Case number 1801613/2020

EMPLOYMENT TRIBUNLAS

Claimant: **Mr N. Midgley**

Respondent: **Vossloh Cogifer UK Limited**

Heard at: Hull (via CVP) **On: 19 August 2021. Deliberations 20 August 2021**

Before: **Employment Judge T R Smith.**

Members: **Mrs Brown**

Mr Langman

Representation

Claimant: **In person**

Respondent: **Mr Siddall QC (Counsel)**

RESERVED JUDGMENT

1. The Claimant is ordered to pay the Respondents costs from the 16 April 2021 on a standard basis.

2. The costs, if not agreed, will be determined by means of a detailed assessment, limited to £10,000.

The Issue

1. The issue was a simple one. Should the Claimant pay all or part of the costs incurred by the Respondent since the issuing of the claim form on the ground that he had acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing the proceedings, or his claim had no reasonable prospect of success?

2. If the application succeeded the Respondent sought taxation of its costs, which it put at in excess of £140,000**.**

The Evidence

3. The Tribunal had before it a costs bundle from the Respondent totalling 142 pages. A reference in this judgement to a page number is a reference to that bundle, and not any other bundle, unless the contrary is indicated.

4. The costs bundle principally consisted of the Tribunal's liability judgement and the Respondents written submission dated 04 August 2021. The residue of the bundle contained documentation which either the Claimant had authored, or received, prior to the substantive hearing.

5. On the morning of the hearing Mr Siddall QC supplied to the Tribunal the transcript of the judgement in **Vaughan -v- London Borough of Lewisham (number two) 2013 IRR 713.** The judgement had been referred to in his skeleton argument.

6. The Claimant submitted, on the morning of the hearing, a written submission running to some 32 pages. He also submitted a number of additional documents. The documents principally carried the suffix CCB.

7. The Tribunal spent some time reading the Claimant's documents prior to the start of the hearing.

8. The Claimant gave affirmed evidence and Mr Siddall QC was given the opportunity to cross examine the evidence of the Claimant which included evidence of his means and the legal advice he took at various stages.

Background.

9. The factual background to the dispute between the Claimant and Respondent is set out extensively in the Tribunal's liability judgement dated 14 June 2021 and sent to the parties on 16 June 2021 (1 to 34).

10. Put very simply the Claimant contended he made two protected disclosures, the first in a business report compiled on 06 September 2019 and the second in a grievance raised on or about 13 November 2019. He contended that he was then subjected to a number of detriments and was automatically unfairly dismissed.

11. The Tribunal did not find either the business report nor the grievance amounted to protected disclosures. It then went on to consider, if it was wrong on that point, whether the Claimant had been subjected to any detriment and had been automatically unfairly dismissed. It found the Claimant had not been subjected to any detriment done on the ground that he made a protected disclosure or

disclosures and nor had he been dismissed by reason that he made a protected disclosure or disclosures.

Additional relevant findings of fact for the purpose of costs.

12. The Claimant's financial position

12.1. The Claimant has obtained alternative employment following his dismissal by the Respondent. He now earns approximately £50,000 per annum, which equates to a net take-home pay of just over £2800 per month.

12.2. He has the prospect of a bonus, which is discretionary and performance related, capped at 7% of gross salary. In other words the maximum bonus the Claimant could receive would be an additional £3500 gross per annum.

12.3. The Claimant lives with his wife and his 16-year-old daughter.

12.4. The Claimant's wife works as a waitress earning approximately £400 per month net.

12.5. The family fixed outgoings such as direct debits including a mortgage total approximately £1800 per month. This figure does not take into account, food, clothing and general household expenses for a family of three.

12.6. The matrimonial home is worth approximately £300,000 subject to a mortgage of some £30,000, which should be paid off in approximately seven years.

12.7. The Claimant has no savings, stocks and shares or other property.

12.8. The only significant outstanding loan the Claimant has is £5000 debit on a credit card.

12.9. The Claimant has a car which is on finance.

12.10. None of the Claimant's description of his financial position was challenged in cross examination.

13. The Claimants knowledge of tribunal proceedings and his conduct at the hearings.

13.1. This was the first time the Claimant had ever represented himself before a Tribunal.

13.2. The Claimant has no legal qualifications.

13.3. He was therefore a litigant in person, whilst the Respondent was represented by a partner and Queens Counsel in these proceedings.

13.4. It is proper to record that in terms of the Claimants conduct before the Tribunal he was courteous and polite to the Tribunal, to Mr Siddall QC, and witnesses, even when stressed.

13.5. He sought to comply promptly and fully with all Tribunal orders. On at least one occasion he wrote the Tribunal to apologise to the Tribunal and the Respondent's instructing solicitor for his lack of understanding of what was required of him(CCB13).

13.6. On a number of occasions the Claimant was directed by the Tribunal to move on during the liability hearing and used his best endeavours to do so, although sometimes with limited effect. The Tribunal regarded that as a lack of understanding of legal principles as opposed to any disrespectful or disruptive behaviour towards the Tribunal.

14. Legal advice.

14.1. The Claimant took legal advice on three occasions.

14.2. On the first two occasions, prior to the issuing of proceedings, the Claimant attended a one-hour consultation with a solicitor. At that stage the Claimant had limited documentation to show the solicitor.

14.3. The Claimant discussed his claim with a solicitor. He was not told he had a bad claim but neither was he told he had a good claim. He was given an indication of the sums that were likely to be needed to instruct a solicitor, some £15,000, but did not have such money. He was told that he would be able to conduct the proceedings himself. He received some advice as regards procedure.

14.4. On the third occasion the Claimant paid for telephone advice with the same solicitor and spent approximately one hour with her. At this stage the Claimant had issued proceedings, a response had been filed and a case management hearing taken place. The Claimant had been recommended by Employment Judge Little to take some legal advice. He followed that recommendation. It is probable that this advice was just after 05 May 2020, the date of the first case management discussion.

14.5. The solicitor advising the Claimant did not have the benefit of the Respondents original or amended response nor, it would appear ,of all the voluminous papers. The Claimant was not told he had a bad claim but neither was he told he had a good claim. He principally obtain advice as regards procedure.

14.6. The Tribunal regarded Claimant's evidence on what legal advice he received and when, to be credible. A solicitor without sight of all the documentation would have difficulty in giving a firm assessment of the Claimant's chances of success. The evidence of the Claimant was not challenged by Mr Siddall QC.

14.7. The Claimant did not seek any legal advice thereafter.

15. Warnings re costs.

15.1. Mr Siddall QC stressed the point that in the Respondent's response dated 14 April 2020 the Respondent pleaded that it believed the Claimant was behaving unreasonably in bringing the proceedings and the claim had little or no reasonable prospect of success.

15.2. This was the last paragraph in the pleading. The Claimant considered that this was the sort of standard clause that would appear in every response. The Tribunal has sympathy with that approach.

15.3. A case management discussion was held on 05 May 2020 (liability bundle 38 to 43) chaired by Employment Judge Little.

15.4. Much of the hearing was spent identifying the pleaded issues. There are three matters, however, that are relevant to note.

15.5. Firstly Employment Judge Little noted the Claimant suggested the Respondents had falsified documents which he referred to as *"a very serious allegation"*

15.6. Secondly an application to amend to include a complaint of wrongful dismissal was rejected . Whilst it is true that the Employment Judge stated that he considered by seeking to amend to unfairness he was *"trying to do so under the guise of a breach of contract complaints – as it were by the back door"* those words have to be read in the context of the global reasons given by the learned Employment Judge for rejecting the application to amend. Put succinctly he considered the amendment to include a complaint of wrongful dismissal had no reasonable prospect of success given the Claimant received a payment in lieu of notice and any such complaint was out of time.

15.7. Thirdly when discussing with the Claimant the number of witnesses likely to be called the learned judge addressed the overriding objective and said *"I fear that this case as currently pursued by the Claimant runs the risk of being disproportionate. I have explained to the Claimant that if a bewildering amount of detail is put before the Tribunal there is the risk that the Tribunal be distracted from the relevant issues. That will also*

be the case of the Claimant endeavours to use the Employment Tribunal process something which is not intended"

15.8. It is proper to note that subsequently, rather than calling the 12 witnesses the Claimant anticipated, he simply relied upon his own evidence. He gave some heed to the advice given. In addition the Tribunal has factored into its overall conclusion that in a case where inferences are important, it can be difficult for a represented, let alone an unrepresented party, to determine what is relevant.

15.9. A second case management hearing was held on 26 June 2020, (liability bundle 45 to 47) again before Employment Judge Little. The learned Employment Judge reset the timetable having rejected applications to amend made by the Claimant. No application for costs was made by the Respondent in respect of those failed applications.

15.10. A third case management discussion took place on 22 October 2020 (93/96). By this stage disclosure had taken place. The purpose of the hearing was principally to address ongoing disputes between the parties as to the contents of the bundle.

15.11. It is clear that Employment Judge Maidment had a level of concern as to how the Claimant was conducting his case, and in particular the level of complexity. He said *"The Tribunal emphasised with the Claimant a number of times during these proceedings that his claim was in essence a simple one where the key issue was the reason for his dismissal. Was it because of his protected disclosure*?[This Tribunal thinks the word disclosure should have been in the plural]. *If so, this complaint of unfair dismissal will succeed. If for any other reason, then it will fail. The complaints of detrimental treatment are mainly precursors to the act of dismissal. The Tribunal will not be concerned with the reasonableness of dismissal or matters of a purely procedural nature."*

15.12. The timetable was once again reset with the bundle to be agreed and witness statements to be exchanged by 18 November 2020.

15.13. The trial date, 30 November 2020 to 04 December 2020 was subsequently vacated, with the Respondent's consent, because sadly the Claimant contracted Covid 19.

15.14. On 08 January 2021 the Respondent's solicitors sent to the Claimant a letter before action citing the Protection from Harassment Act 1997 (127 to 142). The letter alleged acts of harassment from 28 November 2019 to 08 January 2021 which included sending *"hundreds of emails to our clients, its employees and all directors"* .

15.15. Whilst the Respondent's solicitors accepted in the letter before action there was a fundamental difference of opinions between the Claimant

and the Respondent it emphasised the employment issues were best dealt with by the Employment Tribunal and issues as regards an alleged failure to comply with subject access request by the Information Commissioner's Office.

15.16. The letter sought a written undertaking from the Claimant that he would not correspond with the Respondents other than via their legal representatives. The Claimant supplied such an undertaking on 15 January 2021.

15.17. Pausing at this juncture this letter before action does not sit comfortably with an email from the Respondent's solicitors dated 24 April 2020 (CCB16) which reads: –

"That is best explained by summarising his conduct since dismissal on 27 November 2019. Since that time he has raised three formal grievances, two in December 1 in January. He has also made many informal complaints to respondent managers or staff whether in the UK, France or Germany . These were often accompanied by derogatory remarks. He has made three subject access requests, one in January two in February, to a total of 52 people across four countries. He has sent the Respondent staff, whether in the UK or Europe, what they estimate to be in excess of 250 emails. This of course it his right and the Respondent has responded appropriately in every case"

15.18. It is difficult, from what was placed before the Tribunal to see what had significantly changed between 24 April 2020 and the date of the letter before action which appeared to repeat much of what was said in the email of 24 April 2020 when examined in detail. The Tribunal therefore did not give any weight to this letter before action in its deliberations in respect of costs.

15.19. On 26 March 2021 (68/69) the Claimant was sent by the Respondent's solicitors a costs warnings letter (although it is proper to mention that in letters sent to the Tribunal, copied to the Claimant dated 02 June 2020 and 28 October 2020 in respect of interlocutory matters, the Respondent said they were either close to making such an application or reserving their right to make such an application).

15.20. The Tribunal had full regard to the costs letter. It began, correctly, by reminding the Claimant the costs were not routinely awarded in the Employment Tribunal. It then set out when it said costs could be ordered, namely where a claim had "little or no reasonable prospect of success" and where a party had conducted themselves unreasonably during the proceedings. Pausing at this juncture that does not accurately set out the provisions of rule 76 where the reference is to "no reasonable prospect of success".

15.21. It correctly drew to the Claimants attention that the Claimant's witness statement did not expressly make a connection between the alleged detriments and dismissal and what was said to be the protected disclosures.

15.22. It stressed the weight of evidence favoured the Respondent and that the Claimant had blinded himself to all other available evidence. It referred to the fact the Claimant focused on some form of conspiracy for which there was no evidence

15.23. The letter continued "we put you on notice that it is our intention, if you do not withdraw your case, to seek a costs order against you… we believe this is a very fair offer and one that is advantageous to you." The letter went on to suggest the Claimant was at liberty to take independent advice and concluded by warning that if a cost application was made those costs would run to "many tens of thousands of pounds"

15.24. The letter did not expressly state that if the Claimant withdrew at that stage no application for costs would be made although the Tribunal considered reading the letter in its entirety that was the very clear implication. If the Claimant was in any doubt and was interested in the offer he could have sought further clarification.

15.25. At the time the costs warning letter was written the case had been prepared for trial and the Claimant had a copy of the bundle and all the witness evidence.

15.26. There are four further facts in respect of the proceedings the Tribunal ought to record.

15.27. Firstly, at no stage during the proceedings did the Respondent make an application for a deposit order.

15.28. Secondly, at no time during proceedings did the Respondent apply for a strike out order.

15.29. Thirdly, at no stage was the Claimant expressly warned by an Employment Judge that his case had no reasonable prospect of success

15.30. Fourthly, at no stage did the Respondent make a financial offer which might have led the Claimant to believe his claim had significant value.

Submissions.

16. The Respondent.

16.1. Mr Siddall QC, very fairly, set out the law. The real issue for the Tribunal was how to apply the law to the facts.

16.2. The basis of the Respondent's application was summarised by Mr Siddall QC in the following headline terms.

16.3. Firstly that the Claimant commenced his claim knowing at all times that his claim had no merit or alternatively that he ought to have known of the lack of merit in his case.

16.4. Secondly he pursued matters in a vexatious, abusive or disruptive way because the purpose of the proceedings was to vindicate his view of his abilities and he *" sailed under a false banner of the PD claim"* because the Tribunal did not have jurisdiction to entertain a complaint of ordinary unfair dismissal.

16.5. Thirdly the manner in which the proceedings were conducted was wholly unreasonable and in particular his claims were dishonestly advanced and that he should have reviewed the merits of this case in the light of the Respondent's cost warning letter.

16.6. Mr Siddall QC then amplified upon those matters both in his skeleton argument and his oral submissions.

16.7. The Tribunal means no disrespect to Mr Siddall QC by not repeating each and every submission.

17. <u>The Claimant.</u>

17.1. The Claimant emphasised he never been given any legal advice or direction from the Tribunal that his case was hopeless or it had no reasonable prospect of success, or that he was conducting matters vexatiously abusively disruptively or otherwise unreasonably. The legal advice he had obtained was limited due to financial constraints.

17.2. No application had been made to strike out all or part of his claim by the Respondent.

17.3. No application had been made for a deposit order.

17.4. He asserted that as a litigant in person he did not have the knowledge to identify the important points of his evidence which the Tribunal needed and therefore sought to place before the Tribunal all information which might be relevant to his claim. He had been told his statement should include everything he intended to rely upon.

17.5. He emphasised that despite the suggestion of Mr Siddall QC, the Tribunal had never, in effect, made any finding of dishonesty against him in its liability judgement.

17.6. Whilst there was criticism of the length of his statement he did not have access to leading counsel or a partner in an employment firm to help him in the drafting of his own statement.

17.7. He did not accept this could be described as a simple case and that was evidenced by the legal team the Respondents used to rebut his claim.

17.8. The Claimant contended care needed to be taken in awarding costs against a litigant in person in that it might deter such persons from pursuing their right to access to justice.

17.9. It did not follow simply because the Claimant's evidence was not fully accepted that he should have appreciated that it was inevitable from the outset that his claim had no reasonable prospects of success.

17.10. The mere fact the Tribunal did not find in his favour did not mean that he had behaved unreasonably. He indicated he had been prepared to negotiate via ACAS.

17.11. It was not unreasonable, the Claimant contended, to refuse to settle (on the basis he walked away with nothing) when, following dismissal, the Health and Safety Executive had found two breaches by the Respondent in respect of guarding, which formed part of his first protected disclosure.

17.12. The Claimant had complied fully with Tribunal orders whereas there were occasions when the Respondent had been in default.

17.13. He accepted he had made various applications for disclosure and made the point that those applications did result in some further information coming to light.

17.14. Whilst the Respondent may have been vexed that the Claimant had asked for various policies and had raised various grievances it had been accepted by the Respondents solicitors that at least in relation to those requests they were matters that were perfectly within his right to have (CCB 16, 24 April 2020)

17.15. The Claimant contended, whilst accepting he could not bring a claim of ordinary unfair dismissal, he was entitled to probe why he was dealt with so unfairly, which only occurred after he made his first protected disclosure.

17.16. The Claimant stated he did not receive a formal cost warnings letter until 26 March 2021 and it was therefore unreasonable to penalising him in respect of costs prior to this date. He received a draft COT3, which was a *"drop hands"* agreement which he considered effectively sought to gag him and was akin to a nondisclosure agreement.

17.17. He accepted the liability hearing overran but said this was part attributed to technical issues with the video platform.

17.18. The Claimant stressed he had not been dishonest and considered he had not had sufficient time to fully prepare for the costs hearing.

Conclusion.

18. The Statutory Framework.

18.1. Rule 76 (1) of the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013 reads as follows: –

"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 (or part) have been conducted:.or

(a) any claim or response has no reasonable prospect of success…."

18.2. Under Rule 78 the Tribunal's jurisdiction to make an order for costs is limited as follows:-

(1) A costs order may—

(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;

(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, or by an Employment Judge applying the same principles;

(c) … [Irrelevant here]

(d) … [Irrelevant here]

(e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(2) … [Irrelevant here]

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

18.3. Finally Rule 84 states: –

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

19. The relevant legal principles derived from case law

19.1. The fundamental principle is that costs are the exception rather than the rule and that costs do not necessarily follow the event – **Gee –v- Shell (UK) Limited [2003] IRLR 82** at paragraph 22. However just because costs are the exception rather than the rule does not mean that the case itself has to be exceptional in order for an Employment Tribunal to make an order – **Power –v- Panasonic (UK) Limited EAT 0431/04**.

19.2. Costs are designed to be compensatory and not punitive.

19.3. The Tribunal has approached this matter by firstly deciding whether the circumstances set out in rule 76 (1) are engaged, (the threshold stage) secondly, if so, then deciding whether to exercise its discretion to make an award (the discretion stage) and thirdly, if so, then deciding for what amount or proportion of the costs incurred (the award stage).

20. The threshold stage.

20.1. The word unreasonable is not defined although it requires a high threshold to be passed when making a costs order, see paragraph 19 of the judgement of His Honour Judge Mullen QC in **Osonnaya -v- Queen Mary [2011] UKEAT/0225/11.**

20.2. The authorities make it clear the Tribunal must not substitute its view for that of the Claimant but must review the decision or decisions taken by the Claimant. The test has been described as *"wide and objective"* and one which may include having regard to the party against whom the order is sought having an *"unreasonably distorted perception of matters"* **Brooks -v- Nottingham University Hospitals NHS trust UKEAT /0246/18.**

20.3. Allied to this, the Tribunal has reminded itself that what may be very clear now following the liability judgement may not have been either wholly or partly clear to the Claimant when engaged in adversarial litigation. The Tribunal is required to determine what the Claimant knew or ought to have known at the start of the proceedings and what he knew or ought to have known as the proceedings progressed, having regard to the information that was then available to him.

20.4. The Claimant should not be judged by the Tribunal to the same standards of a legal professional. A layperson may well lack the objectivity and knowledge of law and practice of a skilled professional. This may be taken into account both of the threshold stage and also at the discretion stage. The fact that a person is a layperson does not mean that a costs order may not be made, although some allowance may be made for their inexperience and lack of objectivity, see the judgement of His Honour Judge Richardson in AQ Limited –v- Holden 2012 IRLR648 when he said *"the threshold test in Rule 40 (3)* [now Rule 76] *are the same whether a litigant is or is not professionally represented. The application of those tests should, however, take into account whether a litigant is professionally represented. A Tribunal cannot and should not judge a litigant in person by the standards of a professional representative……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 Davis submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal advisor. Tribunals must bear this in mind when assessing the threshold tests…..further, even if the threshold tests were..…. 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…this is not to say that lay people are immune from order to the costs: far from it, as the cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably, even when proper allowance is made for their inexperience and lack of objectivity…."* (approved at paragraph 25 in **Vaughan -v- London Borough of Lewisham (number two) [2013] IRLR 713)**

20.5. The mere fact that a case may be complex such as in whistleblowing, where the legislation has been subject to scrutiny by the Supreme Court, and different burdens of proof apply between detrimental treatment and dismissal does not mean that an order for costs cannot be made see **Millin -v- Capsticks Solicitors LLP UKEAT/0093/14** and nor is there any rule that the public interest in whistleblowing prevents an order for costs being made in such a case.

20.6. Where it is alleged, as here, the Claimant has lied and is therefore dishonest that does not automatically lead to the threshold been surmounted, although it is a factor to be taken into account. It depends upon the nature and relevance of the dishonesty. As Mrs Justice Cox in **HCA International Limited –v- May-Bheemul UK EAT/0477/10/ZT** said*:-"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 effect of the lie in determining the unreasonableness of the alleged conduct….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 the claim and award of costs must follow"….

20.7. The Respondent puts forward its application not only on the basis of unreasonable conduct but also on the basis that the Claimant has acted vexatiously disruptively or abusively.

20.8. The classic definition of vexatious conduct was that of Sir Hugh Griffiths in **ET Marler Ltd -v- Robertson [1974]ICR ICR 72** at 76*" 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."*

20.9. It is important to record that the two concepts are different. If conduct is vexatious it must be unreasonable but the converse does not follow.

20.10. The essential difference between vexatious and unreasonable conduct is that for vexatious conduct the party concerned must pursue the claim knowing it has no reasonable prospects of success or it depends on false evidence or pursues the claim out of malice towards the other party or for some other ulterior reason whereas with unreasonable conduct the party need not be aware that the claim has no reasonable prospects of success.

20.11. The Tribunal considered it was appropriate to address the issue of reasonableness first. If the reasonableness threshold was not met then then it was not necessary to consider whether the Claimant had been vexatious, given the threshold was higher.

20.12. If the reasonableness threshold was met the Tribunal then determined it would look briefly at the issue of vexatiousness, given it was a factor that was potentially relevant at the discretion stage.

21. <u>The discretion stage.</u>

21.1. The approach required to be taken by Tribunal was well summarised by Mummary LJ in **Yerrakalva –v- Barnsley MBC [2011] EWCA Civ 1255** as follows:- *"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 it, and in doing so, to identify the conduct, what was unreasonable about it and what effects it had."*

21.2. Any costs awarded need not be precisely calculated to reflect the additional cost to the Respondent caused by the Claimants

unreasonable conduct but should broadly reflect what has been caused by the Claimant. There is no need for a precise causal relationship.

21.3. As the Tribunal has noted simply because a party has a genuine belief which has no basis in reality does not mean the threshold is not surmounted but it is potentially a relevant factor at the discretion stage see **Topic -v- Hollyland Pitta bakery [2012]All ER (D) 250 (Nov)**

22. The award stage

22.1. If the Tribunal determines the assessment of costs should be undertaken by the County Court the Tribunal must specify whether on a standard or indemnity basis and has the power to order the Claimant to pay a specified percentage of the cost to be assessed or that the costs relate to a particular issue or part of the proceedings.

22.2. Under rule 84 the Tribunal may take into account the paying party's ability to pay and can order payment of a specific portion of the costs.

Application to the legal principles to the facts.

23. The Threshold Stage

23.1. The Tribunal does not intend to expressly address each and every representation made by either party either orally or in their written submissions but that is not to say the Tribunal has ignored a submission if it has not specifically referred to it. The Tribunal has looked at each and every submission when reaching an overall view.

23.2. The Tribunal was not attracted to the argument of Mr Siddall QC that the Claimant commenced proceedings knowing that the claim had no merit, or should have known it had no merit at inception.

23.3. It is important to remember that at this stage the Claimant had very little documentary evidence, other than what he had been issued with by the Respondent. He had a long history working in production and was by all accounts well-regarded. The specific concerns about his performance were raised with him after he had made his first disclosure to Mrs Preston. His first disclosure, included a reference to guarding of machinery and when he issued proceedings he knew, as a result of a report he made to the Health and Safety Executive, that action had been taken by that body in respect of the guarding of two machines. Whilst the Claimant accepted there were one or two things he could have done better whilst working for the Respondent his genuine belief was that he performed reasonably well. He also considered some of the criticism made of him was unfair and the Tribunal shared that view. As the Tribunal noted the Claimant was blamed for matters which he could not have been reasonably expected to remedy such as the Claimant being

required to resolve a collective grievance, when he was the subject of that collective grievance.

23.4. At inception the Tribunal is not satisfied that it could be said that the Claimant knew or ought to have known his claim had no reasonable prospects of success.

23.5. Nor is the Tribunal persuaded that the sole reason the Claimant issued proceedings was to vindicate his view of his abilities and that he deliberately, to use Mr Siddall QC's expression, sailed under a false banner of a public disclosure claim because he knew he had no claim which the Tribunal had jurisdiction to entertain. Mr Siddall QC supported his submission, in part, by reference to paragraph 307 in the Claimant's witness statement which read: –

"*This last year from my unfair dismissal to taking my case to the tribunal has been beyond difficult and the stress and strain has made me feel like dropping out a few times. However, the one thing that drives me on is getting my day in court, proving my case and banishing this accusation that I cannot do my job, truth will out".*

24. A number of points arise.

24.1. Firstly this was at the end of the Claimant's 86-page statement seeking to summarise matters.

24.2. Secondly although there is a reference to unfair dismissal the Claimant had an automatic unfair dismissal claim before the Tribunal.

24.3. Thirdly what the Claimant was saying was that he wanted to prove his case namely that he was dismissed or subjected to detriments because of his whistleblowing activities.

24.4. Whilst it is true the Tribunal found that in respect of the second protected disclosure it had more to do with the Claimant protecting his reputation than fearing for his health and safety from another employee, many protected disclosures are for mixed motives. It does not follow the claim was not reasonably brought from inception.

24.5. To conclude on this point the Tribunal did not regard the Claimant as using the false banner of a public disclosure or disclosures solely for the unreasonable purposes.

25. Whilst Mr Siddall QC took the Tribunal to various areas where the Tribunal had not accepted the Claimant's evidence. The Tribunal did not consider that it followed automatically that the Claimant was dishonest. Evidence is assessed on the balance of probabilities. In almost every Tribunal case the Tribunal has to make an assessment of competing evidential assertions. Simply because one party's evidence on a particular point is preferred to another does not

automatically mean that the parties whose evidence has not been accepted is dishonest.

26. Sight must not be lost of the difficulty facing a claimant in bringing a whistleblowing complaint. Such complaints are similar to discrimination. It is rare indeed for the employer to make specific admissions and therefore a claimant has to rely on the drawing of inferences. It was therefore in that context understandable why the Claimant wished to examine in detail the justification the Respondent relied upon for the termination of his employment. Whilst this was not an unfair dismissal claim it was not unreasonable to probe, to some degree, the factual basis why the Respondent dismissed him. The matter that concerned the Tribunal was to the extent that the Claimant pursued this line.

27. The Tribunal considered that in assessing the overall picture that some weight should be given to the fact that it is far more difficult for a litigant in person to objectively assess the merits or otherwise of a claim compared with the party who has the benefit, as the Respondent did, of the assistance of Queen's Counsel and a partner in a well-respected law firm.

28. It was submitted on behalf of the Respondent that there was no evidence to support the interpretation put on matters by the Claimant which he complained of, all of which had more obvious innocent explanations. Whilst it is true that in the Tribunal's judgement, on a number of matters it found that was no evidence, other than the Claimant's account, the Tribunal is satisfied that the Claimant believed that because he made protected disclosures which included one relating to guarding of machinery and the Health and Safety Executive found the Respondents had breached its obligations in that regard, that this was the reason he was subjected to various detriments and dismissed.

29. Reference was made to some of the language used by the Claimant in correspondence. The Tribunal has taken into account that frequently litigants in person use strong language due to their emotional involvement which would not be used by a professional representative. Mr Siddall QC gave as an example the fact that the Claimant contended notes made at the meeting on 27 November 2019 were a forgery. What the Claimant meant was he disputed the accuracy of notes of the meeting. The Claimant had some basis for concern as they were two separate sets of notes which did not tally and the Respondent's explanation that the differences were merely formatting was not wholly correct. The words forged or forgery would not be words that would have been used by professional representative. Whilst the words were was extreme this was a classic case where there is a difference between a person and a professional representative.

30. Mr Siddall QC pointed out the Tribunal had rejected the Claimant's assertion of a conspiracy. Again the use of the word conspiracy was inappropriate but is frequently used by litigants in person when they consider they have been wronged.

31. Whilst the Tribunal has not discounted the language used by the Claimant in the overall assessment it had to make, it did not regard such behaviour as being dishonest.

32. Mr Siddall QC made reference to the fact the Claimant commenced proceedings having taken legal advice. The Tribunal considered this submission lacked weight. Whilst the Tribunal was mindful that any written advice produced by those advising the Claimant was not before it, and therefore it was dependent upon the Claimant's evidence, it considered that it was highly likely on the particular facts that the Claimant gave a truthful account when he said he was given no assessment of the merits of his case and nor was not told he had a hopeless case.

33. Whilst not determinative, and not a bar to a costs order being made, the Tribunal is entitled, when looking at the global picture, to take into account that at no stage did the Respondent's solicitors apply for strikeout or for a deposit order, the test for the latter being little reasonable prospects of success. There is merit in Mr Siddall QC's submission that when addressing both the strikeout and a deposit order application the Tribunal will look at the Claimant's evidence at its highest, so care needs to be exercised, but the fact that no such application was made whilst not being fatal to a cost's application is a matter that can be looked at when making an overall assessment. If the Claimant's case was so intrinsically weak on paper, as it was alleged, such an application could have been made.

34. Equally the Claimant was never warned by an Employment Judge at any of the three case management hearings that his claim was fundamentally weak. Whilst it is true he was warned about over complicating his case that is not the same saying it was fundamentally weak. Again it is a factor that must be taken into account in the overall matrix of what the Claimant knew or ought to known.

35. It was argued for the Respondent that the length of the Claimants statement, his approach towards disclosure, his email communication in terms of its volume, his views as what should be in the bundle and the conduct of the hearing itself amounting to unreasonable conduct.

36. Starting with the Claimant's statement, it ran to 88 pages. It was the only evidence the Claimant relied upon. The principal witness for the Respondent, Mrs Preston, had a statement running to some 57 pages.. The total number of pages of the Respondent's evidence amounted to 81 pages. The Claimant's statement was not so unreasonably excessive. He had been told his statement would stand as is evidence in chief. He set out the evidence in chronological order. A litigant in person lacks the ability of a party represented by skilled advisers to fully identify what may or may not be relevant. It is certainly true that some of the information was irrelevant to the issues but it as Mr Siddall QC pointed out at the start of the liability hearing, he chose not to cross examine the Claimant on all matters in the statement, only those that were relevant.

37. Looking at matters in isolation the Tribunal did not find this amounted to unreasonable conduct.

38. The Claimant utilised a number of subject access requests. While such requests may be tiresome to an employer they are a perfectly lawful method of obtaining information.

39. It is true the Claimant sought disclosure of some 46 or thereabouts items prior to a general disclosure order but the Tribunal considered that was as a result of a lack of knowledge of the procedure of the Tribunal. The Claimant subsequently still make a number of disclosure requests. Some requests were clearly potentially relevant. For example the Claimant contended that meeting notes were not prepared when they were purported to be prepared and he wanted the meta data. Most of the requests were not relevant. The disclosure requests were sometimes unfocused but the Tribunal did not find they amounted to unreasonable conduct.

40. Various figures were put before the Tribunal as to the volume of the email correspondence whether it was 250, 375 or 500 emails. The Tribunal did not know whether that referred solely to the Claimant or to the interparty communication. The case started in March 2020 and concluded at the end of April 2021. Without such information it did not feel it could even start to fairly make a finding of unreasonableness against the Claimant. Even if that is wrong and the Respondent is right, on the very highest figure, assuming all the emails came from the Claimant, that would be about or just over one day and whilst at the very top end of the reasonableness band it would not surmount the high hurdle.

41. The bundle was voluminous totalling just over a thousand pages. As Mr Siddall QC said there were probably only half those pages referred to in the hearing. Applying its industrial experience it is not unusual for a large proportion of documents in a bundle not to be specifically referred to by the parties. This case was no better and no worse than any of the case. In isolation again the Tribunal did not find this to be unreasonable conduct.

42. The hearing was listed for five days and took seven. The original five-day time estimate was made before witness statements had been exchanged or the bundle agreed.

43. Much of day one was taken up with an application for disclosure and reading time. The original reading time estimates could not have anticipated the length of both parties' statements and the bundle.

44. The Tribunal has a responsibility to both parties to ensure that the proceedings comply with the overriding objective. Whilst a Tribunal can robustly manage represented parties that approach has to be tempered with litigants in person. A litigant in person should be permitted to have a reasonable chance to explore an issue so the Tribunal can consider whether it is relevant. Repeated interruptions may cause injustice to a litigant in person who will then lose their

thread of thought which leads to an appeal and potential further cost to a Respondent.

45. In addition, as here, litigants in person rarely formulate short and precise questions for witnesses and a Tribunal is under an obligation to intervene to ensure that multiple questions are broken down so they are understandable to a witness to ensure a fair trial.

46. It is proper to say that some time was also wasted in the overall hearing due to technology issues with the conference video platform.

47. The Tribunal reminded the Claimant on a number of occasions, Mr Siddall QC said it was 13, of the need to move on when he was pursuing matters that were irrelevant. The Claimant then did his best to comply with that direction.

48. Mr Siddall QC's strongest point was in respect of the cross examination of Mr Marsden (which lasted almost a day) the Claimant failed to concentrate upon the key point namely whether Mr Marsden was influenced in anyway by his knowledge of the two protected disclosures. Whilst it was established Mr Marsden was aware of the protected disclosures much of the time spent upon what he did not why he did it.

49. Cases do overrun and it is the responsibility of the Tribunal to manage time. If time was not efficiently managed that was more the fault of the Tribunal than the Claimant.

50. Whilst having addressed in number of matters where the Tribunal found the Claimant did not behave unreasonably, there are matters where the Tribunal considered the criticism of the Respondent had merit.

    50.1. Firstly following the Claimant's termination of employment he wrote to Network Rail, the principal client of the Respondent. He made serious allegations as to the quality of the products supplied by the Respondent to them.

    50.2. The quality or otherwise of concrete bearers manufactured by the Respondent did not form any part of either of the Claimants protected disclosures.

    50.3. The Tribunal is satisfied that the motive for such correspondence was to cause difficulties for the Respondent.

    50.4. That behaviour was not connected with matters the Claimant was pursuing before the Tribunal and such behaviour was unreasonable.

    50.5. Secondly the Tribunal found that on or about 25 November 2019 as the Claimant himself admitted in cross examination, he downloaded various information from the Health and Safety Executive. His oral evidence for this before the Tribunal was found to be wholly unconvincing, namely the

downloading was mere happenstance because there had been an incident in the Respondent's yard. The Tribunal found the Claimant did this not due to any health and safety incident but because he considered his employment was threatened and did it to protect his employment situation or to be used if he needed to litigate against the Respondent. Here the Claimant's conduct went further than just a highly implausible oral explanation. This is illustrated by a document produced by the Claimant, document CCB14, dated 21 April 2021 when the Claimant asserted that the Respondents had spent *"a considerable amount of time fabricating Google searches".* This was a reference to the HSE downloads. The Claimant knew the downloads had not been fabricated because he admitted before the Tribunal that he had made them. The information in document CCB14 was not a spur of the moment answer to a question, but a lengthy email written by the Claimant to the Respondent's solicitors when he would have had time to read and check the authenticity of the same. To assert something was fabricated when the Claimant knew it was not, was unreasonable conduct.

50.6. Thirdly whilst the Tribunal is not persuaded that the Claimant's case was flawed from inception, he knew or should have known there came a time when he should have reviewed matters and failed to do so.

50.7. For the reasons already given the Claimant did not believe the claim was flawed from inception.

50.8. The mere reference in the last line of the Respondents to response to the merits or otherwise of the Claimant's claim was not sufficient to put him on notice again for the reasons already outlined.

51. Turning to the three case management hearings the Tribunal accepted that criticism could be made of the Claimant but much of that was due to the fact the Claimant did not understand the procedure. He did not know that requests for specific disclosure should await a general disclosure order. He did file a very lengthy case management summary before the hearing but it was accepted by the Employment Judge that some of it was helpful. This was a case of a Claimant who was a litigant in person and did not understand the procedure and doing the best he could against skilled representatives.

52. Following the first hearing he did take the advice Employment Judge Little in seeking to obtain some legal guidance.

53. He did not ignore the advice of Employment Judge Maidment. He was no longer seeking to call almost a dozen witnesses. He just called himself.

54. Where the Tribunal has found the Claimant did act unreasonably is following the cost warning letter. By this stage he had the bundle and all the statements. He knew what was being said and had been warned by the Respondents of the potential weaknesses of his case.

55. The Tribunal is conscious that simply because the Claimant pressed on and was unsuccessful it did not follow the costs order should be made. Nor should the fact that the Claimant had an optimistic view of his chance of success, when others may have taken a more pessimistic view. The Tribunal is mindful that there may be more than one reasonable conclusion to reach as to the prospects of otherwise of a claims success. The Tribunal has reminded itself that the Claimant was completely inexperienced and should not be judged by the standards of a legal professional. The Tribunal has factored all these matters into its conclusion.

56. Even having made all the above allowances following receipt of the cost letter the Claimant should have reflected upon matters. However the Claimant was entitled to a reasonable period of time to reflect and in the accompanying settlement for it was given only a matter of a few days. Having regard to covid 19 in the Tribunal's judgement it would have taken the Claimant three weeks to instruct a solicitor, supplied all the documents, then for the solicitor to have had time to go through all the documents and then take any advice.

57. At the very least if such an exercise had been undertaken the Claimant would have realised that his second protected disclosure was highly unlikely to qualify for protection and having looked at all the evidence some of his detriments were extremely weak (especially one and three).

58. The Tribunal cannot therefore say that a trial would have been completely avoided but it would have been reduced and by failing to critically examine, at all, the strength of otherwise of his claim, having been served with a costs warning the Claimant acted unreasonably.

59. It was therefore unreasonable three weeks after the cost warning, 16 April 2021 for the Claimant to continue to proceed on his original claim in the format that it was put before the Tribunal.

60. It follows that for the reasons set out above Tribunal is satisfied that the Respondent has surmounted the threshold stage.

61. Having found unreasonable behaviour it is not necessary for the Tribunal to consider whether the Claimant acted vexatiously at the threshold stage.

62. <u>The Discretion Stage.</u>

    62.1. The Tribunal has then stood back, as it must, and looked at the total picture.

    62.2. Simply because the threshold stage has been surmounted does not mean that an order for costs must be made.

    62.3. Whilst none of these factors are conclusive, factors that favour the Claimant are that there was no deposit order, he was given no express warning from an Employment Judge that his case was fundamentally

weak and nor was he subject to a strike out application which even if it failed may have exposed weaknesses in the Claimant's case. The Claimant is also entitled to say that he followed the advice of Employment Judge Little and any failings in procedure had to be looked at through the lens of a person wholly unused to such proceedings.

62.4. Against that the Tribunal has made three findings of unreasonableness, the first, the Network Rail incident which could well be classed as vexatious, the second the significant disconnect between the Claimant's written evidence and his oral evidence as to the downloading of the Health and Safety Executive documentation. He knew the contents of his email were untrue and whilst untruthfulness does not necessary lead to a costs order is a factor that must be taken into account. Thirdly he did not stop and reflect after the costs warning.

63. What was the effect of that unreasonable behaviour?

63.1. With the concrete bearers it did not have any significant impact upon the costs the Respondent incurred. In reality the concrete bearers only came into play in two aspects firstly relating to the Claimant's credibility and secondly in respect of its case there should be a Polkey adjustment if the Claimant succeeded. Its effect on costs was minimal

63.2. With the health and safety executive downloads the Respondents were put to having to explain the proper provenance of the documents and how they were prepared. The issue was potentially relevant in respect of whether they had or had not been a protected disclosure. However in terms of the work involved it was very limited and had little effect on overall costs.

63.3. By failing to reconsider his case within a reasonable time period the Respondent, at the very least, faced a lengthened hearing. Proper and reasonable reflection would have resulted in the Claimant dropping some aspects of his claim. This was the principal mischief that flowed from the Claimant's unreasonable behaviour. It would not have impacted upon the preparation time given the case had already been prepared for trial well before the costs warning was given.

64. <u>The Awards Stage</u>

64.1. Whilst the Tribunal accepts that the means itself of the Claimant should not be a factor that prevents an order for costs being made or limited, it is a factor the Tribunal is entitled to take into account. Merely because a person is impecunious they should not escape a costs order if properly sought. Similarly the fact a person has assets should not lead to them being punished for their prudence.

64.2. The Tribunal has a discretion to take into account the means of the Claimant and it determined it would be just to do so. Realistically if the

full sum claimed was awarded on taxation the Claimant would have to sell the family home. That would not be proportionate to the Tribunal's findings in respect of the Claimants behaviour.

64.3. The Tribunal determined that the appropriate course of action was that the Respondents costs could be taxed if not agreed from 16 April 2021 on a standard basis. The reason for the same is that on the Respondents brief schedule of costs the sums incurred after that date will exceed the Tribunal's summary jurisdiction of £20,000. There was no cogent evidence before the Tribunal to justify an indemnity basis.

64.4. Whilst the Tribunal have not ignored the fact that some unreasonable conduct occurred prior to this date the principal expenditure the Respondent faced incurred after this date.

64.5. The Tribunal have capped any costs award at £10,000.

64.6. The Tribunal considers this sum to be reasonable as the Respondent could raise it by means of a second mortgage on the matrimonial home. There is equity in the house and on a mortgage for seven years on a repayment basis would produce payments that fall within the means of the Respondent, particularly if the Claimant consolidated the costs order with the credit card debt.

64.7. The sum the Tribunal has arrived at in its judgement is realistic and affordable to the Claimant and has the advantage that it could be realised within a reasonable period of time.

64.8. It makes no sense to impose an order of such a sum that it acts as a disincentive for the Claimant to work. The Tribunal accepts the reality is the assessed costs will exceed the sum sought but considered the figure it had reached was a very substantial sum and goes some way to deferring the Respondents costs and to mark the Claimants unreasonable behaviour.

Employment Judge T R Smith

3 September 2021