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EMPLOYMENT TRIBUNALS

Claimant: **Mrs D Walker**

Respondent: **Dr G Singh**

Heard at: **East London Hearing Centre** **On: 26 April 2018**

Before: **Employment Judge Ross (sitting alone)**

Representation

Claimant: Mr T Bowles (Solicitor)

Respondent: Mr R Chaudhry (Litigation Consultant)

REMEDY JUDGMENT

The judgment of the Employment Tribunal is that:-

1. The Respondent is ordered to pay the Claimant compensation of £16,011.43 assessed as follows:-

1.1 Basic award of £5,654.40;

1.2 A Compensatory award of £10,357.03.

2. The Recoupment provisions do not apply.

3. The Respondent is ordered to pay the Claimant costs of £9,252 (including VAT).

REASONS

The evidence at the remedies hearing

1 The evidence before me at the remedies hearing consisted of oral evidence from the Claimant who was cross-examined. In addition, the Respondent had

prepared a supplemental bundle (although this was not agreed). In the event, I was referred to relatively few pages in the remedy hearing bundle (which is marked "R").

The issues

2 The parties agreed a figure of £350 for loss of statutory rights. The issues agreed for determination at the commencement Remedies Hearing were as follows:-

2.1 What is the correct multiplier for the Basic award – 12 or 13 years?

2.2 What is the correct multiplicand for the Basic award?

2.3 In the assessment of the Compensatory award under section 123(1) of the Employment Rights Act 1996, whether the Claimant has made reasonable steps to mitigate her loss.

2.4 Should any compensatory award for unfair dismissal be reduced under Section 123(1) of the Employment Rights Act 1996 on account that it was just and equitable to do so, because the Claimant is alleged to have had the option to withdraw her resignation and remain employed by the Respondent?

2.5 What is the Claimant's weekly net loss in the prescribed period?

2.6 What is the Claimant's future loss of earnings?

2.7 What pension loss has the Claimant suffered?

2.8 What uplift should be made under s.207A Trade Union and Labour Relations Consolidation Act 1992?

Findings of fact

3 The Respondent raised the issue of mitigation for the first time at the remedies hearing. It was not referred to in the counter schedule of loss nor in any witness evidence. I allowed it to be pursued given the informality of procedure in the Employment Tribunal (even if this approach contained a degree of unfairness to the Claimant) and because these issue of mitigation is inherent on my application of what compensation was just and equitable to award under section 123(1) of the Employment Rights Act 1996. It was agreed that a fair way to deal with this point was to hear oral evidence from the Claimant.

4 I accepted the Claimant's evidence in full. It was never challenged in cross-examination as not being credible or inconsistent. I found the following facts.

5 The Claimant commenced working for the practice in January 2003 as a receptionist.

6 Prior to this she had been a "stay at home mum" (which was her description).

7 The Claimant had no Information Technology ("IT") qualifications. It was only in the past three years or so that she had been a GP Practice IT Manager. She just knew how to raise specific job for the Lynwood Practice in respect of a specific software package. She was given the title by the Practice.

8 The Claimant had worked 24 hours per week at the Lynwood Practice. She worked the same number of hours and days where she currently works at Dr Patel's practice.

9 When the Claimant had commenced work at the Lynwood Practice, she wanted a local job; if she did extra hours she would take time off in lieu to fit in with school holidays. Both her children are now adults.

10 Historically, as shown by documents at page 31 of the bundle onwards, the Claimant had done some overtime each month; but in June 2016 Dr Singh stopped any overtime other than pre-authorised overtime such as that he had authorised in October 2016 ahead of the CQC inspection.

11 I accepted the Claimant's evidence about why she could no longer work at the Lynwood practice after the suspension, which I found was without reasonable and probable cause. She was distraught to be:

"*marched out of the building. I was in bits when I got home*".

I accepted her evidence as to why she could no longer trust Dr Singh going forward.

12 Despite Mr Chaudhry's submissions, I had difficulty accepting any employee would have returned to work for the same employer in those circumstances.

13 A former partner at Lynwood Practice, Dr Patel, created an IT Manager role for the Claimant at her Practice. This was a much smaller Practice (about 30% of the number of patients when compared to the Lynwood Practice) and less well-funded.

14 The Claimant was employed at £12 per hour by Dr. Patel. This sum was chosen because it was the average hourly rate for this role across GP surgeries nationally, which is evidenced by the staff salary survey table at page 3 of the remedy bundle (a document relied on by both parties).

15 The Claimant was distressed when she was suspended by the Respondent not least because of the conduct of the Respondent after he became the sole partner. The Claimant found that she was happy at Dr Patel's Practice. It was a happy place to work with a team she enjoys working with.

16 The Claimant wanted only part-time work with a degree of flexibility in terms of when she worked. The Claimant was prepared to travel up to 30 minutes for work. As she was only working part-time she decided there was no point commuting up to one hour each way, which working in the centre of London would entail.

17 Although there are 11 other GP surgeries in the locality of the Claimant's home, I heard no evidence that there were any equivalent roles (or any vacant roles at all) over the prescribed period at any of them. This part of the cross-examination was pure speculation by Mr Chaudhry. The Claimant did not contact them looking for work but given that she was settled and happy at Dr Patel's Practice and given the lack of any advertised role, this was understandable and reasonable.

18 The only evidence I heard of other pay rates at surgeries in this locality was that of a former colleague of the Claimant who worked at a practice in the locality; she was paid only £9 per hour.

19 As Dr Singh and the Claimant explained in general terms, the financial climate for GP surgeries was difficult. Surgeries were looking to reduce staff costs. Also the method of financing of Dr Patel's surgery meant its financial resources could not afford for the Claimant's pay to be increased in the near future.

20 The Claimant would have liked to have earned more money but was mindful of the lack of jobs in the current market in respect of GP surgeries and that she loved her new role.

The law

Duty to mitigate

21 A claimant is under no duty to mitigate during the notice period.

22 I directed myself that the principles to be applied when considering the issue of mitigation of loss are as follows:-

22.1 It was the duty of the Claimant to act in mitigation of her loss as a reasonable person unaffected by the hope of compensation from their former employer.

22.2 The onus was on the employer as the wrongdoer to show that the Claimant had failed in the duty to mitigate his loss.

22.3 The test of unreasonableness is an objective one based on the totality of the evidence.

22.4 In applying that test, the way in which the Claimant had been treated and all the surrounding circumstances should be taken into account, including the state of mind of the Claimant.

22.5 The court or tribunal deciding the issue must not be too stringent in its expectations of the injured party.

(See, for example, **Wilding v BT** [2002] EWCA Civ. 349, IRLR 524 at para 37).

Section 207A Trade Union and Labour Relations (Consolidation) Act 1992

23 Employment Tribunals are required to take into account any relevant Code of Practice: see s.207(3) TULRCA.

24 A claim for unfair dismissal is a claim to which section 207A applies. The only Code of Practice which could have been relevant to the Claimant's case was the Code of Practice issued by ACAS in 2009 on disciplinary and grievance procedures.

25 I considered **Lund v St. Edmund's School** [2013] UKEAT/0514, a case in which the Employment Tribunal had refused to uplift the Claimant's award due in part to the finding that he was dismissed for "some other substantial reason", which led the Tribunal to conclude that his claim concerned a matter to which the ACAS Code did not apply. The EAT concluded that the Employment Tribunal had misdirected itself. From the EAT's judgment, I take the following direction (from paragraphs 12 -13):

25.1 Although there are particular situations to which the Code does not apply, it is intended to apply to those occasions when an employee faces a complaint which may lead to disciplinary action or where an employee raises a grievance.

25.2 The important thing is that it is not the ultimate outcome of the process which determines whether the Code applies. It is the initiation of the process which matters.

Conclusions

26 The parties, despite initial disagreement, were able to agree the Basic award in the sum of £5,654.40. This dealt with issues 1 and 2.

27 Applying the above facts and law to the remaining issues identified at the outset of these Reasons, I reached the following conclusions.

Issue 3

28 I concluded that the Respondent failed to discharge the burden of proving that the Claimant had failed to mitigate her loss for the following reasons:-

28.1 The Respondent adduced no evidence that there were job vacancies that the Claimant could have applied for. Moreover, there was no evidence she could have earned more in a similar role of Practice IT Manager.

28.2 Indeed, page 3 of the remedy bundle suggested that in the current climate, taken with the Claimant's evidence, she could not have found a job paying more than she was earning per hour for Dr Patel.

28.3 In submissions, Mr Chaudhry accepted it was fair for the Claimant to look for work in her locality. It was reasonable for the Claimant not to apply to local surgeries, especially when there was no evidence of any vacancy.

28.4 It was inaccurate to characterise the Claimant as "an experienced IT Manager". She was someone who had been trained by providers of software for GP surgeries who offer a specific package. There was no evidence of any general IT training or qualifications. Her economic value as a Practice IT Manager was limited to GP surgeries.

28.5 Given the unhappy last months at the Respondent's practice, culminating in the meeting of November 2016, the unjustified suspension and the lack of any investigation, I find the Claimant acted reasonably by taking the job with Dr Patel immediately her notice expired, not least because Dr. Patel valued her experience and offered her a salary only slightly less than that paid by the Respondent's practice.

28.6 The Respondent made much in submissions that the Claimant had spent 13 years working at the Lynwood Practice. Given that working record and having seen her oral evidence, specifically how hurt and insulted the Claimant was by her treatment in being suspended, without cause and without any evidence, I can fully understand why she has enjoyed feeling settled in her new role and not sought to move to a short-term role solely for money. Given her experience, this was reasonable.

28.7 It was never put to the Claimant that she should have taken a specific role or done a different kind of job.

Issue 4 - Section 123(1) ERA 1996

29 The Respondent's case is set out under the heading of "contributory fault" in the written submissions provided by Mr Chaudhry, but he accepted that he could not and was not trying to go behind my conclusions in the Judgment and Reasons on liability.

30 This in my judgment is really another limb of the mitigation of loss argument made by the Respondent.

31 In any event, whether it is or not, I concluded that it was reasonable for the Claimant not to "withdraw" her resignation as she was alleged to have been invited to do for the following reasons:-

31.1 I repeat the relevant findings of fact. I cannot imagine many, if any, employees withdrawing their resignation in these circumstances.

31.2 I have found that the Respondent had acted in a way which amounted to a breach of the implied term of trust and confidence. I accepted the Claimant's evidence of her lost of trust in him as an employer and the lack of any manager to whom she could have turned for support or to make a formal grievance, given that the Respondent's wife had been made Practice Manager.

31.3 I accepted the Claimant's evidence that she had brought in effect an informal grievance in her meeting with the external consultant and the Respondent, which took place before the CQC inspection. This had not

led to any resolution and moreover the Claimant was suspended without cause shortly afterwards.

31.4 It is unlikely to be just and equitable for the contract breaker, who is the party guilty of repudiatory breach of this nature involving a working relationship, to then rely on an offer to the Claimant to return to work in circumstances where the Respondent had not carried out any or any proper investigation and had not apologised. With the greatest of respect to the Respondent, there was very limited evidence of any real offer and such evidence as there was did not paint the offer as an inviting one.

Issue 5 – what is the Claimant's weekly net loss?

32 I preferred the Respondent's submissions on this specific issue, which were supported by the Claimant's oral evidence before me and at the full merits hearing. The facts are that Dr Singh decided he would not allow staff overtime from June 2016, save in special circumstances. A CQC visit is an exception and is such a special occurrence. Going forward allowing for a small amount of overtime over the course of a year, I estimated that the Claimant was likely to have earned about £1,300 net from the Respondent which equates to £300 per week. The Claimant was likely to earn £1,059.22 net per month from Dr Patel going forward, which equates to £244.43 per week.

33 The Claimant's net weekly loss is therefore £55.57 per week.

34 This loss continues up to the date of this hearing. It was accepted that 67 weeks had elapsed since termination. The total loss of earnings (excluding pension) is therefore £3,734.58 during the prescribed period.

35 It is right to note that the recoupment provisions do not apply because the Claimant did not receive any State Benefits during this period.

Issue 6 – the Claimant's future loss of earnings

36 The Claimant does have a duty to mitigate her loss and she would like to earn more. The Claimant impressed me as a witness who had a fair degree of motivation. I decided having seen her give evidence, that, after the upset of events leading to her resignation had settled, she could mitigate her loss entirely in the 52 weeks after the remedy hearing. I remind the parties that I have to exercise my judgment on the evidence I heard. I heard evidence only from the Claimant and heard and saw no evidence to contradict it. It seemed to me that there would be relatively few jobs that the Claimant could do in the form of Practice IT Manager, within a reasonable travelling distance and which paid more than she was currently earning for Dr Patel; hence 52 weeks appeared a reasonable time to allow.

37 The Claimant's future loss of earnings is therefore 52 weeks x £55.57 which equals £2,889.64.

Issue 7 – pension loss

38 I directed myself to the "principles for compensating pension loss" (Fourth Edition 2017, "the principles"). From the principles, I considered, in particular: sections 4 (especially 4.17 to 4.29) and 5 (especially 5.30 and following paragraphs). In my judgment, the pension loss should be limited to the lost employer pension contributions over the prescribed period (67 weeks) and over the period of future loss identified above (52 weeks).

39 The parties agreed both that the Claimant was a member of the NHS pension scheme and the NEST scheme, and that I could calculate pension loss from the payslips.

40 It was agreed by the parties that under the NEST pension scheme the employer's contribution was 1%. It was agreed by the parties that the employer contribution for the Claimant's NHS pension was 14.3% at all material times.

41 It was agreed that the Tribunal could assess the pension loss from a payslip evidence once the period of future loss was determined by me.

42 My conclusions on pension loss are as follows.

43 Having studied the evidence and made the appropriate calculations I concluded that the parties were in error in thinking the Claimant was a member of the NEST scheme. The Claimant was a member of the NHS pension scheme and therefore there was no need for the Respondent employer to start up a NEST scheme to comply with the auto-enrolment requirements of the law. I reach this conclusion by studying the payslips and making appropriate calculations.

44 For example at page 34 of the liability hearing bundle, under the NHS scheme, 14.3% of the salary per month is £226.68. Using tax period 6 as an example, the employer's contribution at that date matches 6 x £226.68.

45 Therefore my conclusions are as follows:-

45.1 *Prescribed period*

(67 weeks) Loss of NHS contributions £226.68 x 12 ÷ 52 = £52.31 per week x 67 = £3,504.82.

Less pension contributions received from Dr Patel's Practice of £178.95 per month, which = £41.29 per week.

£41.29 x 67 weeks = £2,766.43

The pension loss for the prescribed period is £738.39.

45.2 *Future pension loss*

The future loss of the NHS pension contributions is 52 weeks x (£52.32 - £41.29) which = £573.04.

Therefore the total pension loss is £1,311.43.

Issue 8 – Section 207A Trade Union and Labour Relations (Consolidation) Act Adjustment

46 The parties agree that the Claimant is entitled to a statutory uplift because section 207A TULR(C)A is engaged due to breaches of the ACAS Code.

47 The Claimant claims the maximum uplift of 25%. Mr Bowles said that there was total and wholesale failure to comply with the ACAS Code. The Respondent contends the uplift should be 10% and in part points to alleged failures by the Claimant to raise pay grievance about matters prior to the meeting at which she was suspended. I have read and heard the Respondent's submissions on this sub-issue.

48 My conclusion is that the Claimant is entitled to the maximum uplift of 25% for the following reasons:-

48.1 I found as a fact that there was no reasonable and probable cause for the Claimant's suspension: see paragraphs 102 and 104 of the Judgment and Reasons on liability. It is to be noted that I found that the Respondent lacked a genuine belief that the Claimant was guilty of gross misconduct when the Claimant was suspended and, even if there was such a belief, there was no evidence underpinning it.

48.2 The above findings and several other findings of fact demonstrated egregious breaches of the ACAS Code including but not limited to:-

48.2.1 The Code sets out basic principles of fairness and explains the need for fairness and transparency: see paragraphs 2 and 4 of the Code. The procedure in this case was neither fair nor transparent. The Claimant did not know why she was called to the meeting at which she was suspended and was not sent minutes of that meeting until shortly before the first listed hearing of liability (and I have found that those minutes are inaccurate).

48.2.2 By implication, the Code provides that a period of paid suspension must be a necessary step for a respondent. On the facts in this case, the suspension of the Claimant was far from necessary. I found the Respondent had no evidence that gross misconduct had been committed by the Claimant.

Summary:

49 The Claimant is entitled to the following compensation:

49.1 Basic award of £5,654.40

49.2 Compensatory award of £10,357.03 assessed as follows:

49.2.1 Loss during the prescribed period: £4,822.97 assessed as:

Loss of earnings: £3,734.58

Loss of statutory rights: £350

Loss of pension: £738.39

49.2.2 Future Loss assessed as:

Loss of earnings: £2,889.64

Loss of pension: £573.04

49.2.3 Statutory uplift of 25%: £2,071.41.

The Costs Application

50 The Claimant had made a costs application in writing, served prior to the remedy hearing. The costs sought were set out in a Schedule (served the afternoon before the hearing), amounting to £15,920 plus VAT, to which I will return. This application was expanded upon with some oral submissions. Mr. Chaudhry devoted a substantial part of his written submissions to this application, which he expanded upon with oral submissions. I mean no disrespect to either representative by not dealing with each submission and I confirm that I have taken into account all the submissions made and the documents referred to; to deal with every point in writing is neither necessary nor proportionate.

The law: Tribunal's Costs Jurisdiction

51 Before I deal with the arguments and my conclusions, it would be appropriate to summarise the relevant law. Neither party referred me to any case law on the issue of costs, preferring to direct me to the content of the relevant rules of procedure.

52 Rule 76 of the Employment Tribunal's 2013 Rules of Procedure provide that a costs or time preparation order may be made and a tribunal 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."*

53 The procedure for making a costs application is set out at rule 77. As for the amount of costs that the Tribunal may order should be paid, rule 78 provides that we 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, or by an Employment Judge applying the same principles;"*

54 Rule 84 provides that the Tribunal may have regard to the paying party's ability to pay:

> *"In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay."*

55 Orders for costs remain the exception rather than the rule in the Employment Tribunal. On the other hand, parties should not be subject to expensive, time consuming, resource draining claims or responses that are without merit; the rules of procedure say that a Tribunal may order costs in the circumstances set out in Rule 76 set out above. If the conduct of the litigant meets that definition, then the Tribunal has a discretion to order costs.

56 It is important to recognise that, where the discretion is exercised in favour of awarding costs, the jurisdiction is to compensate the receiving party, not to punish the paying party.

57 In *Millan v Capsticks Solicitors LLP & Others* UKEAT/0093/14/RN, the President of the EAT, Langstaff J, described the exercise to be undertaken by the Tribunal as a 3 stage exercise, which I would paraphrase as follows:

57.1 Has the putative paying party behaved in the manner proscribed by the rules?

57.2 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).

57.3 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).

58 In *Power -v- Panasonic UK Limited* UKEAT 0439/04 His Honour Judge Clarke made it clear that the principles of the Civil Jurisdiction case known as *Calderbank v Calderbank* has no place in Employment Tribunals. In other words, the Tribunal should not simply award costs just because a litigant has failed to beat an offer that has been made. However, unreasonably pressing for a higher award than one could reasonably

hope to achieve or that does not reflect one's prospects of success, could amount to unreasonable conduct.

59 I reminded myself that there is no principle of law that an award of costs can only be made where the party against whom the application is made has been put on notice that she is at risk of costs: see *Vaughan v LB Lewisham* [2013] IRLR 713 (at para 18).

60 Whilst the threshold test is the same, whether a party has been represented or not, the exercise of discretion should take into account whether the party in question has been professionally represented: see *AQ Ltd v Holden* [2012] IRLR 648.

61 I have explained that the Tribunal has a discretion, not an obligation, to take into account means to pay. This was considered in the case of *Jilling -v- Birmingham Solihull Mental Health NHS Trust* EAT 0584/06. This must, of course, be seen in the light of the subsequent guidance in *Vaughan*, at paragraph 29: affordability is not as such the sole criterion for the exercise of discretion and a nice estimate of what can be afforded is not required. Ability to pay was not an issue raised before me.

62 There are two cases often referred to in support of applications for costs in instances where a party has been found by a tribunal to have lied: *Nursing Home Limited -v- Matthews UK*EAT20519/08 and *Dunedin Campbell Housing Association -v- Donaldson* UKEAT0014/09. In summary, the thrust of those cases is that where a litigant has lied, that may be taken as unreasonable conduct. Indeed, it was suggested that not to find such a lie as unreasonable conduct might be perverse on the part of an Employment Tribunal. On the other hand, the EAT have made clear, in *HCA International v May-Bheemul* UKEAT/0477/10, that *Daleside* and *Dunedin* do not establish the principle that if a claimant fails to establish a central allegation, that costs must follow. Mrs Justice Cox said:

> *"Although employment tribunals are under a duty to consider making an order for costs in the circumstances specified in rule 14(1) in practice they do not normally make orders for costs against unsuccessful applicants. Their power to make costs orders is not only more restricted than the power of the ordinary courts under the CPR, it has also for long been generally accepted that the costs regime in ordinary litigation does not fit the particular function and special procedures of ETs"*

63 The mere fact that a party may have given false evidence is not reason on its own to automatically order costs. One has to look at the case as a whole, see *May-Bheemul* and see *Kapoor v Governing Body of Barnhill School* UKEAT/0352/13. The Tribunal must always examine the context and look at the nature, gravity and effect of the lie in determining the unreasonableness of the alleged conduct. This point was endorsed in *Arrowsmith v Nottingham Trent University* [2012] ICR 159.

64 It seems equally important to recognise that the question of whether or not a party lied should not be mistaken as a minimum threshold for determining that there has been unreasonable conduct: see *Topic v Hollyland Pitta Bakery* UKEAT 0523/11. To introduce such a non-statutory hurdle would, in my judgment, dilute the costs jurisdiction of the Tribunal.

65 In *McPherson v BNP Paribas* [2004] ICR 1398 CA it was suggested that in deciding whether to make an order for costs, an Employment Tribunal should take into account the "nature, gravity and effect" of the putative paying party's unreasonable conduct.

66 On the other hand, in *Yerrakalva v Barnsley Metropolitan Borough Council* [2012] ICR 420 (paragraphs 39 – 41) it was emphasised that the Tribunal has a broad discretion, and it should avoid adopting an over-analytical approach, for instance by dissecting the case in detail or attempting to compartmentalise the relevant conduct under separate headings such as "nature", "gravity" and "effect". The words of the rule should be followed and the Tribunal should:

> *"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*".

67 The Court of Appeal in *Yerrakalva* made it clear that although causation was undoubtedly a relevant factor, it was not necessary for the Tribunal to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. Furthermore, the circumstances do not need to be separated into sections, each of which in turn forms the subject of individual analysis, risking the court losing sight of the totality of the relevant circumstances.

(1) Jurisdiction: The Threshold criteria – was there unreasonable behaviour in the conduct of the proceedings and/or did the response have no reasonable prospect of success?

68 Mr. Bowles' first point was that the conduct of the litigation was disruptive or unreasonable. Secondly, he argued that the response had no reasonable prospect of success.

69 Under his first point, Mr. Bowles made arguments based on the Respondent's failure to comply with the duty to disclose and his failure to engage in Judicial Mediation, without explanation. More significantly, he argued that my finding at paragraph 73 that the document at page 172 was not a true reflection of the meeting showed that the document had been fabricated or revised.

70 Mr. Chaudhry responded that both parties had dealt with matters late, that the disadvantages were the same. He argued that Judicial Mediation was entirely optional and that making a costs order on that basis was unfair, because a party could not be compelled to take part. The Respondent opposed the inference that the document purported to be the minutes of the meeting of 30 November 2016 was fabricated; this was never put to the Respondent witnesses and no explicit finding about this was made.

71 Under his second point, Mr. Bowles made the arguments set out at paragraph 4 of his written submissions, which I do not repeat. These were responded to at paragraph 2 of the Respondent's submissions, and orally.

72 Having considered the relevant rules and applying the above legal principles, my conclusions are as follows.

73 The first point is that, on the current state of the law concerning the costs jurisdiction of the Employment Tribunal, an unmerited failure to engage in Judicial Mediation is not a relevant factor, either in reaching my decision as to threshold or, if threshold is established, my decision as to the exercise of discretion. This approach is consistent with *Power v Panasonic* above.

74 I have, however, concluded both that the response in this case had no reasonable prospect of success and that the conduct of this litigation by the Respondent was unreasonable. I have found that these threshold tests have been met for the following reasons.

No reasonable prospect of success

75 As I noted at paragraph 102 of my Reasons, at the submission stage of the liability hearing, the Respondent accepted that if there was no reasonable and probable cause for suspension, there would have been a breach of the implied term of trust and confidence. This concession reflected the obvious: that a finding of breach of the implied term was, on the facts of this case, inevitable, if there was no reasonable and probable cause for suspension.

76 There was no credible evidence before me – not a shred – that the Respondent had any reasonable cause for the suspension of the Claimant. This should have been obvious to the Respondent from the date that the response was being prepared and presented. The Respondent had all the relevant documents in his possession or control which were necessary to demonstrate to him the absence of evidence; none of the documents that I saw suggested that the Claimant could possibly have been guilty of gross misconduct.

77 Moreover, neither the Respondent nor Mr. Mir had ever had evidence to give them reasonable grounds for the belief that the Claimant was guilty of gross misconduct. In those circumstances, the response simply could not have succeeded. In particular:

77.1 By his own admission, the Respondent had difficulty understanding how the EMIS system worked (see paragraph 25 of the Reasons); and contrary to his evidence, Mr. Mir was far from being an expert. In those circumstances, the Respondent's defence (that reasonable and probable cause for suspension existed) had no reasonable prospect of success in the face of the Claimant's case.

77.2 I have found as a fact that, at the time of the suspension, the Respondent and Mr. Mir were likely to have known that the alleged transfer of 1,500 blood results to the Respondent had not occurred all at once, and, therefore, the Claimant could not have been guilty of this allegation.

77.3 Mr. Mir's evidence about the decision to suspend was not credible for the reasons I gave at paragraph 80.5 of the Reasons. In holding the meeting, and in deciding to suspend, he was acting in his role, as an employee of the Respondent.

78 To be fair to the Respondent, I would like to clarify that I did not find that the notes at page 172 (which were purported to be notes of the meeting on 30 November 2016) were fabricated by him. This is a very serious allegation, which was only made in submissions. In the absence of cogent evidence, and without the allegation being put, it would not be fair to hold that the Respondent had done such a thing; and this was not necessary for my findings. I had insufficient evidence to determine how those notes were produced, when or by whom. I did not, however, believe the evidence of Mr. Mir about the content of that meeting, nor the account about the purported minutes at page 172, nor the account of how the recording of the meeting came to be lost or deleted. Mr. Mir was, throughout all these events, employed by the Respondent and acting in the course of his employment.

79 I took account of the submissions that the Claimant had only partially succeeded in the complaints advanced. This was not a good argument, on the issue of the threshold test, because the Claimant's case was that suspension without reasonable and probable cause was sufficient in itself to amount to a breach of the implied term of trust and confidence; and the Respondent (through Mr. Chaudhry) admitted that a suspension in those circumstances would amount to breach of the relevant implied term.

80 I also took account of the argument that the Claimant had not applied to strike out the response on the ground that it had no reasonable prospect of success. This argument carried very little weight; it would have been impossible for any Judge hearing a strike out application to accede to it, given the conflicts of fact which could only be determined after hearing the evidence.

Unreasonableness in the conduct of proceedings (or part)

81 A number of the factors which point to the Respondent's lack of reasonable prospects of success are relevant to this issue. I repeat the above paragraphs, to the extent that they are relevant.

82 I find that the Respondent's conduct in denying liability in its response and maintaining this stance up to and including the liability hearing was unreasonable. This was unreasonable because:

82.1 The Respondent had a knee-jerk reaction to blame the Claimant for the fact that so many blood tests were outstanding at the date of the CQC inspection: see paragraph 78 of the Reasons. But at no point did the Respondent actually investigate whether the Claimant had done anything wrong at all. This wholly unreasonable approach persisted throughout the litigation, right up to and including trial.

82.2 The Respondent relied on the evidence of a witness who was not credible, particularly about the decision to suspend and the meeting of 30 November 2016: see paragraph 80.5 of the Reasons.

82.3 Even Mr. Mir, however, admitted that, when the Claimant was suspended, he had no evidence that she had transferred the alleged 1,500 blood results to the Respondent.

82.4 Moreover, the Respondent had never had evidence to support its case on the central issue of the case, namely whether there was reasonable and probable cause for the suspension: see paragraph 74 of the Reasons. Having begun by suspending without any reasonable grounds to do so, the Respondent was, to my mind, acting in a wholly unreasonable way in pursuing his defence to the conclusion of the merits hearing.

Issue 2: Exercise of discretion; Proportion of costs awarded

83 Having found that the threshold criteria is met, I am satisfied that in this case I should exercise my discretion and award costs, for similar reasons to those set out above.

84 I remind myself that I have a broad discretion and that it is a discretion that should be exercised in a structured, judicial, way. I have considered the exercise of discretion using the approach given in *McPherson v BNP Paribas*, but reminding myself not to be over-analytical and to look at the totality of the case.

85 Turning to the nature of the unreasonable conduct in this case, this is really demonstrated by the fact that the response did not have a reasonable prospect of success. This could and should have been apparent to the Respondent from receipt of the Claim.

86 Given that the Respondent had all the relevant documents from the issue of the Claim, and given that he could and should have investigated whether there was any evidence that the Claimant had failed in any obligation upon her, I consider that the gravity of the Respondent's unreasonable conduct and/or his conduct in continuing to defend, despite the lack of prospects of success for the response, was egregious.

87 The effect of the Respondent's knee-jerk reaction in suspending the Claimant, the lack of any reasonable cause for suspension, and the lack of any real investigation at any point into whether she was guilty of any misconduct led to this Claim being issued and, therefore, costs being incurred.

88 The conduct of the Respondent's key witness, Mr. Mir, in giving evidence which was, frankly, unbelievable, is a further factor that I take into account. But this is not the decisive factor in itself, because I need to consider the effect of such evidence.

89 Here, the factor which carried greater weight was the Respondent's determination to plough on with his defence despite knowing that, at the time of suspension, he had no evidence that the Claimant had done anything wrong in respect of the blood results. This had the effect of maximising the legal costs for the Claimant, despite the fact that the outcome could quite reasonably have been predicted by the Respondent from before the point of presentation of the Claim, on the basis of what he knew or, if his knowledge still had gaps (and if he had taken the time to do so) he could

have realised from looking at the Claimant's case and the evidence he had in his control. The false evidence of Mr. Mir in respect of the suspension meeting served to compound this.

(3) What amount of costs should be paid by the Respondent?

90 The Claimant will recover costs on the standard basis.

91 I remind myself that, whether a summary assessment or a detailed assessment of costs is being conducted, the judge should first look at the overall base figure and consider whether it seems proportionate. If it does, then the costs Judge will allow a reasonable sum for each item on the receiving party's bill which it was reasonable to incur. If not, the costs Judge will allow a reasonable sum for each item on the bill only if satisfied that the item was necessarily incurred.

92 Mr. Chaudhry invited me, if I was minded to make a costs order, to take the issue-specific approach to costs provided for in the Civil Procedure Rules. I do not agree that I should read into the Employment Tribunal Rules of Procedure the comprehensive code for costs provided for in CPR 44, because this would prevent the exercise of my broad discretion. Nevertheless, it appears to me that, whilst not requiring a precise causal link, causation was a relevant factor in assessing costs: see **Yerrakalva**.

93 I reject the Respondent's main point on quantum – which was that it was not "obvious" from the outset that the Claimant would succeed and that oral evidence was required. As I have explained, the response had no prospect of success. Whether this was made obvious or not to the Respondent himself is really a matter for him and his advisers to discuss.

94 I have, however, decided that it would not be just and proportionate to award all the costs sought by the Claimant. There are two main reasons.

95 Primarily, the Claimant made in effect 11 allegations; 6 of these were not upheld. The Respondent had invited the Claimant to withdraw allegations 1 to 8 (although I note that some of those allegations did succeed).

96 Secondly, at least some of these allegations not upheld may well have had professional conduct and/or fitness to practice implications for the Respondent because they alleged dishonesty. These allegations did not succeed, yet they did add to the amount of preparation and the length of the hearing.

97 I have decided to award the Claimant 50% of her costs.

98 I have considered the Costs Schedule prepared. I consider that the overall base figure for costs is proportionate. From the Schedule, I consider that only the fees for travel are unreasonable in terms of the hourly rate. I would reduce the travel time to £300 from £800.

99 I note that the Respondent's submissions do not identify any particular sum as unreasonable. The Respondent does not explain why the total claimed is unreasonable, save to say that the bundle is 212 pages long, and the total number of pages of witness evidence was only 21 pages for the Claimant.

100 I can deal with those points shortly. First, the Respondent is to blame for the length of the hearing, by contesting every point, even those with no reasonable prospect of success. Second, it is not the size of the bundle in this case which takes time and evidence preparation, but the forensic nature of parts of the evidence and the explanation of key matters, especially the EMIS system and the division of roles within the Lynwood Practice. Third, as the Respondent's submissions noted, the Claimant's witness statement is 15 pages long, which would have required significant work.

101 For all the above reasons, I order the Respondent to pay the Claimant costs amounting to £7,710 plus VAT.

Employment Judge Ross

24 May 2018