on a number of occasions to persuade the claimant to stay and help. The respondents wrote that it was very clear

that the making of disclosures did not feature in the reasons for the claimant's dismissal (whether or not they fell within the definition of protected disclosures). The respondents' solicitors wrote that there was particular concern that the proceedings were issued by the claimant in an attempt to place further pressure on the respondents to resolve the commercial issues between their respective clients and without any sufficient regard to the claim or its merits. They wrote that, if the claimant withdrew the claim within seven days, the respondents would not seek an order for costs against him. They wrote that they would apply for costs if the claimant lost at hearing. They estimated that the costs involved from that point up to and including the hearing would be in excess of £20,000 plus VAT.

19. It appears that the respondents made an offer of £10,000 as a global offer in settlement of all outstanding claims, (including the claimant's shareholding).

20. By an email dated 21 January 2019, the claimant's solicitors rejected that offer (p.61). They wrote that the claimant remained confident of the merits of his claim. They did not respond "line by line" to the respondent's observations on the merits of the Tribunal proceedings because, they said, this dialogue had already passed between the parties and because they did not wish to engage in trial by correspondence at that stage. They set out proposals from the claimant which included that he would accept £30,000 in settlement of his Tribunal claim, plus other sums for the breach of contract and shareholder claims. Alternatively, he would accept £30,000 to settle the Tribunal proceedings only, if there was also an agreement to hold meaningful discussions around resolving the shareholder and unpaid wages claims within 30 days.

21. By a further email dated 1 February 2019 (p.64), the claimant's solicitors reiterated that the claimant remained open to discussions to resolve all outstanding matters between the parties, along the lines set out in their letter of 21 January 2019, or to discussions to settle the Tribunal proceedings only, about which they were open to further discussions about quantum.

22. There was no further correspondence relating to settlement.

23. The hearing began on 4 February 2019. As noted previously, the claimant was unsuccessful in his claims.

Submissions

24. We do not seek to record all the submissions but summarise the principal points made by counsel. Mr Nathan's written skeleton argument may be read in its entirety, if required.

The respondent's submissions

25. The respondent submitted that the claimant, who was a solicitor and was advised by specialist solicitors, should have identified that the prospects of success were poor, based on the factual narrative. The key fundamental issue, the reason for dismissal, was that the claimant resigned and "ran for the hills", rather than the making of protected disclosures. This should have been clear to the claimant prior to the hearing. The claimant chose to pursue his case with the risk that he would be

penalised in costs, although the position was pointed out to him repeatedly in correspondence. The respondent accepted that the claimant could not have known of the privileged material. This evidence, which the respondents had not anticipated would be before the Tribunal, supported the respondents' case. The case was contrary to the evidence. Therefore, the case had no reasonable prospects of success and it was unreasonable to pursue it.

26. If the claimant had never had cause to reflect on the merits of his case, letters from the respondent, which spelt out the problems with his case, should have caused him to do so. The claimant's decision to pursue action must have been made, having considered the points against him. A reasonable "drop hands settlement" was proposed by the respondents. It was unreasonable for the claimant to proceed and reject that offer.

27. Mr Brochwicz-Lewinski submitted that Mr Nathan was, in reality, seeking to reargue points which did not succeed at the Employment Tribunal or in the Employment Appeal Tribunal.

28. The respondent submitted that the chronology and facts supported the respondents' fundamental position and this was clear well before the hearing.

The claimant's submissions

29. Mr Nathan, on behalf of the claimant, made the following submissions. The claimant had a good, although ultimately unsuccessful, case. The claimant relied on his closing skeleton argument from the original hearing in support of this argument. Although the second respondent did obviously criticise the claimant for resigning, the claimant was entitled to challenge that as being the real or only reason for his summary dismissal. Factors the claimant relied upon included that the second respondent couched the reasons for dismissal in terms that the claimant had caused significant damage to the first respondent's business and the claimant knew any alleged damage was caused by the disclosures and not by his resignation. The claimant's conduct in resigning was intimately connected with his disclosures. Although the Tribunal ultimately found the two matters could be severed, the claimant was entitled to argue otherwise, particularly given the express caution about doing so in the case law. The claimant was dismissed the day after he sought to make a grievance under the respondent's whistleblowing procedure and it was only upon disclosure at the door of the final hearing of redacted privileged emails that the timing of the respondent's decision to dismiss was made clearer.

30. The claimant submitted that the claimant was reasonably entitled to argue that the second respondent's mindset changed because she had (deliberately or unconsciously) begun to blame the claimant for things caused by the protected disclosures and/or that his resignation was inseverable from his disclosures given their very close connection.

31. The claimant submitted that a lack of documentary evidence demonstrating unlawful motive is typical of most employment cases. It is very rare to find direct evidence of discriminatory motives. Discriminatory motives are very often unconscious. For the s.47B ERA 1996 claim, the burden of proof fell on the second respondent and it needed only to be established that the claimant's protected

disclosures had a more than trivial influence on the second respondent's decision. This would not be inconsistent with her primary case as to her main reasons for dismissal.

32. The claimant succeeded on disputed issues about whether the disclosures were protected.

33. The claimant did not have any documents about the second respondent's state of mind until during the hearing; the privileged documents. The claimant had an uphill battle to prove what was in his employer's mind. There were some prospects of showing that the reasons given by the respondents were not full and accurate, leaving lacuna which could be filled by the protected disclosures. This allowed the claimant to say that the reason for dismissal may be influenced by the protected disclosures. The dismissal letter said the claimant was dismissed for gross misconduct. He knew he had not committed gross misconduct, so he knew the reasons given were wrong. Late on, he found out that the second respondent was being advised that she could not dismiss for gross misconduct.

The Law

34. Rule 76(1) of the Employment Tribunals (Rules of Procedure) 2013 provides:

> "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 (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 have been conducted; or
> (b) any claim or response has no reasonable prospect of success."

35. The representatives referred the Tribunal to a number of authorities including **McPherson v BNP Paribas (London Branch) [2004] ICR 1398 CA, Yerrakalva v Barnsley MBC [2012] ICR 420 CA and Sunuva Limited v Martin UKEAT/0174/17**. The discussion about authorities related to what should be awarded as costs, once a Tribunal had decided, in principle, to make an award. Given our conclusions that no award should be made, we do not need to explore whether there was, in fact, any difference between the representatives as to effect of these authorities.

Conclusions

36. We are alert to the danger of viewing the prospects of success, and what view the claimant must have had of these, with the benefit of hindsight, having made our decision on the merits of the case. We must, in considering the respondents' application for costs, consider what information was available prior to the hearing and whether, on the basis of that information, there was no reasonable prospect of the claims succeeding and whether the claimant was or should have been aware that was the case.

37. Whistleblowing cases, like discrimination cases brought under the Equality Act 2010, are very fact sensitive, which is why it is rare to be able to conclude, at a

preliminary hearing, that such a complaint has no reasonable prospect of success. Evidence often needs to be heard, at a final hearing, to be able to make an assessment of the merits of the claim. The respondents, no doubt aware of this, did not make any application, prior to the final hearing, to strike out the claims on the basis that they had no reasonable prospect of success or for a deposit to be paid by the claimant as a condition of continuing with the claims, on the basis that the claims had little reasonable prospect of success.

38. In considering the prospects of success and what view the claimant had, or should reasonably have had, of them prior to the hearing, we will concentrate, as the parties have done in submissions, on the detriment claim against the second respondent. The respondents have not argued that it was unreasonable to proceed with the unfair dismissal claim, if it was not unreasonable to proceed with the detriment claim, although the difficulties for the claimant in succeeding in the unfair dismissal claim were greater than for the detriment claim, given the different burdens of proof which applied to the claims.

39. We conclude that, considering all the evidence, including that disclosed during the course of the hearing, viewed objectively, the claimant's claims had no reasonable prospect of success. As we noted at J177, the most illuminating material, in terms of Ms Meredith's thought process, was what she was writing to Mr Pike, her solicitor, at the time, not expecting it to be seen by others. As noted at J179, what Ms Meredith wrote in a draft letter sent to Mr Pike all related to how the claimant reacted to the problems after disclosure had been made; it did not make any criticism of the claimant making the disclosures. If all this material had been available to the claimant, prior to the hearing, we would have concluded that he should have realised his claim had no reasonable prospect of success.

40. The claimant did not see the privileged documents until during the course of the hearing. We, therefore, need to consider whether the claimant acted unreasonably in bringing or continuing with proceedings having regard to the material that was available to the claimant before the hearing.

41. We set out at J176, the evidence relating to the reason for dismissal, other than the privileged documents, which we considered to be of particular significance. This was all evidence which was known to the claimant before he began proceedings. We conclude that, with this knowledge, the claimant must have been aware that he faced an uphill struggle to succeed in his Tribunal claims. However, we need to draw a distinction between knowing that it would be an uphill struggle to succeed and being aware that the claim had no reasonable prospect of success. It is only if the claimant was, or should reasonably have been, aware that the claim had no reasonable prospect of success, that, on the respondents' argument, the claimant would have been acting unreasonably in bringing or continuing with proceedings.

42. The evidence we referred to in J176 was all consistent with the respondents' case that the protected disclosures were not a reason for dismissal. The claimant did not have any documentary evidence, prior to the hearing, about Ms Meredith's thought process which would support his argument that Ms Meredith was influenced to a material extent, consciously or subconsciously, by the making of the protected disclosures when deciding to dismiss him. This leads us to conclude that the claimant must have been aware that he faced an uphill struggle to succeed in his

Tribunal claims and Mr Nathan acknowledged this in his submissions, referring to an uphill battle to prove what was in Hilary Meredith's mind. However, as Mr Roberts notes, a lack of documentary evidence demonstrating unlawful motive is typical of most employment cases. Discriminatory motives are very often unconscious. For the detriment claim relating to dismissal against Ms Meredith personally, the Tribunal had to consider whether the protected disclosures had more than a trivial influence on Ms Meredith's decision to dismiss the claimant. The burden fell on the respondents to prove that it did not. Much would turn on the evidence of Ms Meredith at the hearing. If she did not satisfy the Tribunal that the protected disclosures played no part in her decision to dismiss, she would not discharge the burden of proof.

43. There were some matters which we conclude could have led the claimant to take the view that there was a real, albeit perhaps not very great, prospect that Ms Meredith would not discharge the burden of proof on her. As the Tribunal acknowledged, at J189, there was clearly a causal link between the matters forming part of the reason for dismissal and the protected disclosures. In these circumstances, for the Tribunal to conclude that the protected disclosures did not play more than a trivial part in Ms Meredith's decision making, conscious or unconscious, the Tribunal had to be persuaded that the claimant's actions following the making of the protected disclosures could be severed from the protected disclosures themselves. This is not a straightforward matter.

44. The terms of the dismissal letter, referring to the claimant's actions having destabilised the company, could have given the claimant some basis for considering that there was a reasonable prospect that the Tribunal might consider that protected disclosures, and not just the claimant's actions following the making of the protected disclosures, played a part, albeit perhaps unconscious, in Ms Meredith's thought process.

45. There were parts of Ms Meredith's evidence in her witness statement about the reasons for dismissal which the claimant could reasonably consider might not be accepted by the Tribunal. Even Ms Meredith's supplemental witness statement, served the night before the first day of the hearing, continued to make assertions about the reasons for dismissal which the claimant could reasonably consider might be shaken by cross-examination. The Tribunal addressed some matters where the Tribunal considered Ms Meredith's main statement and supplemental witness statement conveyed an impression about advice given which did not correspond to the advice we found was given to Ms Meredith (see J142). Although the claimant would not have been able to anticipate, prior to the hearing, that he and the Tribunal would see the advice given to Ms Meredith, the assertions that Ms Meredith understood, on advice, that the first respondent had grounds for summary dismissal, was an area where her evidence might be vulnerable to cross examination.

46. The Tribunal proceedings were begun and proceeded to hearing, in a wider context of other disputes between the parties, to which we referred in our previous judgment. We are mindful of the possibility that the claimant viewed the Tribunal proceedings as leverage to try to achieve settlement of other potential claims, including the shareholder dispute. Even if this were the case, however, this would not make it unreasonable conduct to bring these proceedings, provided the claimant considered there was some reasonable prospect of the claims succeeding.

47. Whilst we have concluded that the claimant must have been aware there was an uphill struggle to succeed in his claims, we have not been able to conclude, given the matters to which we have referred, that the claimant was, or should have been, aware that his claims had no reasonable prospect of success. In these circumstances, we conclude that the claimant did not act unreasonably in bringing or continuing with proceedings.

48. Our conclusion that the claims had no reasonable prospect of success, taking into account all the evidence, including the privileged material disclosed during the course of the hearing, would give us power to make an award of costs. However, we conclude that it would not be appropriate to exercise our discretion to make an award of costs where we have concluded that, on the information available to the claimant prior to the hearing, he should not reasonably have known that the claim had no reasonable prospect of success. We, therefore, refuse the respondent's application for costs.

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Employment Judge Slater

Date: 25 June 2021

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON
28 June 2021

FOR THE TRIBUNAL OFFICE