EMPLOYMENT TRIBUNALS

Claimants: **(1) Mr C. Costagliore di Fiore**
(2) Ms. H. Qadri
Respondent: **Introhive UK Ltd**

London Central Remote Hearing -CVP

Employment Judge Goodman
Mr T. Cook
Ms D. Keyms **31 May, 1 June 2022**

Representation:
Claimants: Mr I Mitchell QC
Respondent: Ms J Coyne

JUDGMENT

1. The first claimant is ordered to pay the respondent £20,000 costs
2. The second claimant is ordered to pay the respondent £20,000 costs

REASONS

1. Following a judgement with reasons sent to the parties on 4 November 2021, dismissing the claimant's claims of detriment and dismissal because of protected disclosures, the respondent applied on 3 December 2021 for an order that the claimants pay their costs.

2. There was also an application that the claimants' former solicitors pay wasted costs, and so the application was listed for a two-day hearing. That application has been settled.

3. The claimants applied in January to postpone the costs hearing on the basis that they had appealed both the judgement on 4 November, and (later) the cost management orders made in the course of the October 2021 hearing, sent on 11 February 2022. (The case management record was served late

because it was only when reading the notice of appeal, copied to the employment tribunal on 11 February that it was appreciated the orders had not been sent with the judgment). The postponement was refused because it was not known if either appeal would proceed past the sift stage; if they did, and a costs order had been made, the parties would probably agree a stay or seek an order for one pending the outcome of the appeal. That was better than the substantial delay in relisting before the original panel if the costs application was postponed to a full hearing by the Employment Appeal Tribunal.

Relevant Law

4. In the employment tribunal, unlike the courts, costs do not follow the event, but in special circumstances and order can be made under the Employment Tribunal Rules of Procedure 2013. Rule 76 sets out the circumstances when a costs order may or shall be made:

> **76.**—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
>
> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
>
> (b) any claim or response had no reasonable prospect of success.

5. The employment tribunal may order the paying party to pay a specified amount, not exceeding £20,000, for the costs of the receiving party. As an alternative to this summary assessment, it may make an order for payment of the whole, or a specified part, of the costs of the receiving party, the amount to be determined following detailed assessment, whether in the County Court or by an employment Judge.

6. An employment tribunal may, In deciding whether to make a costs order, or how much, have regard to the paying party's ability to pay. Counsel for the claimant confirmed at the hearing that neither claimant wished ability to pay to be taken into account.

7. With regard to rule 76(1)(a), the claimants argued that "or otherwise unreasonably" meant that unreasonable must be construed as being of the same kind of conduct as vexatious and abusive. However, the respondent drew to our attention the decision in **Dyer v Secretary of State for Employment UKEAT183/83,** to the effect that "unreasonable" in this section has its ordinary meaning, and should not be taken to be the equivalent of "vexatious".

8. In **McPherson v BNP Paribas (London Branch) (no.1) (2004) ICR 1398**, it was held that the tribunal need not identify a direct causal link between the unreasonable conduct and the costs claimed. Discussing this case in **Barnsley Metropolitan Borough Council v Yerrakalva (2012) IRLR 78**, the Court of Appeal gave guidance that while there must be some causal link, "the vital point in exercising the discretion to order costs is to look at the whole picture of what happened and to ask whether there has been

unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it, and what effect it had".

9. When the tribunal is considering an order under rule 76(1)(b), that the claimant had no reasonable prospect of success, the guidance offered in **Radia v Jefferies International Ltd (2020) IRLR 431**, **Opalkova v Acquire Care Ltd EA – 2020 – 000345 –RN**, is that where there is an overlap between unreasonable bringing or conduct of the claim under rule 76 (1) (a) and no reasonable prospect of success under (b), the key issues for consideration by the tribunal are in either case likely to be the same: did the complaints in fact have no reasonable prospect of success, did the complainant in fact know or appreciate that, and finally, ought they, reasonably, to have known or appreciated that.

10. The wording of rule 76 makes it clear that the tribunal process is to be taken in two stages. First, it must decide whether the conduct was unreasonable (et cetera), second, if one of the grounds is made out, should the tribunal exercise its discretion to make an order to pay costs.

11. On the question of whether the tribunal might consider that there was little reasonable prospect of success, rather than no reasonable prospect of success, the respondent argued that rule 39, which provides that a tribunal can order a claimant to pay a deposit as a condition of continuing with the claim if it finds that there is "little reasonable prospect of success", goes on to say in rule 39(5):

> If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—
>
> (a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown;

12. From this it is argued that what was "little reasonable prospect of success" at the time the order was made, that is, without hearing the evidence, becomes unreasonable conduct if, after the evidence has been heard, it is shown that there was no prospect of success, unless the claimant can show why not. As far as we can discover from reading the case management orders, there was no application for a deposit order in this case. Nevertheless, the argument underscores the point that claimants themselves know whether their own evidence supports the claims they have brought, and later in proceedings, and in and in the documents, they know the basis of the defence to their claim and what the contemporary material shows. At a later stage they can see the respondent's witness statements.

13. The respondent relies on both parts of rule 76 (1).

14. It is helpful to summarise the course of the proceedings. Both claimants started work on 8 October 2019. They were dismissed on 16 and 20 January 2020, respectively, the first claimant for poor performance, and the second claimant for redundancy due to company restructuring. Their line manager was also dismissed. In all, 11 employees from the London operation were dismissed. These facts were known to the claimants at the time. As they had

not worked there long, there was no formal consultation or explanation of the decisions.

15. The claimants instructed solicitors, who wrote at length on 13 February 2020 what is stated to be a grievance/appeal against unfair dismissal and redundancy, but whose language indicates that it is a letter before action, as it refers to the "prospective claimants" at the start, and to CPR 44.3 at the conclusion. It mentions that two new staff members have been hired. It was asserted that the there had been whistleblowing on 16, 23 and 24 October and on 1 November 2019, and that there had been victimisation and unfair dismissal. The respondent was told: "our clients are entitled to issue proceedings to an employment tribunal and a less satisfactory resolution is reached promptly, our client will issue proceedings within the timeframes set out in statute". The respondents replied.

16. Following early conciliation, the claimants presented claims on 21 May 2020. The grounds of claim are long and detailed. They next served schedules of loss. The first claimant's is for £867,451. The second claimant's schedule totalled £1,000,712.

17. Between then and the filing of the response the parties attempted to negotiate by way of mediation, of which more below.

18. In October 2020 the response was filed. This was equally detailed, denying that disclosures have been made, or that there was reasonable belief in them, or that they were in the public interest, denying that the alleged detriments occurred as stated, and asserting the dismissals were part of the group of dismissals made as a result of a restructure of the London office, the claimants' line manager, Faisal Abbasi, having embarked on substantial expansion without approval from US head office.

19. At a Case Management hearing in December 2020, where the claimants were represented by counsel, they withdrew the claims of unfair dismissal, redundancy payment and victimisation, leaving the claims for public interest disclosure detriments and dismissal.

20. The response set out, in paragraphs 110 -118 an assertion that the claims were vexatious and had no reasonable prospects of success. It was argued that the grievance drafted by lawyers made no reference to public interest motivation for disclosures, which had only appeared in the grounds of claim document, intended to disguise that the claimants were motivated by self-interest, and that the claimants had sought to intimidate the respondent into settling proceedings in a mediation with the threat to notify the respondent's clients of their opinion about data protection compliance issues with the software the respondent sold. The schedules were said to be "extortionate", without legal grounds. The threats were said to be concealed by the shield of without prejudice correspondence, and respondents sought to rely on this as an exception to the rule on privilege in settlement correspondence.

21. The claimants applied to strike out this part of the grounds of response. Employment Judge Grewal decided at a hearing in March 2021 that the nature of the threats meant that this correspondence did fall within the exception for "unambiguous impropriety", and she did not grant the

application to strike out that part of the response. The detail of what the claimants had said is set out in her judgement. They had invited mediation, mentioning that they were preparing a detailed complaint to the ICO. They did not want a mediator with experience of employment law. They give a tight deadline to settle before this action is taken. When negotiations stalled they said that as well as complaining the ICO they would "inform the breaching companies about the complaint lodged". This would be lodged by 23 July. On 24 July the respondent called off negotiations, saying the demands and threats were "indicative of impropriety and malicious intent and an abuse of privilege", and that they would "not be intimidated into settling this dispute". The claimants' emails were sent by the first claimant, at a time when represented by their first solicitors. Immediately afterwards, on 12 August, their solicitors wrote to say that they had not been instructed after 15 July, while mediation was to be attempted, and were in discussion with their clients about the distinction between employment tribunal proceedings and the Information Commissioner.

22. This tribunal knows, as Employment Judge Grewal did not, that the claimants did not then make a report to the information Commissioner that the Introhive product harvested data in breach of GDPR. They did, in September 2020, insert a short paragraph asserting a breach of GDPR into a much longer letter dealing with an existing allegation that the respondent had failed to comply with data subject access requests. The ICO was given no details of the alleged breach, and eventually dismissed the complaint for lack of detail. It was therefore a token complaint only, saying nothing about why or how the product was in breach, despite the level of information set out in the pleading, and the discussions the first claimant had with Sam Collier and David Goyette during employment.

23. There was another case management hearing in April 2021 before Employment Judge Stout to decide a number of remaining applications for which there had been no time in March. This included substantial amendments to the pleaded claim, by considerably amplifying and repleading what had been said to the respondent by each claimant in each protected disclosure, and by adding as detriments of the warning by Mr Abbasi on 1 November 2019 that they had been troublemakers and Mr Walchli would use this as a reason to remove them from the company.

24. She also considered whether a settlement agreement between first claimant and his previous employer for a very large sum of money, (a whistleblowing claim), found by the respondent on his work computer, was admissible in evidence. Despite the expectation of privacy, to some extent nullified by downloading it on a work computer and in breach of his contract of employment, it was held relevant to the conduct of settlement discussions, and to the assertion that the claim was vexatious, but excluded it from consideration in the strike out hearing.

25. She heard an application by the respondent to strike out the claim as vexatious. She held that the claimant had some basis in law. It was not "obviously hopeless", but might have weaknesses, and noted that the wholesale repleading of what was supposedly said in the protected disclosures suggested at the very least a lack of clarity about the content of

the alleged disclosures. The threat of reference to the ICO tended to undermine the claimant's claim as to belief in the public interest of the protected disclosures, but that was not fatal. It was conceivable that someone could believe in the public interest in the matter while at the same time being willing to compromise public interest for private gain, but that was a matter for the full tribunal. She rejected an argument that the proceedings were themselves harassment, (an improper purpose of proceedings) although the conduct in July 2020 probably was. Proceedings themselves were not an abuse of process, although the threats made had been improper. The fact that there had been an earlier claim settled had provided "a considerable incentive to try again with this employer", but if a claim did have substance, it was not an abuse of process.

26. We know from reading the correspondence that there had been substantial disclosure of relevant emails and other material by the time of the March 2021 hearing. Other documents were added later, up to July 2021. In August 2021, an order having been made to finalise the bundle by July 2021, the claimants were carrying out a detailed review of the content, asking for additional material, and, importantly, seeking redactions to the respondent's solicitor's attendance note of their without prejudice discussions in July 2020. Employment Judge Burns made orders in respect of specific disclosure in August 2021. Employment Judge Baty, in the absence of Employment Judge Grewal, directed on 4 October that the redactions the claimants sought should not be permitted, as while not word for word the same as the claimant's own emails, they covered the same ground; to redact them would nullify the order that they were not privileged material. The substance was the same.

27. Witness statements were exchanged towards the end of September. The trial ran from 11 to 21 October 2021. The reserved judgement sent to the parties on 5 November 2021 held there had been protected disclosures, though not to the extent they had been pleaded, and in some cases not at all. The claims failed because the claimants did not establish detriment, nor that the dismissals were by reason of any disclosure.

28. We learned in the costs hearing that on 15 October 2021, at the end of the first week of the trial, the respondent had offered to pay the claimants' legal costs to date if they would abandon the claims and sign a settlement agreement. The offer was not accepted.

Submissions
Respondent

29. The respondent submitted that the claimants' conduct had been unreasonable within the meaning of section 76 (1)(a) by reason of the unambiguously improper conduct found by Employment Judge Grewal, specifically, by attempting to leverage a settlement by threat of the ICO, and informing all their clients of data breaches, explicitly mentioning the danger of this to many people's livelihoods at a time of global pandemic, coupled with a very tight deadline to make an offer if not, and by insisting the mediation was only to be "commercial" and not examine the law, and by relying on inflated and unrealistic schedules of loss, given that they had only been employed three months. As for the schedules, they were grossly

inflated: it was very unlikely they would be paid bonus given their performance to date, and their share options had not vested. They added that the attempt to redact from the respondent's solicitors attendance note for the hearing bundle the discussion about the threat to go to the ICO and inform customers led to further costs being incurred in the adjudication by Employment Judge Baty.

30. The respondent also relies on 76(1)(b), that the claimants never had a realistic prospect of success in the claims. On the disclosures, they rely on the findings in the judgement on the lack of detail in the claimant's evidence which simply replicated the amendments in the pleaded case, with a level of detail not set out in the grievance letter, and our finding that the substance had been overlaid by later discussions of what occurred. We found that the only reliable evidence of the claimant's concerns were his WhatsApp exchanges with Mr Abbasi and notes made by Sam Collier (which prompted an amendment from the first claimant as it alluded to matters not mentioned in his case so far). The tribunal had rejected the wider disclosure alleged, that there was processing of personal information inaccurately and without consent. While they wanted to be satisfied how it could be GDPR compliant, it was not said Introhive was deceiving clients, let alone, as the second claimant said, that she had spoken of "failing to protect customers interests, the risk of large fines for lack of compliance, deceiving customers by alerting licensing the product was not compliant, and processing sensitive personal data", and though the second claimant had mentioned personal data, it was not sensitive data. She was held to have imagined her second disclosure. The respondents argue therefore massive exaggeration of what was in fact said, and that it was no coincidence that this occurred after switching legal advisers(February 2021) and reformulating the phrasing, as much of what was later said had not appeared in the lengthy grievance drafted by the previous lawyers. The tribunal also must consider the improper without prejudice correspondence, and the tweeting during the final hearing that the tribunal was hearing that the respondent was misleading and deceiving customers and misusing personal data. The respondent argues that the claimants knew or should have known that the vast majority of their protected disclosures had no reasonable prospect of success, while respondent spent extensive resources identifying changing litigating them.

31. Next the respondent argues that even if they did disclose some information, they could have had no reasonable prospect of success in establishing that they suffered detriment as a result, let alone dismissal. They refer to the contemporary evidence about what the first claimant was told about the Microsoft deal, the slender and speculative evidence that Mr Walchli knew anything about either claimant saying anything about GDPR compliance, that neither claimant had asked for an investigation or raised a grievance which required an answer, so that could not be detriment, and that they had not been threatened by Mr Abbasi. On dismissal, the respondents argue that causation is entirely speculative, as Ben Roles who prepared the review of the London office, knew little or nothing about the disclosures, and there was substantial evidence in the disclosed documents of the reasons for the restructure and the data from which individuals were selected to go. They argue that the claimants knew or should have known that there was no evidence to support their claims; alternatively, if it was permissible at first pleading, it became unreasonable following disclosure. On the second

claimant, the verbal threat had not been accepted, there was no evidence Mr Walchli knew about protected disclosures, it was speculation that David Goyette might have mentioned them; reasons were given why he did not support pursuing the NHS at the time as a client. As for Ryan O'Sullivan as an alternative position, the second claimant knew from disclosure documents that his contract had been signed many months earlier, as she accepted in cross examination. There was no expectation of investigation and report back.

32. For both claimants, the respondent makes the point that the substantial value of the schedule of loss lies in the dismissal, rather than any detriment, so their belief in disclosures being the sole or principal reason for dismissal that is important.

33. The respondents further argue that the tribunal's findings about the claimant's evidence indicate that it claim was conducted unreasonably. The changes in the description of what they said on each disclosure, alleged to have been overlaid by later discussion, that the first claimant initially made no mention of legitimate business interest, and the concession that when talking to David Goyette they had *not* discussed the body of the email but meta data, but then adding: "that's really what we're talking about". With respect to the second claimant, when she amended her claim about being told she was a troublemaker, she did not amend the narrative section of the claim form to say more than that she had a meeting with Mr Abbasi that day, and her account of the warning on 27 November was that he had warned about raising issues with Mr Goyette, while first claimant says it was about raising issues with Mr Walchli. Overall, the revisions of the pleadings and the disputes on the list of issues, show the claimants' "reconstructed and shifting narrative" was unreasonable conduct, prejudicing the respondent's ability to make sense of it, or defend it a proportionate cost.

Claimant's Submission

34. The claimants argue that Employment Judge Stout decided whether the conduct of the claim was abusive, disruptive or unreasonable when she refused to strike it out on those grounds, and that to argue now that conduct was unreasonable is to take a second bite of the cherry. She also did not find it had no reasonable prospect of success. If it was said that at some later date the claimants ceased to have prospects of success, the respondents should identify when that was.

35. On protected disclosures, the claimants point out that they were successful in establishing they had made some disclosures, though not wholly as pleaded, and that penalising them for that is to go behind normal no-cost rule.

36. On causation issues, it is argued that whistleblowing claims turn on inferences, that they had been told by Mr Abbasi that they were troublemakers, and no paperwork was disclosed about the decisions leading to their detriments and dismissals. A finding that the Tribunal preferred the evidence of the respondent was not to say that the claimants had no reasonable prospect of success.

37. The written submissions were amplified orally. On the respondent's argument relating to rule 39(5) the claimants argue that rule 76(1)(b) wording excludes there being *little* reasonable prospect of success.

38. It was argued that the language used by the respondent in relation to the mediation was extravagant and exaggerated, and that it was being asserted that the entire conduct of the proceedings was motivated and sustained by the same threats as those made in July 2020. The argument about redrafting the disclosures showed the respondent "projecting an agenda" onto the claimants. That the claimant's memory was not reliable did not show that they lacked credibility. Their belief that they were dismissed because of disclosures may have been mistaken, but that was because they did not have the whole picture. The tribunal was urged to step back from the Machiavellian theory that the entire proceedings were launched and continued in order to extract a settlement for the dismissal, and to find that in view of the lack of information about the circumstances of dismissal, it was reasonable to bring proceedings, and it was not shown when it became unreasonable to continue. On the argument about unambiguous impropriety, there was no finding that had an impact on the tribunal's decision making, or the substance of the claim. When redacting documents, the claimants were not trying to improperly avoid the preliminary hearing decision: they had mistaken identical words for identical substance.

39. Replying, the respondent said that at Employment Judge Stout's hearing, no one took any point about causation of detriment or dismissal. Reasonable conduct was still open as a ground even if the proceedings were not struck out as vexatious. She had to decide on the basis of taking the claimant's claims at their highest, without hearing evidence. Further, from an early stage the claimants had the pipeline analysis and notes of Ben Roles who was driving the restructure, together with his emails about the sales prospects of each of the many candidates for dismissal. The claimants knew they had to link their disclosures to Mr Walchli in order to establish that dismissals by reason of protected disclosures, and this was always entirely speculative. On the unambiguous impropriety point, the test was not the impact on the ultimate decision but on whether the conduct was unreasonable and impacted on the proceedings and increased costs. The tribunal was entitled to look at conduct in the round.

40. It was clarified that the settlement of the wasted costs application did not involve payment of a sum of money, so no consideration of set-off arose, should the tribunal decide to make a costs order against the claimants.

Discussion and Conclusion

41. The tribunal did not agree with the respondent's contention that the entire proceedings were driven by the first claimant cynically claiming he had been dismissed for whistleblowing, taking the second claimant with him, in order to achieve substantial payoffs, because he had been very successful in a similar claim with his previous employer. That said, they understand why the respondents believed this, in the face of the wholly unjustifiable threat to denounce their product to their customers as the subject of a complaint to the Information Commissioner, and having found the settlement agreement downloaded to the hard drive of their computer. From the claimants' point of

view, most employees find dismissal or redundancy hard to accept, and the lack of consultation must have made it very hard for the claimants to understand at the time. Coupled with their concern about the Introhive product harvesting material from the second claimant's private emails to produce a report, which they had taken up with their line manager, and then discussed with technical support and David Goyette, they could well have put two and two together and made five. No doubt the prospect of achieving a settlement was an incentive, but they believed in themselves and did not understand why they had been dismissed. The lack of reference to public interest in the lawyer-drafted grievance letter, relied on by the respondent as grounds for showing no real belief in whistleblowing, could reflect the quality of the advice provided, given that the letter also claimed unfair dismissal, for which they lacked qualifying service, and victimisation, when there has never been any suggestion of anything that might be a breach of the Equality Act. That said, the claimants were never able to account for why they believed they had been dismissed for whistleblowing, when eight other people had been dismissed without whistleblowing. This should have put reasonably careful claimants on enquiry, and made them consider the plausibility of the reasons given by the employer for the decision to dismiss, whether in October 2020 when they saw the response, or by March 2021 when they had disclosure.

42. We do not believe the improper threat in July 2020, attempting to force a settlement without going in to the merits if the claims, can be overlooked. It was a blatant threat to damage the respondent's business. It is one thing to highlight the advantage of settling without a hearing so as to limit reputational damage, and quite another to threaten deliberate – and unnecessary- reports to their customers of a proposed complaint to the ICO about the product. The threat looks all the more cynical when the report to the ICO was not made until nearly 2 months later and then was so bare of detail as to be no report at all. This suggested to the tribunal either that the claimants had never grasped the detail of how the product might breach GDPR, or that they did not care that a non-compliant product was being marketed. In our finding they had had some belief in wrongdoing, based on the second claimant's email being harvested, and that this was in the public interest, but the later threat was idle. There was an immediate effect of this conduct in costs, as the respondents solicitors spent some time discussing and taking instructions on the proposals and mediation which never took place, plus a hearing on whether they could rely on that in the response, and a more insidious effect in that thereafter the respondents were not disposed to make any further attempt to settle the claims, the claimants having on this occasion clearly acted in bad faith.

43. We considered carefully whether the attempted redactions to the material on this in hearing bundle in September 2021 were innocent, the claimants not being represented save at preliminary hearings. We concluded the claimants were well able to understand that the tribunal order referred to documents reflecting the content of the improper emails and did not require identical wording, otherwise redaction would, as Judge Baty put it, drive a coach and horses through the order. It was suggested that the first claimant not having English as a first language may have contributed to his confusion, but we have heard him give evidence for some time and read documents he has composed and do not accept that; in any case, threat, and tactics to avoid

bringing matters before tribunal, are comprehensible in any language. This too was unreasonable conduct.

44. Next we considered the arguments that the claimants had no reasonable prospect of success, what they believed about the prospects of success, and their grounds for that belief, so as to decide whether their conduct was unreasonable, or became unreasonable. In our finding, at the outset, they knew that GDPR had been raised with their manager, and pursued further by the first claimant, and that they had been suddenly dismissed without much explanation. Employment Judge Stout alluded to the weakening of their claim of protected disclosures by the extensive amendments. The claims were not struck out then as vexatious.

45. There was no application that the claims were without prospects of success. That does not mean they did have reasonable prospects of success. In whistleblowing cases, tribunals making decisions at a preliminary hearing before evidence is heard must exercise great caution not to strike out cases unless, taking the pleaded case at its highest, it has no reasonable prospect of success. That it was not struck out on that occasion does not mean, when the evidence has been heard, that it must then have had a reasonable prospect of success. The claimants knew, or ought to have known, what their evidence was, and that the pleading mixed later explanation with what was said at the time, while their witness statements could say nothing of what they actually said. As we found, most of the claimant's account of the disclosures was bare of detail, merely reciting the amended Grounds of claim prepared 16 months later, after changing solicitors, and in truth they were exaggerating what had actually been said. We still found there had been some disclosure.

46. The claimants also knew, which was not argued before Employment Judge Stout, about the other half of the picture on detriment and dismissal. Of the Microsoft detriment, the first claimant had been told the explanation at the time and it was clear in the contemporary emails he saw on disclosure. In our finding there was no threat about Mr Walchli – or Mr Goyette- at most an instruction not to discuss GDPR concerns with clients. They knew they had not raised a grievance, or asked for it to be followed up and investigated. On the dismissal, where the value of the claim lay, they now knew of the restructure, they could read Ben Roles's advice and plans, and that this accounted for others being dismissed at the same time. It will have been clear to them that Mr Abassi did not leave because of protected disclosures.

47. This should have shaken their initial conviction and prompted a rethink. They continued to seek more documents. They could have been hoping something would turn up, or that they could build a case on the appointment of a substitute for Mr Abassi and Ryan O'Sullivan. We know from reading the first claimant's letter to the respondent about the content of the final bundle in August 2021 that they had been reviewing the documents very carefully. We can also see in the bundle that they wrote a carefully constructed letter to the respondents seeking to persuade them making offers to settle on 5 July 2021. They said: "at this stage in the proceedings, we believe it is the right time for the parties to stock-take. The next tranche

of litigation… will be very costly and time-consuming process to both parties". They invited offers of £736,000 and £698,795 respectively

48. Finally, witness statements were exchanged, we assume at he beginning of October as directed. They would then know fully what each witness would say, notably on reasons for dismissal.

49. Stepping back, we considered in the round whether the claimants should have appreciated at some point between April, when they had most relevant documents, and July 2022, when they had all other items requested, that the initial response that the dismissal must have been because they made trouble over GDPR was a false impression, and that in fact they had no reasonable prospect of success. We considered that they may have known that, but hoped something would turn up. Perhaps they had invested in the case so much that they believed their pleading. Objectively, they should have appreciated that they had no reasonable prospect of succeeding in establishing they had been dismissed because of any disclosures about GDPR. We consider there was a good case for holding that this point came quite soon, around the time of the April 2021 hearing, but bearing in mind the high requirement of unreasonableness in an employment tribunal, we give the benefit of the doubt by taking the later date, when they had done the stock-take, and knew there was no further offer. In our finding continuing the case after that point was unreasonable conduct, which must be taken in conjunction with their conduct in respect of the attempted redactions and the threats during the attempted mediation.

50. On the schedules of loss, they were ambitious, as the respondent recognised, but not dishonest (as where a claimant asserts an ongoing loss when he has in fact found alternative employment, or has in fact been unfit for work). Repleading can be a consequence of changing representatives, but in this case must be associated with their lack of real recall of what they had said, and is relevant to reasonable conduct.

51. There was unreasonable conduct in the threats and redaction under rule 76 (1)(a), and no reasonable prospect of success from August 2021. The threshold is crossed. Having regard to the length of the proposed hearing, and the value of the claims they were bringing, by continuing they put the respondents to considerable expense. We considered it appropriate to exercise discretion and order that they pay costs.

52. We next considered what to order. The schedule of costs overall is over £300,000. That might be reduced on a detailed assessment but is still considerable. Counsel's fees were nearly £40,000 for the brief fee and refreshers alone. We considered as alternatives ordering a detailed assessment of the costs from, say 15 August, or 9 October, or making a summary assessment. We concluded that having regard to finality, and saving the costs of the process of detailed assessment, that it was just to make an order that each claimant pay the respondent the sum of £20,000. The receiving party will thereby have a substantial contribution to the trial costs.

53. We considered the relative responsibility of the two claimants. It was evident that the first claimant took the lead, but the second claimant followed. Each is liable for the findings in respect of conduct of the proceedings.

Employment Judge Goodman
2nd June 20222

,

JUDGMENT AND REASONS SENT to the PARTIES ON

.

. 04/06/2022.

.....
FOR THE TRIBUNAL OFFICE