

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4113302/2015 & S/4104660/2015

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Held in Glasgow on 31 October 2017 & 18 April 2018

Employment Judge: Frances Eccles

Members: Peter Kelman

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Paula McColl

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**Claimant
Represented by:**

**Ms L Bain -
Solicitor**

Glasgow City Council

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**Respondents
Represented by:**

**Ms A McFarlane -
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The **unanimous** Judgment of the Employment Tribunal is that the respondents' application for expenses shall be refused.

REASONS

BACKGROUND

30 1. The claimant complained of being subjected to detrimental treatment for making a protected disclosure; automatically unfair dismissal for making a protected disclosure and constructive unfair dismissal. The Hearing took place on 38 days on various dates during August to November 2016. The Tribunal heard from the claimant, his trade union representative and twenty-six witnesses for the respondents. Written and oral submissions were

submitted on behalf of the parties and the Tribunal met on three occasions to deliberate. In terms of its Judgment dated 31 May 2017, the Tribunal found that (i) the claimant was not subjected to a detriment by the respondents on the ground that he made a protected disclosure; (ii) the claimant was not dismissed by the respondents by reason that he made a protected disclosure and (iii) the claimant was not unfairly dismissed by the respondents.

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2. The respondents made an application for expenses on 23 June 2017. The application was opposed. The case was listed for a Hearing on 31 October 2017 to consider the application. Both parties provided the Tribunal with Productions. The Tribunal heard evidence from the claimant about his ability to pay any award of expenses made in favour of the respondents. At the close of the Hearing the respondents made an application for disclosure of (i) the claimant's tax returns for the financial years ending April 2015, April 2016 and April 2017 and (ii) the claimant's bank statements for the period from his resignation on 27 August 2015 to date. The application was not opposed. The application was granted and the claimant was ordered to disclose the above documents no later than 14 November 2017. Following receipt of documents from the claimant, the respondents sought a continued Hearing to challenge the claimant's earlier evidence on his ability to pay. The above application was not opposed.

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3. At a continued Hearing held on 18 April 2018 the claimant gave evidence about his financial position. The respondents lodged documents recovered from the claimant including bank statements (R15 to R38). The claimant lodged documents | [REDACTED] [REDACTED] and a letter confirming that his rent arrears at the end of March 2018 totalled £2,555.94. The claimant was represented by Ms L Bain, Solicitor. The respondents were represented by Ms A McFarlane, Solicitor.

SUBMISSIONS

RESPONDENTS' SUBMISSIONS

4. The respondents provided the Tribunal with written submissions and a list of authorities. What follows is a summary of the above.
5. In support of their application, the respondents referred to the contentions advanced in their closing submissions as to why the claimant made allegations of L [REDACTED]...J and what they considered to be the true explanation for the way in which the claim was pursued. The respondents accepted that the Tribunal did not make a finding that their contentions were correct and submitted that it can or should do so now. In this respect, Ms McFarlane referred to the respondents' closing submissions at paragraph 671 to 682 and the Tribunal's Notes on evidence at paragraphs 138, 141 & 164 which, in summary, contend that the claimant had not considered the possibility of and therefore expressed his concern [REDACTED] until he wrote to Celia Gray on 15 March 2015 identifying [REDACTED] [REDACTED]. The respondents submit that this is entirely consistent with their position that the claimant cynically made up the [REDACTED] and inconsistent with any argument that the claimant had any genuine belief that he had made those very serious "*and wholly baseless) disclosures*". Ms McFarlane submitted that the claimant's conduct was deliberate and vexatious and/or the claimant knew that his case was wholly unmeritorious and had no reasonable prospect of success. There was no realistic possibility that a Tribunal would conclude that he had made [REDACTED] before sending his letter to Celia Gray.
6. Ms McFarlane submitted that more generally the Tribunal rejected every single aspect of the claimant's case except his reason for leaving their employment which was not an issue requiring the resolution of conflicting evidence. Where there was a conflict, submitted Ms McFarlane, the Tribunal consistently preferred the evidence of the respondents to that of the

claimant. The Tribunal was referred to the numerous occasions when it preferred the respondents' evidence.

7. The respondents submit that the case advanced by the claimant of a "*grand conspiracy*" which involved a very large number of employees working in different departments and under different managers was rejected by the Tribunal. The claimant, submitted Ms McFarlane, not only alleged that he had been moved to U4 to allow UM4 to bully and harass him because of his whistleblowing but also that UM4 was deliberately selected to perform this task and that those involved were party to a cover up, all because of his whistleblowing. The claimant's allegations, submitted Ms McFarlane, extended to the respondents having not upheld his complaints to avoid reputational damage, all of which was rejected by the Tribunal. While it was not utterly inconceivable that such a thing might have happened, submitted Ms McFarlane, there was never any prospect the Tribunal would conclude that such a wide-ranging conspiracy occurred without cogent supporting evidence. The claimant offered nothing other than wild speculation. The claimant went as far, submitted Ms McFarlane, as to claim that documents relied upon by the respondents had been fabricated for the Hearing. This supports their position, submit the respondents, that the claimant ought to have known that the claims he was making had no substance and therefore no reasonable prospect of success.

8. The respondents referred to the text messages between the claimant and SR4 which led the Tribunal to conclude that the claimant's evidence on the matter lacked credibility and could not be relied upon. The respondents also identified passages in the Tribunal's Judgment where examples were given of the claimant's tendency to exaggerate what he thought and said at a particular point to bolster his case, to misinterpret the actions of others and his failure to accept the role of management. Ms McFarlane submitted that these were all examples of deliberate, vexatious and unreasonable conduct on the part of the claimant.

9. Ms McFarlane submitted that the length of the Hearing was due to the number of witnesses that the respondents had to call to refute the numerous allegations made by the claimant. The claimant failed, submitted Ms McFarlane, to show how the many issues raised by him related to his whistleblowing other than to allege that they took place. The claimant could not have believed that his claim was well-founded. By bringing and continuing his claim, submitted Ms McFarlane, he had acted vexatiously or otherwise unreasonably and he must have known that his claim had no reasonable prospect of success. He should be found liable for all the respondents' expenses.
10. The costs incurred by the respondents, excluding the cost of in house Solicitors, exceed £161,000. The respondents seek to recover these costs subject to taxation. In the alternative they submit that the claimant should be ordered to pay specified parts of their expenses, Ms McFarlane referred the Tribunal to specific aspects of the claim including the allegations relating to the risk assessment. The claimant's position had to be that UM2 and the respondents had fabricated the document at V.2.P35A submitted Ms McFarlane. The claimant was defending a position that he must have known was false given that he was the person responsible for modifying the risk assessment. The respondents spent time and were put to inconvenience, submitted Ms McFarlane, in meeting a wholly unfounded and wounding allegation. The claimant's position that the document was fabricated was not even put to UM2 in cross-examination and John McGoldrick's evidence went unchallenged. Reference was made to the Tribunal's Notes on Evidence that the claimant's evidence on this matter was unreliable and lacked credibility. The respondents estimate that the time in dealing with the allegations relating to risk assessment can be calculated at a cost of £2,706.
11. The respondents also referred to the allegation that the claimant did not receive any response from UM2 to his e-mail of 5 June 2014 (V2.125). Ms McFarlane submitted that the claimant's position that this was another example of his concerns being ignored not only relied on the respondents' witness UM2 having lied but was demolished by evidence of the claimant's

own text messages with SR4. The respondents estimate their expenses in relation to this matter to be in the region of £380.

12. Likewise, the respondents referred to costs totalling £631 incurred by calling Graham Johnstone as a witness to answer allegations concerning his conduct and the adjournment of the Hearing on 23 August 2016 to allow the claimant to insert references in his statement for which the respondents sought an award of expenses of £2,025.

13. The respondents challenged the claimant's evidence about his financial situation. As referred to above, they sought disclosure of his income since resignation in the form of tax returns and bank statements. Ms McFarlane questioned the claimant's credibility in relation to his financial position. She

[REDACTED]. The claimant, submitted Ms McFarlane, was unable to provide a satisfactory explanation for the money paid into his account. He had failed to disclose on a voluntary basis his receipt of compensation [REDACTED]

[REDACTED]. It is not the case, submitted Ms McFarlane, that the claimant's family are in financial hardship. The Tribunal should in any event, submit the respondents, take account of the claimant's potential to earn. He is ambitious and there is no reason why his financial circumstances should not continue to improve.

14. Ms McFarlane submitted that the claimant has lied about his income. He has also lied, submitted Ms McFarlane, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] This is further evidence, submitted Ms McFarlane, of unreasonable conduct on the part of the claimant.

15. The respondents referred to letters sent to the claimant on 26 May and 14 October 2016 in which they warned him that they would be seeking an

award of expenses. The respondents submit that the claimant has had plenty of time to withdraw his claim but has chosen not to do so. The Tribunal therefore, submitted Ms McFarlane, should order the claimant to pay the respondents' expenses as taxed; a sum not exceeding £20,000 or some or all of the parts identified above.

CLAIMANTS SUBMISSIONS

16. The claimant provided the Tribunal with written submissions and a list of authorities. What follows is a summary of the above.

17. In response to the application, the claimant submitted that costs in Tribunal procedure have always been the exception not the rule. The application for expenses should be refused. Ms Bain submitted that when considering whether the claimant had acted unreasonably, triggering the costs threshold, it should have regard to all the circumstances of the case. The claimant had not acted out of spite to harass the respondents. The Tribunal had not found that he lied. If he misunderstood what had been said then he corrected his evidence. Ms Bain also referred to the lack of any specific finding by the Tribunal that the claimant had attempted to "run an argument"

Ms Bain submitted that the claimant had maintained his position throughout and disputed that he had attempted to fabricate information to strengthen his case. The claimant had not acted unreasonably in pursuing his claim.

18. Ms Bain gave the claimant's disclosure of text messages that contradicted his earlier evidence as an example of him not seeking to mislead the Tribunal and his willingness to accept that his recollection of events was not always completely accurate. She referred to a number of the respondents' witnesses having to amend their statements during the course of the Hearing. The claimant submitted that he should not be punished for his failings.

19. Ms Bain referred the Tribunal to findings it made in relation to the respondents' treatment of the claimant's Grievance and in particular the time

taken to conclude the relevant investigations. She also referred to the Tribunal's finding that the delay had caused the claimant concern and that it was not unreasonable for him to regard it as being to his detriment. The fact the Tribunal did not find that the claimant was subjected to detrimental treatment does not mean, submitted Ms Bain, that the pursuit of his claim was unreasonable or vexatious. The claimant rejected the respondents' description of his claim as a "*grand conspiracy*". He had made a disclosure. It was his belief that it resulted in him being treated differently and to his detriment. The claimant maintained his position | [REDACTED]

[REDACTED] and did believe that the reason he was moved to UM4 was because of his whistleblowing. The claimant submitted that his belief was genuine and not a fabrication to strengthen his case. There were no grounds, submitted Ms Bain, to find that he had acted either vexatiously or otherwise unreasonably.

[REDACTED] The claimant was entitled, submitted Ms Bain, to reasonably believe that his claims were well founded. He was unable to identify anything other than his whistleblowing to explain how he claimed to have been treated by the respondents. The fact that his claim was unsuccessful, submitted Ms Bain, does not lead to the inevitable conclusion that the case was progressed unreasonably. The claimant refutes any suggestion, submitted Ms Bain, that he fabricated the position in his letter to Celia Gray in March 2015 | [REDACTED]

[REDACTED]

21. Ms Bain submitted that the claimant should not be punished for the length of the Hearing given the number of witnesses called by the respondents and their decision to instruct Counsel. Ms Bain submitted that the costs sought by the respondents are excessive and unreasonable. As regards the e-mail relied upon by the respondents concerning the risk assessment, the claimant accepted that he could not explain its existence and was unable to challenge Mr McGoldrick's evidence. He submitted that his recollection was honest and that he did not seek to mislead. He had produced the text messages with SR4 which showed that there had been a discussion with

UM2. The explanation for the delay in producing the text messages was their storage on a disused mobile telephone. This was not unreasonable submitted Ms Bain and was not grounds to order the claimant to pay part of the respondents' expenses. Likewise, submitted Ms Bain, the respondents' decision to call Graeme Johnstone to give evidence should not result in an order of expenses against the claimant. The adjournment of the Hearing on 23 August 2016 submitted Ms Bain was to assist the Tribunal by referencing statements and to allow the proceedings to continue more efficiently. Any delay this caused did not amount to unreasonable conduct by the claimant.

22. The claimant submitted that if the Tribunal finds that he acted unreasonably, which is denied, that it should take into account his ability to pay before making any award of expenses. The claimant submitted that an award of expenses would be inappropriate E [REDACTED] [REDACTED] H, and from which he derives no income. The claimant referred to a form EX140 provided to the Tribunal in which he has recorded his income from child tax credit of £684 and child benefit of £184 per month. The claimant confirmed that [REDACTED] [REDACTED], he has no savings and rents his home. [REDACTED] [REDACTED] followed by a period of ill health of around a year during which time he received Employment Support Allowance. The claimant submitted that in these circumstances he is unable to pay expenses in the region of £161,000 or any lesser sum.

23. In relation to evidence about his financial position, Ms Bain submitted that the claimant had been open and honest and the Tribunal should find that any award of expenses would leave him in a difficult situation. Given the passage of time, submitted Ms Bain, it was understandable that the claimant was unable to identify each and every source of income in his bank statements. In all the circumstances, submitted Ms Bain, the Tribunal should exercise its discretion and refuse to make an award of expenses against the claimant.

DISCUSSION & DELIBERATIONS

24. The Tribunal considered the terms of its Judgment dated 31 May 2017; the evidence of the claimant at the expenses Hearing; the parties' submissions and the authorities to which it was referred.
- 5 25. In terms of Rule 76 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("Rules of Procedure 2013"), the Tribunal may make an expenses 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
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- (b) Any claim or response had no reasonable prospect of success or
- (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."
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26. The respondents sought an order for the whole of their expenses on the grounds that the proceedings were brought and continued vexatiously or otherwise unreasonably and/or had no reasonable prospect of success. In the alternative they sought the expenses incurred in meeting various contentions advanced by the claimant that were made and/or continued vexatiously or were otherwise unreasonably.
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27. The amount of expenses that can be awarded by a Tribunal is regulated by Rule 78 of the Rules of Procedure 2013. The respondents sought an order in terms of Rule 78 (1) (b) of the Rules of Procedure 2013 that the claimant pay the whole or part of their expenses with the amount determined by way of taxation by the Auditor of Court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions)
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1993 or by an Employment Judge applying the same principles. In the alternative the respondents sought an order in terms of Rule 78 (1) (a) of the Rules of Procedure 2013 that the claimant pay a specified amount, not exceeding £20,000. The respondents provided the Tribunal with a note of their disbursements (P7) which totalled £161,067.77. This included the fees for Counsel and external Solicitors. In addition, the respondents provided the Tribunal with details of the time spent by their in-house Solicitors working on the case (P8 to 12) which totalled around 1800 hours.

28. The Tribunal began by considering whether the claimant acted vexatiously or otherwise unreasonably in bringing and continuing the proceedings. In the case of **ET Marler Ltd v Robertson 1974 ICR 72**, the NIRC stated; *"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. In such cases the tribunal may and doubtless usually will award costs against the employee"*.

29. It was not in dispute that the claimant had made a protected disclosure. It was also not in dispute that the claimant disclosed information to the respondents about child protection and management practices involving young people in their care (paragraph 171). The Tribunal was satisfied that the claimant reasonably believed that the disclosures he made to the respondents, which were wide ranging and concerned child protection, were in the public interest and tended to show that a relevant failure had occurred, was occurring or was likely to occur (paragraph 172). As regards what was reported when the claimant first contacted the respondents' Hotline, the Tribunal on balance preferred the evidence of John McCallum who took the claimant's call. |

? | The Tribunal did not however make a finding that the claimant had based his claims on lies |

32. As referred to above, it was not in dispute that the claimant had made a protected disclosure, the subject matter of which was child protection and management practices concerning child welfare. These are both very serious matters. The respondents are a local authority with statutory responsibilities for the protection of children in their care. The Tribunal did not doubt that the claimant had concerns about RW1's care of YP1. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] It

was not in dispute that the concerns raised by the claimant when he first contacted the respondents' Hotline were very serious. The Tribunal did not find that the claimant lied about his concerns.

33. The Tribunal found that the claimant had a tendency to exaggerate and that he struggled to accept that his version of events was incorrect. This was the case when faced with evidence to the contrary such as his amendments to the risk assessment (V2.36A) and text messages (V2.223) about meeting with EM1. The Tribunal did not however find that this was deliberate and when considered in the context of the whole case, was not persuaded that the claimant's conduct in response to the above evidence or overall was so serious as to justify an award against him for all or part of the respondents' expenses. Graeme Johnston was called to give evidence by the respondents. While the Tribunal accepted that this was to challenge the claimants' description of their exchanges, there was no suggestion by the claimant that this formed a significant part of his case. The Tribunal did not find that reference by the claimant to Graeme Johnston in his evidence amounted to unreasonable conduct on his part. Referencing documents in his statements was to assist the Tribunal and not unreasonable conduct.

34. In relation to whether the claimant was subjected to detrimental treatment by the respondents, the Tribunal also found that the claimant had a tendency to misinterpret the actions of others. He struggled to accept the role of management and misinterpreted observations and instructions as unwarranted criticism. Again however, the Tribunal did not find that this was

deliberate and in the context of conduct by management such as delays in responding to his concerns, not entirely unreasonable. Having considered the claimant's conduct in the context of the whole case, both overall and in respect of the specific examples identified by the respondents, the Tribunal was not persuaded that the claimant's conduct in bringing or continuing with his claim, either before or after receiving correspondence from the respondents containing cost warnings (R1 & 2), was so unreasonable as to justify making an award of expenses against him.

35. The respondents also submitted that the claimant knew that his case was wholly unmeritorious and had no reasonable prospect of success. The claim was concerned with whistleblowing. As referred to above, it was not in dispute that the claimant had made a protected disclosure. It was not in dispute that the claimant disclosed information to the respondents about child protection and management practices involving young people in their care (paragraph 171). The Tribunal was satisfied that the claimant reasonably believed that the disclosures he made to the respondents, which were wide ranging and concerned child protection, were in the public interest and tended to show that a relevant failure had occurred. As regards detrimental treatment, the respondents did not dispute that there was a delay in contacting the claimant after his call to the Hotline in which he disclosed concerns regarding child protection. The respondents did not dispute that there were delays when investigating the claimant's concerns. The respondents accepted that members of management could have taken more care when responding to the claimant's concerns. While the Tribunal recognised that the claimant referred to a significant number of the respondents' employees when presenting his case, it also took into account that the respondents considered it necessary to call twenty-eight witnesses to rebut the claimant's evidence. Having heard the above evidence the Tribunal concluded that the respondents' conduct towards the claimant was not because of his whistleblowing. In all the circumstances however, the Tribunal was not persuaded that it was possible to say that the claim had no reasonable prospect of success or alternatively was so lacking in merit that

the claimant should be required to pay all or part of the respondents' expenses.

5 36. In terms of Rule 84 of the Rules of Procedure 2013, when deciding whether to make an award of expenses and if so in what amount, the Tribunal may have regard to the paying party's ability to pay. In this case, the Tribunal had regard to the claimant's ability to pay. The respondents were granted an application for recovery of the claimant's tax returns and bank statements. It is the respondents' position that the claimant has failed to disclose his true financial position. Despite extensive questioning of the claimant and detailed examination of his bank statements, the respondents did not persuade the Tribunal that the claimant had any source of income or assets that had not been disclosed. The Tribunal found that the claimant's financial position is complicated. E [REDACTED]

15 [REDACTED]

[REDACTED] The Tribunal was not persuaded that either award has improved the claimant's personal financial circumstances. [REDACTED]

20 [REDACTED] Q The Tribunal is unable to predict with any certainty what if any income the claimant may be able to derive I [REDACTED]

[REDACTED] There is evidence of payments passing through his bank account for the business as opposed to income for his family.

25 37. The claimant relies upon "loose loans" from family and his partner's income which consists of [REDACTED], tax credits and family allowance.

[REDACTED] A [REDACTED] payment received [REDACTED] was spent on a family holiday and clothes for his children. He is in arrears of rent. In all the circumstances the Tribunal was not persuaded that the claimant has the ability to pay an award of expenses.

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CONCLUSION

38. In all the circumstances the Tribunal was not persuaded that it should exercise its discretion to make an award expenses against the claimant.

5 The application shall be refused.

10 **Employment Judge: F Eccles**
Date of Judgment: 5 June 2018
Entered in register: 5 June 2018
and copied to parties

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