EMPLOYMENT TRIBUNALS

Heard at: Croydon (by video) **On:** 5 September 2024

Claimant: Mrs Sandra Messi

Respondents: Change, Grow, Live

Before: Employment Judge Fowell

Representation:

Claimant John Robertson (lay representative)

Respondent Jonathan Davies of counsel

JUDGMENT

1. The claimant is liable to pay the respondent's costs of the applications for interim relief in the sum of £10,184.80.

REASONS

Background

1. Mrs Messi has brought a number of claims on the basis that she was dismissed as a whistleblower. On 3 June 2024 I heard her application for interim relief in case number 2303961/2024, and refused it on the basis that she had not been dismissed, or at least that it did not seem likely that she had been. Her employer, Change Grow Live (a charity) maintained that she had only been suspended and was still being paid. There was nothing in writing to suggest otherwise, and Mrs Messi was not able to satisfy me that she was likely to succeed on that issue.
2. In that hearing I was also made aware that Mrs Messi had brought ten previous applications for interim relief, many of them quite recently. All had been unsuccessful. That pattern of applications suggested that Mrs Messi was engaged in a scheme to obtain compensation, and on that basis I ordered that she would be liable to pay the respondent's costs of the interim relief application. Today's hearing was listed to decide on the amount of those costs.

3. Since then Mrs Messi has indeed been dismissed, on 21 July 2024. She brought a further application for interim relief, in case number 6006412/2024 (now reassigned as 2306137/2024), which was heard by Employment Judge Heath on 15 August 2024. He also formed the view that Mrs Messi was engaged in a scheme to extract compensation by claiming to be a whistleblower, dismissed the application and ordered costs against Mrs Messi. It appeared, from the information presented at that hearing, that she had spent some time trying to access data on the respondent's system, had managed to locate confidential information about other employees, including settlement agreements and HR advice, and had then sent it to outside bodies such as the Information Commissioner and Bristol Employment Tribunal. Her justification was that the company had not kept the information secure enough, and so was in breach of GDPR, and so by making this public she was a whistleblower.

4. In both applications, the conclusion was that the application was both vexatious and totally without merit. The phrase 'totally without merit' is the relevant test for the introduction of a Civil Restraint Order, an order preventing vexatious litigants from bringing further claims without permission, but that is outside the scope of today's hearing. It is however a stark assessment, and one which easily encompasses the more usual test of having no reasonable prospects of success.

5. Rule 76 provides:

> (1) A Tribunal may make a costs order … and shall consider whether to do so, where it considers that—
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> (a) a party … 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;
>
> (b) any claim or response had no reasonable prospect of success; …"

6. By Rule 84:

> 'In deciding whether to make a … costs order, and if so in what amount, the Tribunal may have regard to the paying party's … ability to pay.'

7. To understand the total amount that might be payable, those costs were summarily assessed this morning, on what is known in the civil courts as the standard basis, i.e. such costs as are reasonably incurred and reasonable in amount, with any doubts resolved in favour of the paying party. For the reasons already given, the costs of the first application have been summarily assessed in the sum of £6,620.90 and the costs of the second application as £3,563.90, making a total of £10,184.80. That is about three quarters of the total claimed. Mr Davies confirmed that no VAT was due. It also emerged that the respondent has the benefit of legal expenses insurance, to which I will return.

The relevant evidence

8. It does not follow that this total is to be awarded in full. Rule 76 involves a further exercise of discretion in deciding on the total. Before setting out the arguments on each side I should explain the material I had available to me. Since the hearing on 3 June 2024 the tribunal has received a high number of emails from Mrs Messi, often containing many attachments. Usually these are in the form of screenshots of exchanges which took place at work, which are about the merits of the claim, and so do not help on the question of costs. There are also some screenshots from what appears to be a banking app showing receipts of universal credit payments and another screenshot showing that she began to receive those payments in May 2024. Ignoring pence, they show a first payment of £333 in May, then £722 in June, £691 in July and £563 in August. The reasons for the fluctuations is not clear. Prior to that she was in receipt of payments from the respondent of £2,784 per month net. It appears from this that although she was suspended from early May 2024, she was not on full pay but was paid in accordance with the company's sick pay provisions, which had already expired.

9. The respondent helpfully put together a further small pdf bundle containing these various attachments. It did not include all of the material sent to the tribunal however, such as the entirety of the Equal Treatment Bench Book and previous judgments of mine in other cases. None of that was referred to by Mr Robertson.

10. I should explain that in total Mrs Messi has brought seven claims against the respondent arising out of her brief employment with them, and has named an additional 19 individual members of staff as respondents, which include allegations of discrimination on grounds of disability, race and sex together with an equal pay claim, so it may be that this other material relates to wider aspects of the dispute.

11. One item of potential relevance to this claim which did not appear in the supplementary bundle was a letter from Mrs Messi's GP, dated 30 July 2024. According to this, she has been suffering from panic attacks, anxiety and depression, has recently been seen in A & E and been commenced on antidepressants. It makes reference to "another recent suicide attempt that was stopped in time by a family member." She has also now been referred to talking therapies. That letter was not provided to the respondent but I made Mr Davies aware that there was such a letter and he had no objection to me taking it into account.

The parties submissions

12. Mr Davies, for the respondent, referred me to two authorities: **Jilley v Birmingham and Solihull Mental Health NHS Trust**, UKEAT/0584/06/DA and UKEAT/0155/07/DA and to the decision of Underhill LJ in **Vaughan v London Borough of Lewisham** (No. 2) [2013] IRLR 713, both of which relate to the relevance of a claimant's means and are considered below.

13. Mr Robertson focused on the fact that the respondent has a policy of insurance covering the legal costs in question. He took the view that this insurance policy should have been disclosed earlier and described it as verging on insurance fraud. He also advanced an argument that the respondent, which is a large organisation, receiving, he says, over £200 million per year from the taxpayer, has been the subject of over 40 employment tribunal claims. Not only that, but they have an obligation under the Charities Act 2011 to disclose in their annual accounts any legal costs of more than £1000 and have failed to do so.

14. As to the merits of the claim put forward by Mrs Messi and the conclusions reached by the tribunal that she had been attempting to extract money by positioning herself as a whistleblower, he maintained that she had the right to make those disclosures. However, he also said that she was suffering from anxiety and impulse issues, that as a litigant in person himself he had been giving her coaching and she had changed her approach. He also emphasised that she was not in a position to pay £10,000 or any such sum.

Conclusions

15. Let me deal first with the insurance position. The general principle is that legal liabilities have to be determined first, then the terms of any policy of insurance have to be considered. Double recovery is of course not permissible, and the respondent will have an obligation to disclose everything to their insurers, but such policies are a perfectly usual feature of claims in the employment tribunals and in many other areas. A good deal of time in the County Court is taken up with road traffic accidents where, in the vast majority of cases, both parties are insured against liability. The task of the court is to decide who is responsible for the collision. In cases of that sort the payments are then generally dealt with between insurance companies, but enforcement action can be taken against individuals.

16. There are also cases in the civil court system in which a party is obliged to disclose its means of funding, particularly where a contingency fee arrangement is entered into allowing one party to charge a success fee and then recover it from the other side. That is because it is a jurisdiction in which costs are generally awarded and the other side needs to know the risk it is running, the potential costs which it might have to pay. That is not the position here and there is nothing improper about the respondent having a policy of insurance and no obligation on them to disclose it. It would be wrong in principle to alter the amount of costs in a case such as this to pass the burden from the claimant to the respondent's insurers. That is simply not a relevant consideration in the award of costs.

17. The next significant aspect is the relevance of the claimant's means. Again, I have little information about those means. It is clear from the documents disclosed in the course of the application for interim relief, that the claimant has had little difficulty in taking up employment, and has had at least ten employers since 2021. Given the salary received from the respondent in this case these were presumably at a reasonably senior and responsible level.

18. The thrust of the authorities to which Mr Davies referred me are that a tribunal is permitted but not required to have regard to a claimant's means. If payment of all the respondent's costs would be beyond the claimant's means, it may order payment of a specified proportion of the costs. As stated by Underhill LJ in **Vaughan** (at [28]):

> 'It is necessary to remember that whatever order was made would have to be enforced through the County Court, which would itself take into account the [claimant's] means from time to time in deciding whether to require payment by instalments, and if so in what amount.'

19. In that case the claimant was ordered to pay one third of the respondent's costs, which were said to be £260,000. In making that order, the Tribunal took into account the claimant's earning potential, as follows [quoted at §8]:

> 12. In considering whether a costs order should in fact be made, we have considered the Claimant's means. From the evidence presented, the Claimant appears to have limited means. She is currently on benefits and has no savings or capital assets. However in the case of **Arrowsmith v Nottingham Trent University** [2011] EWCA Civ 797, it was held that costs orders do not need to be confined to sums the party could pay as it may well be that their circumstances improve in the future.
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> 13. Although the Claimant is currently unemployed, this has only occurred very recently. The Claimant, at age 36, is relatively young. She has at least 15 years' experience in the care sector and, although signed off sick at the moment, it is her intention, once she is fully fit, to seek re-employment in this field. Up until recently, the Claimant was earning around £30,000 per year. There is no reason to assume that she won't return to her chosen career at this level at some point in the future.

20. Pausing there, as far as it is possible to judge Mrs Messi is in very much the same situation, and of course the overall costs of these applications are very much less.

21. The conclusion reached by Underhill LJ was at follows [§29]:

> "On that basis the question for the Tribunal – given, we repeat, that it thought it right to have regard to the Appellant's means – was essentially whether there was indeed a reasonable prospect of her being able in due course to return to well-paid employment and thus to be in a position to make a payment of costs; and, if so, what limit ought nevertheless be placed on her liability to take account of her means in that scenario and, more generally, to take account of proportionality. As to the former question, views might legitimately differ as to the probabilities, but the Tribunal was well-placed – better than we are – to form a view that there was indeed a realistic prospect, and we see no basis on which that judgment can be said to be perverse. As to the latter, we see the force of the argument that it would be pointless, and therefore not a proper exercise of discretion, to require the Appellant to pay more, even in the optimistic scenario envisaged, than she could realistically pay over a reasonable period; and we have been concerned whether the cap was simply set too high. But those questions of what is realistic or reasonable are very open-ended, and we see nothing wrong in principle in the Tribunal setting the cap at a level which gives the Respondents the benefit of any doubt, even to a generous extent. It must be recalled that affordability is not, as such, the sole criterion for the exercise of the

> discretion: accordingly a nice estimate of what can be afforded is not essential. Approached in that way, we cannot in the end say that the limit of one-third of the Respondents' costs – whether that comes to £60,000 or some other figure in the range – was perverse. It was of course rough-and-ready, but there is in truth no means of arriving at a more precise figure. We cannot conscientiously say that a proportion of, say, a quarter would have been right while a third was wrong. The Respondents are the injured parties, and even if the order does indeed turn out to be recoverable in full at some point in the future, they will be out-of-pocket to the tune of two-thirds of their assessed costs."

22. I have quoted that lengthy passage to illustrate the broad nature of the assessment and the difficulty of arriving at a firm figure for what a claimant may be able to afford over a reasonable period. Again, the costs claimed in this case are very much less than in **Vaughan** and I can see no reason to conclude that she would not be able to pay the sum of about £10,000 over a reasonable period. She would not be in receipt of universal credit if she had substantial savings at present, but that does not mean that she does not have, for example equity in a property, or other assets. But the more telling consideration is that she should be able to resume employment in due course at the same or similar level, at which point this sum represents about four months' net earnings. (In **Vaughan** the costs were about two years gross pay.) The limiting factor for Mrs Messi appears to be her mental health, which should be amenable to treatment over time.

23. One feature of this case which was not present in **Vaughan**, and is rarely encountered, is that we are still at an early stage of the case. The dust has not settled on these claims. If Mrs Messi was ultimately to obtain substantial compensation for, say, acts of discrimination, the respondent would be entitled to say, 'But you still owe us £10,000 in costs, so we will reduce the payment to you by that amount.' In those circumstances, it also seems to me wrong in principle to reduce the costs today on the basis of her ability to pay. If her claims have merit, she will certainly be able to pay these costs.

24. The other main area of concern is with regard to her mental health. I acknowledge the concern set out in the letter from her doctor. It is not clear whether her present anxiety is the result of losing her job, or of these proceedings, or both, or whether she has a longer history of mental health problems. I was concerned to explore whether, to any extent, her actions in seeking to expose the respondent in the way described by Employment Judge Heath were affected by some underlying mental health condition. Of course one might simply take the view that this was unscrupulous conduct and that Mrs Messi hoped to gain by it. On the other hand, a more measured assessment might be that it was an extremely foolish course of action, and could hardly leave her better off than had she simply carried on with her employment, so there must be some other explanation. Ultimately however, nothing substantial was put forward by way of evidence or argument, and I have to conclude that there is no material before me to excuse or explain what she did.

25. Overall therefore, I have taken into account Mrs Messi's means, as far as I am able, I conclude that she should be able to pay this amount within a reasonable further period, and I see no other basis for making a reduction.

26. As a footnote, there was also an application for a transcript to be prepared at public expense following the hearing on 3 June 2024. Having now received and considered the evidence showing that the claimant was in receipt of universal credit at the time of the application, I will allow that request.

Employment Judge Fowell

Date 5 September 2024

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