EMPLOYMENT TRIBUNALS

Claimant: Mr M Dowding

Respondent: The Character Group PLC

Heard at: London South **On: 4 and 5 November 2021 (in chambers 13 January 2022)**

Before: Employment Judge Khalil sitting with members
Mr Shaw
Mr Clay

Appearances

For the claimant: in person
For the respondent: Mr J Laddie QC, Counsel

RESERVED JUDGMENT ON COSTS APPLICATIONS UNDER RULE 76

Unanimous Decision:

The respondent's application for a Costs Order under Rule 76 is well founded. A Costs Order is made of 21 % of the respondent's overall costs (of £600,000) capped to £127,563.70 *subject to* detailed assessment.

The Respondent's application for a Costs Order in relation to the Costs Hearing is well founded. A Cost Order is made for £20,000.

The claimant's application for costs is not well founded and fails.

Reasons

The Issues, appearances and documents

1. This was a Costs Hearing in relation to the respondent's application for costs pursuant to Rule 76 (1) (a) and (b) and the claimant's application

pursuant to Rule 76 (1) (a). The respondent was seeking a limited (capped) sum of £127,563.70 which it said represented just over 20% of its overall costs of over £600,000. It was inviting the Tribunal to award/Order that proportion. The claimant's costs claim had increased from £8,620 to a more latterly advanced figure of £99,126.97.

2. The claimant was in person; the respondent was represented by Mr James Laddie, QC.

3. The Tribunal had an electronic bundle from the respondent running to 96 pages and a skeleton argument from Mr Laddie which was expanded on orally. The claimant had produced a supplementary bundle which had 11 tabs and documents numbered 1 to 321, but it was not paginated. The claimant had produced a 189-paragraph witness statement and a further 67 paragraph witness statement. The claimant also produced a witness statement from his son Mr Jonathan Dowding (specifically in relation to a 'renewed' recusal application). The claimant and his son both gave evidence. The claimant had also produced written submissions.

4. The Tribunal intimated that having undertaken some pre-reading, it appeared that the first witness statement and most of the second witness of the claimant was in relation to the claimant's challenge to the Tribunal's findings and conclusions. This was not the permissible forum to resolve that. The claimant said he understood this and did not challenge the Tribunal's remarks about the relevance/context of most of his witness statement evidence.

Recusal application

5. The Tribunal first referred to the claimant's application of 14 April 2021. That had been properly considered by the Tribunal in chambers following which a decision was sent to the parties on 6 May 2021.

6. The authorities (in their plurality) cited by the parties were expressly stated to be considered. That included ***Porter v Magill 2001 UK HL 67***. ***Locabail v Bayfield Properties*** was expressly but not exclusively referred to.

7. That decision of the Tribunal was not appealed. Neither were the Tribunal asked to reconsider, effectively by way of a variation to a case management decision.

8. The claimant was represented by Counsel at the Liability Hearing. He had since engaged Cole Khan Solicitors in relation to the Costs Hearing who he had dis-instructed in September 2021.

9. The Tribunal's answer to the Recusal application arguably provides a complete answer to the application made on 28 October 2021 save in so far as there may be a fresh ground for recusal.

10. The claimant's email of 28 October 2021 essentially raised 2 purported new/additional matters. First, that there was no reference to or citation of ***Porter,*** second, the witness statement of the claimant's son was attached supporting the view that the alleged comment made by this Tribunal about the claimant's whistleblowing claim was made.

11. In relation to ***Porter***, this was considered when the first recusal application was made as the recusal response makes it clear that the authorities cited by the parties had been considered. That the Tribunal referred in particular to ***Locabail v Bayfield 2000 IRLR 96 CA*** is a matter of Judicial discretion in its assessment of the application. The Tribunal noted that the claimant himself had cited several extracts from ***Locabail.***

12. The evidence of Mr Jonathan Dowding was solely in relation to the alleged whistleblowing comment. His statement was not provided previously. This has already been considered by the Tribunal in its decision of 6 May 2021. In summary, it was said no comment was made; or words to that effect; or close to that effect. The respondent's professional legal representatives (Counsel & Solicitor) had not recalled any such remark. Neither was anything said at the time by the claimant's own Counsel or in support of the claimant's application.

13. Under cross examination, Mr Jonathan Dowding acknowledged that his evidence of his professional standing, to which he had just sworn, was incorrect. He said he had made notes on day 1 but these were now lost. He said he provided a copy to the claimant, but there were no notes before the Tribunal. There were no notes of Mr O'Dempsey either which could and should have been requested.

14. The claimant also confirmed that he was aware that his Counsel was also a fee-paid Employment Judge. There would thus have been no-one better qualified to challenge such a comment had it been made.

15. The thrust of the claimant's oral submissions were all in relation to the findings of fact and conclusion he disagreed with either because the Tribunal erred in law or because of alleged perversity. That is not for this Tribunal to determine. It is also noted that an allegation of bias has not been raised as part of the claimant's appeal to the EAT.

16. The application for recusal is refused.

Postponement application

17. The parties were informed by the Tribunal by a letter dated 25 March 2021 that the claimant's application dated 28 January 2021 to postpone the Costs Hearing until after adjudication of the claimant's appeal had been determined, was refused.

18. That decision was not asked to be reconsidered, effectively by way of a variation to or revocation of a case management decision. Neither was the decision appealed.

19. Nothing more has been raised until today.

20. The Appeal is outstanding, but it has not even been considered at the sift stage. Had the Tribunal had some tangible evidence of the appeal getting through the sift and/or that the appeal had been listed for a Hearing or a Hearing had occurred with a decision awaited, it might have been a better platform upon which to make such an application.

21. It is not in the overriding interest to postpone this Hearing. The proceedings date back to 2017 and the Liability Judgment was promulgated almost a year ago.

Statement of means

22. The claimant was in breach of the Tribunal's Order to provide a statement of means. His explanation for not doing so – that he was seeking clarification why the Tribunal had not Ordered the respondent to provide a statement of means was wholly inadequate. It did not excuse non-compliance with an Order.

23. The Tribunal took evidence of the claimant's means under oath and invited the respondent to cross examine that evidence if it wishes to do so, on the morning of day 2.

The Respondent's application for costs

24. The respondent's application was pursuant to Rule 76 (1) (a) and (b) dated 4 December 2020.

25. Mr Laddie's skeleton argument fleshed out the reasons as follows:

Unreasonable conduct in that the claimant:

- Gave dishonest evidence in respect of a large number of disputed matters;

- Came up with new and unheralded evidence on a whim;

- Accused the Respondent of not having made disclosure in circumstances where he himself had concealed his possession of the very documents that he was accusing the Respondent of not having disclosed;

- Pursued and failed to concede a ludicrous and distressing allegation of forgery/documentary fabrication against Ms Nahal even though it was obvious;

- Contrived a whistleblowing case in a cynical and misconceived attempt to displace the statutory cap on recovery of awards for ordinary unfair dismissal (thereby enabling him to claim the wholly unrealistic sum of £1,463,567.34 + ACAS uplift in his final schedule of loss. The

Tribunal will recall, he said, that the Claimant first raised the possibility of whistleblowing detriment after his dismissal, in his appeal (and even then it was barely related to the Companies Act s.228 issue); whilst not specifically referred to in the Judgment, there are numerous passages in the Claimant's witness evidence where he claimed that he knew that the writing was on the wall shortly after making his alleged protected disclosures. Plainly, that evidence was false. He knew that his "whistleblowing" had nothing to do with the events leading up to and culminating in his dismissal. Why, then, did he bring a whistleblowing claim? The answer is obvious – to be able to serve an intimidating and grossly inflated schedule of loss.

- The nature, gravity and effect of the unreasonable conduct was profound. The Claimant advanced a claim that was in large part false, presumably designed to embarrass the Respondent and/or pressurise it into compromising the dispute at an unrealistic and disproportionate level. The Claimant's unreasonable conduct led directly to the trial being far longer than it needed to be, with far more documents and witnesses than were necessary. Had the Claimant limited himself to an ordinary unfair dismissal claim, as he ought to have done, the claim is unlikely to have been heard at all (i.e. it would have been compromised on a commercial basis, consistent with the sensible approach taken by the Respondent immediately prior to the Claimant's dismissal). If it had been heard, it would have taken no more than a couple of days of Tribunal time and the Respondent would have had to call many fewer witnesses and would not have needed to instruct a QC.

The Claimant's whistleblowing claims – i.e. his claims under ERA, s.47B and s.103A had no reasonable prospect of success. In particular:

- The Claimant knew at all times that he had no subjective belief that his disclosure of information relating to the technical breach of the Companies Act 2006, s.228, was in the public interest.

- The Claimant knew at all times that his dismissal and any detriments that he suffered had nothing whatsoever to do with his communications about the technical breach of s.228, but were caused by his own sub-optimal conduct whilst in post. In this regard, the Respondent relies in

part on the Claimant's appreciation that the Respondent's reaction to the S.228 information was both appreciative and unworried.

- The points made at sub-paragraphs (a) (v) (*'contrived a whistleblowing case)* and (b) (*'the nature, gravity and effect of the unreasonable conduct was profound')* above are repeated and reiterated in respect of the contention that the whistleblowing claims had no reasonable prospect of success.

Costs/amount sought by the respondent

- As to the proportion of the Respondent's costs that the Claimant ought to pay, the Respondent is prepared to make the following concession of principle. A significant element of the Respondent's costs were incurred because the trial was twice adjourned, on both occasions not due to the fault of either party. That said, the lion's share of the costs of pleadings, disclosure, preparation of witness statements and attendance at trial were and would always have been incurred regardless.

- The Respondent's overall costs of defending this litigation have greatly exceeded the amount claimed. For the reasons set out in the foregoing paragraph, the Respondent does not consider that it would be appropriate to seek recovery of all of those costs from the Claimant. Adopting a broad-brush approach, the Respondent seeks its costs of the 2020 trial , namely the sum of £127,563.70. This is a very generous position for the Respondent to take; it could legitimately have sought a far higher element of its costs. It asks that costs be assessed on the indemnity basis. Assessing on the standard basis would not reflect the egregiousness of the Claimant's conduct.

Oral submissions of the respondent

26. In oral submissions, the respondent placed significant reliance on the claimant's credibility and specifically the claimant's dishonesty in respect of the unreasonable conduct limb of its application. The respondent referred to the Tribunal's findings on the claimant's credibility in paragraphs 23 to 33 of the Liability Judgment in their totality. In addition, the respondent relied on:

- Paragraph 46 – rejection of the claimant's evidence on his bonus

- Paragraph 49 – rejection of the claimant's credibility in relation to the notice period

- Paragraph 65 – introduction of evidence for the first time

- Paragraph 77 – the respondent said this was an outrageous allegation of dishonesty against Ms Nahal (regarding an email of 2 August 2017)

- Paragraph 79 – rejection of the plausibility of the claimant's evidence relating to a meeting about NAV/EVO

- Paragraph 96- rejection of the claimant's evidence that he had not picked up his messages on 13 September 2017

- Paragraph 116 – rejection of the plausibility of the claimant's evidence regarding recalling Company Law knowledge from 30 years previous having regard to the wording of the email of 14 June 2017

- Paragraph 119 – Rejection of the claimant's subjective belief in the public interest – *the respondent emphasised that this paragraph was critical/really important in support of its application*

- Paragraph 138 – rejection of the claimant's evidence that he was being set up

27. In submissions, the respondent also sought reliance on the without prejudice save as to cost correspondence which the claimant had included in his bundle. The rejection of the pre-trial offer, it said was unreasonable. It said, essentially, that the claimant did so because the claimant had advanced a dishonest case on whistleblowing to remove the statutory cap.

28. In addition, the respondent said the claimant's whistleblowing claim was founded on a lie because the claimant did not have the public interest in mind. This was in support of the no reasonable prospects of success limb of

its application. The respondent said the issue of whistleblowing was not raised until the claimant's appeal against dismissal and even then, was not about S.228 Companies Act 2006. The respondent submitted that the litigation would not have continued/taken place had it not been for the claimant's cynical and untruthful whistleblowing claim.

The Claimant's application for Costs

29. The claimant's written submissions for the Costs Hearing did not advance a claim for costs in relation to his application. They were a defence/resistance to why a costs Order against him based on the respondent's application, should not be made.

30. The claimant's costs application had been made in his letter of 9 December 2020. The claimant's ground was follows:

The Respondent acted in breach of the Tribunal's case management order ("The Order") in relation to its obligations to set out its case in witness evidence and its failure to comply with directions on disclosure. The Respondent has been provided with appropriate costs warnings several times throughout proceedings as noted below and the Claimant has incurred additional and avoidable cost by virtue of the noted failures to comply with the Order.

The Claimant seeks a costs order that the Respondent make a payment in respect of the costs the receiving party has incurred while legally represented under Rule 75 1 (a) in the amount of £8,620 for work done arising from R's failure to comply with the Order on disclosure and witness evidence.

31. By an email dated 27 April 2021, the claimant amended his Costs application as follows:

- *I request the Tribunal to exercise its discretion for an amendment to his application for costs. On the basis that the respondent's failure to comply with orders and practice directions has prevented a fair trial being carried out, and alternatively R's unreasonable conduct*

under Rule 76, the claimant seeks an award for all his costs incurred of £99,126.97, to be dealt with on detailed assessment.

Findings of fact relevant to the Costs Hearing

32. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence/documentation during the hearing, including the documents referred to by the parties, including the Judgment on liability and taking into account the Tribunal's assessment of the evidence.

33. Only findings of fact relevant to the issues in the Costs Hearing, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence or submissions and considered relevant.

34. On 5 February 2018, the respondent made a without prejudice save as to costs offer to the claimant in settlement of all of his claims, including a putative high court claim in relation to shares. That claim was never before the Tribunal and/or within the Tribunal's jurisdiction.

35. The offer was expressly stated to include the claimant's unfair dismissal claim and was also expressly stated to be on a commercial basis. The whistleblowing claims were stated to be 'wholly without merit'. The offer was for £200,000, including breach of contract claims. The claimant was forewarned of an application under Rule 76 if the offer was refused.

36. This offer was rejected. This correspondence was in the claimant's bundle for the Costs Hearing. The claimant's reply was not in the bundle. The claimant said in submissions it was not about the money. The Tribunal asked the claimant if he had said in his response said he was seeking a declaration. He said he had but there was no correspondence in the bundle at all in relation to his response.

37. There was a further offer made to the claimant without prejudice save as to costs after the Hearing had taken place but before the Tribunal had decided the case. This offer was for £55,000 and was expressed to be in the context of the respondent's assessment of the claimant's case and evidence at trial and in relation to the threatened outstanding High Court claim. This offer was rejected too. The response to this letter was also not in the bundle.

38. The Tribunal noted that the claimant, in his written skeleton argument for the Costs Hearing was relying on the case of ***Telephone Information Services v Wilkinson 1991 IRLR 148*** in which case an offer from the respondent for the maximum Unfair Dismissal claim had been refused in circumstances where an express declaration had been sought. That had not happened in this case. The claimant would thus have appreciated the potential relevance of that factor, yet there was no evidence before the Tribunal of the claimant's written response via his Solicitors after the offer was made on 5 February 2018. The Tribunal thus found, on a balance of probabilities, that there was no such request made.

39. In response to the respondent's application for costs because of the claimant's conduct in the proceedings and in particular the Tribunal's findings and conclusions on the claimant's credibility and honesty, the claimant sought to rebut the assertions with a robust counter.

40. The claimant had to be curtailed on several occasions when he fell into the territory of disagreeing with the Tribunals findings and conclusions, (which had been remarked upon at the outset of the Costs Hearing), against which he has an outstanding appeal which has not yet been assessed at and/or passed the sift. Those findings and conclusions were thus (currently) undisturbed. Both parties were bound by them unless and until overturned. The claimant's first witness statement for the Costs Hearing which ran to 189 paragraphs read almost exclusively about the claimant's challenge to the Tribunal's findings and conclusions. At the Costs Hearing, the claimant placed no reliance on it at all and the respondent did not question the evidence in this statement at all.

41. The claimant did forcefully reject the respondent's claim that he had accused Ms Nahal's evidence of being false/untruthful (which the respondent said went to unreasonable conduct). He cited from the Tribunal's Judgment which he said was wrong. That submission did not have any force in the light of the above comments on the Judgment. The

claimant also/instead sought reliance on his supplemental rebuttal witness statement used at the liability Hearing (which was in his bundle for the Costs Hearing). That statement said Ms Nahal's evidence appeared to be false. The claimant said he had not said it was false, merely that it appeared to be the case it was false. That was a far-fetched interpretation or difference. However, the Tribunal noted that in his second witness statement for the Costs Hearing, paragraph 67, the claimant had asserted that a prime example of the respondent lying was Ms Nahal's evidence which he said was entirely false. The Tribunal found the claimant's wavering of evidence in this respect to be extremely unconvincing, disingenuous and a fanciful attempt to retreat from what was a categoric allegation of dishonesty against Ms Nahal.

42. The issue in relation Ms Nahal's evidence had an additional relevance in relation to the Costs Hearing *itself.* During the course of the Hearing the claimant made an allegation of dishonesty against Mr Laddie in relation to his letter dated 4 September 2020 at page 116-117 (of the claimant's bundle). This letter appeared to be written consequent on the claimant's supplementary evidence as referred to in paragraph 29 of the Liability Judgment. In this context, the Tribunal found this allegation of dishonest conduct against Mr Laddie entirely inappropriate.

43. The claimant also sought reliance on the exchange of emails at page 122 and 126 of his bundle in relation to existence or purported availability of the original of the email he said had been tampered with. This was part of the claimant's application for costs against the respondent. These emails had not been produced at the liability Hearing. Neither were the emails referred to therein (26 & 27 November 2017). In addition, there was no explanation of what happened after and/or what efforts were taken by the claimant to reverse the position on disclosure and to produce the alleged original, for example seeking an Order for specific disclosure even at the outset of the liability Hearing. On the claimant's case, it was a key document for him. He was legally represented at the time.

44. As part of his 'counter', the claimant also resisted the respondent's attack on his conduct by asserting that Ms Cooper, the respondent's Solicitor had 'impersonated' being the claimant in relation to the delivery of the bundle to the claimant. This was alleged by the claimant to be dishonest. This was in the context of Ms Cooper attempting a re-delivery via Royal Mail. The Tribunal did not have a precise timeline of the circumstances but on any

objective analysis, this was not evidence of Ms Cooper acting in a dishonest way. She was not for example attempting to sign off receipt of documents by the claimant.

45. During the course of the litigation, the claimant had provided 3 separate schedules of loss in relation to his whistleblowing claims (dismissal and detriments). On each subsequent occasion of doing so, quantum had substantially increased. The schedules served were as follows:

- Undated - £480,263.88
- 10 September 2019 - £762,204.27
- 14 August 2020 - £1,463,567.34 (+ unquantified ACAS uplift)

46. On 12 October 2021, the Tribunal had Ordered the clamant to provide a statement of means 14 days before the Costs Hearing and for this to be filed and served on the respondent too. The claimant had not done so. He had written to the Tribunal asking why the respondent had not been asked to provide a statement of means. That correspondence had not been addressed. It was addressed at outset of the Costs Hearing. It ought to have been plainly obvious to the claimant why, the respondent, a PLC, had not been Ordered to provide a statement of means in relation to the claimant's costs application. The claimant had retained Solicitors until September 2021 in relation to the Costs application and had clearly undertaken substantial research in relation to the rules and the case law. The respondent's application against the claimant, an individual, was substantial. Whilst the claimant was seeking substantial costs (which had increased to circa £99,000) against the respondent, it would hardly ever, if ever, be the case that a Tribunal would seek a statement of means from a PLC trading on the AIM market. In the circumstances, the Tribunal found that the claimant, a former Group Financial Director of the respondent, would or should have reasonably know that.

47. Regardless of the what the claimant ought to have known about whether or not the respondent should provide a statement of means, this did not excuse the claimant from providing his own statement. In consequence of not doing so, the respondent had no advance notice of what the claimant was saying about his means. The Tribunal resolved that it was not proportionate to disbar the claimant from relying on any evidence about his means; instead, the Tribunal considered it proportionate to take the claimant's

evidence on means, live under oath, and to permit the respondent to cross examine the claimant, if it so wished, at the beginning of day 2. The claimant was invited to produce documentation in support of his evidence. The respondent submitted it would invite the Tribunal to draw an adverse inference in the absence of corroborating documentation.

48. The claimant gave evidence that he had worked from October 2020 to October 2021 earning £92,000 per annum. He was no longer in that employment. He said he might obtain some consultancy opportunities in the near future. This would be via a limited company in which he was the only employee – Opus Management Service Limited. He said the company was trading at a loss.

49. The claimant was asked by the Tribunal if he had worked since his dismissal in September 2017 to October 2020. He said he had not.

50. The claimant's testimony was that he had savings of between £100,000 to £150,000 in that period. The savings were now exhausted.

51. The claimant lived in a flat which he said was worth about £600,000. It was mortgaged and the amount outstanding was about £450,000. (From the documents the claimant produced on day 2 in support of his assertions, his bank statements showed his mortgage debt totalled approximately £440,000). The repayments were interest only.

52. The claimant said he had an interest in his stepfather's property but which was contingent on his death or his stepfather's remarriage. The claimant said neither were likely in the near future. His stepfather's health was generally ok. He is 65 years old.

53. The claimant said he had a pension fund (which he was permitted to access) in the sum of about £550,000. From the documents submitted, this amount to £564,000 (AJ Bell).

54. The claimant was asked an open question by the Tribunal to put forward any other relevant evidence relating to his income or outgoings which might be relevant to the assessment of his means. He said there was nothing further.

55. The claimant also produced land registry documentation relating to his flat on day 2. This confirmed he had paid £640,000 in 2014 when he had purchased the flat. He produced a comparison of a another flat purchased for £735,000 in December 2020. It was noted in cross examination that the description of his flat which he had put before the Tribunal was that it was a one-bedroom flat but the claimant agreed it was actually a 2 bedroom flat. This had not been volunteered by the claimant.

56. The claimant agreed he had 108,000 shares in the respondent in December 2017 which he had since divested. He said these would have been worth about £450,000. However, he had only realised between £100,000 to £150,000 from their sale. That was unexplained. It was also not clear to the Tribunal if this sum was the same as the evidence he had given on day 1 in relation to his savings. The Tribunal asked the claimant more than once if his non-share savings were separate/in addition to his share-sale savings. Although this was confirmed, the Tribunal found the claimant to be reluctant to offer clarity in this regard and his evidence was very unconvincing. The ultimate source of his uncertainty stemmed from the absence of a completed statement of means, as Ordered, which might have led to further enquiries/examination by the respondent or the Tribunal. Thus, the Tribunal rejected that the claimant's evidence on his savings was the same 'fund' as his evidence on monies from the realisation of the sale of shares of around £150,000 if not more.

57. The claimant's bank statements, also produced on day 2, showed a HSBC loan which had circa £26,000 outstanding towards which the claimant was repaying at circa £660 per month.

Applicable Law

58. Rule 76 (1) says:

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.

59. In assessing whether a party has acted unreasonably, the Court of Appeal in ***Yerrakalva v Barnsley Metropolitan Borough Council and another 2012 ICR 420*** held the vital point in exercising the discretion is to look at the whole picture. The Tribunal has to ask whether there has been unreasonable conduct by the paying party in bringing, defending or conducting the case and in doing so, identify the conduct, what was unreasonable about it and what effect it had.

60. The Tribunal should have regard to the nature, gravity and effect of the instance or instances of unreasonable conduct ***Mcpherson v BNP Paribas 2004 ICR 1398 EAT.***

61. Giving false evidence is an example of behaviour that might constitute unreasonable conduct having regard to the nature , gravity and effect of such conduct. ***Arrowsmith v Nottingham Trent University 2012 ICR 159.***

62. Where a Tribunal finds unreasonable conduct and exercises its discretion to make a costs order, there is no requirement to establish a causal link between the unreasonable conduct and costs attributable to that unreasonable conduct ***(Yerrakalva).***

63. In relation to no reasonable prospects of success, the EAT has recently confirmed in ***Opalkova v Acquire Care Ltd EAT 0056/21*** that 'claim' refers to a complaint or cause of action.

Conclusions and analysis

The Tribunal's conclusions were unanimous

The respondent's application for costs

64. The Tribunal first considered the respondent's application for costs based on its assertion that the claimant's whistleblowing claim had no reasonable prospect of success.

65. The Tribunal considered in some detail its own conclusions in paragraph 119 of the Liability Judgment which set out multiple reasons why the Tribunal concluded that the claimant did not have a subjectively held belief that the disclosure of information relied upon was in the public interest. Those reasons are not repeated herein but they were all very compelling reasons why the Tribunal concluded as it did, in particular that the claimant only believed he was raising a 'technical' breach with the respondent. The Tribunal also noted its conclusion and remarks on the triviality and inadvertency of the breach referred to in paragraph 123 of the Liability Judgment and that the claimant himself was prepared to send on a memorandum of terms to the Solicitors, copied to Mr Shah, without qualification, in purported compliance with S.228 CA, knowing that on his case, most of the terms were not agreed (paragraph 119, bullet 4 of the Liability Judgment). This was wholly contradictory to a Director holding a subjective belief that the reporting of the S.228 CA breach was in the public interest.

66. The Tribunal concluded in the light of its own conclusions that the claimant knew or ought to have reasonably known that he did not have a subjective belief in the public interest and that even if he did, it was not objectively reasonable. With regard to the latter, the Tribunal considered its own conclusion in paragraph 122 of the Liability Judgment and found it particularly notable that the claimant did not assert a reference to whistleblowing until after his dismissal and that when he did, it was not in reference to the S.228 CA breach issue at all, but something altogether separate which never formed part of his claim.

67. The whistleblowing claim was on any analysis the key and main claim of the claimant. The escalating and considerable schedules of loss made that plain. There was no prospect of the sums being sought being 'awardable' unless the statutory cap on an unfair dismissal claim was removed.

68. The Tribunal has concluded in its liability Judgment that none of the detriments relied upon by the claimant had occurred. This view was expressed in the alternative to the conclusions that the claimant did not have a subjective belief and if he did, was not objectively held. Conclusions in the alternative are not uncommon and are open to be made by a Tribunal. The alternative conclusions do not undermine or dilute its earlier conclusions. Within the context of a costs application where the prospects of success are being analysed, the Tribunal concluded that the

alternative 'in any event' conclusions of no detriment did in fact have force in support of such an application rather than if some or all of the detriments were found to have occurred. This was not a case where the claimant would have succeeded on his claims for detriment or detriments had his disclosure of information been found to be a qualifying protected disclosure.

69. In relation to at least 2 of the key components of the disciplinary case against the claimant, there was a complete answer as to the reason why the claimant had been charged – first, his repeated refusal to provide changes/comments on his contract in a marked up Word document and his refusal to provide S&W emails as requested by Mr Shah. In respect of both, the Tribunal has already concluded in its liability judgment that the claimant's 'conspiracy case' was hopeless and flawed (paragraphs 138 & 141). This fundamentally undermined the claimant's assertion on his case that the reason (or principal reason) why he was dismissed was the whistleblowing.

70. The Tribunal thus concluded that the whistleblowing claim had no reasonable prospect of success and this was known or ought to have been known to the claimant. It was the main reason why the case had not been capable of a commercial resolution. The claimant had turned down, unreasonably, a £200,000 offer, wherein the respondent had expressly stated the whistleblowing claims to be wholly without merit. The pursuit of the whistleblowing claims was the main reason why the Hearing was listed for the number of days it was and before a full panel. It was the main reason why the respondent had to call the number and/or nature/extent of its evidence and documentation running to several lever arch bundles and a volume of witness statements and rebuttal witness statements from the claimant. The overwhelming share of the preparation was engaged on the whistleblowing claims under S.47B and S.103A - to advance them or to resist them.

71. In addition, the claimant's conduct in relation to his conduct of the proceedings was unreasonable – collectively for the all the reasons set out in the Tribunal's findings and conclusions in its liability judgment, in particular, under its credibility findings, including by way of emphasis being dishonest and unreasonably accusing others of fabrication in furtherance of his case and in so doing causing or risking reputational or economic harm to them. That was the effect. The basis of the claimant's

own costs application was about disclosure, yet it was his own position on multiple requests for disclosure which ultimately exposed the claimant. In addition, the claimant unreasonably turned down an offer of £200,000 intertwined with submitting increasing and grossly exaggerated/inflated compensation in his schedules of loss, ultimately seeking £1.464 million plus an uplift. The offer was way above the Statutory maximum for 'ordinary' unfair dismissal (and in circumstances where no other breach of contract claim was ever advanced). No declaration (for unfair dismissal or otherwise) was sought, even if it had been, the Tribunal was not satisfied that it would have been in the overriding interest of proportionality or saving expense to (still) pursue the claim.

72. In considering whether to exercise its discretion to award costs in relation to the threshold being met in relation to both limbs of the respondent's costs application, the Tribunal noted that the claimant was represented by counsel and had previously been represented by Solicitors. He knew or ought to have known the stakes of pursuing a bad claim and of not conducting himself reasonably. In addition, the nature and gravity of his conduct was extremely serious. He gave dishonest evidence under oath. He made very serious allegations of fraud against at least 2 other employees causing actual or risking significant harm to reputation and/or livelihood to those individuals. The whistleblowing claim, (which also had no reasonable prospect of success), risked significant reputational and/or financial risk to the respondent and the individual employees who were targeted by that claim.

73. The Tribunal had regard to the claimant's means under Rule 84. It was right to do so, in the Tribunal's view, as the sum sought was significant. The Tribunal concluded that the claimant had equity in his property, more than he had chosen to initially assert. It was closer to £300,000 than £150,000 as initially claimed. His current mortgage commitments are interest only, with his largest mortgage of just under £300,000 being at a 0.48% interest rate. He also has access to his pension fund of £564,000. The claimant's evidence on his share sale proceeds and the amount and use of his savings was evasive and unconvincing. The source of that lay with the claimant's election not to comply with the Tribunal's Order in relation to a statement of means. The Tribunal was not presented with any evidence suggesting that the claimant could not obtain employment in the near future. On the contrary, the claimant's evidence was he expected to obtain consultancy opportunities in the near future.

74. The Tribunal concluded that an award to pay just over 21% of the respondent's stated overall costs of £600,000, capped at £127,563.70 was reasonable, fair and proportionate. The sum is awarded on indemnity basis for the same reasons set out in paragraph 65, *subject to* detailed assessment by the County Court. The Tribunal rejects that this assessment should be undertaken by an Employment Judge as, the sum to be assessed is significant and because it is much more commonplace for Costs Assessment to be undertaken in the County Court, with the attendant experience of doing so.

The claimant's application for costs

75. In relation to the claimant's application for costs the threshold for making a costs order was simply not met. There was a wholly inadequate basis for the claimant's application. Even if he had asked more than once for minutes of the disciplinary hearing minutes and/or Mr Kissane's script, this did not meet the threshold of unreasonable conduct. The documents in this litigation were vast and the Tribunal concluded were inflated entirely because of the claimant's whistleblowing claim. The Tribunal was only taken to exchange on 10 December and 20 December 2020. Mr Kissane's script appears to have been disclosed on the first request.

76. The Tribunal was not specifically taken to any purported earlier requests or disclosure of the disciplinary hearing minutes.

77. The Tribunal noted the correspondence from the claimant's advisers on 22 June 2018 and the comprehensive reply of 31 July 2018 (15 pages) dealing with disclosure issues. That letter was written with a pre-amble that the disclosure sought was not relevant and a fishing expedition and in a number of respects, no additional disclosure existed.

78. Any outstanding disclosure ought to have been the subject of a disclosure application, if relevant.

79. Even if the Tribunal was wrong in its above conclusion, the Tribunal would not have exercised its discretion to award any costs. The Tribunal has found in its liability Judgment that the claimant had lied in relation to multiple allegations of disclosure – documents he was asking for which he always had. No disclosure application was made or any other point taken

on the delay in disclosure at the Hearing. This was, at its highest, routine litigation dispute about existence or relevance of disclosure. In addition, the amount sought – revised to about £99,000 – undermined and diluted the credibility of the application. The amount/sum sought was hopeless, unsupported by any evidence, nonsensical and the Tribunal concluded, sought in bad faith. It was not appropriate to exercise its discretion to award costs in such circumstances

The Costs of the Costs Hearing

80. The Tribunal concluded the respondent's costs of the costs Hearing should be met by the claimant. The Tribunal had regard to the claimant's conduct referred to in the respondent's skeleton argument, paragraph 15 and in its submissions in paragraph 22.

81. The claimant had not provided a statement of means, in breach of the Tribunal's Order. In evidence, the claimant referred to a lower value of his flat (£600,000) which was a figure lower than he had paid for it 7 years earlier, without explanation. He also submitted a document which stated it was a 1-bedroom flat when he knew it wasn't. The Tribunal concluded he did this to distinguish the value from that of the other 2-bedroom flat, particulars for which he had submitted, which had a January 2020 value of £735,000. This was misleading. The claimant was also evasive about the disposal of his savings and the amount of those savings. The Tribunal also concluded that the claimant had also inflated his own costs application to negate and detract from the Respondent's application, not because his own application had any merit. The claimant referred almost exclusively to the liability judgment being wrong. That was an improper basis to defend the costs application.

82. The Tribunal exercises its discretion to award the respondent's costs of £20,000 as it considers the claimant's conduct to be serious and wilful. The respondent's overall costs were £28,000. The claimant sought advice and was represented by solicitors in relation to the costs applications until September 2021. He would thus have known, or ought to have known of the risks involved. The respondent was reasonable in continuing to instruct Mr Laddie QC for the Costs Hearing, which took place over 2 days and the preparation for which would have been disproportionate owing to the sizeable bundle and substantial witness statements submitted by the

claimant. The same means consideration as above have been taken into account in relation to the costs Hearing too.

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Employment Judge Khalil

18 January 2022