EMPLOYMENT TRIBUNALS

Claimant: **Ms S McKendry**

Respondent: **(1) Switalskis Solicitors Ltd**
(2) Mr John Durkan

Heard at: **Leeds** **On:** **4 and 5 May 2017**

Before: **Employment Judge Davies**

Members: **Mrs L Anderson-Coe**
Mr K Lannaman

Representation
Claimant: Ms S McKie QC, counsel
Respondent: Mr M Rudd, counsel

JUDGMENT having been sent to the parties on 8 May 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

REMEDY

Introduction

1. This was the hearing to determine the remedy payable to the Claimant in respect of the successful claims of unfair dismissal and indirect discrimination that were the subject of the Tribunal's judgment dated 23 March 2017. The Claimant has again been represented by Ms McKie QC and the Respondents by Mr Rudd. The Tribunal heard evidence from the Claimant. Although the First Respondent had indicated that it might call evidence, by the time of the hearing it was not pursuing arguments based on *Polkey* or contributory fault and did not do so.

Issues

2. In view of the concession on *Polkey* and contributory fault, the issues to be determined were:

2.1. Has the Claimant taken reasonable steps to mitigate her losses?
2.2 If so, what are her financial losses to date and for what, if any, level of future losses should she be compensated?
2.3 If not, what would her financial losses have been if she had taken such steps?
2.4 Did the First Respondent unreasonably fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures and, if so, by what percentage, if any, is it just and equitable to increase the compensatory award payable?
2.5 What is the appropriate compensation for injury to feelings caused by the application of the discriminatory PCP to the Claimant?

Findings of Fact

3. The Tribunal of course relies on the findings of fact set out in detail in its judgment dated 23 March 2017. We make the following further findings of fact for the purposes of determining the issues set out above.

4. The Tribunal noted that after her suspension but before her dismissal the Claimant made a job application to a firm of solicitors. She was unsuccessful in that application. She was summarily dismissed on 8 July 2016. On 29 July 2016 she made an application to a set of chambers with a view to transferring to the Bar. On 7 August 2016 she applied to the Bar Standards Board to transfer to the profession. That application was ultimately dealt with by 11 November 2016. The Claimant was effectively exempted from a number of the qualification requirements and the Bar Standards Board indicated that she would simply need to complete a three month working pupillage.

5. Prior to that, the Claimant's appeal against dismissal had been rejected on 28 September 2016 and she had become unwell. She was suffering from mental health difficulties and she described powerfully in her evidence to the Tribunal the impact of her dismissal and the disciplinary process that she had been through on her mental health. She explained how that had been devastating to her. She spoke to her GP in September 2016 and he prescribed her medication at that stage. She saw a consultant psychiatrist subsequently and by November she had been diagnosed with adjustment order with features of PTSD and depression. In view of that diagnosis she came off the medication that had been prescribed. There is no dispute that the Claimant has suffered with mental health difficulties. At some points, it is clear from her evidence that her symptoms have been particularly severe; at other points she has been well enough, for example, to deal with her Tribunal claim and the drafting of a detailed witness statement. It is clear from her evidence in March and her evidence to us today that there has been an improvement in her mental although she has not yet fully recovered.

6. In December 2016 the set of chambers to which she had made an application invited the Claimant for an interview. That was arranged, but the Claimant then cancelled it on grounds of her ill health. Her evidence was that her family and friends advised her that she simply was not well enough to go to the interview and that is why she cancelled it. Chambers indicated that they would be in touch

with the Claimant in the new year. In fact they did not contact her and she subsequently got back in touch with them after our judgment was delivered in March.

7. The Claimant also suffered a physical health scare in January 2017 and that too has not yet been fully resolved. The Tribunal proceedings took place in early March and our judgment was promulgated on 23 March 2017. At that stage the Claimant got in touch with a number of her contacts in the legal profession and with the Chambers to which she had already replied. She also made a further application to a different set of Chambers. She told the Tribunal that having received the Tribunal's judgment not only did she feel more confident and stronger, but she also felt in a better position to restart her career with the Tribunal's findings behind her. The Claimant has been offered an interview with the first set of Chambers to whom she applied and that interview is due to take place later this month.

8. The evidence before the Tribunal about the Claimant's likely earnings were she to succeed in securing a pupillage and transfer to a set of Chambers, was that she would be expected to carry out a six month pupillage or probationary tenancy during which she would be earning very little and would be relying on her own money. In her first year in practice she would be expected to earn approximately £35,000; in her second year £65,600; and in her third year £86,000. From those figures she would be expected to pay tax, VAT and Chambers' contributions.

9. The Claimant's application to the Bar Standards Board and her application to Chambers was supported by three extremely glowing references from members of the Bar who had worked with her over the years in a professional capacity.

10. The Claimant explained to the Tribunal that she had decided not to pursue work opportunities with firms of solicitors. Her experience at the First Respondent had led her to wish to be more in control of her own destiny. She wanted to pursue self-employment at the Bar rather than being at risk of a similar experience in a firm of solicitors where somebody else had a say over her employment. The evidence before the Tribunal was that there are very few suitable vacancies within law firms in the region. The First Respondent had identified one potentially suitable vacancy with a firm in Newcastle. However, while acknowledging that it might well match her skill set, the Claimant explained the very real practical difficulties in commuting on a daily basis to the firm, which was not in the centre of Newcastle but a short journey on the Metro from there. She did not consider that this would really be manageable for her, although in theory she could get there and back on a daily basis. She has not applied for that vacancy. Mr Rudd for the First Respondent fairly acknowledged that there are not a large number of vacancies. This is compounded by the fact that the Claimant's field of work is very much dependent on the award of Legal Aid franchises. They are limited in number and are also subject to being removed from any particular firm at any particular time. That contributes to the uncertainty of working in a law firm in this field.

11. The Claimant's evidence was that after she was summarily dismissed for gross misconduct she was advised that this would be a difficulty for her in applying for work. She was told that a gross misconduct dismissal would be a "red flag" for potential employers and essentially that there was little point in her making applications until that had been resolved. The Tribunal also noted that the Claimant investigated the possibility of working as an academic, either in research or lecturing, but that she had not been able to identify any suitable vacancy in that field.

12. We turn to the question of injury to feelings. As we have said, there is no question that the Claimant has been caused very real distress and anguish by the treatment she has experienced from the Respondents as a whole. The Tribunal's job today is to focus on the distress and injury to feelings caused by the application to her of the discriminatory PCP of requiring her to work 5 days a week. The Tribunal finds that the application of that PCP did cause the Claimant real distress and anxiety at the time. We have referred to the Claimant's original witness statement and to the findings of fact in our liability judgment. They make clear that in February 2016 when Mr Durkan raised the issue of working Wednesdays she was extremely upset. She described envisaging her carefully balanced professional and family life falling apart and that was a matter of anxiety for her. She also described feeling under additional pressure to justify her requests for additional resources within the team, in circumstances where her flexible working pattern was being questioned. She said that on 17 March 2016 she "pleaded" with Mr Durkan to allow her to continue with her existing arrangement and described her level of upset at that time. The level of concern on the Claimant's part was such that she went to her former firm, Langleys, to try and resolve the matter, and also took legal advice. The Tribunal had no doubt that from the time Mr Durkan raised the matter in February until the time of her suspension, the Claimant was genuinely worried and upset about being told that she would have to work 5 days a week.

13. However, it seemed to the Tribunal that her evidence today focused on her distress and anguish as a result of the disciplinary process to which she was subject, the events to which that led and her need to seek justice for that treatment. Her oral evidence today about her distress and anguish did not focus on the anguish or upset caused by the application of the discriminatory PCP. Mr Rudd asked her questions about that specifically, and it was only when he put to her that the application of the discriminatory PCP was not an important part of the matters contributing to her distress that she indicated to the contrary. The Tribunal found in those circumstances that while the Claimant plainly suffered real distress at the time for a period of 4-5 months as a result of the application of the discriminatory PCP, the distress that has followed and continued since her suspension has essentially related to the disciplinary process and the events that followed. We have therefore based our approach on the Claimant suffering genuine distress and upset at the time as a result of the discriminatory PCP, but with that essentially being superseded by the distress caused by the disciplinary proceedings and eventual dismissal thereafter.

Legal principles

14. The legal principles were not the subject of submissions from counsel and they are uncontroversial. In brief outline they are as follows.

15. As regards the remedy for unfair dismissal, a basic award is payable under s 122 and a compensatory award under s 123 of the Employment Rights Act. The compensatory award is to be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal, insofar as it is attributable to action taken by the employer. Under s 124 Employment Rights Act, the maximum compensatory award payable is capped at £78,962.

16. Under s 123(4), the principle that employees must take reasonable steps to mitigate their losses applies. Useful guidance is set out in the case of *Archbold Freightage Ltd v Wilson* [1974] IRLR 10, which suggests that the dismissed employee should act as a reasonable person would act if they had no hope of seeking compensation from their previous employer. The Tribunal should ask what steps should reasonably have been taken; and when, if those steps had been taken, the individual would have secured an equivalent alternative income: see e.g. *Savage v Saxena* [1998] ICR 357. The burden of proving that the individual has not taken reasonable steps to mitigate her loss is on the employer. A move to self-employment may be sufficient mitigation, depending on the circumstances.

17. The Tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures. Under s 207A of and schedule A2 to the Trade Union & Labour Relations (Consolidation) Act 1992, if a Tribunal in relevant proceedings concerning a matter to which the Code applies finds that the employer or employee has failed unreasonably to comply with the Code, it may, if it considers it just and equitable, (respectively) increase or decrease any award by up to 25%.

18. An award of compensation in a discrimination case is designed to put the individual so far as possible in the position he or she would have been in but for the discrimination. Awards for injury to feelings are compensatory, not punitive. The aim is to compensate the Claimant fully for the proven, unlawful discrimination for which the Respondent is liable. The crucial consideration is the effect of the unlawful discrimination on the Claimant. The Tribunal will have regard to the well-established bands of compensation for injury to feelings: see *Vento v Chief Constable of West Yorkshire Police (No 2)* [2003] IRLR 102, as upgraded in the case of *Da'Bell v NSPCC* [2010] IRLR 19. Although the recent case law is not entirely consistent, the Tribunal also took into account the more recent decision of the Court of Appeal in *Simmons v Castle* [2012] EWCA CIV 1039, which indicates that those bands should be uprated by a further 10%.

19. The Tribunal applied the Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803. The Employment Tribunals (Interest on Awards in Discrimination Cases)(Amendment) Regulations 2013 (SI 2013/1669) apply to claims presented after 28 July 2013.

Application of legal principles to the facts

20. The Tribunal started with the remedy for unfair dismissal, for which the First Respondent alone was liable. There was no dispute from the First Respondent about the underlying figures in the Claimant's schedule of loss (on which the calculations were based) and there was no dispute that the appropriate basic award was £5,029.50.

21. The Tribunal noted that the Claimant was not seeking compensation to cover the first 6 months following her dismissal because she has reserved her right to bring a breach of contract claim to recover damages for wrongful dismissal in the County Court.

22. The question for the Tribunal is therefore to determine the level of the Claimant's financial losses. That involves consideration of what her actual losses are, whether she has taken reasonable steps to mitigate her losses and, if not, when she would have secured an equivalent alternative income if she had done so. The Tribunal broke the position down into the period to date and the future.

23. The Tribunal concluded that the Claimant has taken reasonable steps to mitigate her losses to date. Fundamentally, we concluded that it was reasonable for the Claimant not to have taken steps beyond those she has taken prior to receiving the Tribunal's judgment. We find that it was reasonable not to pursue applications to firms of solicitors or barristers' Chambers prior to that stage. The Claimant is a solicitor of long standing. She was summarily dismissed for gross misconduct in stark terms and that dismissal was upheld on appeal. She had been advised that this would be a red flag for employers. It seemed to the Tribunal given the legal field in which the Claimant was working, Court of Protection, the importance of instructions from the Official Solicitor and the nature of the work involving vulnerable individuals, that it was right that she was extremely unlikely to secure work while a dismissal for gross misconduct was hanging over her. We also accepted that it was not realistic to apply to firms or Chambers, risk having the application rejected because of the gross misconduct dismissal, and then try and go back to those firms or Chambers a second time once the Tribunal proceedings had been determined. For those reasons, the Tribunal considered that up to the date of promulgation of the Tribunal's judgment, the steps taken were reasonable.

24. That is all the more so given the state of the Claimant's mental and later physical health. This has been to some extent a fluctuating position: she has been well enough at times to deal with the Tribunal proceedings but has plainly also been very unwell at times. This added weight to the Tribunal's conclusion that the Claimant had taken reasonable steps to mitigate her losses up to the date of promulgation of our judgment.

25. Following the promulgation of the Tribunal's judgment, the Claimant has taken the steps described above in actively pursuing alternative work. The Tribunal found that she has taken reasonable steps since receiving our judgment in late March until today's date.

26. That brings us to the question of future losses. The First Respondent suggested that it was not reasonable for the Claimant to pursue a career at the Bar only. It accepted that pursuing a career at the Bar was a reasonable approach for the Claimant, but said that she should also pursue job opportunities with solicitors' firms. The Tribunal found that it was reasonable for the Claimant to focus on a transfer to the Bar only, at least for a period. We understand the Claimant's wish to be in charge of her own destiny and her deep seated concern about going back into a law firm. At the same time, it is clear from the references that she has received that pursuing a career at the Bar is a sensible and realistic avenue for her. It is also right that this is a relatively small legal world, of which the First Respondent forms a significant part, and that the number of jobs in legal firms is limited. For all of those reasons, the Tribunal found that it was reasonable at this stage for the Claimant to focus on transferring to the Bar. There may come a point if she is unsuccessful in that approach when that would no longer be reasonable and it would be reasonable for her to look at other options. The Tribunal found that a reasonable period to pursue what is a sensible career approach would be 6 months. If she does not succeed in transferring to the Bar within that period, then reasonableness would require her to broaden her approach and consider applying to law firms or some other legal career.

27. The Tribunal considered what the Claimant's likely future losses would be based on either scenario. The best case scenario is that the Claimant succeeds at the interview she has later this month and starts work within a month or two at a set of Chambers. She would then have a period of about 6 months during which she would have very little in the way of income, followed by years 1, 2 and 3 during which she would suffer a loss compared with her earnings at the First Respondent as described in the figures above. During that period she would also suffer ongoing losses of pension, private medical and other insurance benefits that she enjoyed at the First Respondent. The First Respondent did not dispute that the expenses associated with a transfer to the Bar would amount to £4,200. The Tribunal would also have to deal with grossing up those losses. Without carrying out any detailed calculation it was clear to the Tribunal that the Claimant's losses would very swiftly exceed the statutory cap of £78,692.

28. That is the best case scenario. We have indicated that we think it is reasonable for the Claimant to spend 6 months pursuing a career at the Bar. If she were unsuccessful in that period, she would then need to start looking for a different kind of legal work. We have referred to the limited number of jobs available for solicitors and the difficulties of finding work in the field. Only one even potentially suitable role was identified in evidence and that might well not be a practicable location for the Claimant, even were she to be successful in applying for the position. She has not been able to identify a suitable academic position to date. Bearing those factors in mind, we take the view that it would be likely to take the Claimant a further 6 months to find alternative work that was not work at the Bar. There would therefore be a total of 12 months during which the Claimant was not earning. Having regard to her losses, the other benefits and the other matters to which we have referred, her losses would again swiftly exceed the statutory cap.

29. Having reached that conclusion the Tribunal did not consider that it was proportionate to carry out detailed calculations of losses. On our findings, if the Claimant takes reasonable steps to mitigate her losses in the future, she will in all circumstances suffer losses significantly in excess of the statutory cap on compensatory awards for unfair dismissal and it is therefore appropriate for us to award her the full capped figure of compensation. Further, having reached that conclusion, it did not seem to the Tribunal proportionate to go on to deal with the question of an ACAS uplift because it would have no effect on the compensation the Claimant would receive.

30. That brings us lastly on to the question of compensation for injury to feelings for the indirect sex discrimination. The First and Second Respondents are jointly and severally liable for such compensation. The Tribunal considered that the appropriate level of compensation was within the bottom of the middle *Vento* band (as uprated). The fundamental question is the level of injury suffered by the Claimant, although the nature of the discriminatory conduct is relevant to making that assessment. The Tribunal's findings of fact about the level of injury suffered by the Claimant as a result of the application of the discriminatory PCP are set out above. In the light of those findings, the Tribunal found that this was not a case that fell within the lower band. The application of the PCP was not a one-off or isolated matter, it was conduct extending over a number of months. Further, and crucially, it was conduct that led to a clear level of upset and distress throughout that period (until it was superseded by the disciplinary process) as described above. Those factors push this case into the middle band (as uprated) but towards the lower end. The Tribunal considered that the appropriate figure was £8,000.

31. As far as interest is concerned the parties were agreed that it should run from 9 June 2016. The Tribunal calculated that as a period of 330 days to today's date, which gives the figure of £578.63 for interest at the rate of 8%.

COSTS

Introduction

32. Both the Claimant and the Respondents made costs applications, which the Tribunal dealt with after the remedy hearing.

Legal principles

33. The Tribunal has power to make an award of costs by virtue of Rules 76 and 84 of the Employment Tribunal Rules of Procedure 2013, which provide, so far as material, as follows:

> **76 When a costs order or a preparation time order may or shall be made**
> (1) A Tribunal may make a costs order …, and shall consider whether to do so, where it considers that –
>
> > (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success.
…
(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.

84 Ability to pay
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.

34. The Tribunal had regard to principles derived from some of the cases, in particular:
    a. The Tribunal must identify the unreasonable conduct, say what was unreasonable about it and say what its effect was: see *Yerrakalva v Barnsley MBC* [2012] ICR 420 CA;
    b. A tension arises when claims are withdrawn late. On the one hand the Tribunal must not operate the costs regime so as to deter litigants from withdrawing their claims for fear of being pursued for costs but on the other hand the Tribunal must not operate it so as to encourage speculative claims. What the Tribunal has to consider is whether the conduct of the claim has been unreasonable not whether the withdrawal was unreasonable. Further, there does not have to be a direct causal link between the unreasonable conduct and the costs awarded: see *Macpherson v BNP Paribas* [2004] ICR 1398 CA.

Claimant's costs applications

35. With those principles in mind we deal with each of the costs applications in turn starting with the Claimant's applications. The Tribunal dealt with what are referred to as applications A and B together. The starting point is Case Management Orders made by Employment Judge Rostant which required standard disclosure to be provided by the Respondents by 2 December 2016. Following that order disclosure was provided, after which the Claimant made a request for further documents from the Respondents. Her then solicitors wrote a letter on 14 December 2016 requesting 30 separate documents or categories of documents. The Respondents' solicitors replied on 21 December 2016 asking for an explanation of the relevance of those documents. The Claimant's solicitors provided an explanation of relevance on 6 January 2017 but it was a very brief indication of what the relevance was said to be. On 13 January 2017 the Respondents' solicitors wrote to the Claimant's solicitors indicating that they were not convinced that the documents requested were relevant. On many occasions the requests were also too wide. Further they took the view that they did not expect the documents requested to exist in the vast majority of cases and even if they did they took the view that disclosure would breach the Respondents' obligations under the Data Protection Act. They said they were not in a position to provide the documents requested.

36. The Claimant had by now instructed fresh solicitors. They wrote a further letter on 23 January 2017 in the form of an application for specific disclosure. By this stage, counsel had advised on the application. The application requested 24

documents or categories of document and provided for the first time a much fuller explanation of the relevance of each. In her submissions to us today Ms McKie has relied on particular items from that list.

37. On 30 January 2017 the Respondents' solicitors responded to the specific disclosure application. So far as the paragraphs relied on by Ms McKie today are concerned, they accepted that all but one potentially referred to relevant documents and indicated that disclosure would be provided voluntarily. Only one of the documents that featured in the submissions before us today was said at that stage to be irrelevant.

38. On 2 February 2017 the Claimant indicated that she would continue to pursue her application for specific disclosure. The parties were notified on 6 February 2017 that a Preliminary Hearing would be listed to deal with it and I conducted that Preliminary Hearing on 17 February 2017. I ordered disclosure of those items of which voluntary disclosure had already been offered, but on the basis that disclosure had been volunteered. I also ordered disclosure of the additional item on which Ms McKie relied today. There were other parts of the application that I refused.

39. The Tribunal has not been provided by the Respondents with any explanation of what searches it carried out or how those searches were carried out so as to comply with its disclosure obligations.

40. The Claimant says that the Respondents were in breach of Employment Judge Rostant's Order to provide standard disclosure and, alternatively, that their conduct of the proceedings was unreasonable in relation to the request for specific disclosure and how that was handled.

41. Starting with the question whether the Respondent was in breach of Employment Judge Rostant's Order, the Tribunal noted that the burden of proof that the threshold for an award of costs was met lay on the Claimant. We also noted, as Mr Rudd submitted, that the Respondent had provided substantial disclosure at the first stage. In our experience it is entirely normal for additional documents to emerge following an initial tranche of disclosure, either because they have subsequently come to light or because they have subsequently been requested. But, against that, we take into account the fact that despite the clear concerns about disclosure referred to in our Judgment and the detailed application made by the Claimant, no clear explanation has been provided by the Respondent about how it carried out the disclosure exercise in this case and what it says were the reasonable searches it carried out for relevant documents. There were some indications in the evidence before us at the liability hearing that this was to a substantial extent dealt with as an IT matter, rather than by the individuals involved being asked to turn their mind to the question where relevant documents might be found.

42. With that in mind the Tribunal considered the documents within the supplementary bundle, which were the documents that had been provided after the initial tranche of disclosure. Taking into account all those matters, there was sufficient evidence to persuade us on the balance of probabilities that to some

extent the Respondents had failed to carry out reasonable searches such as to comply with their standard disclosure obligations. To that extent they were in breach of Employment Judge Rostant's Order. For example, the supplemental bundle contained emails to and from the Claimant's email address, and those of Ms Park, Ms Coates, Mr Kennedy, Ms Lockley and Mr Durkan, each of which were of clear and obvious relevance to the issues to be decided in these proceedings. If those individuals had been asked to carry out searches or if individuals had been instructed to carry out searches of those email addresses it seemed to the Tribunal on a balance of probabilities that that would have revealed some at least of those documents. We were therefore satisfied on the balance of probabilities that reasonable searches had not been carried out. There was therefore to some extent a breach of Employment Judge Rostant's original Order for standard disclosure.

43. The Tribunal was not, however, persuaded that the Respondents' conduct in respect of the specific disclosure application was unreasonable. We have set out the correspondence. There was an initial very extensive request, some of which was very wide indeed. It led the Respondents' solicitors to question what the relevance was. The initial response did not in the Tribunal's view provide a helpful explanation of relevance. By the same token, the Tribunal was not particularly impressed with the Respondents' letter of 13 January 2017, which was somewhat dismissive of the request as a whole, instead, for example, of asking for a proper explanation of relevance. However, when a proper explanation of relevance was provided on 23 January 2017, with one exception (so far as the documents relevant to today's application are concerned) the Respondents agreed that the documents were relevant and that any that could be located would be disclosed. The Tribunal found that this was a reasonable approach. There were other parts of the specific disclosure application that were not successful at the Preliminary Hearing. Looking at it in the round, the Tribunal did not consider that the Respondents' approach as a whole to the specific disclosure request had been unreasonable. Nor was it unreasonable to resist the one matter that was disputed and that remains live before us, in the context of those other matters that were being pursued on which the Claimant was not successful.

44. The Tribunal turned then to the question whether costs should be awarded in respect of the breach of Employment Judge Rostant's original Order. We asked ourselves what the consequences of that breach were. We found that the breach led, in part, to correspondence between legal representatives, requests for voluntary disclosure and ultimately the application for specific disclosure. Primarily, those consequences were related to the period from 14 December 2016, when the initial disclosure request was made, to 30 January 2017, when the Respondents agreed voluntarily to disclose all but one of the documents. There was also the knock-on effect in going to the hearing in respect of the one disputed matter. The Tribunal found that it was appropriate to make an award of costs in respect of this matter. The breach of the Order had led to costs being incurred on the Claimant's part in identifying missing documentation, itemising and explaining its relevance and pursuing at least one item to a Preliminary Hearing. It also led to some duplication of work in dealing with the new material once that had been produced.

45. The last question is how much that order should be. The Tribunal considered that, as a starting point, the costs must be proportionate. We were not provided with hourly rates or detailed breakdowns of costs on the Claimant's side. We reminded ourselves too that we can award the costs incurred by the Claimant's legal representatives but not her own costs in dealing with material. It was entirely apparent that the Claimant herself had done substantial work behind the scenes on these matters. The Tribunal necessarily had to take a broad brush approach in the absence of detailed hourly rates and costs breakdowns. The Tribunal relied on its own experience of the kind of time that these matters usually take and standard hourly rates, the usual levels of proportionate costs associated with specific disclosure applications of this kind, the actual shortcomings that flowed from the failure to comply in part with the original Order and our general experience. Taking all of those matters into account the Tribunal considered that the proportionate and appropriate sum for the Respondents to pay the Claimant by way of costs is £1,000 plus VAT. The parties agreed that any costs order should be made against the First Respondent only.

46. That brings us to the Claimant's third application, application C. That application that relates to the mistaken inclusion of confidential information in the draft Tribunal bundle. We referred in our liability Judgment to the fact that some unredacted documents that referred to confidential client information had been included within the bundle. The Claimant had originally identified that material when the draft Tribunal bundle was provided to her. On 23 February 2017 her solicitors wrote a detailed two page letter to the Respondents' solicitors drawing attention to those documents and giving page references. The letter also referred in detail to legal principles and raised questions, for example about whether the breaches of confidentiality had been referred to other regulatory authorities. It seemed to the Tribunal that the letter was not confined to pursuit of these Tribunal proceedings but was to some extent a continuance of the Claimant's disputes with the Respondents more generally. In the Tribunal's view, all that was required so far as these proceedings were concerned was a brief letter or email drawing attention to the fact that material had been wrongly included and giving the relevant page references. We have been told today, although the information was not available at the liability hearing, that the Respondents' solicitors sent a response to that letter on 2 March 2017 and with that response they sent redacted copies of the relevant documents. As referred to in the liability Judgment, there continued to be issues with confidential material within the Tribunal bundle but that is not the subject of this application.

47. The first question again is whether the Respondents' conduct of the proceedings was unreasonable in this regard and the Tribunal concluded that the erroneous inclusion of confidential information in the draft bundle was not unreasonable conduct of the litigation. It was a mistake and it was a mistake that could have been swiftly and proportionately drawn to the Respondent's attention with a brief email or letter. In the absence of unreasonable conduct the Tribunal has no power to make an order for costs.

48. The Claimant's fourth application, application D, relates to what she refers to as unsubstantiated allegations made against her. It falls into two parts. The first relates to unsubstantiated allegations said to have been made by Mr Kennedy, primarily in his witness statement. In that witness statement, as set out in the liability Judgment, Mr Kennedy advanced criticisms of the Claimant not confined to the matters directly at issue in these proceedings, which the Tribunal found to have been advanced without any proper foundation. Those criticisms must have been designed to influence the Tribunal in the Respondents' favour and the Tribunal concluded that that was unreasonable conduct of the litigation.

49. The Tribunal turned then to the question whether this should lead to an award of costs and we concluded that we should not exercise our discretion to make an order for costs. The principal effect of Mr Kennedy's evidence was that the Claimant dealt in detail in her witness statement with the allegations he had made. That would primarily have involved the Claimant's time, though of course it would have involved some time on the part of her legal advisors, in assisting with the drafting of the witness statement and dealing with relevant documentary evidence. But the context is that the Claimant prepared an extremely detailed witness statement and gave very detailed evidence. It is clear that her approach is to make sure that every angle is covered, every "I" dotted and every "t" crossed. General underlying criticisms were made of her in the disciplinary process. A whole range of concerns was advanced and those were also addressed at length by her. In that context the Tribunal did not consider that it was appropriate to separate out or to try to separate out what the Claimant had said specifically in response to Mr Kennedy's unsubstantiated allegations. She was, in any event, giving detailed evidence refuting all of the criticisms that had been made of her and the Tribunal did not consider that it was appropriate to make an order for costs in those circumstances.

50. The second part of application D relates to the fact that the Respondents advanced the case that the Claimant was only charging for three hours' chargeable time a day and subsequently provided data purporting to back up that assertion. That assertion was explored in cross-examination and was shown to be based on a fundamentally flawed approach to the calculations. The Tribunal considered that it was unreasonable to advance the contention given that fundamentally flawed approach. Again, we considered what the effect of that unreasonable conduct was. The Claimant's counsel refers to the fact that the Claimant and counsel spent considerable time in dealing with the allegation, going through the data and seeking to refute it. The Tribunal considered whether in those circumstances it was appropriate to make an order for costs and concluded that it was not. The Tribunal considered that this assertion was and must have been so palpably wrong that all that was required was for the Claimant to say that this was both (a) irrelevant and (b) incorrect, for example by reference to her billing targets and the fact that she had far exceeded them. It did not call for any detailed consideration of what was clearly irrelevant and incorrect. In those circumstances it was not appropriate to make an order for costs.

51. We turn to the final part of the Claimant's application, which was advanced only orally today. It related to the fact that the First Respondent indicated that it was

not pursuing its case that the Claimant would have been fairly dismissed in any event, or that she contributed to her dismissal, for the first time at the start of yesterday's remedy hearing. The Tribunal considered that it was not unreasonable for the Respondent to reserve its position on these matters until it had received the Tribunal's Judgment on 23 March 2017. Clearly it then needed time to review that detailed Judgment and reflect on its position. By 12 April 2017 it informed the Claimant that it would not be calling any evidence on these points, although it did not say in terms that it was not pursuing them. That was not said expressly until the start of the remedy hearing. The Tribunal was not persuaded that the First Respondent acted unreasonably. It was fairly plain that if no evidence was to be called the Respondent was going to be in some difficulty in continuing to advance arguments based on *Polkey* or contributory fault.

52. In any event, even if there had been unreasonable conduct, the Tribunal did not consider that it was appropriate to make any order for costs. The only costs that could have flowed from an unreasonable failure between 12 April 2017 and the start of the remedy hearing to confirm that those matters were not being pursued was time spent in preparing to deal with *Polkey* or contributory fault. In circumstances where no evidence was to be called, it was quite clear that all that was going to be required was a very simple reference to the Tribunal's Judgment and its indication about the evidence available at the time and the Respondent's reliance on it in support of any suggestion that the Claimant had committed gross misconduct.

Respondents' costs applications

53. That brings us to the Respondents' applications. The first of those relates to the Claimant's second application for specific disclosure and her late application to amend her claim, as well as to the parts of her first application for specific disclosure that were unsuccessful. The Tribunal did not consider that the Claimant had acted unreasonably in pursuing either of the specific disclosure applications or in making the late application to amend her claim form. As far as the amendment application was concerned, the protected act on which she sought to rely was referred to in her witness statement. Counsel's advice was obviously taken and it was suggested that this ought to be included by way of a second protected act. While that application was refused for the reasons I gave at the time, it does not seem to the Tribunal that it was unreasonable for it to have been made. It was sufficiently in advance of the liability hearing. It was on the face of it potentially a proper basis of claim and it was not unreasonable to ask the Tribunal's permission to add it by way of amendment. Likewise, while parts of the first disclosure application and the second disclosure application were not successful, matters inevitably arose as a result of the exchange of witness statements and the ongoing preparation for the hearing. The fact that the applications were refused does not mean that it was unreasonable to make them in the first place. This was just part and parcel of ordinary preparation for proceedings. In the absence of unreasonable conduct that part of the Respondents' application does not succeed.

54. The next part of the Respondents' application is based on the contention that the Claimant's direct discrimination claim had no reasonable prospect of success. The Tribunal did not consider that the direct discrimination claim had no reasonable prospect of success. We found as a matter of fact that the comment relating to the painting of nails was made by Mr Durkan. We have upheld the underlying indirect discrimination claim about working hours. There was a seeming illogicality in Mr Durkan's approach to a solicitor who was performing so impressively and there were the many flaws in the disciplinary process to which we have referred. Those were matters that the Claimant was entitled to say might cause the Tribunal to draw an inference of discrimination. Mr Rudd submits that what was always missing was a causal link between the Claimant's treatment and her sex but this is about the territory of drawing inferences in a direct discrimination case. This was not a case where the suggestion that the Claimant's sex was part of the reasoning could possibly be said to have no reasonable prospect of success. It required evidence to be heard and considered so that the matter could be dealt with.

55. The last part of the Respondents' claim relates to the Claimant's complaint of less favourable treatment of her as a part-time worker. The Respondents said that the Claimant acted unreasonably in bringing and pursuing that claim, which was withdrawn only at the start of closing submissions. With some hesitation, the Tribunal found that it was not unreasonable initially to advance the claim. We were told that Employment Judge Rostant had raised concerns about how it would be made out, but there is no record of that in his Order and no evidence to that effect was provided to the Tribunal. The Respondents had not made any application for that claim to be struck out or for a Deposit Order to be made, nor had Employment Judge Rostant made such an order of his own volition. The Tribunal's attention was not drawn to any costs warning in respect of the part-time worker claim. In those circumstances, the Tribunal found that it was not unreasonable to continue to pursue that part of the claim.

56. However, the position changed at the start of the liability hearing. The Tribunal discussed the issues in all the claims with counsel at the start of the hearing. As far as the part-time worker claim was concerned, we discussed the requirement for an appropriate full-time comparator to be identified and proved with evidence. The Claimant also indicated that her part-time worker case was based on the premise that she was paid, at least in part, by reference to the time she worked. That too was a matter that called for evidence. Despite concerns being raised by the Tribunal at the outset of the hearing and no clear answer being given, no evidence to deal with those parts of the claim was advanced. It must have been clear that the claim was unsustainable in those circumstances. Accordingly, the Tribunal considered that it was unreasonable to pursue the part-time worker claim until the very final morning of the hearing, after counsel had prepared written closing submissions overnight.

57. The effect of that unreasonable behaviour was that a modest amount of time was spent in cross-examination dealing with the part-time worker claim and a not insignificant part of counsel's written closing submissions prepared overnight dealt with it. The Tribunal considered that it was appropriate to make an award of costs in those circumstances. We noted on the information before us that

counsel was being paid on the basis of a daily refresher. No doubt that daily refresher would have been the same whether or not he had been dealing with the part-time worker claim. However, as indicated above, there does not have to be a direct causal link between the unreasonable conduct and the costs. The Tribunal considered that it was appropriate to reflect this unreasonable conduct with a modest award of costs and in those circumstances it seemed to us that £300 was the appropriate sum.

Employment Judge Davies

Date: **15 June 2017**