EMPLOYMENT TRIBUNALS

Claimant: Ms S Kauser

Respondent: Keighley Town Council

Heard at: Leeds **On:** 25 June 2019

Before: Employment Judge D N Jones
Ms L Fawcett
Mr M Brewer

REPRESENTATION:

Claimant: In person
Respondent: Mr D Flood of Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The respondent shall pay to the claimant a maximum compensatory award in respect of the unfair dismissal of £44,022.64, being 52 weeks' pay.

2. The respondent conducted the proceedings unreasonably and, in respect of its defence of the complaint of unfair dismissal, the response had no reasonable prospect of success.

3. The respondent shall pay to the claimant costs in the sum of £7,125 inclusive of Value Added Tax.

4. The respondent's application for costs against the claimant is dismissed.

REASONS

Remedy

1. The respondent conceded that the claimant would have recovered losses in excess of the statutory cap. By section 124(1ZA)(b) of the Employment Rights Act 1996 ("ERA"), in this case that would be 52 multiplied by a week's pay of the claimant. The week's pay is that received by the claimant at the effective date of

termination of her employment which, by section 226 and section 97 of the ERA would have been 22 March 2018. The parties agree that that would be an annual sum of £40,057 in salary to which is to be added pension at 9.9% of gross salary, being £3,665.64.

2. The claimant also asked for an additional award under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992. That, however, would have been in excess and subject to the same statutory cap by reason of section 124A of the ERA (see **Digital Equipment Company Limited v Clements (No. 2) [1997] ICR 237 and [1998] ICR 258**).

3. There is no need to gross up any award for tax purposes as that would also exceed the statutory cap.

The Law

4. By rule 76(1) ERA:

> "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 has no reasonable prospect of success; or
>
> (c) A hearing has been postponed or adjourned on the application of a party made less than seven days before the day on which the relevant hearing begins."

5. Section 76(2) ERA provides that:

> "A Tribunal may also make an order where a hearing has been postponed or adjourned on the application of a party."

6. In **Barnsley Metropolitan Borough Council v Yerraklava [2011] EWCA Civ 1255** Mummery LJ said:

> "The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the [party] in bringing and conducting the case and in doing so, to identify the conduct, what was unreasonable about it and what effects it had."

The Facts

7. The claimant brings her application by reference to six grounds, being:

(1) A delay to the hearing, where evidence was not heard from the respondent's witnesses on the afternoon of the first day because counsel took the rest of that day to take instructions;

(2) A belated concession of unfair dismissal on the second day of the hearing;

(3) The fact that the complaint of unfair dismissal had no reasonable prospects of success;

(4) A decision not to call any witnesses conveyed on the second day of the hearing by the respondent;

(5) Unmeritorious pursuit of claims of wrongful dismissal, contributory fault and *Polkey*; and

(6) An adjournment of the remedy hearing on the fifth day by application of the respondent's counsel.

8. The respondent applies for costs on the grounds that the claimant did not negotiate or accept settlement offers.

The Respondent's Application

9. We do not accept that the claimant was culpable of any unreasonable conduct. Initially the application sought to draw upon negotiations which had taken place which were privileged. These discussions were "without prejudice". They were not qualified by either party informing the other that they reserved the right to rely upon the offers in respect of any costs application. Both the claimant and the respondent had intended to rely upon each other's respective negotiations but were not prepared to waive their privilege. In the circumstances they were ignored by the Tribunal save for an offer made by the respondent after the liability hearing on 7 June 2019. The respondent reserved the right to refer to its offer of £43,662 in full and final settlement, which it stated was the maximum amount the claimant could have recovered. The claimant refused that offer and intimated that she had incurred significant additional costs in preparing for the remedy hearing. She intimated she was to make her own costs application.

10. We do not consider that the claimant acted unreasonably in drawing to the attention of the respondent that the maximum award was greater than they had offered; nor was there anything in the letter to suggest that the respondent was prepared to countenance paying a greater sum. In any event the sum may have been inadequate if the claimant was successful in applying for her own costs, which in the event she has done. In the circumstances we are not satisfied the threshold required under rule 76 is made out.

The Claimant's Application

11. We find that the respondent was culpable of unreasonable conduct in the conduct of the defence to the unfair dismissal claim and that it had no reasonable prospects of success. The unreasonable conduct has been summarised already in respect of the failures to disclose relevant materials and the position taken in respect of the meeting of 27 November 2017 as set out in paragraphs 101-104 of the Judgment and Reasons sent to the parties on 9 April 2019. Moreover, at paragraph 9 of the claim form, the claimant set out her belief that there had been an investigation to justify retrospectively the decision to dismiss her on 27 November

2017, and that the minutes of the meeting which had been disclosed did not reflect what had actually happened. Other minutes, which were received subsequently, supported the pleaded case. To that allegation the response was silent.

12. On the second day of the hearing a concession was made that the dismissal was unfair but without any explanation from the respondent of the basis of the concession. The Tribunal therefore did not rule upon the specific allegation at paragraph 9 of the claim form, notwithstanding our comments in the reasons relating to *Polkey*. Nevertheless, in all the circumstances there could have been no question but, from an early stage in these proceedings, it was apparent that there were serious flaws with the way in which the respondent dealt with the dismissal of the claimant, which would have led to a finding of unfair dismissal, and no reasonable respondent would have failed to concede unfair dismissal at an early stage. The decision not to call any witnesses came as a surprise, but it was unreasonable not to communicate that decision to the claimant and her representative at an early stage. That would have reduced the remaining issues for the hearing, notwithstanding there remained the complaints of discrimination.

13. We had considered whether it was unreasonable of the respondent to defend the complaint of wrongful dismissal and pursue allegations of contributory conduct and a request to reduce the compensation under the *Polkey* principles because the respondent called no evidence at all about those events. In particular, the failure to produce a witness statement from Councillor Westerman in respect of the first allegation was surprising, given that only he and the claimant were present to that conversation. Furthermore, the decision not to call Councillor Anayat who could had given some evidence as to what the claimant allegedly said to him shortly after was surprising, as was the omission in his witness statement of anything at all in that regard. However, it is commonplace for parties to pursue allegations of contributory conduct and *Polkey* without the first-hand witnesses involved in those matters being called to give evidence or the accusers being heard, and we do not consider that decision in this case crossed the threshold of unreasonable conduct.

14. The postponement of the remedy hearing was not an application of the respondent. Its accession with that proposal of the Tribunal was not unreasonable. The claimant had served a Schedule of Loss which had been based upon previous guidelines in respect of compensation of pension loss, and did not give any explanation of why it had included a particular sum for the claimant's expectation of pension in her new employment. Furthermore, no documentation had been served about the claimant's current pension entitlement. That was requested by the respondent on the third day of the hearing and provided on the fourth day. Given that the pension claim was potentially for many hundreds of thousands of pounds, that was inadequate and late disclosure by the claimant. It was not appropriate to consider the pension aspects of this case without the parties having the opportunity to take further information from the respective pension providers and to address the position under the new pension guidelines. The Tribunal postponed the case and made consequential orders for that to happen. That outcome could not be said to be unreasonable conduct of the respondent.

15. We do not need to consider ability to pay of the Keighley Town Council pursuant to rule 84.

16. The effect of the unreasonable conduct was, in our judgment, to create additional legal expenses for the claimant. We accept Mr Flood's submission that there would have been a significant hearing of a number of days in any event to deal with the remaining issues, but there would have been some reductions in the costs in preparing for that hearing. The claimant has prepared a schedule in which she seeks £21,954.99 including Value Added Tax, the total of her costs being in excess of £35,000. She restricts her claim to that amount because she recognised that the discrimination complaints incurred costs. Those claims were not successful.

17. The review of witness statements by her counsel would have involved far less time spent had the respondent properly indicated it was not intending to call any witnesses at an earlier stage. We award £1,687.50 in respect of that legal expense, which is ¾ of the fee incurred for review of the witness statements. We consider that the claimant would have been able to negotiate a reduced brief fee if the issue of unfair dismissal had been conceded, and although we do not accept it would have been half the brief fee, as the claimant says, we consider it would have been £6,000 and not £9,000. That led to the additional cost of £3,000. Delay during the hearing for Mr Flood to take instructions would have not been required. Together with the reduction in issues, by an early concession about the unfair dismissal, an additional day would have been saved, which we quantify as one refresher of £1,250. That is a total of £5,937.50. We do not consider any of the costs incurred otherwise, including instructing counsel in respect of the remedy hearing, arose from the unreasonable conduct.

18. To the sum of £5,937.50 we add Value Added Tax of £1,187.50 giving rise to a total of costs attributable to the unreasonable conduct of £7,125.00.

Employment Judge D N Jones

Date 10 July 2019