EMPLOYMENT TRIBUNALS

COSTS JUDGMENT

BETWEEN

CLAIMANT		RESPONDENT
MR R HALPIN	**V**	**EVERBRIGHT SUN HUNG KAI (UK) COMPANY LIMITED**

HELD AT: LONDON CENTRAL (BY VIDEO) **ON: 28 & 31 OCTOBER 2022**

EMPLOYMENT JUDGE: MR M EMERY

REPRESENTATION:
For the claimant: Mr N Bidnell-Edwards (Counsel)
For the respondent: Mr A Rhodes (Counsel)

COSTS JUDGMENT

The claimant's application for a preparation time order, alternatively a costs order fails and is dismissed

REASONS

The costs application

1. The application is pursued under Rule 76(1), on the basis and in summary that the respondent acted unreasonably in its disclosure obligations between

April 2020 and October 2021, including failing to disclose relevant documentation, requiring the claimant to seek orders for disclosure, failing to comply with consequent Orders, requiring Unless Orders to be sought, and failing to provide transcripts of meetings.

The costs application process

2. The application for costs was sent to the respondent on 16 October 2022. In advance of the remedy hearing the claimant served a costs witness statement, a skeleton argument and relevant timeline. The respondent served a Response to the Costs Application and a statement on costs from Mr Egan. There are also relevant documents in the remedy hearing bundle including pages 108-137, 248-255, 259-280, 297-310, 322-326, 331-339, 345-358, 362-373 and 377-382. I read these documents, and I re-read the judgment to remind myself of the evidence and findings in relation to the whistleblowing, compliance, and disciplinary policies in force at the relevant time.

3. I heard brief costs arguments from the parties at the two-day remedy hearing. It was agreed I would determine the costs application on the arguments I head and on the papers.

Facts relevant to the application

4. I accepted the claimant's witness statement account of the steps he undertook to gain documentation and some of the delays he experienced. I accept having read the documents that he was not always provided with the reason for the delay when documents were eventually provided. I note Mr Egan's evidence, that there were various applications from the claimant for disclosure and the respondent tried to comply with each of them. He says that not all of the applications were for relevant documents, that the applications were made in a piecemeal way – for example there were seven different requests for documents; the claimant wrote numerous and lengthy emails on documents and other issues. Mr Egan also argues that the claimant failed to comply with his own disclosure obligations.

5. The respondent says it would not be reasonable to penalise it when there are at worst failings on both sides in the disclosure process. On the transcripts, it acknowledges making an error, but it was an error and not unreasonable conduct.

6. I noted the following evidence in the bundle about disclosure applications:

    a. The respondent provided its list of documents on 1 April 2020.

    b. The claimant requested specific disclosure from the respondent on 7 April 2020 – a wide ranging request seeking documents on issues relating to his redundancy, document relating to his capability, potential other redundancies, cost saving rationale, as well as documents relevant to whistleblowing.

c. The claimant made an application to the tribunal for specific disclosure on 8 June 2020 seeking 10 categories of documents.

d. In its response dated 15 June 2020 the respondent stated "it did not understand" many of the claimant's requests; as one example "the claimant was not dismissed for reasons of capability"; another request was for a redundancy process 18 months earlier; some of the requests are broad. The respondent says it had disclosed documents in 5 of the 10 categories.

e. The issue of disclosure was raised at a Preliminary Hearing dated 11 August 2020: the PH Order states disclosure issues were "dealt with mostly by agreement between counsel…". An order for specific disclosure by 8 September 2020 was made for a recording and transcript of a conference call or a statement if no recording or transcript existed. The respondent sought and gained an extension of time for providing the call transcript, and it was provided within the revised deadline. In the meantime the claimant had applied for an Unless Order in respect of this disclosure (279-80).

f. On 23 December 2020 C wrote to R saying it had failed to provide documents "Paragraphs 1 A, B, D, E of the Specific Disclosure Application, which the Respondent agreed to disclose at the preliminary hearing".

g. On 7 January 2021, the claimant made a further application to the tribunal, stating that the respondent had failed to comply with the Tribunal's 11 August 2020 Order. On 11 January 2021 the respondent replied, disclosing documents in respect of A and B, it said that documents D and E did not exist. On 12 January 2021 the claimant confirmed to the tribunal that the 11 August 2020 disclosure Order had now been complied with.

h. On 25 January 2021 the claimant made a further request for specific disclosure from the respondent, requesting 21 classes of documents: the first request related to the treatment of another employee who the claimant contended was treated differently in a comparable disciplinary situation several years earlier. The rest related to the respondent's knowledge of documents and electronic material he brought with him when he joined the respondent, and documents relevant to whistleblowing and detriment. On 8 February the respondent's solicitor said he was taking instructions but this was a "significant" request and his client would need to do a "thorough search", suggesting a two week period to respond.

i. The respondent solicitor's response on 22 February 2021 stated that the prior employee issue was not relevant; also items relating to materials he brought to the role were not relevant. It says it disclosed items 5-9 and 11-14. It says it is taking instructions on item 10. Item

15 it says is legally privileged. It says it has searched but cannot locate documents relating to items 16-21.

j. In further correspondence the respondent sought clarification on the relevance of items 2-4 and on 2 March the claimant stated it related to the respondent's knowledge of the platforms he brought with him into the business.

k. On 15 March 2021 the claimant applied for an Unless Order On 22 March the respondent provided some of the documents sought. The claimant stated that this disclosure was not complete – without specifying exactly what. On 12 and 22 April 2021 the claimant asked for his applications for disclosure to be urgently put in front of a judge.

l. On 26 April 2021 the respondent stated that it had carried out searches in respect of all the claimant's specific disclosure applications. It reiterated that the disciplinary proceedings in 2014 were not relevant; it said many of the specific disclosure documents requests were provided on 26 March 2021; it said the claimant had the disciplinary policy as it was given to him at disciplinary stage; it was searching for the relevant compliance manual.

m. On 4 May 2021 the Tribunal postponed full merits hearing "in part to the Tribunal's failure to deal with applications made by the Claimant". The respondent was ordered to provide the FCA Notification form; the 2014 disciplinary issue; the relevant disciplinary policy and the relevant compliance manual. The respondent was ordered to provide statements in respect of disclosure issues.

n. On 10 & 13 May 2021 the claimant applied for an Unless Order in respect of disclosure failures. The respondent then provided updated statements and two additional documents.

o. A further Case Management Preliminary Hearing took place on 25 May 2021. The Order states that it will not grant the Unless Order requested by the claimant, because of "confusion" over the scope of the 4 May 2021 Order. The claimant again referenced the compliance manual and it was noted that a failure to provide the relevant version may be an issue of cross-examination.

p. On 16 July 2021 the claimant requested a statement from Mr Yeung on additional disclosure; the respondent was that this would be sent as soon as the disclosure search was completed. On 28 July the claimant sought signed statements from Mr Yeung and Mr Benton and the whistleblowing policy in force at time.

q. On 2 August 2021 the respondent disclosed the '2017' compliance manual.

r. A Further Case Management preliminary hearing took place on 24 September 2021. The application for a statement from Mr Benton was rejected on the basis he had provided a statement, and the claimant can cross-examine on the documents. There was clear concern expressed about the failure of the respondent to provide an adequate and timeous copy of the meeting transcripts:

> "I am concerned by the way the litigation has been conducted by the respondent, in particular in relation to disclosure and compliance with tribunal orders… It seems the respondent has simply ignored my Order … [the claimant] is now struggling to deal with apparently machine generated transcripts… the respondent runs the risk of facing an application for a preparation time order…" .

As a consequence the respondent was denied the right to reply on its transcripts at the forthcoming full merits hearing. The respondent was ordered to provide information about the version of its whistleblowing policy in force at the time of the events in question

Legal arguments on costs

7. Relevant submissions are outlined below.

The Law

8. *COSTS ORDERS, PREPARATION TIME ORDERS AND WASTED COSTS ORDERS*

Definitions
74.—

(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.

(2) "Legally represented" means having the assistance of a person (including where that person is the receiving party's employee) who—

> (a) has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates' courts;
> (b) is an advocate or solicitor in Scotland; or
> (c) is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland.

(3) "Represented by a lay representative" means having the assistance of a person who does not satisfy any of the criteria in paragraph (2) and who charges for representation in the proceedings.

Costs orders and preparation time orders

75.—

(1) A costs order is an order that a party ("the paying party") make a payment to—

(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;
(b) the receiving party in respect of a Tribunal fee paid by the receiving party; or
(c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.

(2) A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

When a costs order or a preparation time order may or shall be made

76.—

(1) 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.

(2) A Tribunal may also make such an 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.

(3) …

Procedure

77. –

(1) A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

The amount of a costs order

78.—

(1) A costs order may—

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;
… agree as to the amount payable, be made in that amount.

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

The amount of a preparation time order

79.

(1) The Tribunal shall decide the number of hours in respect of which a preparation time order should be made, on the basis of—

(a) information provided by the receiving party on time spent falling within rule 75(2) above; and
(b) the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required.

(2) The hourly rate is £33 and increases on 6 April each year by £1.

(3) The amount of a preparation time order shall be the product of the number of hours assessed under paragraph (1) and the rate under paragraph (2).

9. Ayoola v St Christo'her's Fellowship UKEAT/0508/13; Haydar v Pennine Acute NHS Trust UKEAT/0141/17:

    a. There is a 3 stage process a tribunal must follow:

    b. Firstly, the tribunal must make findings of fact about the paying party's conduct and, where r 76(1)(a) is being considered, about the merits of the claim. The tribunal must consider whether, on those findings, one or more of the statutory thresholds in r 76 are met. The tribunal will need to explain in its reasons which aspects of any conduct fulfilled which part of the r 76 test.

    c. Secondly, if the r 76 threshold has been met the tribunal will go on to consider whether to exercise its discretion to award costs or a PTO. In doing so the tribunal must take account of all the relevant circumstances including, where appropriate, the paying party's ability to pay any costs order.

    d. Thirdly, and only when the first two stages have been completed, a tribunal may proceed to consider the amount of the award payable and the form of any award.

10. Duhoe v Support Services Group Ltd (In Liquidation) UKEAT/0102/15: Where two applications are made, one for costs and one for a PTO, and the tribunal decides that an award should be made, it must consider both applications and make a conscious decision which type of order to make.

11. Beynon v Scadden [1999] IRLR 700, EAT: There is a discretion to award costs once the threshold test is met; the test for the tribunal is "… whether it was just to have exercised as it did the power conferred upon it by the rule … [The EAT] must not consider whether we would have ordered as the [employment judge] did but instead ask ourselves whether the employment tribunal took into account matters which it should not have done, or failed to take into account that which it should have done or whether in some other way it came to a conclusion to which no employment tribunal, properly directing itself, could have arrived…"

12. Lodwick v Southwark London Borough Council [2004] EWCA Civ 306: the purpose of an award of costs is to compensate the party in whose favour the order is made, and not to punish the party ordered to pay the costs; questions of punishment are irrelevant both to the exercise of the discretion whether to award costs) and to the nature of the order that is made.

Conclusions on the facts and the law

13. The first element of the test is - was the conduct of the respondent unreasonable?

14. I noted first that the respondent in the main engaged with the claimant over disclosure: it considered some of the claimant's requests to be irrelevant including a redundancy 18 months earlier and a disciplinary issue several years earlier. While its arguments were overruled in part at a preliminary hearing, I did not consider it unreasonable to object to voluntary disclosure of issues relating to former employees which it considered irrelevant to the claim. While its arguments did not succeed, this was not an unreasonable position for the respondent to take.

15. I did not accept that the respondent acted reasonably in querying the relevance of documentation relating to the web-based material the claimant brought with him to his role at the beginning of his employment – see paragraphs 26 - 30 of the liability judgment. The respondent's knowledge of this was of clear relevance to the disciplinary issue, and this should reasonably have been known to the respondent at disclosure stage. The respondent's failure to provide disclosure of this documentation at an early stage in the disclosure process amounts to unreasonable conduct.

16. Several of the requests for disclosure relate to the policies in place at the time of the events in question – the whistleblowing policy; the compliance manual; the disciplinary policy. Policies were provided at various times, but not always the version in place at the relevant time. I concluded that efforts were made to provide disclosure of policies. I also note my finding at paragraph 199 of the liability judgment: "It was apparent during the hearing that Mr Egan had only a hazy idea of the policies of the respondent. I concluded that he was not considering the compliance manual, he was not aware what the policy was…". Also paragraph 203: "… the respondent's policies were not always up to date, and Mr Egan was not on top of them."

17. On the failure to provide policies, I concluded that the respondent took steps to provide disclosure but that Mr Egan was not on top of the policies, what was the relevant version, where was it stored. I concluded that this lack of knowledge was the principal reason why disclosure of these policies was late; this was not deliberate behaviour. I note that the respondent did carry on searching and eventually turned up most of the relevant policies. While not in any way ideal, this was more of an issue of capability in a relatively small employer, and I did not consider that this met the test for unreasonable conduct by the respondent.

18. Significant criticism was made of the respondent for its failure to provide transcripts of the relevant meetings; this led to the respondent being barred from relying on its transcripts, the claimant was allowed to rely on the excerpts he wished to rely on. I noted the criticism of the Employment Judge, that the respondent had ignored its Order in respect of the transcripts. I also noted that the claimant had already transcribed parts of the recorded meetings that he

wanted to rely on; the Tribunal gave him permission to rely on these transcriptions. The respondent was barred from relying on parts of the transcript it wanted to rely on.

19. I concluded overall that the respondent did not undertake a proper search for all the relevant documentation when it was required exchange documents, which led to the claimant having to make multiple attempts in correspondence to gain documentation. However the respondent *did* engage with this correspondence, both providing documentation, asking for clarification and providing rationale if it did not accept the documents relevance.

20. I also accept that it is often the case that a party does not at the outset of a case realise the amount of disclosure required; often documents are located late; often there is a disagreement on the relevance of specific documents.

21. I concluded that in two instances this amounted to unreasonable conduct – the failure to transcribe the transcripts in time, and the failure to provide disclosure relating to the respondent's knowledge of materials the claimant was bringing to the role.

22. The next part of the test is to consider whether I should exercise my discretion to award costs or a preparation time order in respect of these two issues. I decided that I should not do so. There are several reasons for this decision.

23. Firstly, only a proportion of the respondent's activities in relation to disclosure amounted to unreasonable conduct. It provided many of the documents sought on request; it provided explanations why it did not consider documents were relevant. While it can be criticised for not including these documents in its list of documents at the outset of disclosure, I did not accept that this in itself amounted to unreasonable conduct.

24. It follows that in respect of the majority of the claimant's disclosure requests the respondent did not act unreasonably. However, the claimant seeks all of his costs of all of his disclosure attempts, no matter whether the respondent provided the documents on request or not. I did not consider that this was a reasonable approach to take, as the claimant is attempting to gain costs for elements of his requests for disclosure where he cannot advance an argument of unreasonable conduct.

25. Secondly, while the claimant sought Unless Orders and claims the costs of doing so, no Unless Order was granted.

26. Thirdly, it was the tribunal which was unable to deal with many of the claimant's applications, and this led to the postponement of the liability hearing. The respondent was entitled to make its arguments in respect of disclosure and await the outcome of the tribunal's actions where it reasonably disagreed with the claimant's contentions. Therefore, much of the delay and the claimant's preparation time was expended not because of the respondent's conduct but because of the Tribunal's own resourcing issues.

27. Fourthly, in respect of one disclosure issue, the transcripts, the respondent did act unreasonably in not disclosing its transcripts earlier and it was barred from doing so. This was an advantage to the claimant. It was not the claimant at this stage insisting on the transcripts, instead he was saying the transcripts were provided too late and were not adequate. The tribunal accepted this argument and barred the respondent from relying on its version of the transcripts. In effect, the claimant gained an advantage in the litigation by this action. He did not need the respondent's transcripts; he was not relying on them. In these circumstances, I did not consider it just to make an order for disclosure failures where the claimant in effect did not want the respondent's transcripts and gained a potential advantage by their exclusion.

28. For these reasons I did not consider it just or appropriate to award costs even in the two circumstances where the respondent's actions in the disclosure process were unreasonable.

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EMPLOYMENT JUDGE EMERY

Dated: 25 August 2022

Judgment sent to the parties
On

26/08/2023
For the staff of the Tribunal office

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