EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Charles Macdonald	**v**	Milton Keynes Development Partnership LLP

Heard at: Cambridge

On: 21 April 2023

Before: Employment Judge Tynan

Members: Mr C Grant and Mr C Davie

Appearances
For the Claimant: Ms I Bayliss, Counsel
For the Respondent: Mr M Bignell, Counsel

COSTS JUDGMENT having been given orally on 21 April 2023 and written reasons having been requested by the Claimant in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Respondent has made two applications for costs against the Claimant. The first, undated, substantive application is at pages A1 – A9 of the Costs Bundle. It is accompanied by a document entitled 'Narrative for costs application' and completed form N260, the standard form Statement of Costs used for summary assessments of costs in the Civil Courts. The latter is dated 6 March 2023. The second application for costs was made on 19 April 2023 and relates to the costs of the costs application. The Respondent submits that the Claimant's conduct in relation to the issue of costs has been unreasonable. As the Tribunal indicated at the outset of today's hearing, it would be inappropriate for the Tribunal to consider or determine that application until it has decided the substantive application.

2. The substantive application provided the structure for Counsel's respective submissions at Tribunal and inevitably had also informed Ms Bayliss' written submissions which the Tribunal adjourned to read before hearing Counsel's oral submissions.

3. Paragraphs 2 to 7 of the substantive application accurately summarises the relevant Rules and legal principles that apply to costs applications in the Employment Tribunals, specifically where, as here, the application is pursued with reference to Rule 76(1)(a) and (b) of the Tribunals Rules of Procedure, namely that the Claimant has allegedly acted unreasonably in bringing the proceedings and the claim allegedly had no reasonable prospect of success. However, Ms Bayliss was quite right to expand upon Mr Bignell's summary, emphasising that costs applications involve a two-stage process (indeed, it could be said, a three-stage process): the Tribunal must first consider whether the threshold test in Rule 76(1) for considering making a costs order has been met; only if it has been met will the Tribunal then go on to consider whether, in the exercise of its discretion, a costs order should be made; in that regard, the Tribunal may have regard to the paying party's ability to pay in deciding whether to make a costs order (as well as the amount of any order), something we shall return to. We do not lose sight of the fact that costs orders in the Tribunals are to be regarded as the exception, not the rule.

4. It does not automatically follow that because a party has behaved unreasonably and/or the claim or response had no prospect of success that the Tribunal should make a costs order. Tribunals retains a discretion in the matter and, as Ms Bayliss reminded us, in the exercise of that discretion we should have regard to the nature, gravity and effect of any unreasonable conduct (McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA), though on the question of 'effect' it is not necessary for the Tribunal to determine whether or not there was a precise causal link between the conduct in question and the specific costs being claimed. However, a costs order is not intended to be punitive and should not be made simply in order to somehow mark a Tribunal's displeasure.

5. The substantive application and Mr Bignell's submissions are structured with reference to four matters: Jurisdiction – that the Claimant pursued s.47B whistleblowing detriment claims that he knew or ought reasonably to have known were out of time; Protected Disclosures – that the Claimant unreasonably persisted in claiming throughout the proceedings that he had made protected disclosures to the Respondent about the Respondent, until Mr Ratledge conceded at the Final Hearing that his only protected disclosures were to Milton Keynes Council about the Council; Detriments – that the Claimant made "hopeless and misconceived" claims that the Council's workers had subjected him to detriments, only for Mr Ratledge to concede in closing submissions that they were not the Respondent's agents; and Calderbank Offer – that the Claimant unreasonably refused a sensible commercial settlement offer which was 50% higher than the maximum award for unfair dismissal and did so without addressing fundamental weaknesses in his case. Although the Calderbank Offer

related to the whole of the claim, the costs application is limited to the Respondent's costs of preparing for and defending the s.47B detriment claims. In that context, the second to fourth grounds for the application are effectively secondary to the Jurisdiction point which strikes at the heart of the s.47B detriment claims rather than relating to discrete elements.

6. We have, of course, re-read our Judgment, and also still have access to the Hearing Bundle. By 20 August 2020 the Claimant had instructed Altor Employment Solicitors, who it may be presumed are employment law specialists. They wrote to the Respondent on the Claimant's behalf asserting that he had made qualifying disclosures and that he had been subjected to detrimental treatment by the Respondent, identifying six specific detriments in sub-paragraphs a. to f. of the fifth numbered paragraph of their letter (pages 1636 to 1638 of the Hearing Bundle). They went on to assert that in the event the Claimant was dismissed, he would have "strong" claims for automatic unfair dismissal as a whistleblower and for ordinary unfair dismissal, and they also referred to the potential for a claim of disability based discrimination. The Claimant plainly had in mind bringing a claim against the Respondent. It was not suggested at the Final Hearing nor was it suggested today that the Claimant was other than competently advised by Mr Whysall, a partner at the firm, including as to the applicable time limits for pursuing claims in the Employment Tribunals. The letter was written over 8 months before the Claimant's claim was received by the Tribunals.

7. As we noted in our Judgment, the potential discrimination complaint was not pursued, presumably on advice. In so far as the Tribunal could have entertained any claims that were brought outside the primary time limit for notifying them to ACAS under early conciliation and thereafter presenting a claim to the Tribunals, it could only have done so where satisfied by the Claimant that it was not reasonably practicable for the claim to be notified and presented within that primary time limit and, further, that it was notified and presented within such further period as the Tribunal considered reasonable. The Tribunal's power to extend time in respect of whistleblowing detriment claims is framed more narrowly for example than the discretion available to it in discrimination cases to extend time where it considers this to be just and equitable.

8. Mr Tiley within the Council's Legal Services responded to Mr Whysall's letter on behalf of the Respondent on 4 September 2020 (pages 1658 to 1662 of the Hearing Bundle). As well as disputing that the Claimant had made qualifying disclosures, he addressed each of the six identified claimed detriments in turn (page 1660). It would be a further 8 months before the claim was presented to the Tribunals.

9. Even accepting the Claimant's case at its highest, namely that the detriments complained of were to be regarded as a single act extending over a period, alternatively part of a series of similar acts such that time only ran from the last of them, Mr Ratledge conceded from the outset of the Final Hearing that the three month primary time limit ran from 18 September 2020 at the latest, meaning that the Claimant should have

notified his potential claims to ACAS by 17 December 2020. By the time he in fact notified ACAS of his potential claims on 24 February 2021, his claims were, as a minimum, over two months out of time. That notification did not serve to extend time in respect of his s.47B detriment claims, so that when his claim form was received by the Tribunals on 6 May 2021 those claims were then approximately four and a half months out of time.

10. The claim form was accompanied by detailed Particulars of Claim. By then, the Claimant was represented by DWF Law LLP, a leading provider of legal services, known amongst other things for their work representing claimants in the Employment Tribunals. Nine specific detriments were pleaded in paragraph 15 of the Particulars of Claim, which echoed if they did not exactly replicate the detriments referred to in Mr Whysall's letter of 20 August 2020. The first seven detriments all pre-dated that letter. As with Altor Employment Solicitors, there is no suggestion that the Claimant was other than competently advised by DWF. Furthermore, it has not been suggested that, when the Particulars of Claim were drafted and the claim subsequently submitted, DWF had only very recently been instructed or were otherwise acting under some time constraint which meant that there was no real opportunity for them to reflect upon or advise the Claimant as to the merits of his claims, including in respect of any time issues that might impact the Tribunal's jurisdiction to consider some or all of his claims. Notwithstanding it was readily conceded at the Final Hearing that the s.47B detriment claims had been brought outside the primary time limit, and also notwithstanding the detailed and precise manner in which the claim was pleaded in the Particulars of Claim, the Particulars did not address the jurisdiction point, in particular why it was not reasonably practicable for the claims to be notified and presented in time or why it might be said that the claims had been pursued within a further reasonable period outside the primary time limit. It was a notable omission from the pleading and is an issue that remained unaddressed by the Claimant through to the conclusion of the Final Hearing.

11. We raised this omission with Mr Ratledge in the course of his closing submissions, noting that the Claimant's witness statement was entirely silent on the matter of the Tribunal's jurisdiction. We refer in this regard to paragraphs 14 to 16 of our Judgment. As we set out there, Mr Ratledge sought to deal with the issue by way of closing submissions. Whilst he referred in his written submissions to the Claimant feeling he was on 'thin ice' and that he did not wish to create waves at work as the reasons why it was not reasonably practicable for the claims to be brought in time, it was only in the course of his oral submissions, that he additionally made reference to the Claimant's health issues. Even then, it was left to the Tribunal to locate the Claimant's relevant medical records in the Hearing Bundle since we were not referred to them in the course of submissions and they did not feature in the parties' evidence or cross examination of witnesses.

12. Whether or not it was reasonably practicable for claims to be brought within the primary time limit applicable to them is a question of fact. As

with all issues of fact, it is to be determined on the strength of evidence rather than submissions. Whilst the documents in the Hearing Bundle are, of course, part of the overall evidence in a case, it is usual for a claimant to address reasonable practicability in their witness statement. In the experience of this Tribunal, many unrepresented claimants do so, particularly where, as here there is a List of Issues that has identified jurisdiction, including extension of time, as an issue to be determined by the Tribunal. In this case, throughout the entirety of the proceedings the Claimant has been represented by an experienced firm of claimant solicitors and, at Final Hearing, by experienced Counsel, with no suggestion by Ms Bayliss or evidence from the Claimant that he was badly advised in the matter by either of them. The Claimant's failure to address jurisdiction in his witness statement matters because it means that Mr Burns was denied the opportunity to question him as to why he considered he might have been on thin ice or wanted to avoid making larger waves, and how and to what extent any health issues impacted his ability to provide instructions to his solicitors and/or pursue litigation. At the point at which he cross examined the Claimant he did not know that these were the explanations that would be put forward in closing.

13. We cannot accept Ms Bayliss' attempts to somehow attribute responsibility in the matter to the Respondent (paragraphs 12 and 13 of her submissions and developed in her oral submissions). The Respondent pleaded in its Grounds of Resistance that the claims were out of time and, as we have noted already, jurisdiction was included within the List of Issues as an issue to be determined by the Tribunal. Reasonable practicability is rarely an issue in respect of which a Respondent leads evidence. In our judgment it was, however, an issue on which the Claimant ought reasonably to have led evidence in his witness statement. In any event, the Respondent did not let the matter rest with its Grounds of Resistance and the List of Issues. Instead, on 8 March 2022 it served a request for further information (pages B37 to B39 of the Costs Bundle) which noted the date of the most recent claimed detriment and requested that the Claimant identify any and all grounds relied on by him that it was not reasonably practicable for him to present the claims in time and, secondary to this, why 6 May 2021 was a reasonable time thereafter. We agree with Mr Bignell that the response to the Respondent's request that was eventually forthcoming on 14 June 2022 (Pages B57 to B61 of the Costs Bundle), only after the Respondent had unsuccessfully sought to secure compliance through an application to the Tribunal, reflected a conscious effort on the part of the Claimant to avoid addressing these, and indeed other, issues. We regard the specific responses that were forthcoming on the time/jurisdiction issue to amount to obfuscation on the part of the Claimant. He failed to engage in any meaningful way with the time issue, merely asserting in the most general terms that his s.47B detriments claims were in time (an assertion that was not maintained at any point by Mr Ratledge).

14. In our judgement, when the s.47B detriment claims were first presented to the Tribunal, and as they continued to be pleaded and pursued through to

closing submissions, they had no reasonable prospect of success. Mr Ratledge's belated efforts to advance arguments in closing as to why the Tribunal might have jurisdiction failed to breathe life into claims that from start to finish were plainly out of time and in respect of which the Claimant had no reasonable prospect of securing an extension of time. The Claimant's response to the Respondent's request for further information evidences to us that he knew that to be the case, but even if he had not appreciated it that he should have done so given the advisors he had retained in the matter and the Respondent's efforts to highlight the issue to them and him. This was not a case like Rogers v Dorothy Barley School UKEAT/0013/12/LA, referred to by Ms Bayliss, where a litigant in person was simply not grasping a jurisdictional question. This was an intelligent, experienced former Chief Executive, advised throughout by capable, experienced legal advisors who was quite capable of grasping the issues in the case but who was unwilling to engage with an obvious jurisdictional time point. Such time points are 'bread and butter' issues for solicitors, barristers and other professional representatives in Tribunal proceedings.

15. It is not strictly necessary for us to consider or determine the costs application on the other grounds advanced by Mr Bignell. However, there is weight to his submissions that the Claimant was misconceived in seeking to frame his disclosures as having been made to the Respondent about the Respondent rather than, as was the case to Milton Keynes Council about the Council. As with the jurisdiction/time issue, there was a degree of obfuscation in his response to the Respondent's request for further information regarding his claimed qualifying disclosures. On the detriment issue, he persisted until closing submissions to maintain that Mr Bracey, Mr Palmeiri and Mr Proffitt were the Respondent's agents when they allegedly subjected him to various detriments, and likewise he failed to engage with this issue when the Respondent served its request for further information. It was an unusual route by which to pursue a s47B claim and in our judgement it called for some further explanation from the Claimant as to the basis of the assertion, albeit this was not forthcoming. Instead, once again, the Claimant avoided the issue by simply asserting that the three named individuals were acting as the Respondent's agents without any further explanation. As Mr Bignell has noted, in our Judgment we said that the Claimant had failed to establish even basic facts to support his complaints deriving from the three individual's alleged actions. The same pattern of behaviour on the part of the Claimant is evident in his response to the Calderbank offer that was put forward by the Respondent on 17 August 2022 and which referred to these aspects of his claim as being "hopeless". We agree that they had no reasonable prospect of success. The Claimant's response through his solicitors was to assert that he had a very strong case, without explaining why. They went on to propose a financial settlement at a level some way above the maximum amount the Claimant could have hoped to recover if he succeeded in his claim of 'ordinary' unfair dismissal. It evidences to us a claimant who was not engaging with the issues in an informed or sensible way with a view to resolving a dispute, important elements of which were problematic. It adds to the overall picture of a claimant who appreciated that his s.47B claims

had no reasonable prospect of success or who, at the very least, should have appreciated that. Lindsay J's observations in Beynon v Scadden [1999] IRLR 700, cited at paragraph 4 of the substantive application are apposite.

16. As we say, these further grounds are effectively secondary to the Claimant's primary contention and have not given rise to additional costs, over and above the Respondent's wasted costs of defending out of time s.47B claims, though it evidences a claimant who was avoiding engaging with fundamental weaknesses that impacted various aspects of the claims. The Rule 76 threshold test having in our judgment been met and the Tribunal having turned its attention thereafter to the question of the nature, gravity and effect of the conduct, we regard the Claimant's conduct as serious and persisting over the lifetime of the litigation, including all the way up to Final Hearing, with the detriment issues above only being conceded in closing submissions and jurisdiction not conceded at all, notwithstanding the dearth of evidence to support Mr Ratledge's closing submissions on the issue of reasonable practicability.

17. We have gone on to consider the effect of the Claimant's conduct, noting again that it is not necessary for the Tribunal to determine whether or not there was a precise causal link between the conduct in question and the specific costs being claimed. Ms Bayliss submits that the alleged disclosures and detriments formed the factual matrix to his unfair dismissal claims and so this evidence would have to have been heard in any event. Having reviewed his witness statement, which runs to some 41 pages, approximately 24 pages of it are concerned with his s.47B detriment claims, a further 10 pages address his redundancy dismissal. Although a claimant will inevitably provide additional information by way of background and for context, that was not the purpose of the extensive evidence regarding the claimed detriments in the Claimant's witness statement. Whilst we recognised in our Judgment that some aspects touched upon his unfair dismissal complaints, material aspects did not and went significantly beyond what might be considered proportionate background and context. We are certain that we would not have heard or received the volume of evidence that we did, and the Respondent would not have been put to the significant time and expense that it was, had the Claimant not pursued misconceived s.47B detriment claims. Furthermore, we set out in some detail in our Judgment why the automatic unfair dismissal complaint itself was problematic. The overall picture is of a Claimant advancing a hopeless case partly in support of a further claim with relatively limited prospects.

18. Whereas the Respondent has sought different percentages in respect of specific costs incurred by it, we have approached the matter on a more broad brush basis. In our judgement, the s.47B detriment claims served to increase the time and costs in this case by at least one-third. Had the claims not been pursued, we consider that the case, including remedy, would have been capable of being heard and disposed of within three or, at most four days rather than six days, particularly as it would then have

been heard by a Judge sitting alone rather than a full Tribunal. Having briefly reviewed the Hearing Bundle, we consider that upwards of 1,000 pages out of a total of just over 2,000 pages might have been dispensed with. We are in no doubt that the witness statements would have been shorter, though we disagree with Mr Bignell that there might have been no need for Mr Bracey to give evidence at all. It was Mr Bracey who proposed the secondment arrangement that ultimately triggered the Claimant's redundancy. Whilst the Claimant accepted at Tribunal that he had no evidence that Mr Bracey had brought forward the secondment proposal because he had made protected disclosures (indeed, he did not put forward a positive case that Mr Bracey knew of his disclosures, assuming instead that as the Council's Chief Executive he must have known of them), as long as the Claimant was pursuing an arguable claim of automatic unfair dismissal, which the Respondent accepts he was, Mr Bracey would likely have been required to give evidence at the Final Hearing as to the matters that informed his proposals, even if the detriment claims had not been pursued. However, Mr Bracey's evidence, and accordingly his witness statement, might well have been more limited. It is less obvious why Mrs Fru or Mr Proffitt might have needed to have given evidence had the s.47B detriment claims not been pursued. As regards Mrs Fru, her evidence did not touch upon the issue of the Claimant's dismissal and, in the case of Mr Proffitt, he gave evidence because the Claimant was claiming that he had acted as the Respondent's agent in subjecting him to detriments. That assertion and the claim more generally that the Council's workers had acted as agents of the Respondent with its authority was problematic, indeed legally and conceptually muddled from beginning to end. It was only finally conceded by Mr Ratledge at the outset of his closing submissions and it caught Mr Burns by surprise. In reality it never had legs. We have highlighted already the Claimant's failure to engage with this issue on receipt of the Respondent's request for further information.

19. Our starting point is that the Claimant should pay one-third of the Respondent's costs of the proceedings, excluding the costs of the costs application which are the subject of a separate costs application. However, pursuant to Rule 84 of the Tribunals Rules of Procedure we consider it appropriate to have regard to the Claimant's ability to pay. This is not a case where the Claimant's financial situation is such that we should not make a costs order, but they are such that we have decided to cap the amount of the costs ordered to be paid by the Claimant pursuant to our order at £30,000, subject as appropriate to detailed assessment of the Respondent's claimed costs. Whilst the total amount of the Respondent's costs is said to be approximately £195,000, given the level of those costs we do not rule out that following detailed assessment one-third of the assessed amount might be less than £30,000. In arriving at a maximum amount of £30,000 we have regard to the fact that the Claimant has the benefit of a £15,000 costs indemnity under the terms of his legal expenses insurance for this litigation. His earnings have reduced significantly; he told the Tribunal that his current earnings from self-employment may be in the region of just £28,000 per annum. His mother

has supported him with a soft loan, albeit which will need to be repaid in due course from £88,000 or thereabouts that he expects to receive from the Respondent in satisfaction of his successful unfair dismissal claim. Whilst we have not been provided with a detailed breakdown of the Claimant's assets and liabilities or income and outgoings, he has two teenage children to maintain. We do not underestimate his expenses in that regard or the difficulties he faces in effecting immediate reductions to the family's outgoings where there has been a significant change to their earnings. We consider that it would be just and proportionate to expect the Claimant to pay up to a further £15,000 from his own capital resources, even if these comprise solely of the monies to be received from the Respondent. We take into account that those monies are intended to compensate the Claimant for his past financial losses. However, that does not mean they should not be taken into consideration, in the same way that the lost earnings they compensate would be taken into account. Even if the outcome of any detailed assessment is that the Claimant is required to pay a full £15,000 to the Respondent, that will still leave him with a sizeable capital buffer whilst he endeavours to rebuild his earnings and perhaps also begin to address his outgoings.

20. The Tribunal will not undertake a detailed assessment pending further discussion between the parties as to whether the final amount of the costs can be agreed. However, in the meantime, further case management orders will be made with a view to their assessment in the event they cannot be agreed and also to deal with the Respondent's second costs application, assuming it wishes to pursue it.

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Employment Judge Tynan

Date: 13 July 2023

Sent to the parties on: 17 July 2023

GDJ
For the Tribunal Office