EMPLOYMENT TRIBUNALS

Claimant:	**Miss C Barron**	
Respondent:	**Methodist Homes for the Aged**	
Heard at Leeds:	**Liability:**	**28 to 31 January 2019**
	Deliberations:	**12 March 2019**
	Reserved Judgment:	**15 March 2019**
	Remedy hearing:	**24 May 2019**
	Costs (preliminary issue)	
	In chambers	**3 October 2019**
Before:	**Employment Judge J M Wade** **Mr Q Shah** **Mr M Taj**	

Representation

Claimant:	By lay representative, and then in person
Respondent:	Mr C Crow

RESERVED JUDGMENT

The respondent's conduct of the proceedings and hearing did not amount to acting "otherwise unreasonably" within the meaning of Rule 76 (1) and the Tribunal does not consider it is in the interests of justice to make a preparation time order as further set out below.

REASONS

Introduction and issues

1. The hearings in these proceedings are set out above. In short, the claimant, a care assistant, succeeded in her constructive unfair dismissal complaint against the respondent, and in one allegation of protected disclosure detriment. References to paragraphs in these reasons are references to paragraphs of our our liability decision.
2. The claimant was represented by a lay representative throughout, apart from on the last day of the liability hearing when her representative became ill; the claimant chose to press on rather than adjourn in those circumstances. The context of that representation and the scope of this case is set out in our earlier reasons.

3. At a one day remedy hearing in May, the representative presented a new schedule of loss in manuscript which included aggravated damages as a head of loss (not previously claimed). The respondent had come prepared to address the schedule of loss previously served, some of which had been agreed.

4. The Tribunal dismissed the claim for aggravated damages, which included consideration of two without prejudice save as to costs letters from the respondent. The Tribunal gave an extempore decision that those letters were not improper "threats", as characterised in the application.

5. The claimant's lay representative also presented a written Preparation Time Order in respect of her work on the case, seeking some £21, 299 plus out of pocket expenses. Her application repeated allegations about the two without prejudice save as to costs letters. It commenced: "I respectfully request the Tribunal to consider a Preparation Time Order on the grounds of the unreasonable conduct of the Respondent throughout this case. **A costs warning was issued to the Respondent by the Claimant on 21 January 2019."**

6. After setting out eighteen allegations or points, (of which Mr Crow had not had prior notice) the application's closing paragraph said this:

"*Both these hearings and associated costs were avoidable had the Respondent accepted their legal responsibilities towards the employee. Since the judgement the Respondent has continued to refuse to accept the seriousness of this case and offer a serious remedy. Despite repeated requests the Respondent has also failed to provide any legal reasons for their unreasonable offer. I therefore ask the Tribunal to consider this Preparation Order".*

7. That application was presented in the context of a previous case management order for a remedy hearing to take place "unless the parties are able to agree remedy". Apart from deciding that the two without prejudice save as to costs letters were not improper threats, and not unreasonable conduct, there was insufficient time in May to address the remaining fifteen points asserting unreasonable conduct.

8. The lay representative subsequently confirmed she was content for the Tribunal to decide the application without a hearing and the respondent has confirmed that it is content for the issue of whether the respondent acted "otherwise unreasonably" to be determined in chambers, but if the Tribunal were to consider that threshold crossed and was minded to make a Preparation Time Order, it wished to be heard in an oral hearing on the issues of causation of costs, and quantum.

9. The unfortunate delay, between correspondence in the Summer concerning the application and today, arose because of the need to arrange time when the full Tribunal could meet to deliberate and decide the application. The members of this Tribunal have been heavily listed on lengthy cases over the past months.

10. <u>Consideration and decisions concerning the allegations of unreasonable conduct of the proceedings</u>

10.1. <u>The respondent's initial defence was misconceived (that multiple events did not happen); and in its response to this application the respondent continued to disagree with the Tribunal's findings of fact.</u>

It is not unreasonable conduct in litigation to seek information from relevant witnesses and then enter a defence based on that information; in effect the claimant's case is

that the respondent should have preferred her account over Mr Thornton's and others on a number of matters, from the outset. It did not do so. In this case the Tribunal made a series of findings on disputed matters, some for and some against the claimant. On events concerning Mr Thornton's conduct following the Fire Alarm Incident the Tribunal accepted the claimant's evidence and made findings accordingly. The respondent does not accept those findings. Tribunals and courts have to make decisions on the evidence exercising their Judgment. Parties do not always accept particular findings, but may pragmatically decide not to appeal them, which is the respondent's position after the decision was given. This is not unreasonable conduct.

10.2. The respondent changed its position in the hearing.

The Tribunal permitted the respondent to amend its defence to include the statutory defence to the detriment complaints. The relevant documents and evidence were already within the case and had been exchanged; this was to be, in effect, an additional submission which may have deprived the claimant of a remedy, if it had succeeded. In the event it failed as a defence. Mr Crow accepted in making the amendment application that the defence could have been pleaded from the outset. The Tribunal permitted the respondent to amend. The initial pleading omission could be said to be unreasonable conduct by the respondent's solicitors, but that was a factor to be considered in granting (or not) the application, and it was granted. It is not then in the interests of justice to consider a preparation time order because of that conduct in these circumstances.

10.3. The respondent produced documents every day of the hearing and the claimant and her representative could not respond.

This is factually an exaggeration. Limited additional respondent documents were permitted to be added to an already extensive bundle by the Tribunal, when they were relevant and consistent with the ongoing duties of disclosure and/or to assist the Tribunal. Time was afforded for consideration and the documents were necessary in the interests of justice. This was not unreasonable conduct by the respondent. The claimant has not asserted that there was not a fair hearing.

10.4. The respondent failed to provide the claimants' statements referencing the page numbers in the bundle at the hearing.

The Orders of the Tribunal were for the exchange of statements referencing pagination of the bundle. The claimant provided these to the respondent later than the exchange date. The originals were provided to the Tribunal by the respondent at the start of the hearing. There was no order for either party to produce the right number of copies of their statements at the hearing and the Tribunal noted the difficulty and the claimant submitted the paginated copy in time for the Tribunal's deliberations. It would have been more helpful for the paginated versions to be provided to the Tribunal by the respondent's solicitors at the outset, with the relevant explanation; was this a form of gamesmanship by the respondent's solicitors, or was it an omission, or was it simply relying on the claimant bringing the right copies, there being no Order with which the respondent was in default? We take into account the style of correspondence between the parties in the preparation for this case (that is between the claimant's representative and the respondent's solicitor) and we consider it the latter. There is nothing to indicate oppression of the claimant's representative, who, we learned in the course of the hearing, had retained solicitors at some point to assist. This was not unreasonable conduct.

10.5. The issue of two cost warnings: previously determined not to be unreasonable conduct.

10.6. The timing of the first cost warning: as above. In addition the parties were ordered to complete disclosure by the date of the costs warning letter; the letter reflected review of documentation **to date**. The fact that the claimant later provided further documents (if that is asserted) does not render the statements in the letter, "acting otherwise unreasonably".

10.7. The timing of the second cost warning: as above.

10.8. In effect: the size, resources and context of the respondent should have enabled it to avoid a contested hearing and the consequent strain of such a hearing on the claimant.

The parties were in dispute as to both facts and interpretation of those facts. The claimant did not wish mediation (it was noted at the case management hearing). Defending contested hearings as to both liability and remedy was not acting otherwise unreasonably.

10.9. The respondent knew about the prevailing bullying culture at the relevant facility..documented throughout the hearing.. and continued to deny and dismiss the claimant's case. The respondent failed to "fully disclose" documents.

These were not the findings of the Tribunal. The respondent's defence of the claimant's case cannot be said to be acting otherwise unreasonably in all the circumstances. There was no finding of a failure to give disclosure and many of the documents in the Tribunal's bundle were those requested to be disclosed by the claimant.

10.10. The respondent knew the CQC had inspected Victoria Court and failed the inspection on the same grounds reported by the Claimant.

The Tribunal's finding on the CQC is at paragraph 106 only. Even if this is ground is a fair summary of the position, it does not render the respondent's defence of a claim which included that the claimant had been subjected to a series of detriments because of protected disclosure, acting otherwise unreasonably, not least where all but one of those allegations failed.

10.11. The claimant's area manager labelling the Claimant "mentally ill", thereby dismissing her concerns.

The Tribunal referred to this as an unfortunate remark by Ms Murphy in paragraph 129, in the context of assessing the quality of Ms Murphy's evidence as a witness. In fact the remark was: "I believe that CB has some sort of mental health issues which I think we should all be aware of". It was made after the claimant's resignation and was not alleged as a detriment for having made protected disclosures. Its context was the claimant alleging Ms Murphy's contact with her after her resignation to be harassment. It was, as we describe it, an unfortunate comment. It was not remotely linked to the conduct of proceedings. Further, in context, it cannot bear the dismissive quality ascribed to it in the round. We also know that the respondent at that time was gathering the relevant parties' full responses to the resignation letter, which could not be described as dismissive.

10.12. The respondent's knowledge of Mr Thornton's record, and subsequent treatment of him.

See above: this is not conduct of the proceedings and we have made findings about the respondent's earlier investigation and disciplinary action in relation to him. We have made no findings about post CQC matters.

10.13. The respondent refused to provide full disclosure and continued to refuse even after an Order.

The Tribunal's general order was for disclosure by 26 November 2018, after further particulars and after an amended response. The claimant sought specific disclosure in October and by the time this was referred to a Judge and directions given, it was 20 November. That direction was clear as to its requirements. Many of the requested documents were in the Tribunal's bundle, but for example, details of all grievances against Mr Thornton, and his qualifications, were not. The Tribunal did not see the respondent's itemised response to the requests in or around late November 2018, but there was no further application after that Order had been given, suggesting that there was a detailed response explaining the respondent's position on relevance.

Had further application been made before the hearing, a separate hearing would have been arranged to determine relevance, or not, and order specific disclosure, or not. When this was raised in the hearing, the Tribunal permitted questions to address matters evidentially, and there were additions to the bundle where just. If, and we do not know this to be the case, the respondent did not, as ordered, set out in writing in relation to any requested item, "whether it considers it relevant to the pleaded issues (and if not, why not)", then that might have been unreasonable conduct of the proceedings. Nonetheless it is not in the interests of justice now, a full hearing having been completed with many of the itemised documents, to exercise discretion in a preparation time order, without explanation of how the claimant has been put to extra expense by any particular failure.

10.14. The issue of a third costs warning (with offer of settlement of remedy), to avoid the costs of a remedy hearing.

By this stage the claimant had engaged solicitors to assist with settlement of remedy. The parties put to each other their final negotiating positions on remedy, we are told, and the respondent added a subsequent costs warning to its final position. As it turned out the Tribunal's judgment was such that the respondent's final offer was beaten by the claimant at the hearing. While repeated costs warnings can amount to unreasonable conduct, in this case they do not. The third letter was an attempt to conserve the respondent's costs. The claimant was assisted by formal and informal legal advice and by a lay representative and the parties by this stage fully understood the adversarial nature of this dispute.

10.15. The respondent could have applied for a deposit order. This relates to the statement in the January costs warning letter: .. "we are overwhelmingly assured, and we have reiterated this assurance to our Client, that you have no prospects of succeeding at Tribunal hearing with your claim".

The legal advice provided on a review of a case is privileged. The Tribunal cannot and should not know if this was the advice given. If so, it was very brave advice. In reality it probably reflected one element of the case that the respondent had ignored the claimant's concerns (when plainly it had not). We have already decided the costs warning letter was not unreasonable conduct and given our reasons. Applications for deposit or strike out orders are themselves costly, and not so applying cannot be unreasonable conduct of litigation in this context. In reality, this is a further submission to support the claimant's case on the issue of cost warning letters.

10.16. If there was no chance of success, why did the respondent instruct a barrister and solicitors against an unrepresented care worker?

Again, this is a further submission concerning the costs warning letters, and again, we consider it misconceived. It is not unreasonable conduct for a party to seek or retain legal advice in the circumstances of this case and the context of the claimant's representation.

10.17. The claimant was accused by Counsel of being the real bully.

This allegation arises from cross examination of the claimant about the matters at paragraphs 58 to 62. The claimant's allegation was of detrimental treatment by Ms A on grounds of disclosure (referred to as the "filing incident"). There was clear oral evidence that Ms A had been upset in their encounter. The claimant's evidence was: "she was crying and blubbering". Mr Crow said: "and you have told her she was being unprofessional". The claimant replied, "Yes". Mr Crow then asked: "and she is the one who was bullying you – is that right?" The claimant replied "yes". The implication in Mr Crow's question was that, in fact, matters could be construed the other way around, or that the claimant's interpretation of events could not possibly be right. There was nothing unreasonable in that suggestion in cross examination in context, given the evidence of Ms A's upset at the time, and the Tribunal did not uphold the claimant's complaint on this matter. This cannot found a submission of acting otherwise unreasonably in the conduct of the proceedings.

10.18. The Tribunal's judgment found Mr Thornton's treatment of the claimant in relation to the Fire Alarm Incident very significant, adverse and unlawful treatment of her, which remains unacknowledged by the respondent.

The respondent's response to this application sets out that it does not accept the findings of fact which underpin these conclusions but that it does not appeal. It is not for us to comment on that position other than to repeat that we have determined, of itself, that its position is not acting "otherwise unreasonably". For the same reason this basis for an application for costs must fail. The respondent engaged in negotiations of a remedy for the complaint but those negotiations failed. A preparation time order is not a means to punish a respondent for its position on remedy. It is a means for lay costs to be awarded if such costs have been unnecessarily caused by unreasonable conduct of proceedings. In short, the parties were unable to agree remedy and the Tribunal gave a Remedy Judgment.

Employment Judge JM Wade

Date 3 October 2019