EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr Syed Furquan Ahmed	**v**	**(1) EngineF Holding Ltd** **(2) EngineF Operating Ltd** **(3) Mr Mark Allcock**

Heard at: London Central
On: 7- 9 November 2023

Before: Employment Judge G Hodgson
Mr T Cook
Mr M Baber

Representation

For the Claimant: Ms R Thomas, counsel
For the Respondent: Mr D Adams, counsel

JUDGMENT

The claimant shall pay to the second respondent costs of £20,000 (twenty thousand pounds).

REASONS

Introduction

1. Following the full merits hearing, the respondent employer (the second respondent) applied for costs. Regrettably, there was delay dealing with the costs hearing and it came before the tribunal on 7 November 2023.

Background

2. The liability decision was sent to the parties on 24 March 2022. On 6 April 2022, the respondent's solicitor wrote to the claimant indicating the respondent would wait for the appeal period to expire before proceeding with a costs application. The claimant did not agree to this proposed course. The time for appeal expired on 5 May 2022. On 13 May 2022 the respondent applied for costs, but failed to apply to extend time.

3. Pursuant to rule 72 Employment Tribunal Rules of Procedure 2013 ("The Rules"), the application should have been sent within 28 days, by 22 April 2022. The application was late three weeks. On 17 June 2022, the respondent applied for an extension of time and gave this reason:

> **The reason for this is simply to afford the Claimant the opportunity to consider his prospect of an appeal with his solicitors. The Claimant's solicitors had been in correspondence with us, advising that the Claimant was considering an appeal against the judgment. It also has to be said the wife of the Third Respondent Mr Allcock was diagnosed with cancer during this proceedings and had to undergo extensive surgery shortly after the judgment was given, which also meant that the Third respondent was not readily available to provide us with instructions.**

4. Directions were given on 2 August 2022 for the filing of skeleton arguments and a schedule of costs. On 5 September 2022, the respondent provided a "cost application" and the supporting statement from Mr Allcock, together with various invoices and a statement of costs.

5. On 26 May 2022, further orders were made for the serving of a schedule of costs. Both parties were ordered to file skeleton arguments.

6. The costs hearing came before the tribunal on 7 November 2023. The respondent failed to file a skeleton argument, and there was dispute as to whether the respondent had complied fully with the requirement for a schedule of costs.

Law

7. Rule 76, insofar as it is applicable, states:

> **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.**

8. The amount of a cost order is addressed by rule 78

> **78. The amount of a costs order**
>
> **(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;**
>
> **(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.**

9. The word "may" confirms that making the order is discretionary. However, the tribunal shall consider exercising that discretion in certain circumstances. The circumstances are often referred to as the threshold test or the gateway.

10. The threshold test is met in a number of circumstances which include: if either a party, or a party's representative, acts unreasonably in bringing or conducting proceedings (rule 76(1)(a)); and if the claim had no reasonable prospect of success (rule 76(1)(b).

11. There are three broad stages to a tribunal's consideration of a costs application. First, is whether the threshold for making a costs order under has been met; second, is whether it is appropriate, in all the circumstances, to make a costs order (i.e. the exercise of its discretion); and third, is what amount of costs should be payable.[1]

12. Once the threshold test has been met, the tribunal must consider the exercise of its discretion. Discretion will result in a tribunal making a number of decisions which can include the following: should costs be awarded at all; should the costs be awarded for a period; should the costs be limited to a percentage; and should the costs be capped. The order can be tailored to suit the circumstances.

13. In exercising its discretion, the tribunal should have regard to all of the relevant circumstances. It is not possible to produce a definitive list of the matters the tribunal should take into account.

14. We should be cautious about the citation of authorities on costs, albeit broad principles can be distilled from the relevant authorities.

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[1] (see *Haydar v Pennine Acute NHS Trust* UKEAT/0141/17 at [25] and *Vaughan v LB Lewisham (No.2)* [2013] IRLR 713 at [25])

15. We should not adopt an over analytical approach to the exercise of a broad discretion. The vital point is to look at the whole picture and ask whether there has been unreasonable conduct in the bringing and conducting of the case. In so doing, we should consider what was unreasonable about the conduct and what effect it had. See **Yerrakalva v Barnsley MBC [2012] ICR 420 LJ** Mummery said:

> **39. I begin with some words of caution, first about the citation and value of authorities on costs questions and, secondly, about the dangers of adopting an over-analytical approach to the exercise of a broad discretion.**
>
> **40. The actual words of Rule 40 are clear enough to be applied without the need to add layers of interpretation, which may themselves be open to differing interpretations. Unfortunately, the leading judgment in *McPherson* delivered by me has created some confusion in the ET, EAT and in this court. I say "unfortunately" because it was never my intention to re-write the rule, or to add a gloss to it, either by disregarding questions of causation or by requiring the ET to dissect a case in detail and compartmentalise the relevant conduct under separate headings, such as "nature" "gravity" and "effect." Perhaps I should have said less and simply kept to the actual words of the rule.**
>
> **41. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in *Mc Pherson* was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances.**

16. It is always the case that costs are compensatory; they are never punitive.[2]

17. The case law does identify specific matters which may be relevant to the exercise of discretion and we should consider some of the matters previous tribunals have found relevant to the exercise of discretion.

18. As it may affect the ability to analyse appropriately and reach objective decisions, Ill-health may be a factor.

19. When considering what a party should have reasonably known at a particular point in time, we should exercise caution. We have regard to the comments of Sir Hugh Griffiths in **ET Marler v Robertson 1974 ICR 72**.

[2] See, for example, Lodwick v Southwark London Borough Council 2004 ICR 884, CA.

> **Ordinary experience of life frequently teaches us that that which is plain for all to see once the dust of battle has subsided was far from clear to the combatants once they took up arms.**

20. We can consider how a party has pursued a matter. We can have regard to **Beynon v Scadden [1999] IRLR 700, EAT**. We would note the following from Justice Lindsay.

> **A party who, despite having had an apparently conclusive opposition to his case made plain to him, persists with the case down to the hearing in the "Micawberish" hope that something might turn up and yet who does not even take such steps open to him to see whether anything is likely to turn up, runs a risk, when nothing does turn up, that he will be regarded as having been at least unreasonable in the conduct of his litigation.**

21. In relation to r. 76(1)(b), a tribunal should look at what a party knew, or ought to have known, had it gone about the matter sensibly: **Cartiers Superfoods Ltd v Laws** [1978] IRLR 315, per Phillips J.

22. When considering whether a party should reasonably have realised there was conclusive opposition to that party's case, we should consider if there were clear statements setting out that opposition. Those statements may appear in the response or claim form, correspondence, and cost warning letters. We would add that the difficulty may be obvious on a simple reading of the documents reasonably available.

23. Where evidence turns out to be false, it may be appropriate to consider whether the evidence was advanced dishonestly, particularly if it concerns a central allegation.[3] However, a lie, even about an essential allegation, will not necessarily lead to an award of costs.[4]

24. It may be appropriate to consider a party's motive in bringing a claim. This is particularly relevant where there are allegations of vexatious behaviour.

25. The manner of proceedings should not be limited to questions of vexation; conduct that causes disruption, or prolongs the claim may be relevant. This is part of the general consideration identified in **Yerrakalva**.

26. Rule 84 expressly provides that the tribunal may have regard to a paying party's ability to pay.

> **84. 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.**

27. The tribunal is not obliged to restrict the order to one the paying party could pay in **Arrowsmith v Nottingham Trent University 2012 ICR 159** at **paragraph 37 Lord Justice Reimer said the following.**

[3] See for example Daleside Nursing Home Ltd v Matthew (UK EAT/0 519/08).
[4] See for example Arrowsmith v Nottingham Trent University 2011 EWCA Civ 797.

> **37. …The fact that her ability to pay was so limited did not, however, require the ET to assess a sum that was confined to an amount that she could pay. Her circumstances may well improve and no doubt she hopes that they will.**

28. In **Vaughan v London Borough of Lewisham UKEAT 0533/12** the EAT also reiterated the tribunal was not obliged to have regard to the ability to pay at all.

> **26. We come finally to the question of the Appellant's means. The Tribunal was not in fact obliged as a matter of law to have regard to her ability to pay at all: rule 41 (2) gave it a discretion.**

29. It may be desirable to consider means, and the tribunal should give reasons for why it has, or has not, taken means into account. The tribunal should set out its findings about ability to pay.[5]

The issues

30. The issues were identified as follows:

    a. It being agreed that the claim for costs was not made within 28 days, should time be extended.

    b. Is the threshold for ordering costs met, in particular: was the claim vexatious; was there unreasonable conduct of proceedings by the claimant; and did all or any of the claims have no reasonable prospect of success.

    c. If the threshold is met, should the tribunal exercise its discretion to award costs.

    d. If any costs are to be awarded, what is the appropriate level.

Documents

31. The respondent filed a bundle of documents which including the application and Mr Allcock's statement. The respondent failed to file a skeleton argument. Mr Allcock did not attend to give evidence.

32. The claimant relied on a skeleton argument and filed a bundle of authorities.

33. The tribunal had regard to all relevant correspondence, and the liability judgment and reasons.

The extension of time

[5] See Jilley v Birmingham and Solihull Mental Health NHS Trust UKEAT/0155/07.

34. It was accepted that the application had not been brought within 28 days as provided for in rule 77 Employment Tribunal Rules of Procedure 2013. Ms Thomas, claimant's counsel, stated that time should not be extended. She submitted: the application was 22 days overdue; there were no cogent reasons for the late application; Mr Allcock gave no genuine reason as to why he could not comply; Mr Allcock's statement was in part contradicted by correspondence, particularly the explanation in the letter of 17 June 2022; the claimant had not agreed to an extension of time, and reference to waiting until time for the appeal to expire was a unilateral decision of the respondent; there was no good reason why Mr Allcock could not have given instructions; the claimant would suffer prejudice in that he may be exposed to a claim for costs, and he would have to bear the additional expense of dealing with the application to extend time; the respondent had breached orders, particularly by failing to file a skeleton argument; the application to extend time was not made with the original application for costs; and allowing an extension of time shows no respect for the primary time limits, and is not consistent with the overriding objective.

35. Mr Adams, respondent's counsel, submitted that the extension of time should be allowed. He accepted that time to bring the claim for costs had expired and the application was made three weeks late. He accepted the original application did not include an application to extend. He alleged there was a cogent reason for the late application. He relied on Mr Allcock statement which cited his wife's ill-health and the need for an operation which occurred in February 2022. He gave no explanation for why the letter of 17 June 2022 appeared to be inconsistent with the later statement. He submitted that Mr Allcock had responsibility for giving instructions, and because of personal difficulties, in particular caring for his wife's during her illness and family commitments, which were not specifically reflected in the statement, cogent reason had been made out. He stated this was a genuine reason for failure to comply. The offer to wait until after time for any appeal had expired was a genuine offer and was a reasonable stance to take. In brief, he submitted there were proper reasons for the failure to give instructions earlier, and in any event, absent the claimant objecting to the extension of time, it was reasonable to wait until after the appeal period expired. Finally, he submitted there was no prejudice to the claimant and any extension of time would be consistent with the overriding objective.

36. Rule 77 provides that "A party may apply for costs… at any stage up to 28 days after the date on which the judgment finally determined proceedings… was sent to the parties." The rule does not set out the circumstances in which time may be extended and it is common ground it is subject to Rule 5 which gives general discretion to extend the time limit specified in the rules, even when that time has expired.

37. The rules do not provide for any specific test when exercising a discretion to extend time. Claims, such as unfair dismissal, are subject to a

reasonable practicability test. Discrimination claims are subject to a just and equitable test. No test is provided for in rule 77.

38. As for the exercise of discretion, no specific case law was identified.

39. The claimant pointed to a number of cases.

40. It may be appropriate to consider the balance of prejudice, see **Baisley v South Lanarkshire Council** [2017] ICR 365, EAT. It may be relevant to consider whether the fault was the party's or the legal advisers, see **TLO In-Well Technologies UK v Stuart** [2017] ICR 1175, at para.30. Even if it were reasonably practicable to bring the application in time, that would not remove discretion, see, for example: **Petrofac Facilities Management Limited v Evans, HM Inspector of Health & Safety** [2021] 6 WLUK 395.

41. The tribunal also notes **Adams v BT plc** UKEAT/0342/15, [2017] ICR 382, applied in **Baisley v South Lanarkshire Council** [2017] ICR 365, EAT. The tribunal must consider all the facts (not just the fault or otherwise of the defaulting party) and may balance the prejudice to each party.

42. In considering whether to extend time, we have regard to the overriding objective. In considering all the facts, it may be appropriate to consider the following, albeit this is not an exhaustive list: the reason for delay; the effect of any advice given, if applicable; the period of delay; any effect on the cogency of the relevant evidence; any prejudice suffered by either party; the hardship either party would suffer; and compliance of orders.

43. We had regard to all of the reasons advanced. For the purpose of these reasons, we will apply the above headings to summarise our findings.

44. We are satisfied that the respondent has advanced a reason for failure to make the application within 28 days. The reason consists of two elements. The first is the personal circumstances of Mr Allcock, particularly in caring for his wife, who at the material time has or was having treatment for skin cancer. She had an operation to remove her toe, albeit that operation occurred before the decision was sent. Second, there was a unilateral offer to wait until expiration time for appeal.

45. We accept the claimant's submission that there is some inconsistency between Mr Allcock statement and the representations made in correspondence by the respondent solicitor. Mr Allcock did not attend to give evidence, his statement must be treated with some caution. We have no reason to doubt that he was having a difficult time personally. Nevertheless, it would appear that he gave some instructions. It is unclear why a holding application could not have been made. We received no evidence as to any advice given. It is clear that respondent was represented, and that thought was given to when the application should be made. It is unclear how the delay related to Mr Allcock's personal difficulty, if at all.

46. We are satisfied that a reason has been advanced. It is unlikely that the reason would be sufficiently strong to demonstrate that it was not reasonably practicable to present the application in time. However, as noted, reasonable practicality that does not appear to be the test.

47. In no sense whatsoever was the cogency of evidence impacted or reduced by the delay. The evidence relevant to the application for costs is mainly concerned with the presentation of evidence at the liability hearing, and the findings in the liability decision. Thereafter, there is reference to the way the costs application has proceeded, and the circumstances are not in dispute.

48. The delay itself was for a limited period of three weeks. The claimant was aware that there may be delay, because the respondent informed the claimant of its intention. In no sense whatsoever has the delay made it more difficult for the claimant to deal with the claim for costs.

49. The delay has not caused material prejudice to the claimant. The respondent losing the opportunity to bring a claim for costs by making the application out of time may be a material advantage to the claimant, but dealing with the application is not itself a prejudice.

50. There may be some prejudice in that it will be necessary to deal with an application to extend time, which may increase costs. However, any unnecessary costs can be considered in the exercise of discretion if costs are awarded. If costs are not awarded to the respondent, any unnecessary costs of the claimant can be compensated for by an order for costs.

51. Denying the respondent an opportunity to bring a claim for costs may be a material hardship, particularly if the application may prove meritorious. The fact the claimant may be ordered to pay costs is not itself a hardship caused by delay.

52. We specifically considered with the parties whether it was appropriate to consider the potential merits. Ms Thomas declined to make any specific submission.

53. If a claim clearly has no merit, it may be appropriate to consider this. However, it cannot be said in this case that, on its face, the claim for costs has no merit. As there is potential merit, refusing an extension of time would be a potential hardship for the respondent and a potential windfall for the claimant.

54. Taking all these factors into account, we consider the hardship caused to both sides. The delay causes no specific hardship to the claimant. Refusing to extend time would deny the respondent an opportunity to bring what may be meritorious claim for costs, and that would be a significant hardship.

55. If the test were reasonable practicability, we would not extend time. We are not satisfied it was not impracticable to bring the claim. However, our discretion is wide. Having regard to the overriding objective, which is to deal with claims fairly and justly, and having regard to the hardship to both sides, we are satisfied that time should be extended; the application should be allowed to proceed.

Discussion

56. We next consider the merits of the application.

57. It is necessary to consider whether the threshold for awarding costs has been met. We first consider whether all or any of the claims had no reasonable prospect of success. When considering this, we remind ourselves that we must consider what the claimant ought to have known at the time he brought his claim had he gone about the matter sensibly. It is necessary to consider, having regard to the evidence given, what the claimant can be taken to have known at the time the application was brought.

58. The judgment deals with a number of areas which were broadly as follows: who was the employer; were there any protected disclosures; were there any detriments; the claim for indirect discrimination; and the claim of unfair dismissal. We will consider what the claimant should have known for each relevant to a reasonable consideration of any reasonable prospect of success when the claim was brought.

59. We accept that there was confusion about the employer. There were applications to amend at the hearing. There appears to have been a genuine dispute and there was a genuine argument. We need to consider this no further.

60. It is necessary to consider each of the alleged protected disclosures. We do not propose to repeat, in detail, either the alleged disclosures, or the detailed reasoning set out in liability decision. It is appropriate to read that liability decision with these reasons. We rely on the finding of fact in that decision.

61. Disclosure one concerned the alleged change to a legal opinion and the claimant's alleged protest.

62. When considering all of these disclosures we note that it is for the claimant to set out his case. In the claim form, he should set out the information, the way in which information was disclosed, what he believed to be relevant failure, and why the disclosure was made in the public interest. He had a further opportunity to give detail by way of further and better particulars, if appropriate. Supporting evidence should be given in the witness statement. Cogent evidence should be given at the hearing. The disclosures should be detailed in the submissions. It follows there are

a number of opportunities to set out the disclosures and to identify the relevant evidence. Failure to take those opportunities is relevant when considering whether the claimant should have known there was no reasonable prospect of an allegation of protected disclosure succeeding, as it gives evidence about what he did know and what he ought to have known at the time.

63. For the reasons we will come to, we find that, for each of the alleged protected disclosures, there has been a material failure to set out the relevant information in the claim form, and that failure has permeated the entirety of the subsequent proceedings, including presentation of the witness evidence, the evidence given at trial, and the submissions made.

64. Disclosure one concerns the alleged change to a legal opinion and the claimant's alleged protest. At no point did the claimant identify the change to the legal opinion. As for his protest he stated in a WhatsApp message of 12 November 2018 that he was "not comfortable sharing the contract with the legal opinion in its current form."[6] The disclosure failed to set out any information. He failed to set out what was the relevant failure. He failed in relation to this alleged protected disclosure, and all others, to give any evidence as to what was said to be the public interest. To the extent that he may have thought there was a failure, it was necessary to have regard to the reasonableness of the opinion; we dealt with at paragraph 7.9 of the liability hearing reasons (FMH):

> **7.9 When considering the reasonableness of his opinion, it is necessary to have in mind that he was a highly paid employee, with two postgraduate degrees, and well over a decade's experience. He had access to accounting advice. He had access to legal advice. He was used to negotiating at a high level, and should have had, at least, a rudimentary understanding of contract law. He should have appreciated the need for parties to obtain and rely on their own investigations and legal opinions. One of his subsequent alleged disclosures involve the need for Mr Allcock to undergo due diligence. He must have appreciated the need for other companies to undertake their own due diligence, and this must extend to gaining advice on contracts which may be worth millions of pounds. It is in that context that we must consider whether he reasonably believed there would be a failure. The submissions fail to set out which relevant failure he is relying on. It may be supposed that it is either a criminal offence, or a broad failure of legal obligation. He should, at least in general terms, give evidence about what he believed to be the legal obligation. He fails to do this. We remind ourselves we must consider what he thought at the time. He gives no evidence on it.**

65. At paragraph 7.10 we noted the claimant accepted that it was for Mobius to obtain its own opinion.

66. It is apparent that the evidence fell far short of establishing the allegation as made. The allegation itself was in broad terms, and was misleading. The claimant should have known the allegation lacked substance and there was no evidence in support. It should have been obvious to the

[6] FMH - paragraph 7.5.

claimant at the time he brought the claim that there was no reasonable prospect of establishing that disclosure one occurred or that it was protected.

67. Disclosure two concerned the request to transfer £70,000. This was poorly particularised and inadequately set out. To the extent the disclosure was identified, we dealt with this at paragraph 7.12 FMH. It was the claimant's case that he was making a disclosure about potential tax fraud. There is no mention of tax fraud at all. The claimant simply asked to which account the funds should be transferred. If he had any concerns, he did not communicate them by way of disclosure of information. Moreover, his written evidence indicated that there was a conversation concerning the possibility of fraud.[7] We found that the alleged conversation did not take place. Moreover, the reality was there could be no failure.[8] The claimant sought to persuade us that when the accounts were prepared, in some manner, he would be excluded and overridden. We found that allegation to be "fanciful."[9] Had the claimant gone about matters sensibly, he would have accepted that no information was disclosed, and there was no basis for alleging he believed that was or may be a relevant failure. There was no basis on which he could allege tax fraud. This allegation had no reasonable prospect of success at any time.

68. Disclosure three alleged the claimant raised verbal concerns about the involvement of Wired World Limited. We found that there was at least a potential disclosure of information. However, we noted that the argument about relevant failure referred to a lack of transparency.[10] We noted there was a difference between discomfort and a reasonable belief there was or could be a failure. We found that he "had no grounds for believing that there had been a failure." Moreover, he undertook no checks, which he reasonably could have done. This is another allegation which is ill thought out and where there is exaggeration and inaccuracy. We find that the claimant should have known it had no reasonable prospect of successfully when he brought the claim.

69. Disclosure four concerned the request for reimbursement of expenses. The claimant alleged that he objected and that he believed there may be a tax fraud. At paragraph 7.25, FMH, we found the following:

> **7.25 The documents reveal that the claimant processed expenses on 9 January 2020. His email states: "As per Mark instruction can you please put the following as business expenses repayable to him. He will later provide receipt/bank statement confirming the same." His statement suggests that he instructed "the accountant as a temporary measure to mark the payment as an expense." That is not supported by the email.**

[7] FMH – paragraph 7.14.
[8] FMH – paragraph 7.14.
[9] FHH – paragraph 7.16.
[10] FMH - paragraph 7.21.

70. In no sense whatsoever did the claimant either raise fraud, or believe there was a fraud. At 7.26, FMH, we found that the alleged conversation did not occur. The claimant's statement was contradicted by the contemporaneous documentation. We found that he did not believe that there would be a relevant failure. In the circumstances, we find this the claimant knew or should have known, at all material times, his allegation had no reasonable prospect of success.

71. Disclosure five concerned placing bids for assets. We deal with the circumstances at 7.28 FMH as follows:

> **7.28 We have already considered the relevant facts. At no time was the claimant instructed to place bids to purchase Neyber. Mr Allcock proposed a limited payment, which was within his authority, for assets which were worth millions of pounds. We accept his evidence that there was no need for due diligence, as he knew what the product was, and understood its value. The claimant had no rational ground for believing that the bid was outside Mr Allcock's authority or, given Mr Allcock's knowledge of the product, there was a need for further due diligence.**

72. At 7.31 we say the following.

> **7.31 To the extent any of the claimant's objections amounted to disclosure of information, there was no reasonable ground for believing there had been, or would be a relevant failure. Again, it is necessary to keep in mind the claimant's position, his education, and his access to advice. Mr Allcock was doing what he could to secure assets and ultimately the future viability of the second respondent. There was no rational ground for believing that he was acting inappropriately at all.**

73. This allegation was rejected largely on the basis that there was no reasonable belief there would be a failure. The claimant also failed to address the public interest. The position adopted by the claimant was irrational. We find at all times he should have known there was no reasonable prospect of this allegation succeeding.

74. Disclosure six added nothing to the alleged disclosure five.

75. Disclosure seven concerned payments of £9,400 salary. We found there was no disclosure of information. In particular, we noted the alleged supporting factual circumstances had been invented. We say this at 7.37:

> **7.37 We find on the balance of probability that no such conversation took place, as it would contradict the available documentary evidence. The claimant's email of 29 January 2020 states, "Mark – payment has been made to your account once you are inducted onto payroll and NI and tax is paid the amount be classified as a directory salary in the accounts." His email of 6 February appears to approve the payment and states, "Andrew – been asked to work out NI and tax on this and once he does the amount will be paid."**

76. We found that the claimant had no concerns and we say this at 7.38 .

> **7.38 There is no suggestion that he had any concerns. Even if such a conversation had taken place, given the immediate instruction to action the**

> **payment, there is no ground for finding that he held a reasonable belief that any disclosure tended to show there had been or would be a failure or that it was made in the public interest. It is possible that his first email indicates it was initially put as a loan, but the intention was always to record it as a salary.**

77. As the payment was for salary, he could not believe there would have been potential fraud on the Revenue. We found that at all material times the claimant should have known this claim had no reasonable prospect of success.

78. Disclosure eight concerned the third respondent's classification of historical payments as a debt to AIP. [11]

79. The evidence in relation to this was poor. We say at 7.41 FMH the following:

> **7.41 The claimant's position is surprising. The promise by an investor to pay funds may legitimately be seen as a debt. It is certainly how Mr Allcock saw it. The debt in this context would be an asset. It would be the responsibility of the finance director to ensure that the asset was identified and recorded correctly in the accounts. It may have been that the claimant was confused or misunderstood. However, when considering the reasonableness of his belief in relation to any disclosure, we must have regard to his expertise. A simple discussion should have clarified the matter.**

80. There was no reasonable belief that there had been a failure would be a failure. Reasonableness in this context would have required the claimant to make some enquiry and he failed to do so. We find that the claimant should have known there was no reasonable prospects of this allegation succeeding.

81. It follows that for each of the alleged protected disclosures, we have found that the claimant should have known that none had a reasonable prospect of success.

82. We considered each of the detriments. We have regard to our findings in the liability judgement we can summarise our findings.

83. The complaints said to be detriments one and two showed an unjustified sense of grievance.

84. Detriment three concerned proposed redundancy. We found that there was no detriment, and the claimant was fully aware of the difficult financial situation.

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[11] We should note that the FMH reasons contain a clerical error. Disclosure 8 appeared in the issues as follows: "Disclosure 8 - by the claimant stating the third respondent's classification of historical payments as a debt to AIP was 'not appropriate or fair.'" However, disclosure 7 is wrongly set out above the findings for disclosure 8.

85. Detriment four was not made out factually. The allegation was withdrawn. However, there was no evidence of failure to prove annual leave.

86. Detriment five concerned the failure to pay a bonus, but there was no evidence that the claimant was ever owed the bonus.

87. Detriment seven concerned requests for annual leave. However, the evidence fell short of demonstrating he was not allowed to take annual leave.

88. Detriment eight concerned a failure of communication, but was not supported by evidence.

89. Detriment nine was not supported by evidence. The claimant was not admonished.

90. Detriment 10 was not made out on the evidence.

91. Detriment 11 concerned notification of potential redundancy and was not, in any sense, detrimental treatment.

92. Detriment 12 concerned the payment of £60,000 commission, but was not made out on the facts. The claimant presented no viable evidence.

93. Detriment 13 concerned a redundancy consultation meeting which was justified and reasonable. It was not a detriment.

94. Detriment 14 concerned the suspension of an email account, but was withdrawn, and there was no evidence in support of it.

95. Detriment 15 again concerned the arrangements for redundancy; it was found not to be a detriment.

96. Detriment 16 again concerned the redundancy consultation process. It is unclear on what basis the claimant thought it was a detriment, as his evidence on this was poor and unconvincing.

97. Detriment 17 concerned the failure to proceed with the consultation meeting. However, it did not proceed because the claimant did not cooperate, a fact which he must have known.

98. Detriment 18 concerned the claimant's belief that there would be no independent investigation and we noted it was "difficult to understand." We found it was not a detriment, and the basis for it being a detriment was never set out adequately in the evidence or in the submissions.

99. Detriment 19 concerned the ongoing process of redundancy. Given the financial difficulties of the respondent, it is difficult to see how the claimant could ever have believed that it was detrimental treatment. We would also observe that even if the claimant thought the treatment was detrimental, it

would not have been reasonable for him to believe it attached to any protected disclosure, as there was no basis for believing he had made a protected disclosure.

100. Detriment 20 concerned an investigation for gross misconduct. The claimant's evidence was poor. He had forwarded sensitive emails. He had no grounds for believing that the treatment was detrimental.

101. Detriments 21, 22, and 23 were withdrawn and concerned the unauthorised sending of confidential information. The claimant should have realised at all times that the sending of confidential information to himself may be an act of misconduct.

102. Detriment 24 concerned the requirements that he perform duties when on garden leave. We find he could not have believed it was detriment to be required to perform his duties.

103. The allegations of detriment are fundamentally weak and at times misconceived. Moreover, they are not underpinned by any reasonable belief that there had been a protected disclosure. In the circumstances none of the detriments had any prospect of success; the claimant should have understood that at all material times

104. We accept there was a stronger claim for indirect discrimination. The PCP, which revolved around working from India, could have disadvantaged the claimant as he was a Pakistani national, and he could have difficulty obtaining a visa. However, it is more difficult to understand why the claimant believed that policy was not justified. In alleging it is not justified he stated that a presence should have been kept in this country for his benefit we say this at 7.81, FMH:

> **7.811 There has been no suggestion that Mr Allcock was wrong in his business assessment. The means adopted could achieve the aim. The only argument put against all of this is that the claimant should have been kept on in the UK and/or that the business should not have moved to India because it should have been kept in this country for the benefit of the claimant. It is the claimant's approach which is not reasonable. We accept that the position adopted by the respondent was a reasonable response and one which may have secured the aim. It was a proportionate means of achieving a legitimate aim.**

105. We find there was at least some possibility of arguing that there was an indirect discrimination claim, albeit that the claimant's arguments in relation to justification were weak and unrealistic. However, failing heavily is not necessarily evidence that he should have believed there was no reasonable prospect of success at the time you brought claim. The allegation of indirect discrimination was optimistic but we do not find that he should have known it had no reasonable prospect of success.

106. We considered the claim of unfair dismissal. The claimant argued that there was no redundancy situation. That allegation was fanciful. Given his position as financial director, he should have understood the financial

difficulty of the respondent and the need to address those difficulties including reducing staff and potentially reorganising, to include moving country. There was no reasonable prospect of the claimant arguing that there was no redundancy situation, and heshould have known that.

107. The position is different when it comes to reasonableness. The burden is neutral. At the very least, it may be possible to argue that there had been procedural unfairness. His claim was poor, and his arguments were undermined by his own intransigent position, particularly in relation to consultation. The claimant took a negative view of the process and considered it to be a sham.

108. Given that the consideration of reasonableness is a neutral burden, it may be rare to find that a claimant should have known an unfair dismissal claim had no reasonable prospect of success. We are not satisfied that the claimant should have known the unfair dismissal claim had no reasonable prospect of success, albeit he should have been aware that it was very weak.

109. We have not found there to be vexation in this case. Vexation would normally be shown by some form of abuse of process or where the claim has been pursued in a way that is vexatious of for some ulterior or improper motive. Whilst the claimant pursued claims which were fundamentally weak, and had no reasonable prospect of success, we are not satisfied that there is sufficient evidence to demonstrate vexation.

110. We have considered whether the claimant conducted the proceedings unreasonably. We note that a number of allegations appear to have been invented. Those allegations underpin claims of protected disclosures. It is arguable that such conduct is unreasonable conduct of proceedings. However, where an allegation is based on an invented fact, almost inevitably it will have no reasonable prospect of success, and we have already considered this. We do not need to make a separate finding that there has been unreasonable conduct of the proceedings.

111. It follows, for the reasons we have given that the threshold for awarding cost is met.

112. We next consider whether we should award costs at all.

113. The first stage is to consider whether we should exercise our discretion. There may be occasions when claims have no reasonable prospect of success or there has been unreasonable conduct of proceedings, but there may be some form of mitigation, such as poor mental health, which may mitigate against an order for costs. We find that the claimant advanced no specific argument against exercising the discretion. It would appear that the claimant had legal advice. He is an intelligent man. He chose to make claims with no reasonable prospect of success, in doing so has, on occasions, he invented facts to bolster his claims. In the circumstances, we are satisfied that the should be some order for costs.

114. The claimant has given no evidence that he is unable to meet any order for costs. He was specifically required to put forward evidence of his means, should he intend to allege he had a limited ability to pay any order for costs. He has failed to do so. We need consider it no further.

115. As to the order for costs we have a wide discretion. The respondent seeks all of its costs. It is not necessary for us to limit the order for costs to those costs which are, in some manner, wasted by unreasonable conduct. When the threshold is met, it is possible to award the total costs. That said, where some claims potentially have merit it may be common practice to order payment of a percentage of the costs.

116. We have considered whether to order a detailed assessment, but limit the cost to a percentage. Such a percentage could reflect the relative importance of the whistleblowing claim compared to the others. We decided that is not the appropriate approach in this case.

117. In considering our discretion we have taken into account the broad circumstances. We do accept that there were claims which, although fundamentally weak, cannot be said to have had no reasonable prospect of success. However, much of the case was concerned with the whistleblowing claim which fundamentally, both in relation to the disclosures and alleged detriment, had no reasonable prospect of success. Moreover, at times, the claimant has relied on invented facts.

118. We accept that there is valid criticism of the respondent's conduct, particularly in relation to the disclosure of information, and we have regard to the when exercising our discretion.

119. As noted, the claims were fundamentally weak, and it is not surprising that consideration was given to strike out. When strike out is considered during the course of proceedings, the claimant's case must be taken at its height. When considering, after the event, whether the claimant should have known there was no reasonable prospect of success, it is appropriate to consider the actual facts found. In this case, as in many, there is a large discrepancy between the two. Strike out before a final hearing may fail, but the final hearing may reveal, as in this case, that the claimant ought to have known there was no reasonable prospect of success.

120. The respondent's conduct in relation to the costs application is questionable. We accept that there has been some compliance with orders. A detailed application was produced, albeit the specific grounds relied on were not fully set out. Evidence was produced, albeit that Mr Allcock has failed to attend. If follows that has been some compliance and some ignoring of orders. However, the respondent's failure reflects badly on the respondent's conduct of the costs application, it tells us nothing of the culpability of the claimant in bringing the claim which gives rise to the costs application itself.

121. We accept the claimant has been put to greater expense by the need to deal with the extension of time, we do not accept that the expense is large. However, it is matter we take into account in exercising our discretion.

122. We have considered the respondent's disclosure of costs. We note that three solicitors were involved. The third solicitor has produced a statement of costs, signed by a partner to indicate the costs incurred. We have evidence of counsel's fees, albeit some of the counsel's fee notes are difficult to understand, and appear to be inconsistent with the date of the hearing. However, we are satisfied that significant costs have been incurred.

123. We have taken into account the hourly rates, and we are not satisfied that the hourly rates claimed would necessarily be recoverable inter parties on assessment of costs. However, we are not required to undertake a summary assessment of costs, but we do have in mind that the hourly rates appear to be high.

124. That said we are satisfied that the respondent has paid costs and therefore is entitled to seek to recover them. We are satisfied that those payments are significant. The total claimed is just short of £100,000. Such costs for a multi-day hearing are far from unusual.

125. The parties are required to give full and frank disclosure to the tribunal. We do have concerns about the way the costs application has been pursued by the respondent. There is inconsistency between the evidence given by Mr Allcock and the correspondence from respondent solicitors.

126. We also have regard to the overriding objective to deal with cases fairly and justly.

127. We note that there were cost warning letters and offers to settle. However, it is not necessary to send a costs warning letter in order to make an application for costs. We do not find the letters are important in this case. We do not consider the fact that offers were rejected to be of importance in this case.

128. Payment of costs is always compensatory; it is never punitive.

129. We are satisfied that substantial costs were incurred and the respondent was obliged to pay those costs.

130. Ultimately, the amount of costs is a matter for the tribunal and there is a wide discretion. We do not have to tailor the order to reflect the effect on costs of pursuing claims which have no prospect of success, nor do we need to tailor any award costs to reflect any unreasonable conduct. In reaching our overall decision, we have taken into account the overall

conduct of the respondent, which has, at times, for the reason we have given, been questionable.

131. We consider it appropriate to limit the further costs that may be incurred by the parties and to limit the further time which may be taken in tribunal. We find that a detailed assessment would be disproportionate. However, substantial costs have been expended by the respondent and much of that cost is related to claims which have no reasonable prospect of success. In the circumstances, we consider there should be a substantial order. The maximum we can award on a summary basis is £20,000 and that is the sum we award. The claimant shall pay the respondent costs of £20,000.

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Employment Judge Hodgson

Dated: 21 December 2023

Sent to the parties on:

21/12/2023

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For the Tribunal Office