# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr S Baig**

**Respondent:** **Harneys Westood Reigels LLP**

**Heard at:** **East London Hearing Centre**

**On:** **22 August 2022**

**Before:** **Employment Judge Burgher**

**Appearances**
**For the Claimant:** **Mr M White (Counsel)**
**For the Respondent:** **Mr G Anderson (Counsel)**

***This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.***

## JUDGMENT ON COSTS APPLICATION

**The Respondent's application for costs is refused.**

## REASONS

1. By letter dated 19 October 2021 the Respondent applied for the Claimant to pay its costs on the basis that the claim had no reasonable prospects of success and that the Claimant, in bringing him proceedings, with this claim has acted unreasonably. The Respondent attached to cost schedule claiming £46,172.00. Before me Mr. Anderson claimed a summary assessment of £20,000 to avoid the need for the further process of detailed assessment.

2. The Claimant resisted the application. He gave evidence before me and I was referred to relevant pages in the agreed hearing bundle.

3. The relevant facts are as follows.

4. The Claimant was employed as a Data Protection Officer at the Respondent

offshore law firm from the 23 March 2020 until his dismissal on the 30 November 2020. He is very experienced in the field of data protection and was paid a salary of approximately £95,000 a year by the Respondent.

5. Following compliance with the ACAS early conciliation process the table presented a claim on the 18 March 2021. His ET1 form claimed unfair dismissal and stated:

> At Box 8.1
>
> I was Data Protection Officer for Harney's in line with GDPR requirements. I highlighted systemic failures in the compliance approach, developed a plan and as I was rolling out I was dismissed on the spot with no prior warning ever been issued.
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> At Box 8.2
>
> I conducted a firm-wide gap assessment which led me to identify significant compliance deficiencies which had previously been reported 'fully-compliant' signed by the Chief Operating Officer and the Chairman via a letter. I identified 18 areas of non-compliance and presented a step by step plan to close gaps.
>
> I advised COO and Chief Security Officer to re-evaluate our stance on reporting fully compliant statuses as this could have had a negative impact but this was not taken positively…
>
> I have evidence which I provided to the committee that I had raised these point on multiple occasions, however Chief Security Officer cancelled over 20 meetings and therefore he was unable to understand the risk exposure.
>
> I was asked to build a data breach framework which includes creating reporting templates, processes guidance, intranet posts and training pack. I was asked to take partners through the training which had been on content I created and had approved by Chief Security Officer and COO. I was dismissed whilst I was delivering my planned training sessions...
>
> I was dismissed unfairly.

6. The Claimant presented his claim without taking legal advice. He wrongly believed that the non retaliation provisions that's applied to data protection officers undertaking their duties could be enforced in the employment tribunal whilst at the same time indicating in the ET1 that he would refer the matter to the ICO.

7. On 25 March 2021 the Employment Tribunal, having considered the Claimant's length of service, sent the Claimant a strikeout warning letter specifying that under section 108 of the Employment Rights Act, Claimants are not entitled to bring a complaint of unfair dismissal unless they were employed for two years or more except in certain specific circumstances which do not seem to apply to his case. The claimant had until 8 April 2021 to give reasons in writing where the claim should not be struck out.

8. The Claimant did not seek legal advice at this stage despite the wording of the letter and responded by e-mail dated 8 April 2021 stating as follows:

I would respectfully refer to Section 2 of the Employment Tribunals Rules of Procedure 2013 - Overriding objective.

2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules.

My rationale for case to be considered under overriding objective of the Tribunal is as follows;

1- This case is breach of regulation, Article 38 of the GDPR, specifically Article 38(3) The controller and processor shall ensure that the data protection officer does not receive any instructions regarding the exercise of those tasks. He or she shall not be dismissed or penalised by the controller or the processor for performing his tasks. The data protection officer shall directly report to the highest management level of the controller or the processor.

2- This case is also a breach under UK Data Protection Act 2018, Article 70, specifically 70(3)(c).

3- Based on this, it would be reasonable for the tribunal to bring this within scope as it meets the 'fair and just' requirement of the overriding objective of the tribunal.

4- I have evidence which demonstrates that I was unduly penalised for performing my duties under UK Data Protection Act 2018 and the GDPR requirements. Therefore, an opportunity to present my case to the tribunal will be in line with legal requirements.

UK and European law provide guarantees that protects the role of the DPO for performing tasks required by regulation. I have been unfairly dismissed and, on the grounds mentioned above, I would request the tribunal to confirm the date for hearing.

9. In this letter, the Claimant was maintaining that he was being dismissed for undertaking his data protection officer duties.

10. Having received this letter, the Tribunal wrote to the Claimant on the 16 April 2021 stating that an Open Preliminary Hearing was listed for 24 of September 2021 for two hours to consider whether the Claimant’s claim should be struck out. The Claimant gave evidence that when he received this letter he believed that the tribunal

would strike his claim out but that he wished to clear his name as he had done nothing wrong to warrant his dismissal. The Claimant did not seek legal advice.

11. The Respondent responded to the claimant's claim on the 13 May 2021 and contended that the Tribunal did not have jurisdiction to hear the claim.

12. The Respondent separately wrote to the Claimant on 13 May 2021 with a cost warning letter. The letter stated that the Claimant did not have the requisite length of service to bring a claim for unfair dismissal and that the employment tribunal did not have any statutory jurisdiction to hear claims for breach of the GDPR or the Data Protection Act 2018. The Respondent maintained that the Claimant's claim had no reasonable prospect of success and urged the Claimant to take independent legal advice in respect to the merits of the claim as soon as possible.

13. The Claimant did not seek legal advice. He claimed that he was subject to financial constraints that precluded this.

14. On 21 September 2021, the Claimant wrote to the Tribunal as follows:

> I would like to withdraw my case from the Tribunal as I am now reporting this matter to the regulator, Information Commissioner's Office.

15. The Claimant stated that he regrets that he did not take legal advice earlier, but that he panicked and withdrew his claim. He stated that he withdrew his claim because he understood that his GDPR / DPO claim should be brought in a court not a Tribunal and that he was not aware that his claimed facts would also have supported a whistleblowing unfair dismissal claim and had he known this he would have continued with his claim.

**Law**

16. Rules 76 and 78 of the ET 2013 rules state:

> 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—
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> (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.
>
> (3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—
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> (a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the

hearing; and

(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

The amount of a costs order

78.—(1) A costs order may—

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993(23), or by an Employment Judge applying the same principles;

(c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;

(d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or

(e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

(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.

17. I had regard to the structured approach set out in the case of Millan v Capsticks Solicitors LLP & Others UKEAT/0093/14/RN where the then President of the EAT, Langstaff J, described the exercise to be undertaken by the Tribunal as a 3 stage exercise at paragraphs 52:

> There are thus three stages to the process of determining upon a costs order in a particular amount. First, the tribunal must be of the opinion that the paying party has behaved in a manner referred to in Rule 40(3); but if of that opinion, does not have to make a costs order. It has still to decide whether, as a second stage, it is "appropriate" to do so. In reaching that decision it may take account of the ability of the paying party to pay. Having decided that there should be a costs order in some amount, the third stage is to determine what that amount should be. Here, covered by Rule 41, the tribunal has the option of ordering the paying party to pay an amount to be determined by way of detailed assessment in a county court.

18. I therefore considered the following issues:

> 1. Has the putative paying party behaved in the manner proscribed by the rules?
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> 2. If so, it must then exercise its discretion as to whether or not it is appropriate to make a costs order, (it may take into account ability to pay in making that decision).
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> 3. If it decides that a costs order should be made, it must decide what amount should be paid or whether the matter should be referred for assessment, (again the Tribunal may take into account the paying party's ability to pay).

**Submissions and conclusions**

19. Mr White submitted that the Respondent's application was misconceived. The Claimant was a litigant in person who had presented a viable whistleblowing claim that was mislabelled it as a claim under the GDPR.

20. Whilst I readily accept that the Claimant may have had little difficulty persuading employment tribunal to amend his claim to be a whistle blowing claim, I do not accept the claim as presented by the Claimant was in fact a whistleblowing claim. Therefore on the face of it the Claimant's claim for unfair dismissal and breach of the GDPR was misconceived as the employment tribunal would not have jurisdiction to deal with them.

21. Mr White properly referred me to the cases of McPherson v BNP Paribas (London Branch) [2004] EWCA Civ 569 and National Oilwell Varco (UK) v Mr Jonathan Van De Ruit (UKEATS/0006/14/JW) indicating that a late withdrawal of claims is not, in itself, tantamount unreasonable conduct.

22. I do not criticise Claimant for his late withdrawal of his claim on the 21 September 2021. However, I do conclude that the Claimant was unreasonable in his inertia in determining the proper basis of his claim. He stated before me that he believed his claim would be struck out when he received the Tribunal's letter dated 16 April 2021. That was the time when, acting reasonably, he ought to have taken steps to satisfy himself as to how his case could have been properly progressed. The fact that he was a litigant in person does not run contrary to this.

23. The Claimant's unreasonable inaction was compounded following receipt of the

Respondent's letter dated 13 May 2021 indicating, from the Respondent's perspective, the severe limitations of the Claimant's claim.

24. Further, the Claimant's evidence is unsatisfactory about when finally understood that his GDPR / DPO claim should be brought in a court not a Tribunal And why this understanding could not have been obtained earlier than 21st of September 2021.

25. I therefore accept that the Respondent has established that the Claimant's claim, as presented, was misconceived; and that the Claimant acted unreasonably, by his inertia, following receipt of the Tribunal's letter of 16 April 2021.

26. I then turned to whether it was appropriate to exercise my discretion to make a costs order. I concluded that it was not appropriate to do so. As mentioned above, had the Claimant acted reasonably and sought advice as to the scope of his claim, it is likely that there would have been an application to amend the claim to be a whistleblowing claim for which no qualifying period of employment would have been required at all. On reading of the ET1, it is highly likely that such an application would have been allowed and the Respondent would have been required to meet the costs of defending that claim in full. By withdrawing his claim when he did the Respondent was spared further costs of contesting the claims. It therefore benefited from the Claimant's unreasonable conduct that resulted in him withdrawing his claim instead of applying to amend.

27. Following hearing evidence of the Claimant's means, I would have concluded that the Claimant would have had an ability to pay some costs notwithstanding his financial commitments for his four children and his elderly parents. However, I consider that the costs claimed by the Respondent, of over £45,000, for the claim that had not reached a preliminary hearing were excessive.

28. In all of these circumstances the Respondent's application for costs is refused.

**Employment Judge Burgher**
**Dated: 23 August 2022**