EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr J Akinsaya	**v**	(1) Forensic Risk Alliance Limited (2) Mr J Boscolo Cappon (3) Mr M Trahar

Heard at: London Central (By CVP) **On**: 21 November 2022

Before: Employment Judge B Beyzade
Ms P Breslin, Tribunal Member
Ms J Marshall, Tribunal Member

Representation

For the Claimant: No appearance and not represented
For the Respondents: Mr S Maini-Thompson, Counsel

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the tribunal is that:

1. The claimant being neither present nor represented at a point in excess of 115 minutes after the time set for Final Hearing and there being no answer on the telephone number furnished by the claimant for the purposes of the Tribunal communicating with him or to the Tribunal's email

correspondences and the claimant not having otherwise communicated with the Tribunal; on the respondents' application made at the Bar, the Tribunal dismisses the claim in terms of *Rules of Procedure 47 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013*.

2. The Tribunal is satisfied that the claimant has conducted his claim vexatiously and otherwise unreasonably, that his claim has no reasonable prospect of success, that he has failed to comply with the Tribunal's orders, and that it is appropriate to exercise the Tribunal's discretion to award costs in all the circumstances. Subject to any evidence and submissions that the claimant may send to the Tribunal in accordance with paragraph 3 of this Judgment **by 4pm on 09 December 2022**, the Tribunal provisionally assesses the respondents' costs in the amount of £20,000 (inclusive of VAT and disbursements).

3. The claimant is ordered to send any evidence and submissions in relation to the respondents' costs application including but not limited to his ability to pay and any submissions in relation to the amount of costs sought by the respondents to the Tribunal copied to the respondents' representative, **by not later than 4pm on 09 December 2022**, in the absence of which the Tribunal's assessment of the amount of the respondents' costs to be paid by the claimant at paragraph 2 of this Judgment shall be final.

4. In the event that the claimant provides any evidence and submissions in accordance with paragraph 3 of this Judgment, unless the Tribunal directs otherwise, the Tribunal shall consider the written evidence and submissions provided and make any final decision in respect of the respondents' application at a hearing to be held in chambers (in private) and shall communicate its Judgment and reasons to the parties in writing.

Reasons

1. The claimant lodged a claim for automatically unfair dismissal for the reason or principal reason of having made a protected disclosure under section 103A of the Employment Rights Act 1996 and whistle blowing detriment on 24 November 2021, which the respondents defended.

2. By Order dated 07 March 2022 the Preliminary Hearing Listing on 07 March 2022 was postponed following representations made by the claimant and it was re-listed on 21 March 2022.

3. Parties were advised the date of the Final Hearing during the Preliminary Hearing on 21 March 2022 and the dates of the Final Hearing were recorded in the Case Management Orders dated 21 March 2022 requiring parties to attend a Final Hearing on 21 November 2022 for a duration of 5 days by way of a hybrid hearing at 10.00am.

4. The Final Hearing was subsequently converted to a Cloud Video Platform ("CVP") hearing. Parties were sent log-in details for the CVP Hearing on 18 November 2022.

5. The claimant did not contact the Tribunal in advance of the hearing to advise that he will not be attending or to advise any reasons for non-attendance.

6. On the morning of 21 November 2022 at 09.40am and 10.15am the Clerk to the Tribunal telephoned the claimant and sent an email to him at 09.57am.

7. The case called for Final Hearing at London Central Employment Tribunal by CVP on 21 November 2022 for a duration of 5 days at 10.00am.

8. The respondents' representative, Mr S Maini-Thompson, Counsel was in attendance on behalf of the respondents.

9. There was no appearance for or on behalf of the claimant.

10. The case file records that Notice of the date and time set down for Hearing was sent to the claimant on 21 March 2022 at the correspondence address provided by him to the Employment Tribunal for the purposes of receiving such communications. No return of the Notice of Hearing issued to the claimant has been received by the Tribunal.

11. On the sitting Judge's directions the Clerk checked and confirmed that no contact had been made by the claimant with the Tribunal in connection with the Final Hearing.

12. On the sitting Judge's direction the Clerk attempted to communicate with the claimant on the telephone number provided by the Claimant for that purpose, at approximately 10.30am and 10.35am. A voicemail message was left advising the claimant if he did not log-in to the Hearing by 11.00am the Final Hearing will proceed in his absence. The claimant was also sent an email by the Clerk at 10.41am requiring the claimant to log-in and attend the hearing by 11.00am and in default of which the Final Hearing will proceed in his absence. The email advised the claimant that if he did not attend, the claim may be dismissed under Rule 47 of the Employment Tribunal Rules.

13. The Tribunal sat at 11.05am and then adjourned and sat again at 11.50am to afford the claimant the opportunity to attend (though late) or to communicate with the Tribunal regarding his non-attendance. The Tribunal reconvened at 11.55am.

14. At 12 noon and on the assumption that by his unexplained non-attendance the claimant sought to communicate an intention not to insist upon his claim, and on the respondents' application the Tribunal dismissed the claim in terms of *Rule of Procedure 47 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013* ("the ET Rules").

Respondent's costs application

15. Following our dismissal of the claimant's claim pursuant to Rule 47 of the ET Rules the respondents' representative made an application for costs and he provided a Skeleton Argument and Statement of Costs to the Tribunal, to which the Tribunal had regard. The respondents' representative sought the respondents' costs on the grounds of the claimant's vexatious conduct, that his claim has no reasonable prospect of success and the claimant's failure to comply with the Tribunal's orders. We will deal with each of these grounds in turn.

Vexatious conduct

16. The Tribunal may make a costs order and it is required to consider to do so where we are satisfied that a party has acted vexatiously (Rule 76(1)(a) of the ET Rules).

17. We considered the case law cited in the respondents' skeleton argument including the following:

17.1 Conduct is vexatious "*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*" (*ET Marler Ltd v Robertson [1974] ICR 72*).

17.2 In *Berry v Recruitment Revolution and others UKEAT/0190/10*, the then President of the EAT (Underhill P, as he then was) stated that "*ulterior motives" behind the bringing of employment claims may render them vexatious: "We wish ... to emphasise that the purpose of the [Employment Equality (Age) Regulations 2006] is not to provide a source of income for persons who complain of arguably discriminatory*

advertisements for job vacancies which they have in fact no wish or intention to fill, and that those who try to exploit the Regulations for financial gain in such circumstances are liable, as happened to the claimant in the Investigo case, to find themselves facing a liability for costs." (Paragraph 29)

17.3 In *Kenbata v UNISON UKEAT/0625/13*, the claimant brought a race discrimination claim against UNISON on the basis of a query raised by his union branch secretary during a redundancy exercise. He claimed that, in raising the issue of his race in connection with his position in a proposed restructuring exercise, the union had treated him less favourably than a white member of the union. The claim was struck out by the Tribunal as having no reasonable prospect of success. A costs order was made in the sum of £1,800 plus VAT, on the basis that the claim was vexatious. The Tribunal found that Mr Kenbata had an improper motive in bringing the claim, namely to improve his negotiating position against his employer. The EAT upheld the Tribunal's decision to strike out the claim, and agreed that the claim was vexatious. However, it partially allowed an appeal on costs, as the Tribunal had not given proper reasons for failing to take into account Mr Kenbata's means. The costs award was reduced to £500. If a Tribunal decides not to take into account the paying party's ability to pay, it should say why.

18. The respondents' representative says that the claimant's decision to bring his claim was vexatious because it was made "*out of spite to harass his employers or for some other improper motive*" (*ET Marler Ltd v Robertson*). He also submits that the claimant's dishonesty is plainly evidenced by his personal journal entries which he voluntarily disclosed to the respondents, and he cites the following parts of the claimant's journal:

a. "I really don't care about the whistleblowing stuff, I just want to see what they'll do and what they'll say in my probation meeting" (page 227 of the Bundle);

b. "So I sent the whistleblower email LOL […] what can they do from here? They can't force me out, they can't [???], they can't cut my pay… if they ask me to come into the office, I'll just say I have covid" (page 239 of the Bundle);
c. "These people do not deserve any mercy – they treated me like I was shit on their shoe and I don't care how they feel. I will not fold or cower to their intimidation. Justice needs to be served and I need to be compensated." (page 246 of the Bundle);
d. "My career (something) are actually really good! I really can't wait to sing and dance, I really dislike playing the (something) corporate game. If I can get £250k out of these devious retards, I can fund my career. I stood my ground against the bullies and tyrants." (page 246 of the Bundle).

19. He submits that the claimant's journal entries demonstrate his "*ulterior motive*" of seeking to make a financial gain from a settlement offer that could be made by the respondents.

20. We accept that the journal entries to which we have been referred by the respondents' representative evidence that the claimant's conduct in bringing his claim was vexatious. The claimant refers in his journal entries to obtaining substantial sums of money to fund his career and he clearly indicates that he did not seriously wish to pursue any whistleblowing allegations. This was shown by the claimant's other behaviours such as his unwillingness to attend meetings with the respondents to discuss his allegations.

Exercising our discretion

21. We then considered whether it was appropriate to exercise our discretion to award costs on grounds of the claimant's vexatious conduct. We considered that there was a lack of mitigation evidence on the claimant's part to explain his conduct. His conduct is persistent given the number of journal entries in which he expressed similar sentiments and the extent and manner in which his claim was pursued.

There were other journal entries in which the claimant displayed similar conduct, but we were not directed to consider those.

22. Considering all the circumstances and available correspondences and any evidence before us, we conclude that it is appropriate for us to exercise our discretion to award costs.

No reasonable prospect of success

23. The Tribunal may make a costs order and is required to consider doing so where we are satisfied that a party's claim has no reasonable prospect of success (Rule 76(1)(b) of the ET Rules).

24. In *Opalkova v Acquire Care Ltd EA-2020-000345-RN*, the EAT provided guidance that where a Tribunal is deciding whether there has been unreasonable conduct, the position has to be considered separately in respect of each claim contained within the ET1 form or, as appropriate, the response to each of those claims. It also clarified that the following questions, both of which are relevant to the discretionary question of whether to make an order on the basis of no reasonable prospect of success, are also relevant to the threshold test under Rule 76(1)(a) of the ET Rules for unreasonable conduct:

a. At the stage that the claim or response had no reasonable prospect of success, did the relevant party know that was the case?

b. If the relevant party did not know that the claim or response had no reasonable prospect of success, should they have known?

25. On 15 September 2021 the claimant was removed from a project due to concerns that the respondents had. The claimant received an email on that date advising him that he had been removed and the reasons in respect of his removal from the project. In the claimant's journal entry of that date, he raised the question whether he would be dismissed from his employment within two months. This appeared to be in view of the events that occurred that day. There was feedback obtained about the claimant's performance throughout September and

October 2021. The claimant was in his 3-month probation period at that time. The first respondent's reasons for terminating his employment on 16 November 2021 were related to his performance. Performance concerns were raised about the claimant prior to the dates of his emails (25 October 2021 and 04 November 2021) in which he alleges that he made protected disclosures. Therefore, we did not consider that there were any reasonable prospect of the claimant showing that his dismissal took place for the reason or principal reason that he made protected disclosures.

26. The Court of Appeal stated in *Fecitt v. NHS Manchester [2012] EWCA 1190* that the principles of inferring discrimination were applicable in public interest disclosure cases, if the step-by-step shifting burden did not strictly apply. Thereafter, in Serco Ltd. v. Dahou [2016] EWCA 832 (a trade union detriment case), the Court of Appeal set out that it is for the worker to show a prima facie case before the burden of proof shifts to the employer, an approach that was also (independently it seems) endorsed by the EAT in *Timis v. Osipov UKEAT/0229/16/DA* . The EAT held in Chatterjee v. Newcastle-upon-Tyne Hospitals NHS Trust UKEAT/0047/19/BA that the worker must show a prima facie case in the first instance, and that it does not necessarily follow from the fact of a protected disclosure and the fact of a detriment that the burden of proof shifts i.e. in line with *Madarassy v Nomura International PLC [2007] EWCA 33*. In circumstances in which the claimant failed to provide a witness statement and he did not attend the Final Hearing, there was no real prospect of the claimant discharging the prima facie burden of proof on him both in terms of his claims for automatically unfair dismissal under section 103A of the Employment Rights Act 1996 and whistleblowing detriments.

27. Having considered the Claim Form, the Response, the respondent's witness statements and the documents to which we were referred, we concluded that the claimant's claim had no reasonable prospect of success.

Exercising our discretion

28. The respondents' representative points out that the threshold for making an order is made out under Rule 76(1)(b), and it is for the Tribunal to consider all relevant factors in determining whether to exercise its discretion to make an order. We have no information before us in terms of the claimant's ability to access to any legal advice or any legal advice he may have had had prior to starting his claim. However, the points we have identified would have been evident to the claimant had he undertaken appropriate research and/or sought legal advice. We do not have any evidence before us to suggest that the claimant was unable to do so, and we are satisfied that a prudent claimant would have taken appropriate steps in the circumstances. Moreover he made a detailed application for specific disclosure which suggests that the claimant has undertaken some legal research and/or obtained legal advice. In those circumstances, we have no hesitation in terms of exercising our discretion to award costs.

Unreasonable conduct

29. Under Rule 76(1)(a) of the ET Rules we may make a costs order and we are required to consider making an order where we are satisfied that the claimant has behaved "otherwise unreasonably."

30. Furthermore under Rule 76(2) of the ET Rules we may make a costs order "where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party."

31. Whether conduct is unreasonable is a matter of fact for the Tribunal. Unreasonableness has its ordinary meaning and should not be taken by Tribunals to be the equivalent of vexatious (*Dyer v Secretary of State for Employment UKEAT/183/83*).

32. The respondents' representative relies on the claimant's failure to file and serve a witness statement in accordance with Employment Judge

Elliot's order dated 21 March 2022. Having reviewed the Tribunal file, the claimant had not sent his witness statement for use during the Final Hearing to the Tribunal and he had not requested an extension of time. There was no correspondence from the claimant suggesting that there was any reason in terms of why he could not prepare and send his witness statement to the Tribunal.

33. The respondents' representative stated that the claimant had not been in correspondence with them since 06 September 2022. In particular the claimant had not engaged with the respondents in relation to which documents should be included in the agreed Hearing Bundle. There were three Bundles sent to the Tribunal by the respondents' representative each containing several hundred pages of documents, rather than a single joint Bundle pursuant to the Tribunal's orders. The Tribunal sent correspondence to the parties on 20 May 2022 providing further directions relating to the preparation of the Bundle and extending the timeframe for preparation of the Bundle to 24 June 2022. There was no correspondence from the claimant to indicate that he was not in a position to agree the content of the joint Hearing Bundle and the reasons for the same.

34. We took into account the *Chronology of Correspondence* provided by the respondents' representative.

35. We also considered the fact the claimant had not attended this hearing. He had not contacted the Tribunal or provided any reasons for his non-attendance.

36. We were therefore satisfied that the claimant had acted unreasonably, and he had failed to follow the Tribunal's directions as indicated above.

Exercising our discretion

37. In the absence of any reasons or good reasons explaining the claimant's conduct and taking into account all the circumstances, we

are satisfied that it is appropriate for us to exercise our discretion to award costs on the basis of the claimant's conduct outlined above.

Amount

38. The respondents' representative filed a statement of costs with the Tribunal during the course of the hearing on 21 November 2022 and copied the claimant into that correspondence. The Statement of Costs was brief and there was no detailed breakdown of any invoices or time recording that was provided. Following a short adjournment the Tribunal reconvened to hear the respondents' submissions. The respondents' representative invited us to take into account the respondents' Statement of Costs. He also stated that he recognised that the Tribunal may award only a proportion of those costs.

39. We took into account Court of Appeal's guidance in *Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78* that: *"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." (Paragraph 41).*

40. We also considered that we may take account the claimant's ability to pay in deciding whether to make a costs order and if so in what amount. Although the claimant indicated on his ET1 Form he did not have another job, his claim was presented to the Tribunal almost a year ago and we could not be satisfied that the information was still current. The claimant could well have secured alternative employment since. We therefore did not have any or any sufficient information which would enable us to consider the claimant's means. The claimant was made aware by the respondents' representative on 20 November 2022 that the respondents may make a costs application and he did not attend the hearing.

41. The respondents' representative sent an additional Statement of Costs after conclusion of their submissions to the Tribunal. We have taken this into account although they still did not contain a detailed or sufficiently detailed breakdown as we would normally have expected to see.

42. In the circumstances and on the information before us, we provisionally considered that it would be reasonable and proportionate to award the the respondents the sum of £20,000.00 (inclusive of VAT and disbursements) in respect of costs. This includes the sum of £3500(excluding VAT) counsel's fees, £233.30 (excluding VAT) incurred printing the Bundle totalling £3,733.20 (excluding VAT) and the remaining sum in terms of solicitors' costs. We note that the actual solicitors' costs claimed were in excess of this amount.

Opportunity for claimant to send submissions and evidence

43. We are conscious that the claimant was not sent a copy of the respondents' initial Statement of Costs or the further Statement of Costs prior to the hearing and he has not been given a significant opportunity to consider these or to provide any evidence as to his means. We have therefore decided to provide the claimant with a further opportunity should he choose to do so to send any evidence and submissions in relation to the respondents' costs application including but not limited to any evidence in terms of his ability to pay and submissions on the amount of costs sought by the respondents. We direct that the claimant must provide any evidence and submissions to the Tribunal which must be copied to the respondents' representative **by not later than 4pm on 09 December 2022**.

44. Unless the claimant provides any evidence and submissions to the Tribunal **by 4pm on 09 December 2022**, our provisional assessment of costs payable by him to the respondents in the amount of £20,000.00 shall be final.

Conclusion

45. We dismiss the claim in accordance with Rule 47 of the ET Rules.

46. We conclude that the claimant's conduct has been unreasonable and vexatious, he has failed to comply with the Tribunal's directions, and that his claim has no reasonable prospect of success. We exercise our discretion in relation to each ground where the circumstances justify a costs order (as indicated above), to make an order for the claimant to pay the respondents' costs and we have provisionally assessed the amount of costs payable to be £20,000.00 (subject to the directions we have made above enabling the claimant to provide evidence and submissions by not later than 4pm on 09 December 2022).

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Employment Judge B Beyzade

Dated: 25 November 2022

Sent to the parties on:

25/11/2022

For the Tribunal Office