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## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4100593/2020 (A)**

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**Held in Chambers on 10 June 2021 (By Telephone Conference Call)**

**Employment Judge: P O'Donnell**

**Mrs A Tait**

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**Claimant  
Represented by:  
Ms L Hunter –  
Solicitor**

**Break The Silence**

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**Respondent  
Represented by:  
Mr Ogilvy –  
Solicitor**

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## **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Employment Tribunal is that the Claimant's application for expenses is refused.

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### **REASONS**

#### **Introduction**

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1. The Claimant has made an application for costs (expenses) arising from the judgment sent to the parties on 18 March 2021. The Respondent resists the application.
2. Parties provided written submissions and indicated that they did not seek a hearing. The Tribunal heard the application in chambers on 10 June 2021.

**Claimant's submissions**

3. The Claimant made the following submissions.

4. The application for expenses was made on the basis that the Respondent acted unreasonably in their defence of the proceedings and in the way that they conducted their defence.

5. The Claimant highlighted the following matters as demonstrating unreasonable conduct on the part of the Respondent:-

a. Reference was made to the fact that none of the Respondent's witnesses had addressed, in their evidence-in-chief, the meeting they all attended on 15 August 2019. It was submitted that this omission was an attempt to mislead the Tribunal given that this meeting occurred the night before the Claimant was informed of the appointment of a co-CEO. It was submitted that the Claimant only became aware of the meeting because it was referenced in an email from the Chair to the Trustees which was disclosed to the Claimant by one of those Trustees.

b. The Tribunal concluded that the Respondent's main witness, Marilyn Cairns, the Chair of the organisation, was not a credible or reliable witness and that some of her evidence was evasive. It was submitted that her approach to the evidence elongated her time giving evidence.

c. Reference was made to the findings of the Tribunal that Ms Cairn's evidence was inconsistent with the pleadings. It was submitted that serious and unwarranted claims were made in the ET3 regarding alleged aggressive behaviour by the Claimant which the Tribunal concluded were not consistent with the evidence of Ms Cairns.

d. None of the witnesses for the Respondent were found to be wholly credible or reliable by the Tribunal.

e. The Respondent failed to lodge key documents as set out in paragraph 29 of the judgment.

5 f. The evidence-in-chief of the witness Lesley Craig was a 30 page witness statement and much of it was entirely irrelevant and not put to the Claimant in cross-examination. The submissions highlight the particular paragraphs in the witness statement in support of this argument.

6. The Claimant sought an Order for expenses as taxed or an Order from the Tribunal making its own decision as to the amount. A timesheet and a schedule of costs was included with the application.

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7. A copy of the Respondent's accounts were included with the application as evidence of their ability to pay.

8. In response to the submissions by the Respondent, the following submissions were made on behalf of the Claimant:-

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a. The Respondent missed the point in relation to the 15 August 2019 meeting; the issue to be determined was whether the co-CEO appointment was a demotion which may have entitled the Claimant to resign and reference is made to paragraph 205 of the substantive judgment. It was submitted that the fact that this appointment was made and intimated following the meeting involving all four of the Respondent's witnesses cannot be anything other than a material and relevant fact showing the motive for the decision.

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b. The Respondent's position on the pleadings and in their statements was unreasonable, misleading and false. It was submitted that there was a total lack of candour in not disclosing the meeting. The Respondent's position was that the Claimant had suggested the co-CEO role and that it had been subject to discussion and consultation but this was untrue.

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c. It was submitted that Ms Cairn's conduct goes beyond matters of credibility and reliability. The judgment notes her evasiveness and lack of candour.

5 d. In order to determine what cross-examination was required, detailed consideration of the witness statements was required and it was unreasonable for the Respondents to produce a witness statement such as the one for Lesley Craig which contained a considerable volume of irrelevant material.

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e. The Claimant's agents goes on to make comments in relation to the Respondent's ability to pay and the fact that the funds available to them (as set out in their accounts) are sufficient to meet the sum sought. Further, future events are not relevant to the Tribunal's considerations.

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### **Respondent's submissions**

9. The Respondent made the following submissions.

10. Reference is made to the terms of Rule 76 and it is noted that the Claimant has not raised matters which indicate that the application is made under Rule 76(1)(b) so the Respondent will not comment on that.

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11. It is assumed that the application is made under Rule 76(1)(a) and submitted that there is a high threshold for the Claimant to get over. It is submitted that the Claimant does not do so.

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12. In response to the issues raised in the application, the Respondent says the following:-

30 a. In relation to the meeting of 15 August 2019 and the criticisms of the evidence the Respondent's witnesses regarding that meeting, it is submitted that the context and nature of the claim requires to be

5 considered. It is a constructive unfair dismissal claim and what matters is the reason for the Claimant's resignation; the meeting of 15 August is not given as a reason and matters which come to her attention after her resignation do not inform the reasons for her resignation.

10 b. Reference was made to the list of issues set out by the Tribunal in its Note of 16 June 2020 which did not include the question of whether there had been a meeting on 15 August. It is noted that the Claimant did not seek to amend the list of issues and so it was appropriate for the Respondent to prepare their statements on the basis of the issues set out in the Note.

15 c. The Tribunal had stated that statements should be concise.

20 d. Matters of credibility and reliability are for the judge to determine and the fact that a judge prefers the evidence of one witness over another does not mean that a witness is behaving unreasonably. The obligation on a witness is to give evidence as he or she sees it and that the evidence truly reflects their position.

e. The decision to defend the case was a decision of the Respondent's Board.

25 f. A proper reading of paragraphs 42 and 43 of the judgment it is clear that the Tribunal rejected Ms Cairn's evidence. This turned on the question of reliability and credibility based on the Tribunal's impression of the evidence. The same applies to paragraph 44. It is clear that the Tribunal had before it evidence which, if accepted, would have supported the assertions in the ET3.

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g. The submissions go on to address other matters regarding the findings on the credibility and reliability of witnesses and the fact that these do

not found a solid basis to conclude that the Respondent has acted unreasonably.

5 h. In relation to the failure to provide certain documents, it was noted that the Claimant had not sought these documents in advance of the hearing. Had either party considered, during the hearing, it was necessary to see the documents in question then a request could have been made. It is noted that the Claimant's solicitor made various last minute requests to include further evidence including a new witness statement.

10 i. As regards the handwritten notes taken by Lesley Craig, it is noted that this may have assisted the Tribunal in assessing the reliability of evidence but it was not reasonable to assume these notes were needed.

15 j. In relation to the criticisms of Ms Craig regarding the relevance and volume of the evidence in her witness statements. Issues of relevance are matters to be determined by the Tribunal and there was no such determination in relation to the passages quoted in the Claimant's application for expenses.

20 k. The content of the witness statements and whether they expressed an opinion is a matter for the Tribunal. The witnesses were entitled to say whether their actions were calculated or likely to breach trust and confidence.

25 13. The submissions go on to address the Respondent's ability to pay noting that it is a charity. It has a reserves policy that requires 3 months' worth of costs to hand and this only leaves £26000 unreserved funds. Future funding is not guaranteed and can be withdrawn.

Relevant Law

14. Rule 75 of the Employment Tribunal Rules of Procedure 2013 sets out the definition of a cost order:-

5 (1) *A costs order is an order that a party ('the paying party') make a payment to—*

(a) *another party ('the receiving party') in respect of the costs that the receiving party has incurred while legally represented or while*  
10 *represented by a lay representative;*

(b) *the receiving party in respect of a Tribunal fee paid by the receiving party; or*

(c) *another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's*  
15 *attendance as a witness at the Tribunal.*

(2) *A preparation time order is an order that a party ('the paying party') make a payment to another party ('the receiving party') in respect of the receiving party's preparation time while not legally represented.*  
20 *'Preparation time' means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.*

(3) *A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A*  
25 *Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.*

15. Rule 76 sets out the test to be applied by the Tribunal in considering whether  
30 to grant a costs application:-

(1) *A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*

5 (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;*

(b) *any claim or response had no reasonable prospect of success; [or*

10 (c) *a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.]*

15 (2) *A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.*

(3) *Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—*

20 (a) *the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and*

25 (b) *the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.*

30 (4) *A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.*



(5) *A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.*

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16. Rule 77 sets out the procedure for a costs order:-

*A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.*

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15 17. The principle in the Rules is that costs do not follow success as they do in other areas of civil litigation. Rather, the Tribunal has power to make awards of costs in the circumstances set out in the Rules. In this case, the relevant provision is Rule 76(1)(a) which gives the Tribunal a discretion to award costs if the conduct of a party meets the threshold test set out in the Rule.

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18. The Tribunal's discretion to award costs is not fettered by any requirement to link any unreasonable conduct to the costs incurred (*McPherson v BNP Paribas (London Branch)* [2004] ICR 1398 and *Salinas v Bear Stearns International Holdings Inc* [2005] ICR 1117, EAT). However, that is not to say that any issue of causation is to be ignored and the Tribunal must have regard to the "nature, gravity and effect" of any unreasonable conduct (*Barnsley Metropolitan Borough Council v Yerrakalva* [2012] IRLR 78).

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19. In *Arrowsmith v Nottingham Trent University* [2012] ICR 159 Rimer LJ endorsed the statement of Cox J in *HCA International Ltd v May-Bheemul* UKEAT/0477/10 that there is no general principle that lying, even in relation to a central allegation in any case, must inevitably result in an award of costs. Rather, *'it will always be necessary for the tribunal to examine the context, and*

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*to look at the nature, gravity and effect of the lie in determining the unreasonableness of the alleged conduct'* (as per Cox, J in HCA).

**Decision**

- 5 20. In assessing whether or not it would exercise its discretion to award expenses, the Tribunal bore in mind a number of factors of general application.
- 10 21. First, unlike other areas of civil litigation, an award of costs does not automatically follow success. Rather, the Tribunal has the discretion to make an award when the conditions in Rule 76 are met.
- 15 22. Second, this was a case where the burden of proof was on the Claimant to establish that there was a dismissal. Even if the Respondent had not sought to lead evidence to the contrary, the Tribunal would still have required to have come to a view, from the evidence of the Claimant, that there had been a fundamental breach of contract.
- 20 23. Third, the Tribunal agrees with the submission of the Respondent that a conclusion by the Tribunal on the credibility and reliability of witnesses does not automatically lead to there being unreasonable behaviour. For example, the evidence of a witness can be unreliable because the passage of time has impacted their recall of events but that is not unreasonable behaviour.
- 25 24. However, the Tribunal does not agree with the Respondent's suggestion that the obligation on a witness is to give evidence "*as he or she sees it*" and that the evidence should "*truly reflect his or her position*". The obligation on a witness, once they take the oath or affirm, is to tell the truth even if that has an adverse effect on their case or the case of the party who has called them.
- 30 25. It is a fact of human nature that witnesses will commonly seek to present evidence in a way which most benefits the case of the party calling them. This tendency to "spin" the evidence does not inherently amount to unreasonable

behaviour especially given that the other side can cross-examine or present evidence to counter any such “spin”.

5 26. The question for the Tribunal, in the context of an application for expenses, is whether any issues with the credibility or reliability of witnesses on which such an application is founded has the “*nature, gravity or effect*” of unreasonable behaviour (as per *HCA* above).

10 27. Turning now to the specific issues in this case, the Tribunal considers that, for the most part, its conclusions on the credibility and reliability of the Respondent’s witnesses do not have the necessary nature, gravity or effect to amount to unreasonable behaviour. The findings by the Tribunal in relation to the evidence from the Respondent’s witnesses falls into what it describes above as the tendency of witnesses to “spin” evidence and, whilst this did  
15 persuade the Tribunal to prefer the evidence of the Claimant’s witnesses where there was a dispute of fact, the Tribunal did not consider that the witnesses sought to fabricate matters.

20 28. There were two matters, however, with which the Tribunal had a particular concern.

25 29. The first relates to certain evidence of Ms Cairns which did go beyond just seeking to present evidence in the best possible light. There were a number of instances where the Tribunal found that she had been evasive to the extent that she undermined her own credibility. Examples of these can be found at paragraphs 39-41 of the Judgment and, in particular, her refusal to acknowledge receiving the Claimant’s resignation.

30 30. However, the Tribunal considers that the nature of this issue does not take the conduct of the case into unreasonable behaviour; Ms Cairns did not go as far as to fabricate matters; she simply refused to accept matters being put to her giving an explanation that did not stand up to scrutiny. Further, the effect of these matters, other than undermining her credibility, had little effect on the

Tribunal's decision. The Tribunal, for example, was able to make findings of fact and reach conclusions about the Claimant's resignation from the evidence of the Claimant and the documents.

5 31. The same applies to the issue of Ms Cairn's evidence being inconsistent with  
the pled case regarding her being unwilling to be alone with the Claimant  
because of her conduct. This inconsistency was relevant to the Tribunal's  
assessment of reliability and credibility but it did not have an effect on the  
central issues in the case. The fact that Ms Cairns may or may not have been  
10 willing to be alone with the Claimant did not affect any of the Tribunal's findings  
in relation to matters such as whether or not there had been a fundamental  
breach of contract.

15 32. The second matter, and the one on which the Claimant's application is  
focussed, relates to the lack of evidence-in-chief about the meeting on 15  
August 2019. The Tribunal's findings regarding this can be found at  
paragraphs 31-35 of the Judgment and there has never been a satisfactory  
explanation why none of the Respondent's witnesses spoke to this meeting in  
their evidence-in-chief.

20 33. In this regard, the submission by the Respondent that whether this meeting  
took place was not in the list of issues does not have much force. A list of  
issues is not a list of evidence and, given that the correspondence from Ms  
Cairns stated a link between the meeting and the appointment of a co-CEO,  
25 what happened at this meeting clearly had the potential to be relevant to  
matters such as whether the Respondent had reasonable and proper cause,  
not just for the appointment of a co-CEO but also for the contents of the later  
letter from their solicitor to the Claimant regarding issues about her conduct.

30 34. The Tribunal is troubled by this omission by the Respondent's witnesses and  
it is difficult to shake the impression that the witnesses sought to hide this  
meeting and its contents from the Tribunal for whatever reason.

35. Whilst it is not an outright fabrication, it could be said to be a lie by omission and so must be considered as a serious matter. However, the effect of this, other than on the credibility and reliability of the witnesses, is not significant when viewed in the context of the whole case. If that meeting had never come to light in evidence then it would have had little or no effect on the Tribunal's findings in fact regarding the reasons for the appointment of the co-CEO or the content of the solicitor's letter. It is those findings which are significant to the Tribunal's conclusion that there was a dismissal and they were made from evidence which did not rely on any witness speaking to the meeting on 15 August.
36. In relation to the lack of certain documents, the Tribunal takes account of the fact that it is for parties to decide what evidence to lead before the Tribunal and, if they do not do so, they bear the consequences of that if the Tribunal is not able to make findings of fact in their favour or, as in this case, take an adverse view of assertions made in evidence that rely on absent documents. However, this is not enough for the Tribunal to conclude that there was unreasonable behaviour.
37. In coming to a conclusion on this point, the Tribunal was not particularly persuaded by the Respondent's submission that the Claimant had not asked for the documents listed at paragraph 29; these were all documents relied on by the Respondent's witnesses to support assertions being made in their evidence and it is for the Respondent to produce the documents relied on by their witnesses rather than the Claimant suggesting documents they may wish to produce and on which she does not rely.
38. Similarly, the Tribunal did not find much force in the submission that it was not reasonable to assume that the handwritten note by Ms Craig would be required. This was a note of a meeting about which it was clear there was a dispute between the parties and it is difficult to see a situation where a contemporaneous note would not be relevant.

39. In saying all that, the Tribunal does not consider that the lack of these documents had any significant effect beyond that on credibility and reliability. For example, if the disciplinary policy had been produced and confirmed whether or not there was a power to suspend the Claimant then it would have had no impact on the Tribunal's conclusions given the finding that she was not actually suspended because this was never communicated to her. Similarly, if the alleged written complaints against the Claimant had been produced then this would not have had much impact on the Tribunal's view of whether that element of the solicitor's letter had reasonable and proper cause given that the same criticisms of the passage of time and lack of action on these allegations would still apply.

40. The Tribunal notes the criticisms of the statement of Ms Craig, in particular the fact that parts of it were not put to the Claimant in cross-examination. However, that does not mean that this evidence was irrelevant or that it was unreasonable behaviour for it to be included. A failure to put matters in cross-examination will, as in this case, mean that the Tribunal places little weight on such evidence but the Tribunal does not consider that this has the gravity and effect that amounts to unreasonable behaviour.

41. This was a case where various criticisms of the Respondent's witnesses were made and the Tribunal made findings about their credibility and reliability. However, for the reasons set out above, the Tribunal does not consider that those criticisms, either alone or taken together, have the nature, gravity and effect to take them over the threshold for unreasonable behaviour.

42. In these circumstances, the Claimant's application for expenses is refused.

Employment Judge: Peter O'Donnell  
Date of Judgment: 17 June 2021  
Entered in register: 21 June 2021  
and copied to parties