EMPLOYMENT TRIBUNALS

Claimant: Mr S Harmer (Deceased)

Respondent: Choice Hotels Limited

Heard at: Manchester **On:** 11 June 2019

Before: Employment Judge Grundy
Ms F Crane
Mrs J C Ormshaw

REPRESENTATION:

Claimant: Ms D Grennan, Counsel
Respondent: Mr S Tettey, Counsel

JUDGMENT ON COSTS

The judgment of the Tribunal is that:

1. The respondent shall pay £21,350.50 in costs of the claimant, such amount having been determined as those costs incurred after 19 February 2018 in accordance with detailed assessment carried out by the Tribunal under regulation 78(1)(b) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

2. The above sum includes the figure of £390.70 which the respondent shall pay to Marcus Harmer, specified as necessary and reasonably incurred expenses.

3. Therefore the amount in reference to costs excluding the witness expenses is £20,959.80.

REASONS

1. This is the claimant's application for an order for costs pursuant to rule 76(1)(a) and (b) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The claimant has been represented by Ms Grennan and the respondent by Mr Tettey, both of whom appeared at the liability and remedy hearings

in July 2018. Both parties have made submissions and the Tribunal been referred to a skeleton argument in support of the claimant's costs application. The Tribunal has also read the bundles of documents provided this morning.

The Law

2. The Tribunal has considered rule 76, in particular 76(1), which provides:

> "A Tribunal may make a costs order or a preparation time 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."

3. So far as the amount of the order is concerned, the Tribunal had regard to rule 78 and in particular rule 78(1)(b):

> "A costs order may order the paying party to pay the receiving party the whole of 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."

4. Rule 78(1)(d) states:

> "A costs order may order the paying party to pay another party or a witness as appropriate a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 71(c)."

Summary of the Submissions

5. There was no issue between the advocates as to the quantum of the claimant's costs which were very helpfully set out in a detailed schedule with breakdowns at various dates, for example the end of the EC conciliation process (20 December 2016); the claimant's "without prejudice" offer of £20,000 (11 April 2017); the preparation and discussion up to 16 February 2018; the period in discussion until 25 April 2018; preparation to hearing and outcome of hearing and thereafter application to Tribunal for costs.

6. Without setting out the totality of the submissions made to the Tribunal, in brief, the claimant's Counsel Ms Grennan submitted that the respondent had unreasonably conducted part of the proceedings, if not all of the proceedings, and that the defence had no reasonable prospect of success. In particular, it was submitted that:

> "Unreasonable conduct includes pursuing a case which lacks merit to the extent that it was unreasonable to maintain that position."

7. The claimant's skeleton argument in support of costs is read into this Judgment to include the authorities referred to, in particular:

- McPherson v BNP Paribas (London Branch) [2004] EWCA Civ 569;
- Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255;
- Cartiers Superfoods Limited v Laws;
- E T Marler v Robertson [1974] ICR 72 NIRC;
- Keskar v The Governors of All Saints Church of England School [1991] ICR 493;
- Vaughan v London Borough of Lewisham [2013] IRLR 713;
- Kovacs v Queen Mary & Westfield College [2002] EWCA Civ 352.

8. Ms Grennan argued that the defence had no reasonable prospect of success, particularly in relation to the unfair dismissal claim which was always going to be viewed as substantively and procedurally and unfair, especially in the light of the same person having been involved in every stage of investigation, as a witness and the decision maker, that person being Mr Nelder. Further, she argued that the sanction on these facts was going to make the defence regarding the "conduct" doomed to fail.

9. In respect of the disability claims, Ms Grennan argued it was clear and obvious that disability would be made out, which the respondent failed to concede at any early stage. Further, although the claimant failed on the harassment part of the claim, that was very small considering the other aspects of disability discrimination. The respondent failed to call Sally Carpenito, which was always going to be evidentially difficult, and she drew attention to the fact the Tribunal had described her absence as "astonishing" in its original liability Judgment.

10. Further, Ms Grennan criticised the evidence of Mr Nelder who admitted when cross examined that the root of the problem here had been the claimant's mental health despite doing nothing to assist vis-a-vis his procedure and conclusions in the dismissal. She also submitted the notice pay claim was always a strong claim and the defence was hopeless.

11. Ms Grennan criticised the disparity between the respondent's written case and oral evidence in respect of paragraphs 27, 31A and 37 of the ET3, which did not bear resemblance to the oral evidence of Mr Nelder.

12. She drew the Tribunal's attention to party to party correspondence which she submitted shows the respondent had unreasonably refused reasonable offers on the claimant's behalf, making the point that the claimant's position on unfair dismissal in terms of what was awarded amounted to in the region of £10,000. That was an offer the claimant was prepared to take for early settlement in December 2016 but the respondent did not come to the table. In April 2017 the claimant was looking for £20,000. The respondent again did not make an offer anywhere near that sum. The

offer of the respondent in February 2018 was for £7,000. The claimant recovered over £40,000.

13. Ms Grennan referred to the respondent's failure to engage and submitted that the Tribunal should exercise its discretion to make a full costs order; that the fee earner who was an employment team leader's charge out rate of £110 was extremely reasonable.

14. The figure in total in the schedule of costs on page 23 of the Tribunal's bundle showed the solicitors costs to amount to £19,294 net of VAT; the witness expenses of Marcus Harmer to amount to £390.70; counsel's fees billed and paid to date before this hearing amount to £15,411; medical expenses of £152; counsel's fee for 11 June 2019 £3,600, totalling some £38.847.70, a figure net of VAT on the solicitors fees. With VAT on the profit costs of the solicitors it would be £42,706.50. She submitted that taking into account Marcus Harmer's evidence and those documents in the bundle from pages 132-139 it would be reasonable for him to recover his reasonable expenses for travel and hotel (train, taxi and hotel in Manchester) given that he resides in Blackpool and was obliged to be present to give instructions to her given that the claimant is deceased. The other aspects relate to counsel's fees and medical expenses, all reasonably incurred.

15. Mr Tettey on the respondent's behalf submitted that the application for costs was misconceived and that the defence of the claim had reasonable prospects of succeeding. At no stage was it suggested to the respondent by Employment Judges dealing with case management hearings that the response was doomed to failure.

16. It was submitted that the Tribunal had by and large found the witnesses of the respondent to be truthful and critiqued Mr Nelder's evidence in respect of it being selective only relating to one meeting. It was suggested that the respondent had a small management team despite the number of employees and that that would be a reason why Mr Nelder could be investigator, witness and decision maker.

17. In respect of the respondent's failure to call Sally Carpenito, who was the claimant's line manager, it was submitted today that she had been ill at the relevant time.

18. It was pointed out that the claimant's harassment claim had failed and therefore this was not a total win on the claimant's behalf. It was also submitted that the respondent had properly engaged in negotiations in order to attempt to settle the claimant's claims, and that the parties had each made fluctuating offers such that they had engaged in a process of attempting settlement prior to the hearing. It was also suggested that given the claimant had taken his own life in May 2017 a psychiatrist report could not then be obtained however 400 pages of medical evidence were before the Tribunal and that should not be lain at the door of the respondent.

19. The respondent submitted that the respondent reasonably made a £7,000 offer as at pages 97-98 and it could not have been said that there was no prospect that the defence would succeed.

20. The respondent did not take issue with the quantum of the schedule of costs and alleged that the respondent's conduct had not fallen foul of the rules. Mr Tettey

submitted that the gateway test was not satisfied in relation to the respondent's conduct nor on the basis of the lack of reasonable prospects of success of the defence. There were no submissions made about the ability to pay of the respondent.

21. The respondent further submitted that the Tribunal should exercise its discretion proportionately in a fair and balanced way, considering the total amount of costs and what was proportionate in relation to this hearing.

22. Before the Tribunal rose to consider its judgment, we were told by Mr Tettey that in June 2018 the respondent had offered £10,000 through ACAS. Much of the costs of preparing for trial had then been incurred, and on 26 June the offer was increased to £12,000. The parties were not able to bridge the gap between the settlement figures on the day of the hearing, the claimant seeking £18,000 for a settlement at that stage and the case proceeded at the hearing for 5 days in mid July 2018.

Conclusions of the Tribunal

23. The Tribunal considers that the respondent has acted unreasonably in part in the way the proceedings have been conducted and that the response had no reasonable prospect of success in respect of the unfair dismissal aspect in particular. The Tribunal's conclusions were as follows.

24. The previous judgment on liability and the previous judgment on remedy should be read as background. The brief chronology to assist in understanding this costs judgment is as follows. The claimant's employment ended on 6 October 2016. The costs schedule shows that he consulted solicitors on 22 November 2016. He filed his ET1 with claims relating to unfair dismissal, breach of contract and disability discrimination on 15 February 2017. Very sadly the claimant took his own life in May 2017. There was then a delay when the claim was stayed and his executors ultimately took up the action, however his executors live in Australia (his mother and father) and his partner, Mr Marcus Harmer, dealt with the matter on the ground in Blackpool and the North West. The Tribunal heard the claimant's claim, finding for him on all matters except the harassment in July 2018, and awarded £44,170 by way of compensation. Included within that figure was a figure of injury to feelings related to the disability discrimination of £22,000.

25. Today, so far as this litigation is concerned, the claimant's costs amount to £42,706.50 including all aspects of VAT. On the Tribunal's own inquiry, we were told by the respondent's counsel that their costs amount to £19,858.68. Therefore the total litigation costs in reaching an award of £44,170 have been £62.565.18 including witness expenses and disbursements. Undoubtedly it is a substantial sum of legal costs. The Tribunal considered whether or not the claimant had made out that the respondent had conducted part or all of the proceedings unreasonably, and/or whether the response had no reasonable prospect of success.

26. So far as the failure to conduct the proceedings reasonably, the Tribunal considered that part of the way in which the proceedings had been conducted by the respondent had been unreasonable. On the day of the Tribunal hearing the respondent did not concede the issue of disability and in clarification with the parties at the outset of the hearing Mr Tettey told the Tribunal "he had not got instructions to

concede disability". The witness bundle for the Tribunal contained a substantial number of medical records of the claimant which the Tribunal trawled through in order to fully understand the disability of the claimant, finding inevitably under section 6 of the Equality Act 2010 that the claimant was a disabled person with the assistance also of Marcus Harmer's statement and evidence. This was avoidable.

27. Further, the respondent conducted proceedings unreasonably in not assisting the Tribunal in relation to key evidence from Sally Carpenito, who was the claimant's line manager. This is referred to in depth in the liability decision. Her evidence was a missing piece of the jigsaw; her absence remained unexplained. We are told today that she has been ill, however no witness statement with an application for it to be lodged and her not called was made which could have happened at any earlier time in the proceedings. Paragraph 8 of the original decision refers to this in detail.

28. Further, the evidence of Mr Nelder was at odds with the ET3 in respect of the importance of the claimant's health position, and although it was subtly set out in the paragraphs of the ET3 at paragraphs 27 and 31A, the evidence of Mr Nelder was clearly that there was a link between his illness and the Facebook post which led to such a sad set of circumstances. Although there was a level of acknowledgement of something being wrong the true picture is as in the Tribunal's findings, which Mr Nelder was forced to accept at the liability hearing.

29. The letters of offer of settlement and the position adopted by the respondent show an unreasonable conduct of the litigation. On 20 December 2016 the claimant indicated on early settlement basis without proceedings he would accept £10,000 in full and final settlement. By 11 April 2017 after issue the claimant sought £20,000 and an agreed job reference. His Schedule of Loss was then £41,957.24. The respondent's enlightening response in the letter of 12 February 2018 on page 97 was to offer £7,000 but also to set out "our position on your claims". This is what was written:

> "Whilst we sympathise with your client for the loss of Stuart Hamer this nevertheless presents you with unavoidable evidential difficulties that we do not believe you will be able to get over. Without the live evidence of the claimant, specifically the opportunity to which my client would normally be entitled to cross examine the claimant and therefore test his evidence, we believe your client will be unable to discharge the burden of proof required of him in this case, and so his claims will fail. Without the opportunity of cross examination and the clarification of the claimant there will be live pertinent disputes on the context, quality and content of his evidence in chief. In the event of such disputes we will be strongly suggesting to the Tribunal that where relevant they exercise their discretion in favour of the respondent who need prove nothing in each case. This will in our view further fundamentally weaken your case.
>
> We are also concerned of the nature and manner in which these proceedings are being brought. We have repeatedly attempted to enter into discussions and negotiations with you surrounding settlement of this matter and you have so far refused to enter into meaningful discussions of any kind simply the assertion of unrealistic sums of settlement. If these proceedings, as far as we are concerned, are being pursued on a 'shot to nothing' 'no consequences for loss' basis then you are mistaken. This letter, clear in content, offer and

> consequence to you, potentially activates my client's entitlement to you repaying the costs of his defence which are considerable.
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> Your claim is fundamentally flawed evidentially before we even come to the issue of my client's defence given that in our view the deceased did not provide the required level, depth and proof of evidence before his death. My client's defence, in our view an entirely different additional consideration, is in our view not only meritorious it is the more likely to succeed than your client's claim. We have addressed the reasons for this in previous correspondence and refer you to that.
>
> This will be our last warning to you and last offer in this case. Should you elect to continue in this claim we will stand behind this offer, this letter and the consequences for you that it activates and we will seek our client's costs of defence to their fullest possible extent in the event that you fail to meet the terms of this offer or, as is likely on our view, lose entirely."

30. The Tribunal's view of this letter was that the respondent believed because the claimant had passed away that it was "bombproof" in relation to its defence as the claimant would not give evidence. Sadly it was a wholly erroneous view. The claimant's response in a "without prejudice" letter on 16 February 2018, in particular on page 101 of the bundle of documents, was as follows:

> "We were also surprised by your suggestion that because the claimant is unable to give evidence due to his passing he will not be able to discharge the burden of proof in either of his claims. We find this comment entirely short-sighted and simply wrong as a matter of law. There were wholesale failures by the respondent in appreciating the claimant's condition and what effect this had on his on a day-to-day basis. It is abundantly clear there were no attempts at any stage to engage in any of the issues the claimant was raising in respect of his health and the impact of this on his conduct. This is despite the fact that the respondent had knowledge of his recent ill health including the two suicide attempts and of the fact that the behaviour in question was wholly out of character for an employee with a 12 year previously unblemished employment record. The claimant's treatment during and after the first disciplinary warning will be heavily scrutinised by the Tribunal and we can only anticipate the outcome being in his favour. Scrutiny of the evidence also demonstrates how your client treated a longstanding employee who had clear mental health concerns with contempt and disdain. The documentary evidence and Marcus Harmer's witness evidence will be more than sufficient in the claimant proving his claims."

31. In that letter the claimant intimated that an offer of £22,000 would be a sum sufficient to settle matters and that "we expect the Tribunal to award an amount far in excess of this figure".

32. There was then an exchange of email correspondence with "without prejudice" offers with the respondent offering £7,000 on 21 March 2018, the claimant still seeking £22,000, the respondent repeating its rejection and ultimately the claimant offering to settle on 10 April 2018 for £18,000.

33. The respondent unreasonably conducted the negotiations in failing to appreciate that the fact of the claimant's loss in terms of him having passed away and not being present to give evidence would not mean that he could not substantiate his claims.

34. So far as the reasonable prospect of success is concerned, the Tribunal were persuaded by the submissions of Ms Grennan that the unfair dismissal aspect of the case, which was largely secondary to the disability issues which the Tribunal spent a long time considering, was a weak defence from the respondent's point of view on both procedure and on substance as found by the Tribunal's decision making, particularly in paragraphs 51 and 52 of the final decision. The respondent failed to analyse the strength of or weakness of the defence to the unfair dismissal on the basis that the claimant was not going to be called, and Mr Nelder made quite plain in evidence his failure to engage with the mental health issues, the fact he had been witness, investigator and decision maker, and the fact he had a closed mind, all of which could lead to the defence failing.

35. It is also the case that the point is weakened by the ET3, and the evidence of Mr Nelder not marrying up where there was a clear disparity. The respondent considered ill health, it is written, at paragraph 27 of the ET3 as an explanation but not an excuse for his misconduct. The reality was there was a link between his illness and the Facebook post as Mr Nelder made clear in evidence. This is the subtle acknowledgement that is stated by the Tribunal earlier in this Judgment.

36. Thus it is the Tribunal's view that what Ms Grennan described as the "gateway" for costs to be ordered has been passed by the claimant, and the Tribunal set its mind to exercising the discretion, which is a wide one, in the amount it considered proper to order the respondents to pay.

37. The Tribunal referred back to the totality of the schedule as set out earlier in this Judgment and those steps that were taken at various points within the litigation.

38. First and foremost it would seem that parties in Employment Tribunal proceedings in order to get to a position of considering their cases prior to issue would, if they so wished, be instructing their solicitors and incurring costs. Thus the first part of the claimant's costs are incurred in any event. They amount to £1,804 plus VAT of £360.80 totalling £2,164.80. Thereafter the case did not settle for £10,000 and the costs schedule is broken down to April 2017. That was prior to the claimant's death but when information was still being obtained from him such that the Tribunal do not consider it would be reasonable to order the respondent to pay those costs. They amount to £2,563 plus VAT of £512.60 totalling a gross figure of £3,075.60.

39. Much of the costs were incurred between April 2017 to 16 February 2018 when preparations for trial were beginning, evidence was being obtained and costs ramping up. Those costs amount to £10,703 plus VAT of £2,140.60 amounting to £12,843.60.

40. The total of all of those solicitors' costs (gross) amounts to £18,084.

41. The Tribunal considered it reasonable to draw a line at 16 February 2018 such that the costs of preparing for trial in relation to the bundle, the costs in the later instructions to counsel and in part of the preparation for trial and the trial itself ought

to be borne by the respondent. However the costs to 16 February 2018 remain incurred by the claimant and to be borne by him.

42. The Tribunal therefore calculates, drawing a line at 16 February 2018/ 19 February, that the costs in the schedule of £891, £1,826 and £1,507 were all properly incurred by the claimant's solicitors and amount to £4,224 such that the VAT figure on that sum amounts to £844.80. Therefore the solicitors' costs in total would give a figure of £5,068.80 which the Tribunal considers the respondent should pay.

43. So far as the witness expenses are concerned, all of those in the Tribunal's view were reasonably incurred and necessary relating to Marcus Harmer's evidence, which was very important to the trial and for which the Tribunal is indebted because it must have been a difficult couple of days for him yet his evidence was a vital part of the jigsaw of evidence in this case. They are awarded in the sum of £390.70 which the respondent shall pay direct to Marcus Harmer. The running total is then £5,459.50.

44. So far as counsel's fees are concerned, the Tribunal calculates that those fee notes relating to matters of advice before February 2018 should fall to be paid by the claimant. Looking at the bundle, we observe those to be the fee notes of 31 August 2017 for £1,920 (page 113), £480 (page 114, dated 14 November 2017), £720 for 16 January 2018 (page 129) amounting to £3,120 to be deducted from the total. The total fees of counsel in this matter amount to £15,411 for the trial and pretrial and £3,600 for today, amounting in total to £19,011. £19,011 less £3,120 (all fees being gross of VAT) amounts to £15,891. The respondent shall pay the sum of £15,891.

45. So far as the medical report is concerned, that was obtained prior to trial and would have been necessary in terms of the records being obtained in the circumstances that the claimant had passed away therefore the full psychiatric report was not prepare but there was the short report. Therefore we do not regard that this too should be an expense that the respondent should pay and we have disallowed the total of £152.

46. The reason for the cut-off in February 2018 is that the Tribunal takes the view that the respondent dug in at that point, having reference to their letter previously explained and quoted at length, and that it would be unreasonable for the claimant to bear the burden of costs which ensued thereafter. The benefit of hindsight is a wonderful thing, there is a danger the Tribunal could be lulled into following a "civil" action position of costs following the event ie that the claimant recovered all his costs however this would not be in our view be a proper exercise of the discretion. Hence in total the sums are as follows:

Solicitors' costs	£5,068.80
Witness expenses	£390.70
Counsel's fees post 16 February 2018	£15,891.00
Total carried forward	£21,350.50

47. If the figure of witness expenses is taken out of that figure and paid separately to Marcus Harmer (the figure of £390.70) then the total costs award is £20,959.80.

48. Observing the claim for costs was in its totality £42,706.50, the Tribunal has ordered the respondent to pay in rough terms half of the claimant's costs arising from these proceedings. We have considered this fair in looking at an overview in considering how the order for costs would translate against the respondent, if we drew a line at February 2018.

49. Looking at matters in the round, In the circumstances the Tribunal considers that the respondent paying a figure of approximately half of the claimant's costs appears a proportionate and reasonable exercise of the very wide discretion, which the Tribunal is given in these matters.

50. It is perhaps regrettable to observe that the claimant obtained overall a substantially higher award after a difficult five day hearing and the respondent has borne a further £20,000 or so in costs, when the offer to settle that the claimant made at its highest was for much less.

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Employment Judge Grundy

Date____14th June 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON
8 July 2019

FOR THE TRIBUNAL OFFICE

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