Case Numbers: 2206284/2018

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Mr S Deegan		**Globalgrange Ltd & others**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 7 September 2022; 8 September 2022 (in chambers)**

BEFORE: Employment Judge A M Snelson **MEMBERS: Mrs K Church Ms C James**

On hearing Mrs L Banerjee, counsel, on behalf of the Claimant and Mr A McPhail, counsel, on behalf of the Respondents,

The Tribunal unanimously determines and orders that the Claimant shall pay to the Respondents one-half of their costs of the proceedings, such costs (if not agreed) to be determined by detailed assessment in the County Court in accordance with the Civil Procedure Rules 1998.

REASONS

Introduction

1 On 17 January this year, following a hearing from 15-26 November 2021 and two days' private deliberations, we issued a reserved judgment with reasons ('the liability judgment') dismissing the entire case brought by the Claimant, which consisted of numerous claims for detrimental treatment on 'whistle-blowing' grounds and complaints of unfair[1] and wrongful dismissal.

2 No appeal has been brought against our decision.

[1] He pursued claims for 'automatically' unfair dismissal on 'whistle-blowing' grounds and, in the alternative, 'ordinary' unfair dismissal.

3 The liability judgment should be read with these reasons. In part it contains findings unequivocally rejecting as false the Claimant's central assertions that (a) he had not committed the serious misconduct for which he was dismissed (solicitation of Ms Arora), (b) Ms Arora had accepted a bribe to manufacture that allegation against him, and (c) Ms Chaudhary's allegation that he had attempted to solicit her was also untrue. To be clear, the Tribunal found that so much of his case as concerned his own (alleged) misconduct and the disciplinary proceedings resulting therefrom was based on pure invention. Moreover, he did not stop at false denials; on the contrary, he opted for all-out attack, accusing Ms Arora of the disgraceful act of making up a most serious accusation against him and doing so for reward.

4 Other parts of the Claimant's case failed on much more marginal grounds. Many of the 'whistle-blowing' detriment claims were unsuccessful because the disclosures relied on were found, for one reason or another, not to amount to qualifying disclosures. In some instances, an actionable detriment was not shown. And, having fallen on the merits, all but one was also defeated on time grounds. The unfair dismissal claim failed because, although the disciplinary process was certainly not perfect, it fell within the permissible 'range of reasonable responses'.

5 On 7 February this year the Respondents presented an application for costs on the following bases:

(a) that the Claimant has acted vexatiously, abusively, disruptively, or otherwise unreasonably in the bringing and conducting of the proceedings; and/or
(b) that the claims had had no reasonable prospect of success.

6 The Claimant resisted the application on numerous of grounds.

7 The matter came before us on 7 September this year in the form of a remote, 'hybrid' hearing. The parties and their legal teams attended by CVP. The three members of the Tribunal sat together at Victory House.

8 We heard evidence from the Claimant, confined to the issue of his means. Copious paperwork was prepared and made available to us. Both counsel presented helpful skeleton arguments. The evidence and argument occupied the entire day which had been allowed and accordingly we adjourned with a view to meeting in chambers as soon as practicable. In the event, by a stroke of good fortune, we were all free to sit on the afternoon of 8 September to complete our deliberations.

9 By an email timed at 17:25 on 8 September (after we had completed our deliberations) the Claimant's representative applied for permission to rely on additional evidence, namely an email exchange of 26 July 2019 between the Claimant and his then mortgage advisor about a mortgage application then under contemplation. On 12 September the Respondents' representative submitted his comments in reply. He pointed out, rightly, that the Claimant had breached directions given in advance of the costs hearing. (That default had made it necessary for the Tribunal to hold two case management hearings just to prepare

the costs hearing.) But he added that he would not object to the new evidence being admitted subject to his observations upon it. The nub of those remarks was that the new material (a) reinforced the submission already made that the Claimant had suppressed other evidence and given disclosure selectively to serve his own interests and (b) was in any event consistent with the Respondents' case that he had ample capital resources to meet any costs order that the Tribunal might make.

10 The judge decided not to permit the new evidence to be deployed, for the following reasons. First, no excuse for the late disclosure was given. Second, the reasonable and accommodating line taken by the Respondents' representative was not determinative. The question raised by the application was for the discretionary assessment of the Tribunal. Moreover, it is likely that the representative would have seen the matter otherwise if he had known that the Tribunal had reached its decision before the application was received. Third, the Claimant had already conducted himself unreasonably by breaching straightforward, consensual case management directions for the preparation of the costs hearing, thereby needlessly inflating costs on both sides and increasing the burden on the Tribunal's administrative resources. Fourth, the Claimant had had the benefit of skilled and experienced representation throughout. Fifth, the Claimant, a conspicuously educated and intelligent individual, must be credited with the ability to understand directions and advice given to him and measure the likely consequences of disregarding them. Sixth, the new evidence did not appear to call into question the finding made by the Tribunal on 8 September that the Claimant has the capital means to pay the costs order upon which it had decided (as to which, see further below). Seventh, it would not be just, proportionate or in keeping with the overriding objective to permit yet more of the Tribunal's severely stretched resources to be applied to this excessive and wasteful litigation.

The Legal Framework

11 The power to make costs awards is contained in rule 76 of the Employment Tribunals Rules of Procedure 2013 ('the 2013 Rules'), the material parts of which are the following:

> **(1) A Tribunal may make a costs order … , and shall consider whether to do so, where it considers that –**
>
> **(a) a party … 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**

As the authorities explain, the rule poses two questions: first, whether the Tribunal has power to make an order; second, if so, whether the discretion should be exercised.

12 Once an Employment Tribunal is satisfied that the relevant tests under rule 76 have been satisfied, the Tribunal's discretion to make a costs award against a party is wide and unfettered: see *Barnsley Metropolitan Borough Council v Yerrakalva* [2012] IRLR 78 CA. Moreover, as Mummery LJ, giving the only substantial judgment in the Court of Appeal, observed in that case, in making its

assessment the Tribunal must review the relevant facts and events in a broad, common sense way when determining whether to make a costs order and, if so, in what amount. At para 41 he said this:

> **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 my judgment in *McPherson*[2] 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 ...**

13 The 2013 Rules, r84 provides, relevantly, as follows:

> **In deciding whether to make a costs … order, and if so in what amount, the Tribunal may have regard to the paying party's … ability to pay.**

14 We are mindful of the fact that orders for costs in this jurisdiction are, and always have been, exceptional. Employment Tribunals exist to provide informal, accessible justice for all in employment disputes. We recognise that, if Tribunals resorted to making costs orders with undue liberality, the effect might well be to put aggrieved persons, particularly those of modest means, in fear of invoking the important statutory protections which the law affords them. It would be contrary to the purpose of the Tribunals if parties to disputes declined to exercise their right to bring (or contest) proceedings as a result of unfair economic pressure. On the other hand, we also bear in mind that, when our rules of procedure were revised in 2001, the Tribunal was for the first time not merely permitted, but obliged, to consider making a costs order where any of the prescribed conditions (vexatiousness, abusiveness etc) was fulfilled, and a new and wider criterion of unreasonableness was added. It seems to us that these innovations, preserved in subsequent revisions of the rules, indicate a policy on the part of the legislature to encourage Tribunals to exercise their costs powers where unmeritorious cases are pursued or where the manner in which litigation is conducted is improper or unreasonable.

Submissions

15 We prefer to leave counsel's written submissions to speak for themselves. A bare summary will suffice here.

16 Mr McPhail sought an order for payment of the entirety of the Respondents' costs, to be assessed if not agreed. The nub of his argument was that the Claimant had rested his case on deceit and pursued claims which he knew, or ought to have known, had no prospect of success.

17 Ms Banerjee submitted that the fact that the Claimant had failed in his claims did not warrant ordering costs against him. The costs application was, she

[2] *McPherson v BNP Paribas (London Branch)* [2004] IRLR 558 CA

suggested, vindictive when seen in the context of the "messy" conflict between the three Matharu brothers and its harmful fallout for many in the rival camps. In short, the threshold was not reached and no order should be made. Alternatively, having regard in particular to the Claimant's means, any award should be in a modest, four-figure sum.

Analysis and Conclusions

18 We are satisfied that the just outcome lies roughly midway between the polar extremes for which each side has contended. We can give our reasons quite shortly.

19 In our judgment, the Claimant's conduct in constructing a substantial part of his case on what he knew to be straightforward lies was plainly unreasonable. And that conduct was greatly aggravated by the contemptible accusation which he made against Ms Arora and persisted with to the bitter end. In this, his behaviour must be located at the high end of the unreasonableness scale. In the circumstances, we are in no doubt that the Tribunal has jurisdiction under the 2013 Rules, r76(1)(a) to make a costs order.

20 The Claimant's argument under r76(1)(b) is more difficult. Sadly, we doubt whether it can be said as a matter of principle that a claim based on false allegations of fact has no reasonable prospect of success. Was the Claimant's denial of the disciplinary charges against him bound to fail in this particular case given the documentary evidence? It was certainly very weak, but we are not sure that it had *no* reasonable prospect of success. In any event, the r76(1)(b) angle really adds nothing of substance to our analysis. We will therefore leave it to one side.

21 Should we exercise our discretion under r76(1)(a)? We are clear that a costs order should be made. The unreasonable conduct we have referred to amounted to an abuse of the Tribunal's process. The Respondents have quite wrongly been put to massive cost in fighting issues which should never have been litigated. It is right that they should receive a measure of compensation for the expense to which they have been put.

22 What is the appropriate order? Approaching the matter in a rough and ready way in accordance with *Yerrakalva*, we consider that, in principle and ignoring for the time being the question of ability to pay, the Claimant should be ordered to pay half of the Respondent's costs. This is because the time, work and expense of preparing and pursuing the dispute seems to us to divide roughly equally between (a) claims, allegations and arguments resting on pure invention and (b) other areas of controversy in which, although he failed, his case was not so weak or flawed that litigating them crossed the threshold under the 2013 Rules, r76(1). In relation to the category (b) elements of the case, we hold that the power to award costs is not engaged and that, if we are wrong about that, this would in any event not be a proper case in which to exercise the power. In arriving at this view, we have borne in mind the dangers of assessing reasonableness with the benefit of hindsight. As Sir Hugh Griffiths memorably remarked in *ET Marler Ltd v Robertson* [1974] ICR 72 EAT:

> **Ordinary experience of life frequently teaches us that that which is plain for all to see once the dust of battle has subsided was far from clear to the contestants when they took up arms.**

23 Should we reappraise our 'in principle' view to take account of the Claimant's ability to pay? Our costs jurisdiction involves a broad discretion. In the ordinary case, we think that a just exercise of the discretion will generally require consideration to be given to the means of the paying party. That said, we see much force in Mr McPhail's submission that the Claimant's disclosure and oral evidence on means were unsatisfactory to the extent that we should not place reliance upon them. But even so, does it follow that we should simply disregard ability to pay? On the facts of this case, we think not. This is because, despite the poor quality of the evidence, undisputed facts provide us with all the information that we need for the purposes of deciding whether the Claimant's means warrant reduction of our starting-point award.

24 What does the undisputed material establish? It shows unequivocally that the Claimant and his wife jointly hold equity worth some hundreds of thousands of pounds in real property. It also shows that the Claimant's wife holds, or recently held, a position commanding an annual salary of £100,000, that the Claimant has recently declared, it must be presumed sincerely, in formal documentation that he has an annual earning capacity of £145,000, and that the family home was recently bought with a mortgage of £760,000 and has a value of at least £1m.

25 Having taken account of the Claimant's means, we are confirmed in our view that the justice of the case is met by ordering him to pay half of the Respondents' costs. We are not at all persuaded that our award should be discounted under r84. The question is whether the paying party is *able* to pay any particular costs award, not whether he would find it comfortable to be ordered to do so. Although we do not have a final costs schedule from the Respondents, we understand that, up to the end of the costs proceedings, the overall total will be well below £200,000. The Claimant's starting-point (five-figure) liability, which, we find, he has ample means to discharge, will no doubt be reduced to some extent by detailed assessment in the County Court, if the parties cannot at last co-operate to agree matters and save yet more costs.

Outcome

26 For the reasons we have given, the Respondents' application succeeds to the extent stated in our Judgment above.

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EMPLOYMENT JUDGE – Snelson
04/10/2022

Judgment entered in the Register and copies sent to the parties on: 04/10/2022

For Office of the Tribunals