EMPLOYMENT TRIBUNALS

Claimant: Mr G Hughes

Respondent: The Governing Body of Llansantffraid Church in Wales Primary School

Heard at: Cardiff (in chambers) **On:** 11 February 2022

Before: Employment Judge C Sharp
Ms P Humphreys
Mr M Pearson

Representation
Claimant: Ms J Watson (lay representative)
Respondent: Mr C Howells (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

Under Rule 76, the Claimant is ordered to pay to the Respondent the sum of £14,448.75, being the costs reasonably and necessarily incurred due to his unreasonable behaviour in conducting the whistleblowing claims.

REASONS

1. Following the oral judgment dismissing the claims brought by the Claimant, the dismissal of the wasted costs application sought against Ms Watson, and the finding that the Claimant's continuation of the whistleblowing claims during the preparation of the witness statements served on his behalf constituted unreasonable behaviour, today's hearing was to complete dealing with a costs application.

2. The statements were directed to be served by 21 days before the first day of the hearing by Employment Judge V Ryan on 23 July 2020 (meaning 15 November 2021). Further directions were made due to lack of progress by the parties on 22 November 2021 by Employment Judge S Jenkins, who directed witness

statements be exchanged by 30 November 2021. This was not complied with and Employment Judge C Sharp on 30 November 2021 directed that the witness statements, amongst other documents, were sent to the Tribunal by 4pm 1 December 2021.On 3 December 2021, Employment Judge Sharp understood that statements still had not been exchanged and explained in detail to the parties the practical position; she ordered that the statements were exchanged by 1pm that day and specifically directed that the Claimant's statement was received by the Tribunal by the same time. Draft versions were sent at 1.01pm 3 December 2021. Final versions of the Claimant's statement and that of Ms Watson were served on the Tribunal on 9 December 2021. The whistleblowing claims were withdrawn on 10 December 2021, day 5 of the final hearing, the same day when the Tribunal was told Ms Hovey was no longer being called.

3. The Tribunal found that the continuation of the whistleblowing claims while preparing witness statements wholly silent on the topic constituted unreasonable behaviour under Rule 76 of the Employment Tribunal Rules of Procedure as amended.

4. Written reasons have been supplied upon the request of the Claimant. This judgment should be read in conjunction with the previous judgment, which sets out in detail the background and findings made in relation to this case. However, a key finding of the Tribunal on this issue is set out below:

"107. The Tribunal concluded that it was unreasonable to continue the whistleblowing claims at the stage when the witness statements were being drafted. The Claimant was not prepared to adduce evidence about these claims, despite his reasonable beliefs being fundamental to the claims. The fact that when he was given a chance to put this failure right at the outset of the hearing and did not do so demonstrates that he had no interest in these claims, and it is more likely than not this was why the statements were silent. The Claimant did not withdraw the whistleblowing claims at the point when he, or those advising him, decided not to adduce the necessary evidence. This does not meet the threshold of vexatious in the judgment of the Tribunal. There is no evidence that this failure was an attempt to abuse the process or due to an improper motive or an attempt to harass the Respondent. The nature, the gravity and the effect of the Claimant continuing whistleblowing claims that he appeared to have little or no interest in increased the costs that the Respondent has had to bear as it was preparing to deal with these claims.

108. It is also true that there is an impact on the Employment Tribunal as a full panel sat on the case, believing that whistleblowing was 66% of the claims. It is possible that if the Tribunal had been notified at the point that statements were being drafted that the whistleblowing claims had been withdrawn, it may have been able to shorten the listing in order to offer that time to other parties and would have released the non-legal members. Without the whistleblowing claims, this is not a 10-day case (as shown by how the claim was conducted). The continuing of the claim from the stage that the witness statements were being prepared is unreasonable in the judgment of the Tribunal and passes through the Rule 76 gateway."

5. The issues before the Tribunal today are two-fold:

    a. How should the Tribunal exercise its discretion in deciding whether to make a costs order against the Claimant?
    b. If it does decide to make a costs order, how much should the Claimant be directed to pay?

Submissions

6. The Tribunal had before it the submissions of both parties on paper, together with any evidence either wished to rely upon. This was in addition to the evidence from the previous hearing. Submissions were made sequentially to ensure that the parties had an opportunity to comment. Submissions were made sequentially to ensure that the parties had an opportunity to comment on each other's submissions. Notwithstanding the directions made, Ms Watson sent further submissions on 21 January 2022. This document was not referred to the Judge until 10 February 2022, meaning that there was little opportunity to ask the Respondent if it wished to further comment. As it was the Respondent's application, it is usual that it would have the final word. The Tribunal directed that the Respondent should be given until 10am 11 February 2022 to comment if so advised in order to ensure a fair hearing. It took advantage of that opportunity.

7. The Tribunal carefully considered all the submissions from the representatives of the parties, the supporting evidence and authorities submitted, as well as evidence from the main hearing where appropriate.

Legal principles

8. The Tribunal reminded itself of the relevant legal principles. Having found unreasonable behaviour during the conduct of the proceedings by the Claimant, it does not mean that the Tribunal must make a costs order against him. It has a discretion, and should consider all relevant factors. Costs orders in the Employment Tribunal are the exception, rather than the rule (***Yerrakalva -v- Barnsley Metropolitan Borough Council 2012*** ICR 420, CA). Rule 76 uses the word "*may*" when talking about circumstances which may lead to the making of such an order.

9. The purpose of costs orders is to compensate the receiving party; punishment of the paying party is not a relevant factor (***Lodwick -v- Southwark London Borough Council*** 2004 ICR 884 CA). This means consideration of the loss caused to the receiving party as a result of the identified basis of any costs order is required. The case of *Yerrakalva* demonstrates that costs should be limited to those "*reasonably and necessarily incurred*".

10. The ability of the paying party can be a relevant factor in deciding how to exercise the Tribunal's discretion (and also when considering how much should be paid). However, this is a factor to be balanced against the need to compensate the receiving party if they have been unreasonably put to expense (***Howman -v- Queen Elizabeth Hospital Kings Lynn*** EAT 0509/12). The Tribunal is not required to consider ability to pay, but it may choose to do so. If a Tribunal is asked

to consider the ability to pay, it has been said by the Employment Appeal Tribunal that it should tell the parties if it has done so, and if so, how it did so (***Benjamin -v- Interlacing Ribbon Ltd*** EAT 0363/05). In ***Jilley -v- Birmingham and Solihull Mental Health NHS Trust and others*** EAT 0584/06, the Employment Appeal Tribunal went further and said if a Tribunal was asked to take into account the ability to pay and refuses to do so, it should say why. If it does decide to take into account the ability to pay, it should set out its findings, identify the impact on its decision whether to award costs or on the amount of costs, and explain why.

11. Any assessment of the Claimant's ability to pay must be based on evidence before the Tribunal. It is not though restricted to the paying party's means at the date the costs order is determined. Provided that there is a "*realistic prospect that [he or she] might at some point in the future be able to afford to pay*", a costs order can be made against a person of limited ability to pay (***Vaughan -v- London Borough of Lewisham and others*** 2013 IRLR 713 EAT). Costs order have been made against those with significant debt. The case of ***Abaya -v- Leeds Teaching Hospital NHS Trust*** EAT 0258/16 confirmed that in principle a Tribunal can take into account the income of the paying party's spouse if it also considers the impact of the spouse's means on the paying party's ability to pay; tribunals are encouraged to exercise their discretion according to common sense and with "*a very real regard to the real world".*

12. Another potentially relevant factor can be whether the paying party was legally advised. While the Claimant was represented by an experienced lay representative, as noted in the Tribunal's earlier findings, he was at points getting the benefit of legal advice (see paragraph 106 of the previous Judgment).

13. The Tribunal considered when deciding if the Claimant's decision to continue the whistleblowing claims the case of ***McPherson -v- BNP Parabas*** [2004] EWCA Civ 569. It has already noted that it is not unreasonable to withdraw a claim and explained why it has found the Claimant's conduct was unreasonable. However, the reasons for the Claimant's unreasonable behaviour (or that of his representative) may be relevant when deciding how to exercise its discretion in the Tribunal's view.

<u>How should the Tribunal exercise its discretion?</u>

14. The Tribunal reminded itself of its earlier findings. In addition, it considered that it would now be necessary to identity the period of time, as best it could on the basis of the evidence before it, when the Claimant and his representative were preparing the witness statements to be served on his behalf. Contrary to the submissions of the Claimant, the Tribunal had not wrongly failed to do earlier. The Tribunal was alive at the time of its previous decision that the issue of <u>when</u> the statements were being prepared would be relevant to this stage and the next stage, but not to the decision about <u>whether</u> the Claimant was acting unreasonably; in other words, when deciding if the Claimant acted unreasonably the precise dates were not relevant, provided the unreasonable conduct was identified. It appreciated that the parties would need to be given an opportunity to make submissions on this point, and both have done so at the relevant stage. Further relevant evidence has been adduced as a result.

15. The Tribunal noted the directions made regarding witness statements set out in paragraph 2 above. Unusually due to secondary disputes between the parties, exchange of statements had not been straightforward. Correspondence between the parties is generally not shown to the Tribunal, being irrelevant to the issues it must determine. However, exhibit RCP2 of the witness statement of Mr Robert Clive Pinney dated 30 December 2021, Head of Legal Services of Powys County Council, submitted in accordance with the directions of this Tribunal to prepare for today's decision, is an email from the Claimant's lay representative to the solicitor conducting the litigation on behalf of the Respondent. Within that email, Ms Watson says *"Almost all our statements are in a good state of preparedness…"*

16. Mr Howells on behalf of the Respondent pointed out that the direction of the Tribunal at that time was to exchange witness statements by 15 November 2021. He submitted when the witness statements for the Claimant were substantially completed, the Claimant must have realised that he no longer intended to pursue the whistleblowing claims as he chose to say nothing at all about them. Mr Howells highlighted the Tribunal's finding that the witness statements for the Claimant were silent about these claims and that the Respondent's witnesses were not cross-examined about whistleblowing. He submitted that the Claimant's delay in withdrawing the whistleblowing claims was inexplicable and caused additional expense to the Respondent (as well as denying the opportunity to reduce the listing of the final hearing).

17. Mr Howells noted that the Claimant was in employment, had asserted that he was successful in his role and there was no evidence indicating that his position with the current employer was unstable. He observed that the Claimant's annual salary was stated to be £24,000 within the ET1 and there were no dependent children.

18. Ms Watson on behalf of the Claimant responded and sent to the Tribunal two authorities – ***National Oilwell Varco (UK) Ltd -v- Van de Ruit*** EAT 27/5/14 & *McPherson*. She highlighted that the Tribunal had not found that it was unreasonable for the Claimant to issue the whistleblowing claims and submitted that the whistleblowing claim covered the same evidential ground as the claim he originally wanted to bring of constructive unfair dismissal. Ms Watson said that it was relevant that the Respondent did not complain of the Claimant's conduct until after the hearing had concluded.

19. Ms Watson said that there was no delay in withdrawing the whistleblowing claims and referred to her previous submission about whether the Claimant's conduct had been unreasonable. The submissions went on to make a number of observations which could be seen as criticising the Tribunal's earlier decision that the Claimant's conduct had been unreasonable. They also made comments about the Claimant's representative's approach to whistleblowing and what was required of claimants when dealing with such matters. In essence, the argument was that it was not unreasonable for the Claimant or his representative to fail to deal with whistleblowing in the statements prepared on his behalf.

20. Ms Watson's further submissions were about the exercise of the Tribunal's discretion. She submitted that *National Oilwell* said that a balancing exercise was

necessary between taking a cold hard look at a claim at a late stage and deciding to withdraw it (not unreasonable) and raising a speculative claim and pursuing it to a late stage in hope of a settlement (unreasonable). Ms Watson argued that the Claimant's decision to withdraw his claim fell into the first category and was therefore not unreasonable. The Tribunal would observe at this point that Ms Watson's difficulty is that the Tribunal has already considered this principle and found the Claimant acted unreasonably.

21. Ms Watson submitted that the question was not whether the late withdrawal was unreasonable, but whether the whole conduct of proceedings was unreasonable and relied on McPherson in this regard. Again, the Tribunal would observe that it specifically considered this point previously in finding that the Claimant had acted unreasonably. Ms Watson said that the withdrawal was caused by the Tribunal alerting the Claimant about potential major difficulties, and withdrawals should be encouraged, not punished. Ms Watson's final point was that if the whistleblowing claims had continued, it was unlikely that a costs order would have been made; no evidence was cited in support of this contention.

22. Ms Watson went on to make submissions about the witness statements in a section marked for consideration at the third stage. The Tribunal considered that what she said was relevant at this second stage. Ms Watson's response on behalf of the Claimant said that witness statements were not complete due to issues with page numbers within the bundle to be cited in the statements. She submitted that the Respondent's statements were not completed until late November 2021 and the Claimant's were delayed due to bundle disputes.

23. Ms Watson noted the Respondent's reliance on her email of 25 October 2021, but pointed out it commented on the need for a paginated bundle to complete them. She said that the requirement for the inclusion of the Respondent's whistleblowing policy showed that the Claimant was seriously pursing these claims. Ms Watson reminded the Tribunal that the statements were still drafts until day 4. She said this was when it could be said that it was unreasonable to delay withdrawal, and the claims were withdrawn 24 hours later.

24. Ms Watson submitted that the Claimant earned £33,449 a year; nothing was said about the means of his spouse. Ms Watson said that the Claimant was a person of "*significantly restricted means*" and unable to pay any costs order. She asserted that he spent more than he earned, but no evidence was adduced.

25. Mr Howells in reply to the Claimant's response sent further submissions. He pointed out that much of the Claimant's submissions addressed the issue of reasonableness and attempted to challenge findings and determinations already made by the Tribunal. He submitted that the reasons why the Claimant chose to fail to deal with whistleblowing in the statements were irrelevant at this stage. Mr Howells pointed out that merely adding page numbers to witness statements would not materially alter the contents and there was no analysis of the work undertaken by Mr Pinney. The alleged discrepancies were explained – Mr Howells explained that the earlier claim of 21 hours was based on the time taken over the whole of the proceedings; once the Tribunal made its findings, the relevant time was reduced and hence the claim of Mr Pinney was reduced. He submitted that when

Mr Pinney was preparing his statement, he was acting in his capacity of a solicitor under the service level agreement with the Respondent.

26. Mr Howells drew to the Tribunal's attention the lack of evidence from the Claimant, or regarding the wider financial position of his family.

27. The Tribunal chose to put to one side the potential challenge to its previous decisions and to focus on issues that were relevant to its decision. It considered that much of the Claimant's submissions were attempting to overturn its previous finding of unreasonable behaviour, and the cases cited were about that decision, more than the exercise of discretion. That said, the explanations given as to why the statements were silent could be relevant to the exercise of the Tribunal's discretion and were considered, despite Mr Howells' submissions to the contrary.

28. The Tribunal concluded that the explanation as to why the statements were silent about the whistleblowing claims did not stand up to scrutiny. Ms Watson in her witness statement and in her observations orally to the Tribunal had held herself out as an experienced paid lay representative. Any analysis of the law surrounding whistleblowing claims makes it clear that it is the reasonable belief of the Claimant that is key (as explained in the Tribunal's earlier decision), not the belief or opinion of others. Also, the Respondent's witness who Ms Watson refused to cross-examine about the whistleblowing claims was the chair of the disciplinary panel who decided the Claimant should be dismissed. Both whistleblowing claims asserted this panel recommended dismissal of the Claimant or subjected him to detriment because of the whistleblowing – the witness needed to be challenged to sustain these claims and Ms Watson failed to do so when prompted. It is also relevant that the alleged whistleblowers did not go through each disclosure in their statements.

29. The Tribunal noted that after it had resolved the difficulties with the bundles, the final witness statements were served the next morning. As Mr Howells submitted, adding page numbers was not a lengthy process changing the material substance of the statements. The permission to serve final statements so late in the process gave the Claimant a final chance to include evidence about whistleblowing; an opportunity he failed to take despite the Tribunal's explanation as to why it mattered. This was consistent with the earlier failure; the Tribunal inferred that the reason why the evidence was not within the statements was not because it set out the law and asked questions at the outset, but because the Claimant had no evidence to give on these claims that his representative described as "*not brilliant*".

30. The Tribunal concluded that the period from when the Claimant was preparing the witness statements to be relied upon, according to the evidence before it, was from 25 October 2021 onwards. By this point, according to the email of his representative the statements were substantially prepared. On 25 October 2021, his representative must have assessed their contents to assert that they were "*in a good state of preparedness*". It is likely to be true as this was three weeks before the witness statements were due to be exchanged. The submissions of Ms Watson about the bundle issues does not detract from the fact that the Claimant had nothing substantive to say about his reasonable beliefs and those who made the

disclosures on his behalf had nothing relevant to say about each one and the Claimant's belief (as opposed to their opinion).

31. The Tribunal considered the Claimant's ability to pay. The Claimant, despite the opportunity given, did not adduce any evidence of his means. Through submissions, Ms Watson told the Tribunal about his income and alleged that he spent more than he earned. As Mr Howells notes, there is silence about the contribution of his spouse to the family finances. Strikingly, only £3200 in savings is admitted about the Claimant's assets; he was a long-serving headteacher, a well-paid role with a pension, married and had a family. It was unrealistic in the Tribunal's view, applying common sense, that he had no assets, other than £3200 savings or that he and his family spent more than they earned. Evidence and an explanation from the Claimant was required before the Tribunal would accept that. The Tribunal concluded that there was no evidence on which it could make findings that the Claimant could not afford to pay or there was no realistic prospect of him ever being able to pay when he was in employment.

32. The Tribunal determined that it would exercise its discretion in favour of making a costs order against the Claimant. The Claimant chose unreasonably to continue the whistleblowing claims when he was not prepared to give evidence in support of those claims from 25 October 2021 onwards. The explanation for that failure was unpersuasive and the Claimant had not provided evidence of his inability to pay. The Claimant's actions did increase the costs paid on behalf of the Respondent.

<u>Amount to be paid</u>

33. Mr Howells on behalf of the Respondent submitted that the amount payable should be calculated from 25 October 2021 onwards. He relied upon the statement of Mr Pinney served with his submissions and set out the details of the costs caused by the Claimant's unreasonable behaviour. One point was whether Mr Pinney as an officer of the Council (Grade A National Band 2) should be charged out at the rate for which he was paid, or at the rate recoverable under Solicitor Guideline Hourly Rates. Mr Howells cited ***Ladak -v- DRC Locums Ltd*** UKEAT/0488/13 LA in support of his contention that it was the guideline rate that should prevail, and in particular paragraph 18 of the judgment.

34. Mr Howells said the time cost caused by the Claimant's unreasonable behaviour attributed to Mr Pinney's work and the drafting of the submissions on costs by Mr Howells was £2448.75. Nothing was said about VAT, presumably due to the ***Raggett -v- John Lewis Plc*** [2012] IRLR 906 case (the receiving party should not claim VAT if able reclaim it). Mr Howells also sought £7,000 (excluding VAT) which he said were the inflated costs attributable to representation at the final hearing. Mr Howell's point was that if the hearing had been listed for five days to deal with unfair dismissal only, the costs of representation would have been £14,500 excluding VAT. The actual costs were £21,500 excluding VAT. The difference is asserted to be wholly the fault of the Claimant's unreasonable behaviour in delaying the withdrawal of the whistleblowing claims. Evidence from Mr Howell's clerk and chambers was provided. This demonstrated that the mathematics were incorrect in Mr Howells' original submissions. The correct cost of a five-day hearing

according to his clerk was £9,500 but the actual cost was £21,500; this meant £12,000 was the inflated additional cost due to the longer hearing listed (Mr Howells later corrected this error and confirmed £12,000 was sought).

35. Ms Watson's response on behalf of the Claimant said that at its highest, the Claimant's unreasonable conduct was for no more than 24 hours. As during those 24 hours, all that happened was the cross-examination of the Respondent's witnesses, no costs at all attached to that unreasonable behaviour. She did not accept that the start date should be 25 October 2021. That said, in case the Tribunal was not with her, Ms Watson said Mr Pinney's claim was nebulous and over-inflated, given the contents of his witness statement dealing with the merits of the claim. She noted the difference between what was originally claimed in December 2021 by Mr Pinney (21 hours) and now (6 hours). Ms Watson also said as the Claimant's statement was not complete when Mr Pinney undertook the work claimed, it was not payable.

36. Ms Watson also reviewed the claim in respect of Mr Howells' time, and noted discrepancies between the claim made in December 2021 and now, arguing that VAT alone did not explain the difference. She argued that the assertion that a five-day hearing should cost £14,500 was not supported by the clerk's email disclosed. Ms Watson asserted that a five-day listing for the unfair dismissal claim would have gone part-heard and increased costs. She blamed the number of potential witnesses to be called by the Respondent for the 10-day listing and submitted that the Respondent should have told the Tribunal on reflection the listing was too long (the Tribunal observes in passing that this overlooks the point that the Claimant was still bringing whistleblowing claims until after the hearing started). Ms Watson said that there were no wasted Tribunal days and if the Respondent was always going to make a costs application, then it was not caused by the Claimant's unreasonable behaviour as found by the Tribunal.

37. Ms Watson said that if the Tribunal was told of the reduced listing requirement, the time would not have been used elsewhere due to the need to give 14 days' notice. The Tribunal observes that this submission takes no account of writing days, hearings that do not require 14 days' notice and the ability to release non-legal members and not incur those costs but in any event how the Tribunal would have used the time saved is irrelevant. Ms Watson did not accept the hourly rate claims for Mr Pinney and said such a claim was in breach of the indemnity principle. She submitted that just because a person was an in-house solicitor, it does not mean the guideline rate can be claimed – it depends on other costs and whether they were incurred.

38. Mr Howells responded to the Claimant's submissions on this issue. He reminded the Tribunal that the earlier figures were prepared in a hurry, which was why further time was given. He accepted his mathematic error and sought the award of the increased revised figure. Mr Howells also said the submissions that no costs order would have been made if the whistleblowing claims had been continued were "*ridiculous*", as were the suggestion that ten days of hearing time was required to deal with the unfair dismissal claim but the same amount of time could also deal with the whistleblowing claims.

39. Ms Watson's "*concluding observations*" submitted that there were no wasted costs due to the Claimant's unreasonable behaviour. She asserted that as Powys County Council paid Mr Pinney and Mr Howells' fees, the Respondent suffered no loss as it just paid for cover within the service level agreement. Ms Watson set out in some detail her view of this matter. She submitted documents about the financing of schools and the service level agreement. Ms Watson said that the position was akin to an insurance policy – there was no loss to the policyholder/governing body. The Tribunal would observe that if Ms Watson was correct in this observation, insurance companies would not be able to claim legal fees for claims where they stand in the shoes of policyholders.

40. The Respondent was given an opportunity to respond, but the Tribunal was only able to offer less than 24 hours. Helpfully, Mr Howells was able to respond and pointed out that Ms Watson's concluding observations were misconceived and relied on the case of ***Mardner -v- Gardner & Others*** UKEAT/0483/13/DA, specifically paragraphs 34-36 inclusive.

41. The Tribunal adopts the reasoning of HHJ Eady (as she then was):

42. *"…I start with the question of the relevance of the Claimant's means. The rule does not identify this as a potentially relevant question, and it is easy to see why it should not be. If the relevant circumstances have been met, does the unreasonable litigant avoid the potential costs award simply because the party making the application is well-off or has substantial means? That would seem to me to be contrary to public policy and potentially to lead tribunals into making very difficult Judgments that would seem irrelevant to the exercise of discretion they are engaged in. If costs are compensatory and the relevant criteria are met, then why should it be relevant that the receiving party has not actually been placed into straitened circumstances because of having to fund the proceedings? There may be cases where the means of the receiving party will be relevant, but this will be highly fact-specific, and examples do not immediately come to mind.*

    35. Furthermore, here the potential receiving party was only not personally suffering from the costs of the Respondents' misconceived defence and unreasonable conduct of the litigation because he had prudently entered into an insurance policy that covered these costs. Whilst I am here concerned with a power to award costs derived from a statutory instrument rather than a common-law award of damages, I consider the public policy principle is essentially the same. It is that approved in Parry and serves to prevent Respondents avoiding the cost consequences of their unreasonable conduct because the Claimant prudently entered into a policy of insurance, which would otherwise allow them to appropriate the benefit for themselves."

43. Ms Watson's argument on this point is misconceived. The Respondent entered into an agreement with the Council, who agreed to supply legal advice on HR matters. The solicitors at the Council acted in that capacity; Counsel was instructed by them and as is standard practice, his clerk addressed invoices to the solicitors instructing him – Powys County Council. The fact that the Respondent did not have to pay those monies to the Council does not mean the costs were not incurred on its

behalf. The judgment of HHJ Eady explains this issue fully and the Tribunal will proceed on that basis.

44. It is worth remembering that Mr Pinney was called as a witness to not only to deal with the whistleblowing claims, but to deal with procedural matters connected to the unfair dismissal claim. He advised the Respondent at times and also was the adviser to Llanfechain school. His witness statement in the view of the Tribunal was a statement of fact about his actions and knowledge when acting as a solicitor. Mr Pinney's second statement explains that from 25 October 2021, when considering the whistleblowing claims to respond in his statement, which involved tracking through the evidence to refresh his memory, he took six hours of work for this task. The Tribunal after careful consideration of his initial witness statement was satisfied that Mr Pinney was not just a witness of fact, but undertook the review and gave evidence from the perspective of someone acting in the capacity of a solicitor. As Mr Pinney was in-house, the lines are blurry, but the overall context was that if Mr Pinney had not been acting as a solicitor, he would not have been in the position to make the statement and give evidence about the whistleblowing claims.

45. As the Tribunal had found Mr Pinney had been acting as a solicitor when preparing his statement, it considered whether the six hours claimed had been reasonably and necessarily incurred due to the Claimant's unreasonable behaviour. It found that it was – if the Claimant had not continued the whistleblowing claims from 25 October 2021, this work would not have been necessary. The same applied to the costs claims in preparing the costs application; Mr Pinney had been required to provide a statement to justify the claim and this was caused by the Claimant's unreasonable behaviour.

46. The Tribunal considered that the correct rate for an in-house solicitor in Powys with Mr Pinney's experience was £255 per hour, the lowest rate available. As *Ladak* made clear, there are other costs to consider. There are administration staff, office costs, costs of equipment; all of which an in-house solicitor needs as much as a private practice solicitor. The Tribunal also considered that the claim of six hours for the time dealing with the whistleblowing claims and 1.25 hours to prepare the costs witness statement was appropriate. It takes time to draft documents and check the underlying evidence. In the Tribunal's experience, the time claimed was not disproportionate or excessive. The claims were lengthy and not correctly stated within the Scott Schedule e.g. mistakes were made in citing dates. It takes longer to review evidence in such circumstances. The time taken to prepare the costs statement was modest and could not reasonably be undertaken in less time.

47. Turning to Mr Howells' costs, there was no dispute about the rate. He had been required to draft submissions on costs, and the Tribunal had no doubt that more than £600 in the end had been required as further submissions were necessary. Again, it found that the costs application was due to the Claimant's unreasonable behaviour and should be awarded to the Respondent.

48. The inflated hearing cost claim required more in-depth consideration. The first question is how long would the hearing have been listed for if the Claimant had withdrawn the whistleblowing claim on or around 25 October 2021? The Tribunal

when notified would have released the non-legal members and reduced the listing – 10 days is far too long for an unfair dismissal claim. 1 day is the standard listing. The Tribunal reminded itself that the time listed is an allocation – the parties are expected to conduct the case to fit the time allocated, not to expect endless time to conduct the case as they may wish.

49. The Tribunal was able to analyse the time actually spent on the unfair dismissal claim. Reading time would have been required. One day was spent on this but the bundle should have been smaller with only one claim remaining, though potentially not by much. Cases are not listed in the expectation that three days would be spent on preliminary issues and letting the parties finalise their statements. This time should be excluded. The same applied to the time spent after the main hearing on costs. The Tribunal spent three days hearing evidence and one day reading. Submissions and deliberations could have been concluded in one day, though with a judgment was likely to be reserved. In addition, the Tribunal timetabled the hearing and would have done so if it was just unfair dismissal. It would not have permitted the parties to spend three days on preliminary matters if the listing was only five days or allow the case to be part-heard. It made the point during the hearing that if the parties chose to spend time on preliminary matters, it would be deducted from the main hearing time. The Tribunal may have adopted a different approach in the days preceding the hearing knowing only five days would be available, as opposed to its actual approach with the ten-day listing e.g. deal the strike out application on the papers.

50. The Tribunal considers it more likely than not that the hearing of the unfair dismissal claim alone would have been listed for five days, and concluded within such a window as far as the costs of the parties would be concerned (in other words, the time spent by the Tribunal deliberating and preparing a reserved judgment would not incur Counsel's fees).

51. It was the inclusion of the whistleblowing claims that led to the longer listing. It led the Respondent to initially propose more witnesses would be needed, and represented 66% of the claims to be determined. The continuation of the whistleblowing claims from 25 October 2021 denied the Respondent an opportunity to review its case and confirm how many witnesses it truly required, though the Tribunal believes that the witnesses heard were likely to be called in any event. The Tribunal concluded that the Claimant's unreasonable behaviour did inflate the length of the hearing by five days. Relying on the evidence from Counsel's clerk, this is £12,000 of additional cost reasonably and necessarily incurred as a result. This sum should be awarded to the Respondent.

52. As a result of the summary assessment, the Claimant is ordered to pay the following costs (all figures exclude VAT):

    a. £1530 – cost of Mr Pinney dealing with whistleblowing in his statement;
    b. £318.75 – cost of Mr Pinney preparing his costs statement;
    c. £600 – Counsel's fee preparing cost submissions;
    d. £12,000 – Counsel's fee incurred due to inflated hearing.

    The total payable is £14,448.75.

Employment Judge C Sharp
Dated: 11 February 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 15 February 2022

FOR EMPLOYMENT TRIBUNALS Mr N Roche