EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr F T Stacy	v	Octavius Finance Limited

Heard at: London Central (in chambers) **On**: 27 August 2021

Before: Employment Judge A James
Ms C I Ihnatowicz
Mr I McLaughlin

Representation (in writing)

For the Claimant: Ms A Holland, lay representative

For the Respondent: Mr R Dennis, counsel

JUDGMENT

(1) The claimant must pay to the respondent the sum of £6,500 as a contribution towards the legal costs incurred by the respondent in defending this employment tribunal claim (Rules 76, 78 and 84 Employment Tribunal Rules of Procedure 2013).

REASONS

The issue

1. In a judgment delivered orally on 20 May 2021, with written reasons being sent on 29 June 2021, the tribunal dismissed the claimant's claims. The respondent indicated its intention to make an application for costs at the close of the hearing and case management orders were made, to assist with the determination of that application.

2. The parties indicated that they were content, in principle, for the application to be dealt with by the tribunal on the papers. That remains the position of the parties. This decision has been made by the tribunal on the basis of the written submissions and supporting information received at a virtual private hearing 'in chambers'. Today was the earliest date the panel members could reconvene to consider the application.

The application

3 The basis of the respondent's application is that:

3.1 the claimant acted vexatiously or otherwise unreasonably by bringing and then pursuing his claims on the basis of a lie, specifically that he sent a list of R's candidates to his personal email address by accident, and not with the intention of using it for his own benefit; and

3.2 the claimant repeatedly failed to comply with the Tribunal's Orders, causing the respondent to incur substantial unnecessary costs.

Findings of fact

4 The tribunal made the following findings of fact in its written reasons. The numbers in square brackets correspond to the numbering in the written reasons.

> *[48] At 11:25 on 24 March 2020, the claimant took a screenshot of a search on the respondent's CRM system, Voyager, and emailed it to his personal account. The screenshot shows the names and other details of the top 28 candidates in his specialist area – i.e. fundamental bottom-up global equity candidates.*
>
> *[49] The explanation given by the claimant in his witness evidence is that:*
>
> > *At one point I sent a small list of names to contact to my personal email rather than my work email by mistake. It was not a long list and only contained names of candidates I was going to speak with that morning ahead of my call at 2pm and contained no other data. - I didn't think anything of it as I had sent emails to my personal account for work in the past and we had not ever been given any training otherwise.*
>
> *As we shall see below, that contrasts with what he said in the disciplinary hearing and in the hearing before us. Further, there was no email sent back from the claimant's personal email account to his work email account so that the screen shot was available in his work email account for use that day.*
>
> *[50] The claimant said he sent emails from his work to his personal account regularly. However, no emails were provided to us to suggest that such confidential information had been sent by the claimant before. We were referred by the claimant only to two emails from his work email account to his personal email address. One, sent on 22 February 2019, attached a letter regarding pension contributions. The other is dated 16 August 2019, and contains a link to an article in The Hedge Fund Journal about hedge fund managers of the future. Neither email contained confidential information belonging to the business.*
>
> *[52] Around this time, having carried out a search, Ms Basiratpour discovered that the claimant had sent a screenshot of candidates to his personal email address. Ms Basiratpour explains the significance of that in her statement and we accept this evidence:*
>
> > *In the recruitment industry, everyone knows that candidate data is extremely sensitive. Not only is it candidates' personal data, but it is the*

> *lifeblood of the industry: the ability to find good candidates, match them to a suitable job, and court them successfully, is each recruitment consultancy's key to success. All of employees, including Mr Stacy, knew this and would have heard stories, in our office and elsewhere, of people being dismissed for trying to make off with candidate data. The number one rule of recruitment is that you do not take your employer's data.*

[57] Mr Jayaratne and Ms Basiratpour carried out a search for any further emails containing confidential information but nothing else was found. It was found however that the original email had been deleted by the claimant by the time the search was carried out.

[67] The clamant said in the disciplinary hearing, in relation to the list sent to his personal email address:

FS: They were very good candidates and they are relevant to jobs I am working at the moment.

NB: Okay, can you give us some examples?

FS: If you give me two seconds I just need to bring up your email so I have got….so so a good example could be [RL] who is the third candidate down, he is a LATAM PM working at [name]. I currently have a LATAM equity analyst position that I am trying to source for and thought he would be a good sort of candidate for and also I have recently registered a call with a client in Canada who is looking for an emerging market small cap PM so I was going to talk to [RL] regarding that position as well. The second, the candidate down below there [TC] was he is a long short FTSE analyst working at [name] covering training and TMT I wanted to speak to him regarding a platform position and then also another position that I wanted to run past him which was more speculative. The candidate below him is [CS], he is a emerging market PM working at [name], he speaks Chinese but I was going to speak to him and clear him for the position that I had in Canada. The candidate below him is [NS] … he emailed he interviewed…

NB: So, So just… just to be clear what… what search gave you the result of that candidate list?

FS: I…I searched bottom up, equities, very good candidates but I think that was the search that I ran. [Note, initials of candidate names used above and name of employers removed to preserve confidentiality]

[68] Ms Basiratpour was not convinced by that explanation. 'Bottom up' is a broad denomination for analysts who look at company fundamentals – 'bottom up' therefore, rather than, for instance, specialists in macroeconomics. Mr Stacy worked in the former area only. As Ms Basiratpour stated to us in cross examination, the claimant's explanation, did not make sense to her. It was "like giving someone a potato when they've asked for crisps".

[69] Further, the search was in her view not relevant for the 4pm call because:

> *No-one searches in this way if looking for candidates for specific jobs. You would not bring up a list of very good candidates – using the VGC code. Why on earth would you do that if searching for something specific*

> *– maybe one or two – but you'd never do that search for any one of the jobs.*

[70] As for other roles, Ms Basiratpour told us and we accept that it was more likely than not that if a search was not carried out using other relevant codes (i.e. codes other than the VGC code), that the results would not be relevant.

[71] Before us, the claimant accepted that the candidate list was a list of the best and most valuable clients on Voyager in his area. As for the job in Montreal, he told us that it was 'pretty niche'. If a candidate did not match everything for that position, they still had to be very good even to be considered for it. He also told us: "Other very good candidates would know others". Implying that he could use this list to call candidates to ask them if they someone who might be suitable for the Canada role. We did not find that explanation convincing and it is another example of how the claimant's explanation for his sending of the email kept shifting.

72] Further, the claimant stated in cross examination, when asked if he ran the search for the job relating to the 4pm call that the screen shot was for that particular job [i.e. the one at 4pm] but those candidates were not relevant to other positions. Shortly afterwards the claimant stated that the screen shot search: 'was relevant to that call at 4 but happen to be similar to other similar jobs'. Again, he contradicted himself in a short space of time.

[73] This is also to be contrasted with what the claimant said in his witness statement at paragraph 22:

> *At one point I sent a small list of names to contact to my personal email rather than my work email by mistake. …. I didn't think anything of it as I had sent emails to my personal account for work in the past and we had not ever been given any training otherwise.*

[74] But in the disciplinary hearing the claimant accepted that sending the list was a serious error:

> *I sent it to my personal email address so it was a… it was a… it was a really bad mistake and I hold my hands up to say that that was…*

[75] At this hearing the claimant stated that it had:

> *Never been an issue to use personal accounts for data so long as it was not shared with anyone else.*

[76] For the first time at the hearing of this claim, the claimant raised a further explanation, that the list was sent so he could duplicate his working in the office with two screens, by using two laptops at home. This was the first time that explanation was raised. It is not set out in the claimant's statement for this hearing, in the disciplinary hearing, or in his appeal against dismissal letter (prepared with the benefit of legal advice). He also stated that he deleted the email from his Gmail account when he realised he had sent it there instead of his work Outlook address. But if so, how could the claimant work on that if he was locked out of the work systems? As noted above, the list was not sent by the claimant back to his work Outlook email address once he had realised his mistake. This would have been necessary since he had deleted from his Outlook account.

5 The tribunal came to the following conclusions in relation to the automatically unfair dismissal claim and the wrongful dismissal claim:

Whistleblowing dismissal

[100] If C made one or more protected disclosures, was the sole or principal reason for his dismissal that he made any such disclosure? We conclude that the dismissal had nothing to do with the alleged protected disclosure. Ms Basiratpour decided to dismiss the claimant because she believed that he had taken highly confidential and valuable data from the company, for his own use. As noted above, the claimant's explanation for the sending of the data to his personal email address has changed over time. It is understandable that Ms Basiratpour was not convinced by the explanation given by the claimant. It was her reasonable belief that a breach of confidentiality had occurred and that was the reason for her decision to dismiss the claimant. Whilst the conversation on 24 March had annoyed Ms Basiratpour, we conclude that she would not have dismissed him for that reason, particularly given the effort that she had put into training and supporting him in relation to her business. The claimant was an effective employee and we find Ms Basiratpour did not and would not have dismissed him because of his comments on 24 March.

Breach of contract – notice pay

[101] Did C commit a repudiatory breach of his contract of employment such that R was entitled to dismiss him without notice? This is how the issue was put, but we have concluded that we do not need to determine whether or not the claimant did in fact commit a repudiatory breach of his contract of employment. This is because we conclude that the claimant was in breach of clause 20, taken as a whole and that in such circumstances he was not entitled to notice pay.

[102] Clause 20.1. and 20.1.5 state:

20.1 The Company shall have the right to terminate the Employment at any time without notice, compensation or payment in lieu of notice and without payment in lieu of untaken holiday entitlement in excess of statutory leave entitlement in the event of gross misconduct by the Employee or otherwise meriting summary dismissal including but without prejudice to the generality of the foregoing: ….

20.1.5 being guilty of any misconduct that is in the reasonable opinion of the Company serious misconduct or of any material breach or non-observance of the provisions of this Contract. (our emphasis)

[103] Clause 20.2 states:

The Employee shall have no claim against the Company in respect of the termination of his Employment by the Company pursuant to this clause 20.

[104] For the reasons set out in relation to the dismissal claim above, we conclude that Ms Basiratpour formed a reasonable opinion that the claimant was guilty of serious misconduct; namely, the sending of a list of highly valuable and confidential information to his personal email address, for his own potential gain. In those circumstances, taking those clauses as a whole, the respondent was entitled to summarily dismiss the claimant. Clause 20.2 disentitled the claimant, in those circumstances, from bringing a breach of

contract claim against the company in respect of the termination of his employment without notice, regardless of whether his conduct also amounted to a repudiatory breach. In those circumstances it is not necessary to determine whether in the circumstances such a breach was actually committed.

6 The above indicates that the claimant has failed to provide a consistent or convincing explanation as to why he sent that highly confidential list of the top candidates to his personal email address. He gave a number of different explanations, at various times, which were contradictory. We have rejected them all. In those circumstances, we go on to conclude that, on the balance of probabilities, the claimant sent the list to his personal email address for his own use or for the use of a competitor.

7 The claimant started work for a competitor two weeks' later although there is no evidence before the tribunal to suggest that it was actually used by any competitor. The significance or otherwise of the latter point is considered below in our conclusions.

8 We make the following findings in relation to the claimant's means. In dong so, we have taken into account the information contained within form EX140 which has been completed by the claimant. Although it is not formally signed, we are proceeding on that basis that the information contained within it is true.

9 The claimant is currently earning a gross salary of £35,000. He takes home £24,806 pa, or £2,067 pcm. His partner is not currently earning.

10 The outgoings of the claimant and his partner are £2,500 pcm, including £350 pcm listed under 'other expenses'. It appears that month-to-month, the claimant and his partner have to decide which monthly outgoings to prioritise.

11 The claimant jointly owns his own home, with his partner. The property is worth £440,000; the mortgage is £300,000. It was bought in December 2020. The mortgage is due to run for 25 years; the monthly payment is £1,310.

12 The claimant has savings of £10,725.21.

13 He owns a Mini Cooper, worth about £3,000. He has no other significant assets.

14 Some questions about the information contained in Form EX140 were raised recently by the respondent's solicitors, in relation to information provided about the claimant's partner's income. An explanation has been provided which has been accepted by the respondent and therefore that does not need to concern us further.

15 The respondent's solicitors have provided a summary statement of costs, and a copy of the fee note of counsel. Excluding VAT, the costs are just over £50,000.

The Law

16 The application is made under Rule 76 of the Employment Tribunal Rules of Procedure 2013 ("the 2013 Rules"), which provides, in so far as relevant here:

(1) A Tribunal may make a costs 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 the proceedings (or part) have been conducted;*
>
> *(2) A Tribunal may also make such an order where a party has been in breach of any order …*

17 Rule 76 requires the Tribunal to adopt a two-stage approach:

> *the tribunal must first consider the threshold question of whether any of the circumstances identified in [what is now Rule 76] applies, and, if so, must then consider separately as a matter of discretion whether to make an award and in what amount."* (*Vaughan v London Borough of Lewisham (No. 2) [2013] IRLR 713* at [5])

18 Pursuing a claim on the basis of a lie may constitute unreasonable conduct under Rule 76. In *Nicolson Highlander Ltd v Nicolson [2010] IRLR 859*, Lady Smith referred to a number of earlier authorities, before concluding at #21:

> *As these cases demonstrate, an employment tribunal can be expected to conclude that there has been unreasonableness on the part of a party where he/she is shown to have been dishonest in relation to his/her claim and then to exercise its discretion so as to make an award of expenses in favour of the other party subject, of course, to the requirements for it to take account of the provisions of [what are now Rules 78 and 84 of the 2013 Rules] regarding the fixing of the amount of any such award.*

19 Those earlier cases included Her Ladyship's own judgment in *Dunedin Canmore Housing Association Ltd v Donaldson (unreported, UKEATS/0014/09/BI, 8 July 2009*), where she held at #24 and 25:

> *She [the claimant], in short, had no business seeking to make the respondents pay her in these circumstances. Even less was it appropriate or reasonable of her to seek to do so on a basis which she must have known to be a false one.*
>
> *There is a flavour, in the Tribunal's second judgment, of sympathy for the claimant as a lay person and for the difficulty she might have in paying any award. With all due respect to the Tribunal, these matters are beside the point. The issue was not whether a lay person could reasonably have been expected to understand the law. It was whether she had or had not, in simple human terms, approached the essential factual matters that lay at the heart of her case honestly and reasonably. She had not done so and these are exactly the sort of circumstances where a Tribunal has a responsibility to make clear that it is quite unacceptable to cause expense to another party by bringing proceedings on that basis. …*

20 There is no hard and fast rule in this respect. In *Kapoor v Barnhill Community High School Governors (UKEAT/0352/13/RN)*, unreported, 12 December 2013 at #13 the EAT held]:

> *a lie on its own will not necessarily be sufficient to found an award of costs.*

The test remains that set out in Rule 76, and the Tribunal must:

look at the whole picture of what happened in a case and ask whether there has been unreasonable conduct by the Claimant (Kapoor at #15).

21 If the Tribunal is satisfied that the claimant acted vexatiously or unreasonably, it must then consider separately whether to make an award and, if so, in what amount. At this stage:

the Tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of its discretion …

(albeit the respondent is not required:

to prove that specific unreasonable conduct by the [claimant] caused particular costs to be incurred". (Kapoor at #15)

22 Rule 78 provides, in so far as relevant here:

(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 ["the CPR"], or by an Employment Judge applying the same principles…

(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."

23 The relevant parts of Rule 84 provide:

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.

24 The EAT gave guidance in *Oni v NHS Leicester City [2013] ICR 91*, per Judge Richardson, that:

46. … litigants in person, even if they appreciate that the tribunal may take their means into account, may not know what to do in order to prepare for that issue. They may think it will be sufficient to make a submission on the question to the tribunal. Tribunals are likely to require more; but litigants will not necessarily know that. If the tribunal does not take means into account, and the case subsequently goes to the county court, the form upon which the paying party will set out his or her means is form EX 140. A possible solution to this problem, at least where the tribunal is giving directions in advance relating to a costs hearing, is to say that a party who wishes his or her means to be taken into account should complete this form.

25 Underhill J (as he then was) gave guidance on the relevance of this issue in Vaughan at [28], where he held that:

It is necessary to remember that whatever order was made would have to be enforced through the County Court, which would itself take into account the appellant's means from time-to-time in deciding whether to require payment by instalments, and if so in what amount.

Conclusions

26 We set out our conclusions below in relation to the following headings. The claimant's alleged unreasonable conduct; discretion whether to make an award; the amount of the award; and failure to follow tribunal orders.

The Claimant's alleged unreasonable conduct

27 Bearing in mind our findings of fact above, and the relevant legal principles, we conclude that the claimant acted unreasonably in bringing the proceedings because he either knew or should have known that the decision to dismiss him was a reasonable one, as a result of him sending highly confidential information to his personal email address. In those circumstances, the proceedings were not brought in good faith, and/or the claimant cannot have sincerely believed in the legitimacy of his claim.

Discretion whether to make an award

28 Whilst the fact that the claimant was unrepresented is potentially a relevant factor, that does not lessen the gravity of his conduct. In any event, the claimant acknowledges that he did take professional advice, although we would observe that such advice can only be given on the basis of the information provided to the professional giving it.

29 In bringing the proceedings, the claimant was seeking compensation from the respondent in circumstances where he did not approach the essential factual matter in dispute in a reasonable manner. As a result, the respondent has had to incur substantial cost defending the proceedings. In the circumstances, we conclude that we should exercise our discretion to make an award.

The amount

30 Bearing in mind the above principles, we consider that in the circumstances of this case, it is appropriate to take into account the claimant's means.

31 In summary, the claimant's income does not cover the reasonable monthly outgoings of him and his partner. That position is not likely to change substantially over the next few years.

32 There is a substantial amount of equity in the property he jointly owns with his partner. However, that is also the subject of a mortgage of approximately 68% of the equity, and we take judicial notice that on his current income, the claimant is unlikely to be able to increase the current mortgage on the property to any significant extent.

33 The claimant does not own any other significant assets. He does however have savings of £10,725.

34 In all the circumstances, we consider that it is appropriate to make an order that the claimant pays £6,500 towards the respondent's legal costs. That represents a substantial proportion of his savings. It is an amount he would nevertheless be able to pay immediately. We accept that it is a relatively small proportion of the total costs incurred, but for the claimant, it is nevertheless a significant sum to have to pay.

35 We consider that in the circumstances, awarding an amount in excess of that sum would be punitive, because it would require the claimant to potentially sell the home he jointly owns with his partner and/or it would continue to adversely affect his personal finances for a great many years to come. The sum awarded has the advantage of giving a certain and immediate outcome to both parties.

Alleged failure to comply with Tribunal orders

36 We conclude that the claimant did fail to comply with tribunal orders on a number of occasions. However, we consider that it is not appropriate in the circumstances of this case, to exercise our discretion to award costs under this head, in addition to the sum awarded for unreasonably bringing the proceedings. If we had decided to exercise our discretion, then taking into account the claimant's means, we would not have awarded any additional amount, besides that already awarded. Further, in fixing that amount, we have done so on the basis that no extra amount would be awarded under this head.

Employment Judge A James
London Central Region

Dated 27 August 2021

Sent to the parties on:

01/09/2021

For the Tribunals Office