EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr G Seers	**v**	**Metroline Travel Limited**

Heard at: Watford by CVP **On**: 13 June 2022
Before: Employment Judge George sitting alone remotely

Appearances
For the Claimant: No attendance
For the Respondent: Mr D Brown, Counsel

COSTS JUDGMENT

1. The claimant is to pay to the respondent costs in the sum of £18,050.

REASONS

1. Following the reserved judgment in this case, which was sent to the parties on 15 April 2021, the respondent applied for a costs order against the claimant on 5 May 2021. I made case management orders by which I directed that the claimant should respond to the application and provide any information upon which he intended to rely relating to his income and expenditure by 25 October 2021. There was no response to that order. I caused the orders to be resent on 14 January 2022 and on 22 January a notice of hearing listing the case to be heard on 13 May 2022 was sent. Unfortunately, this was a date on which the tribunal was not sitting and the costs order application was postponed to today. A notice of the postponed hearing, which was originally listed to take place in person, was sent on 1 March 2022.

2. For the purposes of this costs hearing I had the benefit of a bundle of documents which ran to 69 pages. It contained the reserved judgment in this case as well as the case management orders that I made (page 52) and the costs order application itself. Page numbers in these reasons refer to that bundle unless otherwise stated.

3. Today's hearing was converted from an in person hearing to CVP on 9 June 2022. The original full merits hearing had taken place on 7 to 11 and 23 December 2020 by CVP. There had been some technical difficulties

because the claimant joined the hearing through a smart phone which had a limited battery life but overall he did not have any difficulties in joining the CVP which affected his ability to participate in it. The claimant did not attend the hearing by logging into the hearing at the appropriate time.

4. I caused the Tribunal clerk to telephone the claimant to find out whether he was intending to attend and any reasons for non-attendance. She reported that she did manage to speak to him but made more than one phone call in order to do so and the phone calls cut out on a couple of occasions. She reported that the claimant said that he had not received anything and had not known about today's hearing and then said that we should proceed in his absence because, as he put it, the Employment Judge had already made her mind up.

5. I have satisfied myself by looking at the file that the last communication that the Tribunal had from the claimant was his reconsideration application which was made on 28 April 2021. The email address that it came from is the same email address to which the communications resending the costs application and the case management orders on 14 January were sent. It is also the same address to which the two notices of hearing were sent. I am therefore satisfied that the claimant has had notice of the hearing. I know of no reason why he was unable to attend. He has also had notice on two occasions that he can, if he wishes, respond to the application and provide information about his ability to pay any costs order. I consider that reasonable attempts to obtain information about his means have been made but the claimant has apparently chosen not to engage with them.

6. Taking into account that the claimant had been given notice of the hearing and the purpose for it, the fact that he had not responded to the application and the response provided to the enquiries about his intentions during the hearing, I decided that it was in accordance with the overriding objective to proceed in his absence. The final hearing was more than 18 months ago, there had already been a delay in listing the hearing and then because it had to be postponed. It was not in accordance with the overriding objective for there to be further delay in hearing and determining the application. I heard Mr Brown's submissions and gave an oral judgment with reasons on the day. I decided that, because the claimant was absent, full reasons should be provided with the written record of the judgment. There has been an unfortunate delay in providing that written record and reasons for which I apologise.

7. I have decided not to take account of the claimant's ability to pay when deciding the costs application because he has chosen not to put that information forward. I do not have up to date information about the claimant's financial situation available. The claimant was given a reasonable opportunity to put this information forward had he wished me to take it into account. His lack of any response means that he has not, in fact, asked for his financial situation to be taken into account.

The law

8. The power to order that one party pay the legal costs of the other is found in rule 76 of the Employment Tribunal Rules of Procedure 2013 (hereafter referred to as the Rules of Procedure). So far as is relevant, rule 76 reads as follows:

> "(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –
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> (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
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> (c) a hearing has been postponed or adjourned on the application of a party made less than seven days before the date on which the relevant hearing begins.
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> (2) A tribunal may also make such an order where the party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of party."

9. By rule 78(1), the Tribunal may order the paying party to pay a specified amount not exceeding £20,000 or the whole or a specified part of the costs of the receiving party, to be determined by way of detailed assessment. In the present case the respondent applies for an order that the claimant pay their costs in a specified amount not exceeding £20,000.

10. There are therefore two stages to determining a costs application. First the Tribunal must consider whether the grounds for making a costs order in rule 76(1) exist and secondly, if they do, then the Tribunal must consider whether or not to make one. In deciding whether or not to make a costs order, and if so, in what amount, the Tribunal may have regard to the paying party's ability to pay: rule 84 Rules of Procedure. The Tribunal has an open discretion whether or not to take means into account but if it declines to do so, having been asked to consider the paying party's financial circumstances, it should explain its decision: Herry v Dudley MBC [2017] I.C.R. 610 EAT.

11. When deciding whether or not the litigant's conduct of the proceedings has been unreasonable, the words of the rule are the starting point, remembering that, in the employment tribunal, a costs award is the exception, rather than the rule. As Mummery LJ said in Barnsley MBC v Yerrakalva [2012] I.R.L.R. 78 CA at para.41,

> "The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case 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 effects it had. The main thrust of the passages cited above [from Mummery LJ's judgment in *McPherson v BNP Paribas* [2004] EWCA Civ 586] was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET had to determine whether or not

> there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances."

12. Further guidance about the correct approach to whether a litigant in person has acted vexatiously, abusively, disruptively or otherwise unreasonably in the conduct of the litigation is found in AQ plc v Holden [2012] IRLR 648 in a this passage extracted from paragraphs 32 & 33,

> "The threshold tests in rule 40(3) are the same whether a litigant is or is not professionally represented. The application of those tests may, however, must take into account whether a litigant is professionally represented. A tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals; and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent themselves. Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. As [counsel] submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. Tribunals must bear this in mind when assessing the threshold tests in [what is now rule 76(1)]. Further, even if the threshold tests for an order for costs are met, the tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice.
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> This is not to say that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity. But the tribunal was entitled to take into account that Mr Holden represented himself; we see no error in its doing so; and we do not accept that it misdirected itself in any way."

13. There is no general principle that a lie, untruth or false allegation constitutes unreasonable conduct in presenting the claim. It is necessary to examine the context and to look at the nature, gravity and effect of the lie in determining the unreasonableness of the alleged conduct: HCA International Ltd v May-Bheemal (EAT/0477/10) approved by the Court of Appeal in Arrowsmith v Nottingham Trent University [2012] ICR 159, CA

Decision on the application

14. The application is made under rule 76(1)(a) and (b) of the Rules of Procedure: the basis of the application is the argument that the claimant has acted vexatiously, abusively, disruptively or otherwise unreasonably in the

bringing of the proceedings or the way in which they have been conduct and the argument that the claim had no reasonable prospects of success.

15. The respondent argues (paragraph 7 of the costs application – page 58) that the claim of ordinary unfair dismissal had no reasonable prospect of success. This is put on two bases. First, that the poor state of the relationship between the claimant and many of the respondent's senior managers was beyond doubt and, secondly, that the fact that the respondent had followed a fair procedure at the appeal stage was not disputed, regardless of anything that might have occurred earlier on in the process (paragraph 8).

16. As a matter of fact, it is entirely true (paragraph 218 of the reserved judgement – page 47), that the process to be followed on appeal was explained to the claimant at the start of the appeal hearing and he agreed that it would be a fair process. There was no suggestion that the proposed procedure was not followed and, therefore, it is the case that there was no challenge to the fairness of procedure followed at the appeal stage. The first basis of the application is the argument that it ought to have been clear to the claimant that his relationship with the company had broken down, his on-going employment was untenable and that a fair procedure was followed in his case.

17. The claimant did appear at times to wish to use the proceedings as a vehicle to prove that he was right about the underlying historic matters rather than to challenge the fairness of the decision concerning him. He was, in my view, irrationally blind to the impact that his behaviour had on the company. I was taken by Mr Brown to paragraph 100 of the judgment (page 24) and DB's evidence about how the claimant's behaviour at the first Drum event had been perceived.

18. More to the point are my findings at paragraph 104 to which I refer but do not repeat. Although the claimant denied that his intention had been to attack SH, as I found, somebody whom the claimant trusted spoke to him after the first Drum event and explained how his behaviour was perceived. DB made clear that the claimant's views and the way that he acted upon and persisted in expressing those views very vocally and publicly caused difficulties to the senior management.

19. The respondent argues in reliance on those paragraphs in the reserved judgment that the claimant knew, or ought to have known, that his relationship with a number of senior members of the respondent's organisation or those in management over him had been damaged; Paragraph 73 of the judgment refers to JC and YD; paragraph 75 refers to ID, paragraph 215 refers to DH.

20. The respondent also relies of the matters that are set out in paragraph 11 of the costs application (page 60) as being unreasonable conduct of the proceedings. These concerned the ways in which the claimant pursued his unfair dismissal claim which are argued to have been unreasonable and irrational positions to take up (see sub-paras.a to e. on page 61). It is

argued that in pursuing an argument that there was a plot against him, in relying upon coincidences in relation to dates, the claimant refused to accept objectively reasonable explanations which meant that he did not have a proper evidential basis for his allegations.

21. Viewed from the vantage point that I have after hearing all of the evidence, I can see that the unfair dismissal claim had no reasonable prospect of success. Viewed objectively, the claimant ought to have realised that when he failed to change his behaviour despite the warnings of DB against the background of broken relations with so many managers that meant that the factual reason given for his dismissal was likely to be made out.

22. However, I do take into account that the respondent was relying upon the potentially fair reason of some other substantial reason, particularly the allegation that the relationship had broken down. They were not relying upon the faults of the claimant. It can be difficult for former employers to succeed in showing relationship breakdown was the reason for the dismissal and was some other substantial reason of a kind which justified the dismissal of the employee. These sorts of cases are very fact sensitive.

23. Notwithstanding that it is in my experience, unusual that there had been a breakdown in so many senior relationships as in the present case, in an organisation where the ability to keep the claimant being managed and reporting to the one manager whom he trusted could not be guaranteed.

24. I need to assess not only whether the unfair dismissal claim had no reasonable prospect of success but whether it was unreasonable conduct of the claimant to commence or pursue the unfair dismissal claim notwithstanding the length of his service and the depth of feeling that he had. I take full account of the dicta in AQ Plc v Holden to the effect that I should not expect the same degree of objectivity the part of a litigant in person when I am considering whether it was unreasonable conduct to proceed with the ordinary unfair dismissal case. I consider that to be particularly relevant when, as here, the claimant is firmly of the view that the reason for the breakdown in relations is entirely the actions of individual managers in a number of events over a period of years – as evidenced by his desire to investigate those events within these proceedings.

25. I am forced to the conclusion that it was unreasonable conduct to proceed with the unfair dismissal claim and to pursue the arguments that he did because, on any view, the claimant's position in relation to many matters underpinning his arguments were irrational. As I say in paragraph 73 of the judgment (page 18), he had persisted in seeing a pattern in unrelated events which was not supported by the evidence and not rational. He could not see the seriousness of the impact of his own conduct at the Drum event or why he caused a problem to management by persisting in regarding their concerns as an attack upon him. He wished to litigate the underlying historic matters and the employment in the course of the unfair dismissal claim and the employment tribunal proceedings are simply not an appropriate vehicle for that.

26. He persisted in making allegations against many individuals that they lacked honesty or integrity without proper grounds. In particular, his argument that ID was disingenuous in, quite properly, not revealing private information in an email (see paragraph 75 of the judgment) was unreasonable. I also consider that the claimant's approach to the respondent's obligations to investigate his mental health was inconsistent and irrational. I take note of what is said in paragraph 8 of the costs application but the claimant appeared both to argue that the respondent should have taken more account of his mental health and to argue that for the respondent to have referred him to Occupational Health for an assessment of whether there was any mental health element to the breakdown in relations with individual managers were simply a ruse to try to manufacture evidence against him. The two positions are opposed to each other and not reconcilable.

27. Next I consider the argument about whether the claims of protected disclosure dismissal had no reasonable prospect of success. These arguments are found in paragraph 12 and following of the costs application.

28. The protected disclosure relied on was articulated in Employment Judge Bedeau's order at page 28 of the full merits hearing bundle and in particular, where he recorded the issue at page 29, issue number 1. The question was phrased there in the following way, "Did the claimant make a qualifying disclosure in accordance with s.43B of the Employment Rights Act?. The claimant relies upon a verbal disclosure made by the claimant to the respondent's CEO, Sean O'Shea on 16 April 2019 relating to an inconsistency in the application of the respondent's policies to *different grades of employees* who were and would be subject to undue stress by the inconsistent application of the policies" (my emphasis).

29. The claimant withdrew the protected disclosure dismissal complaint after the end of evidence and before submissions. I have reminded myself of my notes of the exchange in cross examination about the nature of the alleged disclosure itself from my hearing notes. It is clear that the case was being run on the basis of that oral communication alone. The conversation with Sean O'Shea had concerned the disciplinary action against colleague G. His unsuccessful appeal had been conducted in March 2019. The claimant accepted that his position was that for management to have withheld information that they knew that colleague G had offered, or threated, to commit a dishonest act was an act of bullying of colleague G under the policies. The claimant accepted that his conversation with Sean O'Shea focussed on colleague G's case which he described as the straw that broke the camel's back. He said that that was the most recent case but when it was put to him that there was no discussion of any other case on 16 April, he accepted that that was the case.

30. Colleague G was not of a different grade to the others whose treatment the claimant contrasted. Taken at its height, it did not appear that the claimant's evidence supported the case in the list of issues. At this point in his evidence the wording of the list of issues was pointed out to him by counsel who said that he was relying on a verbal disclosure but there had been no reference to any case other than colleague G's. It was pointed out to him

that the other two individuals whose position was contracted were not of different grades and it was suggested to the claimant that he did not have a genuine or reasonable belief that the company was applying different treatment to people with different grades and said, "If you rely on that technicality then yes you are right. It would be better if it said different employees but if its that one word I have to accept that."

31. There was then a further discussion about the way in which the claimant put his whistleblowing case before he decided to withdraw it. He asked whether the law was that narrow that if he had communicated information about the different treatment of employees but not the different treatment of different grades of employees, that would not fall within the issues. I informed him, as is the case, that the list of issues binds the parties and unless the issues do not reflect what is in the claim form, it sets out the case that he has indicated he intends to prove and he is unable to argue a different case without a successful application to amend.

32. In seems to me from the above that the reason why the claimant withdrew the automatically unfair dismissal claim on grounds of protected disclosure was that he recognised that he had not made a disclosure that fitted within the description of issue 1 in Judge Bedeau's order.

33. It appears that the claimant suggested in the exchange at the end of day 5 that this was different to the way that it had been articulated in the interim relief application and, given that the claimant is not present at the costs hearing, I went back and re-read the judgment of Employment Judge Tuck KC that was given on 2 September 2019. This is at the full merits hearing bundle (page A4 and following). She recorded the nature of the alleged protected disclosure on page A4 and A5 and, although she refers to an earlier email, this description makes clear that the claimant's case at the interim relief hearing was that he made a public interest disclosure in the meeting on 16 April 2019 (see paragraph 3 of her judgment). She describes his concerns as having been that "disciplinary procedures were being applied inconsistently in relation to more junior and less junior employees". She then recorded the oral disclosure of information in paragraph 6 of her judgment as being

> "oral disclosures of information which in his reasonable belief were in the public interest and tended to show that the health and safety of individuals was being or was likely to be endangered. The claimant orally today told me that in the 16 April meeting he voiced his concerns that there was an inconsistency as to how the disciplinary policies were being applied to different grades of employees, and he gave specific information in relation to the disciplinary process which had been undertaken for [colleague G]".

34. This is, in essence, the case which was pursued at the final hearing until it was withdrawn as I have explained.

35. It seems to me that the claimant's views that colleague G was unfairly treated were irrationally affected by his dislike of JC based upon the historic matters between them.

36. I do notice that in para.22 of her judgment on the interim relief application, Judge Tuck KC held that she considered there to be a pretty good chance on the basis of the information before her that the claimant would show that he had made a protected disclosure. It seems probable that she was unaware that colleague G was in fact being compared with others who were of the same grade as himself. The reason that I mention that is that it seems to me that, in his absence, I should consider whether it could be said that the claimant took comfort from Judge Tuck KC's comments in deciding to proceed.

37. I remind myself that what the claimant brought to Sean O'Shea's attention was actually his complaint that management had not prevented colleague G from carrying out a dishonest act when G's subordinate had told them that colleague G had offered to do so. It was irrational in those circumstances for the claimant to think that colleague G was being treated unfavourably - even taking into account the claimant's position as a law person without professional employment law experience. Failing to prevent a dishonest act is not the same as entrapment and, as the respondent points out, the informant may have been making a malicious report. Further, given his oral evidence, the claimant knew that he had only talked about colleague G's case and that he was the same grade as those whom he was compared with. For that reason, I do not think that the comments of Judge Tuck KC affect my conclusion that it was unreasonable conduct to proceed with the protected disclosure dismissal claim in all of these circumstances.

38. Having decided that both the claims for protected disclosure dismissal and ordinary unfair dismissal had no reasonable prospects of success and also that it was unreasonable conduct of the case to present and to continue with the specific allegations made within those claims, I go on to consider whether a costs order should be made in these circumstances.

39. I do not lightly order a litigant in person to pay significant amount of costs. The claimant has family commitments as I heard in the December 2020 hearing. I did not conclude that the claimant was insincere in his beliefs but in some respects he was irrational in a way that should have been obvious to the reasonable litigant in person in the conclusions that he reached. His inability to set aside the past unreasonably clouded his judgment about whether he should proceed with the case.

40. I take some account of the without prejudice save as to costs offer that was made two months before the final hearing to settle the case for £5,000.

41. I accept that the way in which the claimant argued the case expanded its scope and therefore the expense of the litigation disproportionately. The number of witnesses that it was necessary to call and the size of the bundle were governed by the need to respond to the claimant's allegations and the way that he argued the case which necessitated analysis of historic matters that he persisted in referring to in detail.

42. On the other hand, the claimant was a long-standing employee who was good at his job and accepted to be so. He was dismissed after such long

and good service. It could be argued that he should not bear the whole cost of defending his claim. However, the respondent has not claimed the whole cost, they have limited their claim to counsel's fees. The claimant made a number of interlocutory applications for unless orders for discovery going back into the historic matters when the proper focus of the enquiry should have been upon whether the relationship had broken down and whether reasonable alternatives had been considered. In essence, the claimant's mistaken view of the necessary scope of enquiry caused additional expense. It could be argued that one of the refreshers was potentially because the original listing in September 2020 was postponed for no available judge. However, I looked at the details of the fee note and see that there was no second brief fee claimed for counsel's attendance at the adjourned hearing in December 2020.

43. The claim includes a claim for the cost of drafting this costs application but none of the costs of those instructing Mr Brown have been included. At the eleventh hour the respondent has added to their claim the sum of £1,000 for Mr Brown's attendance today. The claimant had no notice that that was a sum that he would additionally have to face and I decline to order it.

44. On balance, it is just and equitable to award the full sum of £18,050 to be paid by the claimant to the respondent, being the sum that was applied for by the means of this costs application. It is not always possible when deciding how much to award under a costs order to be exact and scientific about which sums should be awarded but viewed in the round, this seemed to me to be an appropriate sum to award to compensate the respondent for the expense to which they have been put by reason of the claimant's unreasonable conduct in this case.

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Employment Judge George

Date: …10 October 2022……..

Sent to the parties on:

10 October 2022

For the Tribunal Office