EMPLOYMENT TRIBUNALS

Claimant: Mr J Moshweu

Respondent: Elysium Healthcare No 2 Ltd

HEARD AT: BEDFORD **ON**: 13th April 2017

BEFORE: **Employment Judge Ord**

REPRESENTATION

For the Claimant: Mr C Davey (Counsel)

For the Respondent: Mr A Aamodt (Counsel)

JUDGMENT ON COSTS

1. Pursuant to Rule 76 of the Employment Tribunal Rules of Procedure 2013, a costs order is made in favour of the Claimant in relation to the merits hearing, on the basis that the response had no reasonable prospect of success and in relation to the remedy hearing on the basis that the Respondents conduct in relation to that part of the proceedings was unreasonable.

2 Under Rule 78(1)(a) I summarily assess the costs to be paid by the Respondent to the Claimant at £15,000.

ORDER

3 The issue of quantum in relation to the period between the Claimant's dismissal and the order for reinstatement is adjourned. The parties are to advise the Tribunal if the matter remains in contention by **4 PM, 12th May 2017**. If the matter is not agreed by that date, the parties are to provide the Tribunal with dates for the months of July, August and September when they are both available for a one day hearing to resolve the matter. In the event that the matter is not agreed, the parties are each at liberty to obtain a report from an Independent Accountant or Taxation Adviser. The parties are reminded that the requirements of Section 114 of the Employment Rights Act 1996 are that the employer shall treat the complainant in all respects as if he had not been dismissed, and therefore full disclosure of all pay rises allowances and other

benefits which the Claimant would have received during the relevant period should form part of the calculation of quantum and that consideration must be given to the potential increase in tax liability on the gross sum by virtue of the Claimant receiving the entire amount due to him in a single tax year rather than over the period between dismissal and reinstatement.

REASONS

4 This matter came before me today on application by the Claimant for a Costs Order pursuant to Rule 76 of the Employment Tribunal Rules of Procedure 2013. The application was in three parts, first of the Claimant sought his costs of the main action, including the final hearing on the basis that the Respondent's response had no reasonable prospect of success. Second, the Claimant sought his costs of the remedy hearing when an order was made for reinstatement referring in the application to the costs incurred "as a result of the Respondent's conduct" which I take to be an application under Rule 76(1)(a), i.e. that the Respondent behaved unreasonably in the way that part of the proceedings were conducted and thirdly seeking his costs of the Costs Hearing itself.

COSTS OF THE MAIN ACTION

5 The Claimant was summarily dismissed on 23rd June 2015 for gross misconduct (sleeping whilst on duty during a paid break). The dismissal was found to be unfair and the Tribunal's Judgment sent to the parties on 19th December 2016 refers.

6 The Tribunal Judgment is clear and I need do no more than refer to certain sections of the conclusions as follows:-

(1) On the night in question there was a chronic staff shortage at the unit where the Claimant worked which was not addressed at any stage by the management.

(2) The Claimant was allegedly found to be asleep during a paid break in his shift. He steadfastly denied being asleep. He had been carrying out one-to-one observation of a patient for a lengthy period (longer than that allowed under his terms of employment) and his break had been delayed.

(3) The senior members of the Respondent's staff (including Mr Campbell, the then Director whose responsibility it was to ensure correct levels of staffing and to whose attention the chronic staff shortage had been brought), who allegedly found the Claimant asleep gave statements to the investigating officer, but they were inconsistent and no challenge was made, or clarifications sought by the investigating officer.

(4) The investigating officer's report was both confused and confusing, with reference made to statements which post dated the date of the report and which took no account of the circumstances in the workplace on the night in question. It made no recommendation of any disciplinary action.

(5) There was no evidence that the staff shortage and the circumstances around the Respondent's failure to address it with the consequential impact that shortage had on the Claimant (and others) was taken into account by the disciplining officer.

(6) The appeal officer had a closed mind because she said that there could be no mitigation for sleeping on duty.

(7) The appeal officer further failed to take into account or properly investigate the allegation made by the Claimant's representative at the appeal that there were four individuals, all of whom had been caught sleeping on duty (not during breaks), who had not been disciplined at all and the response to the enquiry about this matter from Human Resources was disingenuous.

(8) Neither the dismissing officer nor the appeal officer took steps to challenge the evidence (with its clear discrepancies) given by the senior management team and the Claimant was denied the opportunity to question them at the Disciplinary Hearing.

(9) The Tribunal came to the conclusion that the dismissal was unfair. There was insufficient investigation, the Disciplinary Hearing was not fairly conducted because the Claimant did not have the opportunity to challenge the witnesses against him, that appeals conducted with a closed mind, there was no consideration of any lesser sanction than dismissal. Notwithstanding the Claimant's long and unblemished service, the Respondent relied on a contractual term that sleeping whilst on a rest break was an act of gross misconduct, notwithstanding the purpose of a rest break under the Working Time Regulations (the Tribunal referring to the case of Gallagher and others v Alpha Catering Services Ltd) and the Respondent made no serious effort to justify the specific alleged need that even during a rest break individuals on duty had to be available and could not take their rest break as they pleased. There had been an absence of enquiry into the comparators, brought to the Respondent's attention, who had been found asleep but not disciplined at all. The dismissal was both procedurally and substantively unfair, and the finding of the Tribunal was that no reasonable employer would have dismissed the Claimant in the circumstances.

7 The question is, therefore, whether the Respondent's response had no reasonable prospect of success.

8 On behalf of the Respondent Mr Moat drew my attention to the case of Salinas v Bear Stearns [2005] ICR 117, when the then president of the EAT, Mr Justice Burton, expressed the view that the reason why costs orders are not made in the substantial majority of Tribunal cases is that the rules contain a high hurdle to be surmounted before such an order can be considered.

9 Mr Moat rightly pointed out that the fact of an unfair dismissal finding does not mean that the response had no reasonable prospect of success and drew my attention to the lack of a costs warning, and the failure by the Claimant to make an application to strike out the response. Both of these were in his submissions relevant factors in relation to the application.

10 Mr Daley correctly drew my attention to a previous matter which had been listed before me, involving another of the individuals who was found to be asleep on the night in question, which case did not proceed to a full hearing because early during the conduct of the merits hearing, the Respondent reached agreement with the Claimant, but of course the terms of that agreement were not known to me.

11 What is striking, however, is the Respondent's letter to the Claimant's Solicitors of 3rd March 2016, to which my attention has been drawn. That letter was sent "without prejudice save as to costs", and invited the Claimant to withdraw his claim as it had no reasonable prospect of success, according to the Solicitors instructed by the Respondent who described the claim as "entirely misconceived". That letter, amongst other things, described the allegation of inconsistent treatment as misconceived purely because everyone who was allegedly caught sleeping on the night in question was dismissed; described the Claimant's allegations as contradictory and confused; described the breach of the Working Time Regulations as irrelevant, stating that that Regulation 21 would apply due to the Claimant's activities involving the need for continuity of service or production (but in respect of which no evidence whatsoever was produced at the merits hearing) and expressing surprise that a breach of the Working Time Regulations was being advanced as the Claimant should have been advised that such a claim "would undoubtedly fail", describing the Claimant's claim as without merit and misconceived. That letter invited the Claimant to withdraw his claim in default of which costs would be sought in the sum of £6050 plus VAT, approximately (notwithstanding the fact that the Respondents are VAT registered) on the basis that the Claimant's claim was misconceived and that its pursuit was unreasonable and vexatious. The Claimant was given three days to reply.

12 Further Mr Moat has drawn my attention to the case of Morse v Tunstall Telecom Ltd. That is a first instance case where costs were awarded against a Respondent because their decision to dismiss the Claimant had been based "on an unholy mixture of vivid imagination, overactive suspicion and totally inadequate investigation". Mr Moat describes the circumstances of this case as coming "nowhere near" that level, but the case of Morse does not set a level which has to be reached.

13 In the circumstances am satisfied that the Respondent's response, on this case, had no reasonable prospect of success. The Respondent has simply failed to address the issues which the Claimant was raising both during the internal process (at investigation, disciplinary hearing and on appeal) and subsequently. Their approach to the allegation of inconsistent treatment was to ignore the side of the issue of other individuals found to be asleep but not punished and focus only upon the fact that on the night in question everyone who was found asleep was dismissed. The obvious lacunae in the Respondent's case where a

chronically understaffed unit did not have its staffing issues addressed, but rather was subject to a visit in the early hours of the morning from senior management which led to the dismissal of staff instead of those same individuals taking steps to ensure that staffing levels were correct (bearing in mind the Respondent's description of the residents at the home as being those who are a danger to themselves and others), failure to grasp the implications of the Working Time Regulations for the lawfulness or otherwise of the Claimant's contract of employment and the wholesale failure to address the Claimants mitigating circumstances or to consider any sanction short of dismissal ought to have been apparent to the Respondent and those advising it at a very early stage. I cannot contemplate the circumstances in which a proper analysis of the Respondent's case could have led to anyone considering that the contents of the letter of 3rd March 2016 was in anyway a fair analysis of the case.

14 Further, it was notable that there was no realistic attempt to justify the reliance on Regulation 21 of the Working Time Regulations, no evidence was called from the investigating officer or the disciplining officer and the appeal officer had clearly failed to address the fundamental point that was put before her regarding inconsistency of treatment as well as stating that there could be no mitigation in circumstances where the Claimant had been asleep at work. The appeal was therefore meaningless, because the appeal officer had a totally closed mind.

15 In those circumstances, the Respondents response had no prospect of success.

16 Having found that to be the case I must consider whether in the circumstances it is appropriate for me to exercise my discretion of order in favour of the Claimant in relation to the claim up to and including the full merits hearing. I am satisfied that I should exercise my discretion to make such an order in the circumstances of this case.

17 I am conscious that the rule requires focus upon the response itself, but I am bound to take into account whether the pleadings in that response were sustainable on the basis of the evidence adduced by the Respondent. In particular it was pleaded that the investigating officer considered all the evidence include and concluded that there was a disciplinary case to answer, although his report says no such thing; further, it was said that the investigation was fair, thorough and impartial, but it referred to a statement that post-dated the report itself. It was pleaded that the Disciplinary Hearing was fair and open with the Claimant being given a full opportunity to state his case, ask questions, present evidence and call witnesses and places the obligation to make arrangements for the attendance of witnesses on the party requesting their attendance. The implication is that because the Claimant did not ask for the "management team" witnesses to be present he cannot complain that they were absent, but it is clearly the responsibility of the management team to ensure that the Claimant can challenge the witnesses raised against him. It was further pleaded that the Respondent considered the mitigating factors presented by the Claimant (leaving aside the fact that the Claimant steadfastly denied that he was asleep) in particular, the length of time the Claimant had spent carrying out one-to-one supervision, the failure by the management team to address the chronic staff shortage with which the Claimant and others were dealing on the night in question and the Claimants, long service and exemplary record. There

is no evidence whatsoever that those matters were considered either at the Disciplinary Hearing or on appeal when the appeal officer simply set her face against any form of mitigation whatsoever in circumstances where an individual was found to be asleep during working hours (notwithstanding that four individuals had been named by the Claimant's representative at the appeal hearing with the Respondent failing to make any sensible or realistic enquiry into those allegedly comparable situations). It was alleged that Regulation 21 of the Working Time Regulations would assist the Respondent.

18 Put shortly the Respondent failed to adduce any substantial evidence in support of the contentions which were advanced in the response. Throughout the matter, the Respondent had advice from well-known Solicitors and had any sensible enquiry or investigation been made into the circumstances of the Claimant's dismissal and had an honest view been taken about the prospects of the Claimant's success, the Respondent and those advising it would inevitably have been led to the conclusion that the contents of the response had no reasonable prospect of success. The result is that the Claimant has been put to substantial costs in circumstances where a proper assessment of the merits of the case ought to have made that wholly unnecessary. It is correct therefore to make a costs order in favour of the Claimant in relation to the conduct of the case, up to and including the full merits hearing. It should have been obvious to the Respondent at a very early stage that its response had no reasonable prospect of success.

19 In relation to the conduct of the remedy hearing I also make an order for costs against the Respondent. The Claimant sought reinstatement and the reasons which the Respondent raised opposing such an order were wholly without merit and could not possibly have been sustained on the basis of a reading of the Tribunal Judgment. The Respondent resisted an order for reinstatement notwithstanding the fact that they were at the same time advertising for staff to fulfil the very role which the Claimant had previously fulfilled; their advertisement stating that no previous experience was necessary. In support of their resistance, they relied upon the fact that the Claimant had not engaged in reflective practice over the events of the night that led to his dismissal, notwithstanding the fact that the findings of the Tribunal were that he had not done anything which was in any way wrong. The paradigm example of this was the statement on behalf of the Respondent that reinstating the Claimant would "send out the wrong message". When asked what the message was that the Respondent was anxious to avoid it was said that reinstating the Claimant would give out the message that it was all right to fall asleep whilst at work. There had been a specific finding in the Tribunal Judgment the Claimant was not asleep. The Respondent remained critical of the Claimant during the remedy hearing in particular his comment that if he was faced with the same circumstances as he faced on the night in question of the incident which led to his dismissal, he would not do anything differently. Given that the findings of the Tribunal were that the Claimant had not done anything wrong, it was hard to understand the basis upon which he was being criticised. Further, it is a requirement of the work which is carried out by the Respondent that employees should have a valid DVS certificate. The Respondent questioned whether the Claimant still had a current one, but this was within their own knowledge and indeed possession. That caused delay and an unnecessary caveat in the Tribunal's Remedy Judgment and even in relation to the amount of any

compensatory award (or payment to be made following any order for reinstatement or re-engagement), the Respondent did not provide to the Claimant nor to the Tribunal at the remedy hearing proper information to enable calculations to be made of the amounts which would be due to the Claimant.

20 I find that, amounts to unreasonable conduct in relation to the remedy hearing. The Respondent failed to engage in the proper disclosure of information to the Claimant, including the fact that it was the Claimant who discovered that posts were being advertised by the Respondent which was suitable for the Claimant.

21 During the course of his submissions at this costs hearing Mr Davey referred to the Respondent's conduct of the issue of remedy as "piling insult upon insult". I do not find that to be an unfair characteristic of the way the remedy hearing was conducted because the Respondent persisted in questioning and criticising the Claimant in the face of the clear findings of the Tribunal. Indeed, such was the evidence produced by the Respondent at the remedy hearing that I had to ask the Respondent's witness Ms Wagstaff whether she had actually read the Tribunal Judgment. When she confirmed that she had she could not explain the basis upon which she persisted with criticism of the Claimant in the face of the decisions the Tribunal had reached.

22 Accordingly, in relation to the conduct of the remedy hearing the Respondent acted unreasonably so that the best in Rule 76(1)(b) has been met and for the reasons set out I am satisfied that this is a case where discretion should be exercised in favour of the Claimant and a costs order should be made.

23 Finally, turning to the hearing before me today, I make no order. It cannot be said that the Respondents resistance of an order for costs had no prospect of success and I have not found anything in their conduct of this part of the proceedings which has been vexatious abusively disruptive or otherwise, unreasonable.

24 I have been invited to summarily assess the relevant costs. The Claimant's total costs for the merits hearing are placed at £16,328.20. That includes no less than 20 hours are spent in meetings with and correspondence with the Claimant which appears to me to be excessive, some 8 hours of work on counsel, including the drafting of any brief, correspondence with counsel and attendance upon counsel in conference along with a claim for attendance by a Solicitor with counsel at the hearing, which I consider to be unnecessary in the circumstances of the case.

25 In relation to the remedy hearing the claim is for £10,183.20. That includes 8 hours of attendances on the Claimant and the attendance of two Solicitors with counsel at the Tribunal Hearing along with 27 hours of work on documents. The first and third of those appears to me to be excessive, the second unnecessary.

26 The total of those two claims comes to £26,511.40. Under Rule 78(1)(a) the maximum of any costs order made by summary assessment is £20,000, but as confirmed by the EAT in James v Blockbuster Entertainment Ltd, EAT 0601/05 separate costs orders relating to separate and sequential stages of the proceedings can be made.

27 However in the light of the comments which I have already made parts of the claims for costs made by the Claimant are excessive and I do not find that in this case there is a need to apportion the amount of costs being awarded between the merits hearing and the remedy hearing. The total claims for £26,511.40 and I consider an appropriate sum to be paid by the Respondent to the Claimant in relation to costs on the basis of the matters set out in this judgment to be £15,000 and that is the sum which the Respondent is ordered to pay to the Claimant by way of a summarily assessed costs order.

28 In relation to the application on quantum I have reminded the parties of their duty under Rule 2 of the Employment Tribunal Rules of Procedure to assist the Tribunal and in particular to cooperate generally with each other and with the Tribunal so that the Tribunal is assisted in the furtherance of the overriding objective to deal with cases fairly and justly, including in ways which proportion to the complexity and importance of the issues and to save expense.

29 The parties have apparently been able to agree the gross sum which the Claimant should have received during the period between his dismissal and his reinstatement. That is not however the most important feature. The parties ought to be able to agree how much the Claimant would have received by way of net pay on a month by month basis, based upon the Claimant's overtime record, basic pay, allowances (as and when introduced), et cetera. The parties need to take account of the Claimant's current taxation position and the impact of the receipt of that sum by way of a single lump sum during a single tax year and gross up the relevant figures to ensure that the Claimant receives, net, the amount he should have received had he been paid on a month by month basis. That is the sum which the Claimant is due, together with any appropriate interest. If the parties are unable to agree this calculation then – given full disclosure of all relevant documents – the parties ought to be able to instruct a single accountant or other appropriate professional to carry out the calculations and it is to be hoped matter does not require further judicial intervention. The parties have been given a period of time in which to reach agreement in default of which the matter will be considered again judicially as set out in the orders at the beginning of this judgment.

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Employment Judge Ord, Bedford.
Date: 5 May 2017
ORDER SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS

FAILURE TO COMPLY

NOTES: (1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(2) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

(3) You may apply under rule 29 for this Order to be varied, suspended or set aside.