EMPLOYMENT TRIBUNALS

Claimant: Mr T Lapraik

Respondent: Barfoots Cropping Limited

Heard at: Southampton **On:** 14 December 2018

Before: Employment Judge C H O'Rourke
Mr K J Sleeth
Mr M A Knight

Representation
Claimant: Mr T Gillie (Counsel)
Respondent: Mr M Palmer (Counsel)

COSTS JUDGMENT

The Claimant is ordered to pay the Respondent's costs, in the sum of £11,600.

REASONS

Background and Issues

1. Due to pressure of time at the Hearing, summary reasons having been given, those are now confirmed below.

2. Following the Judgment of 18 July 2018 and the provision, subsequently, of written reasons, on 13 August 2018, the Respondent applied for an order for their costs of these proceedings [64-68]. The Claimant resisted that application [72-76]. Both parties having requested a hearing, it was duly listed for the above date.

Respondent's Application

3. The Respondent's application is summarised, as follows:

   a. The Respondent has incurred costs of approximately £53,000 in

resisting this claim, of which approximately £28,000 has arisen following rejection of offers of settlement. This application is, however, limited to the Tribunal's statutory maximum jurisdiction of £20,000. (These figures were not disputed by the Claimant.)

b. The Respondent had accepted, from filing of its Response, in July 2017 that it had, on procedural grounds, unfairly dismissed the Claimant. Although, therefore, the Claimant's claim of unfair dismissal was conceded, the Respondent resisted his other claims of automatic unfair dismissal on grounds of making a protected disclosure and of disability discrimination. As a consequence of its concession as to the unfair dismissal, the Respondent offered the Claimant the sum of £35,978, on 13 March 2018 [56-58], based on its assessment as to the maximum sum that could be awarded to the Claimant for his unfair dismissal claim, based on his annual gross salary having been £35,000. That offer was repeated on 17 April [60] and reiterated at the outset of the substantive hearing. Costs warnings were also made at the same time. The Respondent considered the Claimant's rejection of that offer [59 and 62] to be unreasonable conduct on his part (reliant on **Kovacs v Queen Mary & Westfield College [2002] EWCA Civ 352**), particularly in view of the Tribunal's subsequent judgment that he be awarded £29,580.

c. The Respondent considered the Claimant's position as to the potential remedy sought, of plus of £800,000 [48-51] to be entirely unreasonable and misconceived. His maintenance of this demand at the preliminary hearing listed to consider the possibility of judicial mediation, in December 2017, was met, it was contended by 'surprise' from the judge conducting that Hearing and prejudiced any possibility of the mediation proceeding.

d. It was unreasonable of the Claimant (represented by his father and assisted by his mother – both educated, professional persons) not to have either properly considered the merits of his claims of protected disclosure and disability discrimination, or conversely to have taken legal advice in respect of both of them and the level of remedy sought. This is particularly so, as both claims had no reasonable prospect of success, supported by the Tribunal's subsequent judgment.

e. During the substantive hearing, the Claimant's father (as his representative) and his mother behaved in an intimidatory manner towards the Respondent's witnesses and showed levity in reaction to their evidence, resulting in a rebuke from the Tribunal.

Claimant's Response

4. The Claimant having latterly sought legal advice, his solicitors responded as follows:

a. The case of **Kovacs** was of limited relevance to these proceedings and was instead focused on a paying party's ability to pay any costs ordered. It was not disputed that failure to accept an offer to settle could be a

relevant factor in determining unreasonable conduct.

b. The Tribunal did not find that any claims were misconceived. On that basis, therefore, the Claimant was entitled to proceed with such claims, for which, if successful, the remedy awarded could have beaten the existing offer.

c. Even despite the Respondent's concession of the unfair dismissal claim, the Claimant was entitled to maintain it, as it had been only partially conceded and also the Respondent sought a finding of contributory fault, which was inappropriate when the reason relied upon was Some Other Substantial Reason (SOSR).

d. The alleged misbehaviour of the Claimant's parents was not accepted and was not commented on by the Tribunal, in its Reasons. Further, lay people should not be judged by the standards of professional representatives.

e. If the Claimant's claims of Protected Disclosure and disability discrimination truly had no reasonable prospects of success, then the Respondent should have sought a strike-out judgment, but did not. It was not possible, until the evidence was heard, to come to a view on such issue. The Respondent accepted that the dismissal did not follow any fair procedure, leaving it open to the Claimant to consider that there was some other ulterior motive, related to either his protected disclosure and/or his disability, for that dismissal.

f. The costs warning letters were deficient, in both failing to state what level of costs might be sought or incurred and also in setting out the weaknesses of the Claimant's case.

The Law

5. Both Counsel made extensive reference to the law on these issues, summarised as follows:

a. Rules 76(1), 78(1)(a) and 84 of the Employment Tribunal's Rules of Procedure 2013.

b. The case of **Kopel v Safeway Stores plc [2003] UKEAT IRLR 753** which indicated that while refusal of a 'Calderbank'-style offer was a factor which a Tribunal could take into account in deciding whether to make a costs order, failure to 'beat' such an offer should not, of itself, lead to such an order. Before rejection becomes a relevant factor, a Tribunal must first conclude that the conduct in rejecting the offer was unreasonable.

c. **Anderson v Cheltenham & Gloucester plc [2013] UKEAT/0221/13** indicated that following failure by a party to beat a Calderbank offer, the tribunal had failed, when making a costs order, to take into account relevant factors. These were that neither the Respondent, nor the

Tribunal had suggested, or found that the claim was misconceived and that it was difficult to predict the likely level of contribution, as ultimately found by the tribunal.

d. **Gibb v Maidstone & Tonbridge Wells NHS Trust [2010] EWCA Civ 678**, which indicated that an employee had a right to have a claim of unfair dismissal decided by a tribunal, as it was not simply for a monetary award, but for a finding that the dismissal was unfair. He could not be deterred from exercising such right by an offer that only met the monetary part of the claim. '*If employers wish to compromise a claim, then they can do so by admitting it in full, but they cannot do so by conceding only part of it.'*

e. **AQ Ltd v Holden [2012] UKEAT IRLR 648** set out that a tribunal should not judge a litigant in person by the standards of a professional representative, lacking as they will objectivity and knowledge of the law.

f. **Scott v Commissioners of Inland Revenue [2004] EWCA Civ 400** indicates that in determining whether a claim was misconceived, the test was not whether the party thought they were in the right, but whether they had reasonable grounds for thinking so.

g. **E T Marler Ltd v Robertson [1973] NIRC 26** which stated that in predicting the outcomes of claims '*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 when they took up arms.'*

h. **Rogers v Dorothy Barley School [2012] UKEAT/0013/12** which found, in the circumstances of that case that the claimant had been acting in person and had '*simply not grasped the jurisdictional question that his appeal raises'* and that he had not been given notice of the extents of the costs that might be sought.

i. **Kovacs** (as above), which indicated that a paying party's ability to pay any costs order is not a factor that should be taken into account when deciding whether or not to make a costs order. (Reiterated in **Arrowsmith v Nottingham Trent University [2012] EWCA Civ 797** and **Vaughan v London Borough of Lewisham (No. 2) [2013] UKEAT IRLR 713**).

j. **Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255** stated that tribunals, in exercising discretion to order costs should look at '*the whole picture of what happened in the case', identify the conduct, what was unreasonable about it and what effects it had.*' There does not have to be a precise causal link between the unreasonable conduct and the specific costs being claimed.

The Facts

6. We heard evidence from the Claimant, his father and mother, all of whom provided witness statements.

7. The Claimant stated that he held a genuine belief that his disability (dyslexia) had been a direct factor in the dismissal decision and that his claim was brought in good faith and not, in hindsight, to bolster his claim. Neither he, nor his parents have any legal training. They did seek advice from a solicitor, in or about April 2017 and based on that advice, offered, by email of 28 April 2017, to sign a settlement agreement, on payment of £40,000, but which offer was refused [46B]. He did not repeat that offer, thereafter. He agreed, in cross-examination, that the next settlement figure that he advanced was the '£801,000 plus pension and tax' figure in his schedule of loss, of 13 November 2017 [48-54]. He was asked whether that was the figure that was mentioned in the Mediation Case Management Hearing of November 2017 and said that he'd not been in attendance at that Hearing, but his father had. The offer made the following year by the Respondent, of £35,978, took no account of his disability and protected disclosure claims. On that basis and considering his difficulties in finding alternative employment, he considered his schedule of loss to be reasonable and that therefore it was also reasonable to reject that offer. When asked whether he gave the matter further reflection, when the offer was reiterated, just before an adjourned substantive hearing, in April 2018, he said he had, but refused it '*because I wanted to present my claim, wanted to present my claim of unfair dismissal.'* In view of his employment difficulties, his parents have loaned him money, totaling £13,500, which he has repaid. They have also financed legal representation to defend against this costs application, in the sum of £10,000. Having been unable to find regular or suitably-paid employment, he has set up his own business, but has recently suffered an orthopaedic injury and while awaiting an operation and recovery from it, his ability to work is limited. He confirmed that he has received the remedy sum ordered by the Tribunal, of £29,580 (his father stating, in his evidence that the £13,500 debt to him and his wife had been repaid from this sum).

8. Mrs Lapraik stated that she and her husband are retired, have no legal training and are not wealthy. On questioning, she said that she had been a university academic and that her husband had been deputy CEO of the 'Mary Rose' project. She considered her son's claims, in the circumstances of his dismissal and his accepted disability, to be reasonable. Referring to the £40,000 offer made by them in April 2017, she said that had that been accepted, no subsequent costs would have been incurred. In respect of her son's difficulty in finding suitable employment and his subsequent financial difficulties, she supported his evidence, less that she stated that of the £10,000 in legal fees he referred to, £3500 had been incurred in or about May 2017.

9. Mr Lapraik (senior) stated that he and his son had sought legal advice from a solicitor in April 2017 and were told that he had '*a good case'*; that

it '*was highly unlikely that costs would be awarded'* and that there was no reason why he should not act as his son's representative, as this was not unusual in tribunals. He did so and represented his son at all subsequent hearings (less this one). They continued to have that solicitor '*in the background'*, until he moved to another firm, at some point thereafter. He reiterated his son's and wife's evidence as to the £40,000 offer and his son's debts and employment difficulties. He relied on the fact that at the Case Management Preliminary Hearing, of 31 October 2017, the Employment Judge conducting that Hearing gave no suggestion that the disability and protected disclosure claims '*were in any way misconceived'*. He blamed the failure of the judicial mediation to proceed on the Respondent's refusal to offer any settlement figure relating to those claims, either then or in the subsequent offers. When challenged as to the discussion of his son's schedule of loss at the Mediation Case Management Hearing, he denied that he had said, when asked by the Judge as to the value of the Claim, '*a sum in the region of £1,000,000'*, stating that he had said £801,000, based on his son's lifelong lost career prospects. When it was suggested to him that once he mentioned this figure, the Judge saw no prospect of a successful mediation, he said that he '*was being pressed to quote a number and the Respondent was not going beyond what they'd previously offered and I saw no point in reducing our offer, but there would clearly be a negotiation.'* He agreed that he had never subsequently reduced that figure, or made any lower offer and said that they might have done, had they '*been allowed to go to mediation'*, but otherwise, saw '*no reason why* (we) *should have done*.' When challenged as to his assessment of the £801,000-plus figure, based on his son apparently earning nothing for the rest of his life, he said that it was a realistic figure and if anything, an under-estimate. He said that the figure was not based on legal advice, but on his own understanding of compensation in such matters, following '*reading widely'* and internet research. He regretted that he had not taken formal advice on the figure and agreed that he should have done so. On questioning, he said that the costs warning letters had not given him pause for thought and he had not taken legal advice in respect of them. He agreed that on the final day of the liability hearing (18 July 2018), he had provided a revised schedule, limited only to the unfair dismissal claim and he said that he had both versions, to cover either eventuality.

Closing Submissions

10. On behalf of the Claimant, Mr Gillie made the following submissions:

    a. He had six main issues to cover: the issue generally of settlement and failure to 'beat' offers; that refusal to accept an offer was not unreasonable; that a claimant had a 'vindicatory' right to pursue an unfair dismissal claim; the Claimant's parents' behaviour at the Hearing; whether the claims had no reasonable prospects of success and finally, the nature of the costs warning letters.

    b. Applying **Kopel**, he did not dispute that it was open to a tribunal to take into account offers made by the other party. But the issue is

slightly more nuanced in that case, as it must be unreasonable to reject any such offer, for it to be a relevant factor in any costs order. Simple failure to accept does not automatically result in a costs liability.

c. The Claimant's refusal to accept the offer was not unreasonable. The Tribunal did not, in its Judgment, making a finding that either claim was misconceived [35 and 41] (**Anderson**). Nor, until receipt of the skeleton argument, has the Respondent suggested that the claims were such. **Anderson** established two principles: that the claim must actually be misconceived and that it is difficult to predict the level of possible compensation that might be awarded. It is difficult to predict compensation levels, with various fact-sensitive issues to be taken into account, to include whether or not there had been discrimination or automatic unfair dismissal; whether there should be an ACAS uplift; whether there would be a **Polkey** deduction, or a finding of contributory fault. The suggestion that the Respondent's offer was set at the maximum statutory figure for unfair dismissal cannot be correct, as the Claimant also had a claim for automatic unfair dismissal, along with the possibility of an ACAS uplift and compensation for loss of bonus. It was not, therefore, unreasonable to refuse that offer.

d. Applying **Gibb**, an employee can pursue a claim of unfair dismissal, to vindicate his position and there is no distinction made between 'ordinary' and 'automatic' unfair dismissal. The Respondent did not, in its grounds of resistance, concede this claim in full [28], only admitting procedural grounds and asserting contributory conduct (rejected by the Tribunal). The Claimant was, therefore, not acting unreasonably in rejecting the offer.

e. While the Claimant's parents' behaviour may have been discourteous, applying **AQ Ltd**, they should not be judged, as lay persons, against the standards expected of professional representatives, particularly bearing in mind their inevitable lack of objectivity in this case. (The Tribunal gave an early indication, at this point that we did not consider any such behaviour by the Claimant's parents (Mrs Lapraik staring at the Respondent's witnesses sitting behind her and both she and her husband laughing at a Respondent witness' testimony) to be particularly significant, or having any real bearing on the issue of costs.)

f. The claims were not misconceived and therefore had reasonable prospects of success. The Respondent never suggested that they were misconceived and the outcome of them was dependent on evidence at hearing. The fact that they were unsuccessful does not mean they lacked reasonable prospects of success. Applying **Scott**, the test is whether the Claimant had reasonable grounds to think that he was in the right about both claims. Nor, as in that case, were the allegations 'trivial' ones. In the circumstances of the Respondent conceding unfair dismissal; having, in a pre-meditated fashion, followed no procedure; the Claimant having recently been paid a

bonus and given a good appraisal, the Claimant could reasonably assume that there was some ulterior motive, which could have been discriminatory. It is not, applying **E T Marler Ltd**, until the 'dust of battle has subsided' that a litigant-in-person can be expected to be clear about the merits of their claim. It is impossible to expect the Claimant and his parents to be objective in this case. While it is asserted in the costs application [66] that the Claimant's parents would not have had financial difficulties in instructing a lawyer, there is no evidence to support such an assertion. Both are retired and are not wealthy. Their approach to this claim was not '*opportunistic and cynical'*, as asserted and there was a rationale for claiming the £800,000 figure, based on the two unconceded claims. Because they may have been incorrect in that assumption, does not mean that they have been unreasonable.

g. Applying **Rogers**, in respect of the costs warning letters, such letters must be sufficient to allow the recipient to 'take stock' of their position and set out why their claims are likely to fail. They should also indicate the likely level of costs. However, these letters do not address those issues: there is no reference to any costs figure and no real explanation as to why the claims may be weak, but simply recite the relevant Tribunal Rules and refer vaguely to issues of credibility. The Claimant's refusal of those offers was therefore not unreasonable.

11. On behalf of the Respondent, Mr Palmer made the following submissions:

a. He referred to his written submissions.

b. Applying **Yerrakalva**, the Tribunal has jurisdiction, on the facts of the case heard before it, to determine whether or not the circumstances in Rule 76 apply and a costs order is appropriate. Particular reference is made to Mummery LJ's comments, below:

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.

42. On matters of discretion an earlier case only stands as authority for what are, or what are not, the principles governing the discretion and serving only as a broad steer on the factors covered by the

paramount principle of relevance. A costs decision in one case will not in most cases pre-determine the outcome of a costs application in another case: the facts of the cases will be different, as will be the interaction of the relevant factors with one another and the varying weight to be attached to them. (Counsel's emphasis)

c. As to any alleged defects in the costs warning letters, the letters emphasise how the calculation of the offer was made, bearing in mind the concession as to the unfair dismissal claim. The sum offered, bearing in mind the statutory cap, is the maximum amount possible of net earnings and would have included the possibility of any uplift. By this point, witness statements had been exchanged and the Claimant was in a position to assess the evidence he would have to meet (as also set out in the detailed grounds of resistance). That evidence was dealt with in the Tribunal Judgment [41] and was not seriously challenged. There was, therefore, no need to repeat such matters. Also, the Claimant and his parents were repeatedly urged to take legal advice. It is correct that there was no quantification of costs in the letters, but the Claimant and his parents are intelligent people, who had sought some legal advice and the Claimant's father accepts that he should have sought additional such advice. They cannot, therefore, have been entirely unaware of the likely level of such costs and from which, in any event, the Respondent is not seeking full repayment, but the statutory maximum of £20,000.

d. This discussion is set in the context of a grossly inflated claim, demanding a figure which, by any estimate, was a sum far in excess of anything such claim might merit. It was thus very important that the Claimant took advice on this issue, central as it was to his claim.

e. The outcome of the Hearing was as a consequence of a combination of factors:

   i. The nature of the claims, for which there was nothing like sufficient evidence.

   ii. The fact that the Claimant's dyslexia had nothing to do with his dismissal.

   iii. The Claimant's parents' behaviour at the Hearing, requiring intervention by the Tribunal.

   iv. The fact that the unfair dismissal was admitted, from the filing of the ET3 and that the Respondent was offering more than the Claimant could hope to recover at hearing. While, refusal of an offer is only one factor to be considered, it is a relevant one (**Kovacs**).

f. The Claimant's conduct of these proceedings has been unreasonable and accordingly a costs order should be made, in the sum of £20,000.

Findings

12. Applying **Yerrakalva**, the Tribunal has broad discretion as to whether or not to make a costs order, which is not bound by the facts (as opposed to the principles) of previous cases. It must '*look at the whole picture of what happened in the case'*.

13. We identified the following factors as of potential relevance to our decision:

    a. The Claimant's failure to 'beat' the Respondent's offer at the Hearing.

    b. The level of the Claimant's schedule of loss and its effect on possible settlement.

    c. The vindicating of the unfairness of the dismissal.

    d. The Claimant's parents' behaviour at the Hearing (as stated above, we did not consider this a particularly relevant factor and excluded it from our considerations – **AQ Ltd**).

    e. Whether or not the claims had a reasonable prospect of success.

    f. The nature of the costs warning letters.

14. Dealing with each of those in turn (but not in the same order), we reached the following conclusions:

    a. Reasonable Prospects of Success - Discrimination. Whether or not (the unfair dismissal claim having already been conceded), the claims of discrimination and protected disclosure had reasonable prospects of success. In respect of the discrimination claim, we do not consider that there are sufficient grounds to consider that this claim had no reasonable prospects of success, for the following reasons:

        i. The Claimant is disabled, as accepted throughout by the Respondent.

        ii. The manner of the Claimant's dismissal was peremptory and as accepted by the Respondent, void of any reasonable procedure. In the overall context of the Claimant being in confrontation with his 'Number 2', Mr Denbury, partially at least in relation to Mr Denbury feeling that he was not getting full credit for the 'clerical' assistance he was giving the Claimant, it is not entirely unreasonable that the Claimant should link his disability to his dismissal. Had the Respondent carried out a full procedure and set out in detail its 'Some other Substantial Reason' for the dismissal, then the Claimant would be in much more difficulty in this respect.

    b. Reasonable Prospects – Protected Disclosure. Conversely, we do consider the Protected Disclosure claim had no reasonable prospects of

success (of which the Claimant had grounds to be aware of), for the following reasons:

i. The Claimant's own evidence on this matter was confused and contradictory [35 (21)].

ii. We found his evidence on the matter to be implausible and lacking credibility [35 (21)].

iii. It was entirely clear to us that Mr Leon, the Claimant's line manager, attached no significance whatsoever to the meeting at which the alleged protected disclosure was made, such as he could remember the subject at all and it never arose again [35 (20). As set out in our Judgment:

23. While there may be arguments as to whether or not what the Claimant said to Mr Leon in June 2016 was a protected disclosure, we consider that issue irrelevant, as, in any event, it is clear to us that it had no effect on his subsequent employment. We find this for the following reasons:

(1) Mr Leon's complete disinterest in the disclosure and evident inability to recall the incident.
(2) Mr Leon's subsequent glowing appraisal of the Claimant in January 2017.
(3) The complete absence of any detriment to the Claimant, until the decision, in late-February 2017, to dismiss him, some eight months after the alleged disclosure. If Mr Leon was truly concerned or irritated by this matter, he didn't show it.

iv. This claim, we considered, had all the hallmarks of the Claimant 'casting about' to bolster his case, as, as he stated, he wished to dispute the fairness of his dismissal, in relation to Mr Denbury being retained, but could not do so, as his claim of unfair dismissal was conceded. We didn't consider that he was being credible about his evidence in respect of the alleged disclosure, indicating therefore that he didn't himself really believe in its merits. Even a non-lawyer would realise the evidential difficulties in pursuing an automatic unfair dismissal claim in relation to an alleged protected disclosure some eight months before any alleged detriment arose, the details of which disclosure he himself could not readily recall.

c. Failure to Beat the Offer. Having found that it was not entirely unreasonable to pursue the discrimination claim (and this is a marginal finding), it was, in turn, at least in the Claimant's mind, possible that he could beat the existing offer, if that claim succeeded. We do not, therefore, consider this failure to be a factor in favour of making a costs order.

d. The Schedule of Loss. We consider the schedule of loss to have set out an entirely reasonable level of claimed remedy. Mr Lapraik senior

accepted that he should have taken advice in respect of it, instead, he said, carrying out only internet research. This is particularly surprising, considering the uncontested comments made by EJ Harper at the Mediation Case Management Hearing. Mr Lapraik senior (the driving force behind this claim, we find) should have given those comments serious thought and at that stage, taken professional legal advice. He said that he had done so previously, at a cost of £3,500 and clearly therefore had (and now also has) the means to do so. It is worthy of note that when he was engaging such advice, it was that his son should offer to accept £40,000 and he could not provide, in our view, any worthwhile rationale for his subsequent plus of £800,000 figure. We consider, also that the Claimant's parents (the driving force behind the claim) are relatively sophisticated 'representatives' of a litigant-in-person and more capable than most of reaching logical conclusions in this matter. In view of the disproportionate nature of the value of the Claim and the likely cost of taking some limited legal advice, the Claimant and/or his father should have done so, as also advised in the Respondent's costs warning letters. This failure, we find, completely prejudiced the possibility of a mediation taking place, or any subsequent settlement. Had the mediation proceeded, we don't, of course, know whether it would have succeeded, or not, but it would certainly, in our view, have highlighted for the Claimant the weaknesses of his Claim and the evidential hurdles he would have to get over at final hearing.

e. Vindicatory Nature of pursuing the Unfair Dismissal claim. Briefly, having decided that the automatic unfair dismissal claim for protected disclosure was misconceived, the Claimant had no valid claim for unfair dismissal, but, as we found:

'42. The Claimant sought to dispute this dismissal, effectively arguing that Mr Denbury should have been dismissed, not him, as he (the Claimant) had better skills and knowledge and Mr Denbury had been under-performing. If, indeed, this had been an unfair dismissal claim before us, we would certainly be looking at these issues, but it is not, as unfair dismissal is conceded.'

It appeared to us, therefore that despite this claim being conceded, he continued, pointlessly, to attempt to argue its merits. We consider that any time spent on such issue was wasted, but which, being considered marginal, is not considered further.

f. Costs Warning Letters. There is in fact only one real letter of this nature [56-58] (the other simply being a reiteration of the previous offer) and this exposes a couple of serious flaws: firstly, it does not go into sufficient detail as to why the claims are likely to fail, particularly for a litigant-in-person and secondly, it does not set out the current, or likely future, costs. We doubt, however, in any event, given Mr Lapraik senior's stance in this claim (as exhibited by the schedule of loss) that such more comprehensive letters would have had the desired effect, in any event. The letter does at least have the merit of alerting the Claimant to the possibility of a costs order and pointing him to the relevant Rules and, as

stated before, suggesting he take legal advice.

Conclusion

15. We consider that the Protected Disclosure claim, although one of only two potentially valid claims, took up approximately one-third of the time taken to deal with the overall claim, which therefore would, based on the Respondent's claim for £20,000, consist of approximate costs of £6,666.

16. Turning to the grossly inflated schedule of loss and its effect upon the possibility of mediation and settlement generally, we consider that there was at least some possibility of the mediation proceeding, possibly successfully, or settlement otherwise, had the Claimant presented a remotely realistic schedule of loss. At very least, the Claimant would have had a much greater understanding of the merits, or otherwise, of his claims and perhaps subsequently settled, or perhaps focused on those elements of his claims, for which he had at least some reasonable evidence, thus reducing the hearing time and attendant costs. It is clearly difficult to quantify such possibilities and as we are conscious of an element of 'double-recovery' for the Respondent, having already come to a view about the Protected Disclosure claim, we therefore consider an award of costs of 25% of those sought, to be appropriate.

17. A potential total award of costs, therefore, was considered appropriate, based on a total liability for 58% of the costs sought, of £11,600.

Ability to Pay

18. Following a break, we heard evidence and submissions as to the Claimant's ability to pay such an order.

19. The Claimant had provided evidence of his finances [84-99]. He said that his income is currently running at a deficit of £351 per month and that he is in debt, in the sum of £45,000. While he accepts that whether or not he has the means to pay is not a determinative factor, it is a relevant one, which should weigh heavily in the Tribunal's consideration. The approximate £29,000 he has received from the Respondent is not a 'windfall' for him, but much of it was needed to repay his parents. He has very little means and will not be able to pay such an order easily and therefore any sum ordered should be the minimum possible. Account should also be taken of his disability and his recent orthopaedic injury, which will result in him needing to take time off work.

20. The Respondent argued, relying on **Arrowsmith** and **Vaughan** that the Claimant's ability to pay any award was not the deciding factor in making a costs order. As Underhill J (as he then was) made clear in Vaughan (in a case where costs of £87,000 were ordered against an unemployed claimant), the question of affordability does not have to be decided once and for all by reference to a party's means at the moment the order falls to be paid. Such orders, if not paid, will fall to be enforced in the County Court, which would have to take into account detailed evidence as to the Claimant's means, in

deciding whether to require, potentially, payments in instalments and in what amounts. It has been the Claimant's choice to embark on self-employment and it should be noted that his outgoings are lessened by having a partner in work. Also, he has recently received an award of approximately £29,000 and therefore, certainly, at least in time, will be in a position to pay.

21. Conclusion on Ability to Pay. Our conclusion is to order the Claimant to pay the Respondent the sum of £11,600, for the following reasons:

    a. The case of **Vaughan** gives clear guidance that there is no requirement to make an assessment on the Claimant's ability today to pay any award. There is no reason to assume that over time, he will be able to do so. The facts in **Vaughan** were stark and much more extreme than in this case before us, but yet a very large costs order was considered appropriate.

    b. The Respondent 'cannot get blood from a stone': if the Claimant cannot genuinely pay this award in full, or agreement cannot be reached as to a payment schedule, then the Respondent will have to seek enforcement through the County Court, which will decide, based on all the evidence as to his means, as to what payments should be made and when.

    c. Finally, he has recently received approximately £29,000, a large proportion of which he states that he has repaid, by way of a loan from his parents, which was his choice. We cannot find that any such sums he feels due to his parents take precedence over sums ordered to be paid by this Tribunal.

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Employment Judge O'Rourke

Date: 2 January 2019