Case No: 2204022/2023

EMPLOYMENT TRIBUNALS

Claimant: Mr R Hartigan

Respondent: The Financial Reporting Council Limited

Heard at: Central London (on the papers) **On:** 8th February 2024

Before: Employment Judge Moxon

JUDGMENT ON COSTS

1. The Claimant is ordered to pay the Respondent **£20,000** costs.

REASONS

Introduction

1. I dismissed the claim for automatic unfair dismissal after a preliminary hearing that was heard remotely on 12th December 2023, at the end of which I gave oral reasons.

2. The Respondent submitted an oral request for written reasons and indicated that a cost application was to be pursued.

3. I reserved the matter of costs to myself and directed the following:

    a. By 9th January 2024 the Respondent shall send to the Claimant and the Tribunal a cost schedule, with requisite breakdown, and argument to support an application by costs. It must be drafted in a manner that can be readily understood by a litigant in person;

    b. By 23rd January 2024 the Claimant shall send to the Respondent and the Tribunal a response to the application and details of his ability to currently, or in the future, pay costs. The Claimant should note that he

has the burden of proving any inability to pay and should therefore provide evidence;

c. By 6th February 2024 the parties shall notify the Tribunal whether they require a hearing to determine the application for costs, and if so whether the hearing should be in person or remote. At a hearing, the parties will be able to give evidence and make oral submissions. If no hearing is requested, the application will be determined upon the papers, upon consideration of any documentation provided by the parties;

d. The issue of costs shall be reserved to Employment Judge Moxon.

4. Written reasons were dated 18th December 2023 and sent to the Tribunal for onward forwarding to the parties.

5. By letter, dated 9th January 2024, the Respondent submitted an application for costs.

6. The Claimant submitted a written response, dated 23rd January 2024. He stated that a hearing was not required and that a determination may be made upon the papers.

7. The Respondent emailed the Employment Tribunal on 2nd February 2024 to confirm that it does not require a hearing to determine the application.

Background

8. The Respondent is an independent regulator of auditors, accountants and actuaries. It is a company limited by guarantee and a non-departmental public body at arm's length from the Department for Business and Trade, formerly known as the Department for Business, Energy and Industrial Strategy.

9. The Claimant was employed by the Respondent as a Project Director from 4th January 2021 until his dismissal on 25th November 2022.

10. By claim form, presented on 26th March 2023, the Claimant claimed that he had been automatically unfairly dismissed as a consequence of making a protected disclosure on 9th August 2022.

11. By response, dated 23rd May 2023, the Respondent contended that the Claimant had been dismissed due to a breakdown in trust and confidence as a consequence of a "*strained relationship and difficult interactions*" with his line managers.

12. Whilst accepting that the Claimant made a disclosure on 9th August 2022, it was not accepted that the disclosure was a qualifying disclosure within the meaning of section 43B(1) of the Employment Rights Act 1996.

13. Further, the response indicated an intention to apply to strike out the claim, or alternatively for a Deposit Order.

14. A preliminary hearing was held before Employment Judge Leonard-Johnston on 29th June 2023, during which a timetable was set and a further preliminary hearing listed to consider the application to strike out the claim.

15. EJ Leonard-Johnston, at paragraph 11 of the Case Management Order, stated:

> *"The claimant says that the legal obligation was a government policy/directive to the public sector employees to return to the workplace. The claimant accepts that this was not in legislation. The Claimant was informed at the hearing that media and news reports will not be sufficient and he should provide the official government policy, whether that is on gov.uk, statements to Parliament or similar official government publications."*

16. The application for strike out / Deposit Order was heard by Employment Judge Stewart on 12th September 2023. EJ Stewart declined to strike out the claim but did impose a Deposit Order, with reasons being outlined as follows:

> *"2 After careful consideration of the detailed argument on both sides, the Tribunal concluded that it could not be said, putting the Claimant's case at its highest, that there was no reasonable prospect of success for the Claimant's argument, bearing in mind:*
>
> *(i) That 'legal obligation' is not defined in the statute and that the courts have given it a broad interpretation in the past. The categories are not closed.*
>
> *(ii) Strike out is a draconian sanction at this stage of the proceedings and it can reasonably be said that the issue in this particular case needs the benefit of detailed legal argument on the evidence.*
>
> *3 However, on the face of it, on the material before the Tribunal today, it concluded that there was little reasonable prospect of success and accordingly makes a deposit order as a condition of pursuing the claim, in the maximum sum of £1,000.00, under Rule 39."*

17. EJ Stewart also directed that a preliminary hearing be listed for 12th December 2023:

> "*To determine whether or not the Claimant's sole disclosure on 9 August 2022 constituted a disclosure qualifying for protection within the meaning of section 43B of the Employment Rights Act*"

18. During the preliminary hearing on 12th December 2023 I heard evidence from the Claimant and from Mr Kuczynski, employed by the Respondent as Executive Director of Corporate Services and General Counsel. I heard submissions from Respondent's counsel and the Claimant

19. I dismissed the application and gave oral reasons. I concluded that there had been no protected disclosure as there had been no legal obligation that the Claimant believed to have been breached. I concluded that the Claimant had not thought otherwise.

20. I provided written reasons, dated 18th December 2023, which should be read together with these reasons in order to ascertain the evidence that was before me and my conclusions.

Costs Application

21. The application for costs was made on the ground that the Claimant had acted unreasonably in his pursuit of the claim for the following reasons:

> "*(a)The Tribunal imposed a deposit order on the Claimant pursuant to rule 39(5)(a) of the Rules at a preliminary hearing on 12 September 2023 (**September Hearing**); and*
>
> *(b)The Respondent sent repeated correspondence to the Claimant explaining why his alleged disclosure did not constitute a qualifying disclosure under the ERA, highlighting the meaning and consequences of the Deposit Order and advising him of the Respondent's intention to pursue costs in the event of his claim being unsuccessful. As part of this, the Respondent offered the Claimant the opportunity to withdraw his claim and agreed it would not pursue costs if he did so. The Claimant did not respond and continued with his claim*."

22. The Respondent outlined that it had written to the Claimant on 19th September 2023 and 24th October 2023 in which the flaws of the claim were highlighted and stating that costs would be sought unless the claim was withdrawn. It explained that the Employment Tribunal could award costs of up to £20,000.

23. The application was accompanied by a cost schedule, with costs totalling £32,385.47 inclusive of VAT, albeit with the application was limited to £20,000.

Response to the application

24. By letter, dated 23rd January 2024, the Claimant resisted the application for costs. He stated that he conducted the proceedings as a litigant in person and is not legally trained.

25. He highlighted the fact that his claim was not struck out by EJ Stewart who had detailed within his order, that "…it *can reasonably be said that the issue in this particular case needs the benefit of detailed legal argument on the evidence*". He therefore argued that he has shown that he was not acting unreasonably.

26. The Claimant provided details about the conduct of the Respondent throughout the proceedings, including emailing authorities the day before the preliminary hearing and misquoting EJ Stewart in subsequent cost warning letters. He accused the cost warning letters to be intimidatory.

27. He criticised the conduct of the Respondent's counsel in applying for costs at the close of the hearing and seeking to have the application resolved at that stage.

28. In relation to ability to pay costs, the Claimant stated, at paragraph 75 and 76 of his response that he "…*makes no special pleadings with respect to ability to pay [but] does respectfully request that any costs order permit the spreading of that*

costs order over a period of not less than 3 months, to alleviate cashflow difficulties".

29. Throughout his response to the costs application the Claimant relies upon extracts from the Equal Treatment Bench Book.

The Law

30. The Employment Tribunal's power to award costs is contained within the Employment Tribunals Rules of Procedure Regulations 2013.

31. Rule 76(1) provides that a Tribunal may make a costs order 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*.

32. Rule 39(5) provides:

> "*If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—*
>
> *(a)the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown*…."

33. Rule 77 provides that an application can be made at any stage up to 28 days after the date on which the judgment determining the proceedings in respect of the party was sent to the parties. The paying party must be given a reasonable opportunity to make representations in response.

34. Rule 78(1) provides that a costs order may 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.

35. Rule 84 provides that the Employment Tribunal may have regard to the paying party's ability to pay.

36. The award of costs is an exception, rather than a rule. Costs are designed to compensate the receiving party for costs unreasonably incurred, not to punish the paying party for bringing an unreasonable case, or for conducting it unreasonably.

37. There is a three-stage process when considering a costs application:
    a. The test in rule 76;
    b. Exercise of discretion – the Employment Tribunal must consider as an exercise of discretion whether the conduct merits a costs order; and
    c. The appropriate amount of costs incurred.

38. Dishonesty by a party does not necessarily lead to a meritorious award for costs. Cox J held, in *HCA International Limited v May-Bheemul* [UKEAT/0477/10, 23 March 2011 unreported] that:

> "*It will always be necessary for the Tribunal to examine the context and to look at the nature, gravity and effect of the lie in determining the unreasonableness of the alleged conduct*".

39. Lord Justice Mummery stated, at paragraph 31 of his judgment in *Yerrakelva v Barnsley MBC* [2012] ICR 420:

> "*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.*"

Consideration of the application

40. In considering the application I had regard to the relevant authorities and all of the papers in the case, including:
    a. 339-page hearing bundle, which includes the orders arising of previous hearings in the case and the cost warning letters;
    b. Witness statement from the Claimant, dated 18th November 2023;
    c. Skeleton argument from the Claimant, dated 8th December 2023;
    d. Witness statement from Aleksander Jozef Kuczynski, Executive Director of Corporate Services and General Counsel, employed by the Respondent, dated 15th November 2023;
    e. Skeleton argument from the Respondent, dated 7th December 2023;
    f. The written judgment and reasons, dated 18th December 2023;
    g. Application for costs, dated 9th January 2024;
    h. Response to the application, dated 23rd January 2024; and
    i. Equal Treatment Bench Book, April 2023 revision. particularly Chapter 1: Litigants in Person and Lay Representatives.

41. I was satisfied that it was fair and in the interests of justice to proceed with the application for costs upon the papers, as requested by both parties. To do otherwise would have caused unnecessary delay and expenditure and would have been contrary to the overriding objective, as outlined in rule 2 of the Rules. Both parties had provided full and detailed arguments and so an oral hearing was not necessary.

Conclusions and Reasons

42. I note that the Claimant was a litigant in person with no legal training or experience.

43. However, he is an intelligent person with lengthy experience in senior roles.

44. He was notified by EJ Leonard-Johnston on 29th June 2023 that he "…should provide *the official government policy, whether that is on gov.uk, statements to Parliament or similar official government publications.".*

45. He never did so.

46. It was determined by EJ Steward on 12th September 2023 that the claim had little prospect of success. The weakness of his claim was identified by the Respondent in letters to him dated 19th September 2023 and 24th October 2023.

47. Nevertheless, the Claimant pursued his claim.

48. Whilst he has been a litigant in person, I find that it was unreasonable of him, given the comments of two Employment Judges and the letters from the Respondent, not abandon his claim or to seek some legal advice as to the merits of his case, particularly given that he has a six-figure salary and does not claim impecuniosity.

49. Further, his self-categorisation as a naïve litigant in person does not adequately explain the perseverance of a claim that had little prospect of success. I am quite satisfied that he did not act out of naivety but, as I stated within my written reasons, had acted out of dishonesty.

50. I made the following findings within my written reasons (emphasis added):

> Paragraph 41: "…*as is clear from the wording of the Claimant's disclosure to the Respondent in August 2022, he was not relying on a breach of any government policy or any legal obligation but was relying on the breach of the Respondent's hybrid working guidelines*."
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> Paragraph 45: "*I … find as a fact that the disclosure was not a complaint of a breach of a legal obligation but was a complaint of a breach of company guidance that had no legal force. It was not a complaint that the Respondent was breaching any wider guidance or policy imposed by the government with legal obligation*."
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> Paragraph 50: "….*I am quite satisfied that at the time that he made the disclosure he did not know or believe that there was a legal obligation to return staff to work. He did not know or believe that the Respondent's hybrid working guidelines impose a legal obligation. He did not know or believe that there was a government policy, directive or otherwise imposing a legal obligation on the respondent to ensure that employees returned to work in the office*."
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> Paragraph 51: "*I am satisfied, upon consideration of the documentary evidence, that the Claimant had received, read and been trained about the guidelines and so would have been fully aware that they imposed no legal obligation and were not said to have been drafted in order to comply with any legal obligation*."
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> Paragraph 52: "*The Claimant was dismissed by the Respondent within the first two years of employment and therefore without the sufficient level of service to bring a claim for unfair dismissal.* ***I am satisfied that he has subsequently sought to reverse engineer a claim to square a circle in order to be able to pursue a claim for automatic unfair dismissal***."

Paragraph 54: "*Reliance upon [the press release, from Steve Barclay MP, then the Chancellor of the Duchy of Lancaster, dated 21st January 2022] is flawed by the Claimant's acceptance that he was not aware of it at the time of his disclosure nor was he aware of any specific government policy at the time that he made that disclosure. He therefore cannot have reasonably believed, at the time he made the disclosure, that the Respondent was breaching any legal obligation outlined in the press release*."

Paragraph 58: "*Further, [the press release]t relates to the Civil Service. The Claimant, when working for the Respondent, was not a civil servant, and so any policy upon which the press release applied did not relate to him or others employed by the Respondent. The fact that he was not a civil servant is clear from his employment contract which states that he was employed by the Respondent.* ***I do not consider the Claimant's assertion that he thought he was a civil servant to be plausible and I reject that evidence. As I have said, he is an intelligent man and would have known whether or not he was employed as a civil servant***."

Paragraph 61: "*Save for the press release, which cannot in itself impose a legal obligation, the Claimant has been unable to identify anything that imposes the legal obligation upon which he seeks to rely, despite being advised to do so by EJ Leonard-Johnston on 29th June 2023*."

Paragraph 71: "*It is evident that the press release was not imposing a legal obligation upon the Respondent, nor did it seek to do so or could be reasonably interpreted as doing so or seeking to do so*."

Paragraph 74 and 75: "*It therefore follows that, even when adopting the broadest possible interpretation of what constitutes a legal obligation, as urged by the Claimant, I am not satisfied that the Respondent was under any legal obligation to ensure that staff returned to working in the office…..I do not consider it arguable that a person of the Claimant's intelligence and experience could have plausibly thought otherwise*."

51. Given that the grounds award costs have been satisfied, namely that the Claimant acted unreasonably and pursued a claim with no prospect of success, I must then consider whether to exercise my discretion to award costs.

52. I consider that it is appropriate to exercise my discretion to make a costs order for the following reasons:

    a. Although costs are the exception rather than the rule, this is one of those exceptional cases where a costs order is appropriate;

    b. I am mindful that telling of untruths does not automatically lead to justifying an order as to costs, however, the untruths in this case go to the heart of the claim. These must have been known to be untruths by the Claimant at the outset and were maintained throughout the proceedings, despite compelling evidence and arguments that defeated his claim. In those circumstances, it is appropriate for me to exercise my discretion to award costs;

c. Whilst the Claimant did not have the benefit of legal advice, the Employment Tribunal told him that his claim had little prospect of success and the Respondent identified to him the fact that his claim could not succeed within the cost warning communications. The Claimant appears to have failed to seek external advice despite having the means to do so;

d. The Claimant was put on notice by the Respondent that costs would be sought for pursuing an unmeritorious claim. He was given the opportunity to withdraw the claim without costs being pursued; and

e. It cannot be in the interests of justice, or pursuant to the overriding objective as provided by rule 2, to permit a Claimant to bring and maintain a claim that they know is not well-founded in fact and law.

53. The Claimant's criticism of the Respondent's conduct within his response to the cost application is unfounded. I find that the criticism of Respondent's counsel to be particularly misconceived. She acted with professionalism and integrity throughout the proceedings before myself. Whilst it would have been inappropriate of me to determine the issue of costs on the day of the hearing, upon the Claimant having asked for time to consider a response, it was not inappropriate for counsel to make the application in the best interests of her client, namely to prevent further costs being accrued by preparing and pursuing a written application. I reject entirely any accusation of intimidatory behaviour by the Respondent's legal team.

54. Rule 84 provides that I may take into account the paying party's ability to pay costs. The Claimant has not asserted an inability to pay but has said that he would require 3 months to do so. He disclosed a salary of £100,000 in his ET1. There is therefore no information before me to indicate that the Claimant does not have the ability, either now or in the future, to pay the costs sought by the Respondent.

55. When determining the amount of costs that should be awarded, I note the cost schedule. The Claimant has not challenged the quantum of costs claimed although given that he is a litigant in person it is particularly necessary that I cast a critical eye upon the schedule.

56. When looking at the time spent on the various necessary activities, I note that 11.24 hours for the preparation of Mr Kuczynski's 11-page witness statement is excessive, as is 7.48 hours for preparation of the hearing bundle. An appropriate level of time to prepare the witness statement would have been 5 hours and an appropriate length of time to prepare the hearing bundle is 3 hours. Otherwise, the time spent on activities appears reasonable.

57. I have considered the hourly rates claimed and cross-referenced them with the guideline hourly rates as published on the Gov.uk website. I note from the application letter that the Respondent's solicitors are based in London EC4R. The hourly rates are therefore to be considered under London band 2.

58. The guidelines provide that the hourly rate, prior to 1st January 2024, for Grade A solicitors etc is £373; Grade B is £289; Grade C is £244; Grade D is £139. I note

that the hourly rate claimed by the Respondent for Grade A is above those figures, although the rates claimed for other grades is less.

59. It has been claimed that Richard Kenyon, grade A, undertook 4.08 hours work at an hourly rate of £550 which amounts to a total of £2,244 plus VAT. The appropriate rate would have been £373 and so the total claimed should have been £1,521.84 plus VAT.

60. It has been claimed that Mini Chandramouli, grade A, undertook 30.98 hours work at an hourly rate of £425 plus VAT which amounts to a total of £13,166.50 plus VAT. The appropriate rate would have been £373 and so the total claimed should have been £11,555.54 plus VAT.

61. The total claimed for the work of the Grade A solicitors etc is therefore £15,410.59 plus VAT (which totals £18,492.71) whereas an appropriate figure would have been £13,077.38 plus VAT (which totals £15,692.86). That is a difference of £2,799.85 inclusive of VAT.

62. Mr Kuczynski's witness statement was prepared by Mr Kenyon and Ms Chandramouli and I have considered that 5 hours rather than 11.24 is appropriate for that task. I reduce the claim for grade A further by 6.24 hours, £2,327.52 plus VAT, which is £2,793.02.

63. I reduce the £799.88 plus VAT (£959.65) claimed for preparing the hearing bundle to £417 plus VAT (£500.40) on account of the time that I have adjudged is reasonable. That reduces the claim by £459.25 inclusive of VAT.

64. I therefore consider that the solicitors fees claim should be reduced by £6,052.11 inclusive of VAT, which consists of the reductions above: £2,799.85 + £2,793.01 + £459.25.

65. Counsel fees of £5,500 plus VAT (£6,600) would have been appropriate for attendance at all three hearings but the schedule specifies that this is limited to 12th December 2024. That does seem excessive and £2,500 plus VAT (£3,000) would have been more appropriate. I therefore reduce the claim for counsel fees by £3,600, inclusive of VAT.

66. That reduces the claim for costs by a total of £9,652.11 inclusive of VAT (£6,052.11 solicitors fees + £3,600 counsel fees).

67. Reasonable and appropriate costs, disregarding the cost cap, would therefore amount to £32,385.47 claimed (inclusive of VAT) minus £9,652.11 = £22,733.36.

68. That remains above the £20,000 cap and so I conclude that the total cost claim of £20,000 is reasonable and appropriate in all the circumstances.

69. As with all Employment Tribunal financial orders, the sum is payable immediately and it is a matter for the parties to agree any extended period to pay or any schedule of instalments.

Employment Judge **Moxon**

Date: 8th February 2024

JUDGMENT SENT TO THE PARTIES ON

15 February 2024

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FOR THE TRIBUNAL OFFICE

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