



## EMPLOYMENT TRIBUNALS

**Claimant**  
Mr M Sivarayan

v

**Respondent**  
(1) Ipay Solutions Limited  
(in liquidation)  
(2) Mr S Kuganathan

**Heard at:** Central London Employment Tribunal

**On:** 13 October 2023

**Before:** Employment Judge Brown

**Members:** Ms M Pilfold  
Dr V Weerasinghe

**Appearances:**

**For the Claimant:** In person  
**For the First Respondent:** Did not appear and was not represented  
**For the Second Respondent:** Mr Flood, Counsel

## COSTS JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Claimant acted unreasonably in bringing and conducting the proceedings and it is appropriate to make a costs order against the Claimant.
2. The Claimant shall pay the Second Respondent's costs in the sum of £5,000.

## REASONS

### Preliminary

1. By a claim form presented on 6 April 2021 the Claimant brought complaints of automatic unfair dismissal on the grounds of protected disclosures and protected

disclosure detriment against the First Respondent, his former employer and the Second Respondent, Director and Sole Shareholder of the First Respondent.

2. By judgment promulgated 11 November 2022 on the Tribunal decided that
  - a. The Claimant did not make any protected disclosures.
  - b. The First Respondent did not automatically unfairly dismiss the Claimant.
  - c. The Respondents did not subject the Claimant to any detriment on the grounds of any protected disclosure.
3. On 29 November 2022 the Second Respondent made an application for costs. This hearing was to determine that application. The Tribunal heard submissions from both parties and heard evidence from the Claimant as to his means.
4. The First Respondent is insolvent. It did not appear at the liability hearing, or this hearing. The Second Respondent appeared at both and was represented, at this hearing, by Mr Flood, Counsel.

### **Facts**

5. The Claimant's claims were based on him having made protected disclosures.
6. He alleged that he had made the following protected disclosures:
  - a. By email to Director Mr Senthoran Kuganathan on the 10th of August 2020 notifying him that merchants are asking for their money and asking why the company was still operating when it had been ordered by the courts to be liquidated; and
  - b. To the Court appointed Liquidator Arvinder Singh in December 2020, giving her information about the company still operating and the company structure.
7. The Tribunal ordered the Claimant to produce the original email he had allegedly sent to Mr Kuganathan on 10 August 2020. The Claimant had produced a Word document, allegedly containing the details of the 10 August 2020 email.
8. The Tribunal made the following findings in its judgment:
  - a. That the Second Respondent had produced metadata of the Word document with that email in it, showing that the Claimant created it on 25 April 2022. The Claimant was cross examined as to the authenticity of his alleged email of 10 August 2020. He then said that he had sent an email, with the screenshot of the 10 August 2020 email, to the Respondent's solicitors and that he had the email to the solicitors and the screenshot in his gallery on his phone. The Tribunal adjourned and ordered the Claimant to provide that email and the screenshot, with the date it was taken. The Claimant failed to provide those documents, despite being given a number of opportunities to do so.

- b. The Claimant never produced the original August 2020 emails, or his email to the Respondent's solicitors attaching a screenshot of them, or the screenshot. He said he had sent the screenshot to the Tribunal on 25 April 2022. However, it was clear from the 25 April 2022 email to the Tribunal that the only attachments to it were Word "docx" documents, not screenshots.
  - c. That the Claimant did not send an email to the Second Respondent on 10 August 2020.
  - d. That the Claimant's evidence was not convincing regarding whether he had spoken to Ms Singh in December 2020 or January 2021 at all, or, if he did, what he said. There was no evidence that he sent any information to her in writing.
  - e. The Claimant did not communicate any information to Ms Singh before he was told by the Second Respondent that he would be dismissed on 19 January 2021.
9. The Tribunal therefore did not accept the fundamental factual assertions made by the Claimant on which his case was founded.
10. The Respondent had sent a costs warning letter to the Claimant on 25 March 2022. In the letter, the Respondent said that, while Employment Tribunals do not make costs awards as a matter of course, *"However, if a claim is being pursued vexatiously or unreasonably, as appears to be the case here, the Tribunal can and do make costs awards. We are therefore putting you on notice that, if you continue with your claim against our client and, as seems to be inevitable, your claim is unsuccessful, we will apply to the Tribunal for an Order that you pay all of our client's legal costs."*
11. The Claimant produced screenshots of contact with ACAS. He said that he had not been warned by ACAS that he might have to pay costs. He said that the Second Respondent had not been truthful in evidence at the Tribunal.
12. The Second Respondent is an individual who has had to pay the costs of defending the Claimant's claim.

## **Law**

13. The Respondent makes its costs application under *Rule 76 Employment Tribunal Rules of Procedure 2013*. Rule 76 provides as follows:
- "76 (1)A Tribunal may make a costs order ....., and shall consider whether to do so, where it considers that:
- (a) a party ... has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that proceedings or part have been conducted; or
  - (b) any claim or response had no reasonable prospect of success."

The Tribunal must consider making an order for costs where it is of the opinion that any of the grounds for making a costs order has been made out.

14. Following *Hayden v Pennine Acute NHS Trust* UKEAT/0141/17, the Tribunal should take two-stage approach:
  - a. Consider whether any of the grounds in r76(1)(a) have been established;
  - b. Consider whether, in all the circumstances of the case, a costs award is merited, *Ayoola v St Christopher's Fellowship* UKEAT/0508/13.
15. Where allegations are made and shown to be “baseless” or that things alleged to have been said “were never said” or “never done”, then such conduct will be viewed as “manifestly unreasonable” justifying a costs order, *Daleside Nursing Home Ltd v Mathew* UKEAT/0519/08, [2009] All ER (D) 99 (Aug).
16. By r78 *ET Rules of Procedure*, “ (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; (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the [Act of Sederunt (Taxation of Judicial Expenses Rules) 2019], or by an Employment Judge applying the same principles;...”
17. By r84 *Ability to pay*, “In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.”

## **Decision**

18. The Tribunal found, regarding the Claimant's alleged protected disclosures, that he did not make the disclosures on which the claim was based.
19. It did not accept his evidence that he had sent any emails making protected disclosures in August 2020. It did not accept his evidence that he had made a disclosure to the Court appointed liquidator in December 2020, or at any time before he was dismissed.
20. By inference, it found that the Word document he produced, which purported to show the August 2020 email, was fabricated by him.
21. Accordingly, this is a case where things alleged to have been said, “were never said” or “never done”. The fundamental facts on which the claim was based were not true and the Claimant had fabricated evidence of them. The Tribunal found that such conduct was “manifestly unreasonable”, *Daleside Nursing Home Ltd v Mathew* UKEAT/0519/08, [2009] All ER (D) 99 (Aug).

22. The Claimant acted unreasonably in bringing the proceedings on a false basis and in the way in which he conducted the proceedings, by fabricating evidence. The grounds for making a costs order in *r76 ET Rules of Procedure* were made out.
23. The Tribunal also found that making an order for costs was merited in all the circumstances. The Claimant was warned by the Respondent, before the hearing, that it would seek its costs. He pursued his claim anyway. While the ET, in its judgment, expressed scepticism about the reliability of the Second Respondent's evidence about the Claimant's role and the nature of the Respondent's business, the fact remained that the Second Respondent had not brought a case against the Claimant on the basis of fabricated evidence and untrue facts.
24. The Claimant's conduct was seriously wrong and there was little reason for the Tribunal not to exercise its discretion to make an award of costs. This was a case where it was appropriate to award costs against the Claimant because of his conduct.
25. However, the Tribunal took into account the Claimant's means when deciding whether to order him to pay costs at all, and, if it did, what level of costs to order.

### **Amount of Costs**

26. In his application to the Tribunal, the Second Respondent said that he had incurred a total of £30,316.00 plus VAT in costs in solicitors' fees and £4,500 plus VAT of Counsel's fees in defending this claim (total: £34,816.00 plus VAT (£41,779.20)), in addition to his costs for submitting his costs application and on an ongoing basis.
27. He produced invoices relating to his expenses.
28. The Second Respondent did not seek a detailed costs assessment, but confined his claim for costs to summary assessment of up to £20,000.
29. The Tribunal considered that it was proportionate and in accordance with the Overriding Objective to determine the level of costs at the hearing today, despite the Claimant not having produced a statement of means.
30. The Tribunal took into account that, having heard all the evidence, it had been sceptical about the authenticity of the Respondent Company's business and the veracity of both parties' evidence. It decided that the Second Respondent's apparent lack of bona fides in his commercial operation was relevant to the exercise of the Tribunal's discretion as to the level of costs.
31. The Claimant gave evidence as to his means. He produced benefits records showing Universal Credit payments granted to him for each of the months June – October 2023. He had previously produced proof of Universal Credit payments in December 2022 and January 2023. He produced 2 recent payslips, showing net monthly pay from his employer of just under £1,400 in September 2023 and about £1,486 net in August 2023. He told the Tribunal that his net monthly total income, including Universal Credit is about £2,200. He told the Tribunal that his wife does not work and that he has the following net monthly expenses: £616.67 in rent; £150 for heating; £70 for electricity; £90 council tax; £200 - £300 for food; £121 for mobile telephone; £900 in childcare. On that basis, his outgoings were likely to exceed his income.

32. The Claimant told the Tribunal that he regularly borrows money from his parents. He has young children. He does not have a car and he walks to work.
33. The Tribunal considered that the Claimant's evidence about his outgoings and income may not have been entirely reliable – in that his mobile telephone bill was extremely high for someone on a low wage. However, it accepted that, being on Universal Credit, he was a person with very low income.
34. That being the case, it would take him a very long time to pay any award of costs. It appeared unlikely that he would even be able to manage to pay £100 a month in costs. There was no evidence that he had access to any capital sums. There was no prospect of him paying a sum anywhere near £20,000 in any reasonably foreseeable period.
35. The Tribunal took into account the Claimant's lack of means and the Second Respondent's lack of bona fides in his business operations in exercising its discretion as to the amount of costs. It ordered the Claimant to pay the Respondent £5,000 in costs: there was little reasonable prospect of him being able to pay an amount greater than that sum.

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Employment Judge **Brown**

Date: 13 October 2023

SENT to the PARTIES ON

13/10/2023

FOR THE TRIBUNAL OFFICE