EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100565/2017 Expenses Hearing at Edinburgh on 1 October 2019

Employment Judge: M A Macleod
Tribunal Member: Mr I Drysdale

Dawn Bingham	Claimant Represented by Mr D Edwards Advocate
West Lothian Council	Respondent Represented by Ms E Mannion Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the respondent's application for expenses under Rule 76 of the Employment Tribunals Rules of Procedure is refused.

REASONS

1. In this case, the Employment Tribunal issued its Judgment on the merits of the case, in which it found that the claimant's claims did not succeed, on 5 December 2018.

2. Following that Judgment, the respondent submitted an application for expenses by email dated 21 December 2018. The application was

opposed, and following consideration by the Tribunal, a hearing was listed to take place on 1 October 2019 in order to determine the application.

3. The claimant attended at the expenses hearing, accompanied by her husband Mr Bonelle, who represented her at the original Tribunal hearing, but on this occasion she was represented by Mr D Edwards, advocate, through the offices, he informed me, of the Free Representation Unit of the Faculty of Advocates. The respondent was represented by Ms E Mannion, solicitor, who also appeared before the Tribunal in the original hearing.

4. A bundle of documents was presented to the Tribunal by the respondent in respect of the expenses hearing, upon which reliance was placed.

5. Certain preliminary matters were raised at the outset of the hearing.

6. Firstly, I raised with the parties that one of the Tribunal members from the panel hearing the merits hearing was unavailable for this hearing, and rather than delay the hearing further (dates for this hearing having been somewhat difficult to identify), the parties' written consent had been sought in advance of the hearing to allow the matter to be dealt with by the Employment Judge and the remaining member, Mr Drysdale. That consent was received in advance of the hearing, and parties confirmed in person that they were content to proceed on this basis.

7. Secondly, Mr Edwards protested that it was unacceptable to provide a significant bundle of documents on the Saturday before the hearing (which took place on a Tuesday). This was, he said, outwith the normal timetable within which materials should be produced for a hearing. In addition, he was concerned that the respondent had only produced their bundle of authorities to the Tribunal on the morning of the hearing, without any clear indication by highlighting as to the relevant passages to be relied upon by them.

8. Ms Mannion replied by saying that the relevant documents were sent to the claimant by email. She said that she had no contact details for Mr Edwards, and indeed was unaware that he was acting for the claimant. She

professed that she did not know of any rule which required her to provide highlighted passages of authorities in advance of a hearing such as this, and considered in any event that the authorities were well known. She took issue with any suggestion that it was unprofessional to have acted in this manner.

9. Following discussion, Mr Edwards confirmed that he wished to continue with the hearing, on the basis that all parties were present and the claimant wished to bring this matter to a conclusion. I indicated to him that if he were to confirm to the Tribunal that he considered himself or his client to be disadvantaged in any way, having heard from the respondent's solicitor, he could raise the matter again and if necessary make additional submissions in writing following the conclusion of the oral hearing. Mr Edwards confirmed his agreement to this approach, to which Ms Mannion took no objection.

10. It is useful to set out, firstly, the terms of the application, and secondly, the submissions made by each party, before recording the Tribunal's decision and its reasons therefor.

The Application

11. The application was made on behalf of the respondent for a Costs Order that the claimant make a payment to the respondent of the whole of the costs which the respondent has incurred while legally represented on the grounds that:

    1. The claimant, and/or her representative, has acted vexatiously, disruptively or otherwise unreasonably in bringing the proceedings and/or in the way that the proceedings have been conducted in terms of Rule 76(1)(a) of the Employment Tribunals Rules of Procedure 2013, and/or

    2. The claims had no reasonable prospects of success in terms of Rule 76(1)(b).

12. The respondent sought the amount, to be determined by taxation of the whole costs incurred by them by the auditor of the court on an agent and client basis, client paying.

13. In addition, it was noted that to the extent that it was established that it was the claimant's representative who had acted vexatiously, disruptively or otherwise unreasonably in bringing or conducting the proceedings the application for a costs order should also be considered as an application for a wasted costs order in terms of Rule 80(1).

14. In the application, the respondent expanded upon the basis for the Order sought.

15. With regard to the assertion that the claimant acted vexatiously, disruptively or otherwise unreasonably in bringing or conducting the proceedings, Ms Mannion submitted that during the course of the hearing the claimant conducted herself in a manner which was described in the Judgment (paragraphs 222-230) as unacceptable and disrespectful to the Tribunal. Her evidence was given in an evasive and unhelpful manner, often not answering direct questions and instead making sweeping statements without having evidence to back them up.

16. Ms Mannion went on to say that the claimant, when not giving evidence, continued to act in a disruptive fashion, interjecting as the witnesses gave evidence and reacting to evidence in a manner designed to disrupt the flow of witness testimony. Notwithstanding the multiple warnings given to the claimant about her behaviour, the behaviour persisted.

17. On 17 August 2018, after hearing the evidence of Mr Thompson, the claimant emailed him directly, referring to his evidence and pointing out an email which was the email "you said under oath you could not remember".

18. Ms Mannion went on to say that the claimant's representative acted vexatiously, disruptively or otherwise unreasonably during the proceedings. Again, she made reference to the Judgment at paragraph 323, in which such conduct was described as unacceptable. She submitted that

Mr Bonelle's habit of reacting to the evidence by throwing down his pen or sighing loudly was most disruptive. In addition, when the claimant was subject to cross-examination, he signalled to the claimant, an action he described in his supplementary submissions as "trying to step her saying something to Ms Mannion that might not go in her favour". Ms Mannion described this as the epitome of disruptive and unreasonable behaviour, requiring intervention twice by the Tribunal. She said that it is a fundamental tenet of natural justice that where a witness is giving evidence, they must do so without being influenced. It was a serious matter to try to interfere with that evidence, in Ms Mannion's submission. The claimant's representative was her husband, but he was also an experienced CAB adviser who had appeared before the Tribunal on previous occasions.

19. Ms Mannion then raised the issue of the claimant's calling of witnesses. Prior to the hearing, it was notified to the Tribunal that the claimant intended to call two witnesses, among others, namely Claire Fleming and Graham Findlay. As it turned out, the claimant confirmed, on 8 August 2018, that although Ms Fleming was present in the Tribunal building, she did not intend to call her as a witness as Ms Sally Burton's evidence had covered the necessary facts. On 10 August 2018, the claimant's representative confirmed that he had decided not to call Mr Findlay to give evidence on 13 August as had been planned. She observed that no reason for this decision was given. The respondent prepared their case on the basis that both witnesses would be called and as a result unnecessary preparation was carried out and unnecessary points put to the claimant addressing evidence to be given by those witnesses.

20. Finally, the claimant's representative raised complaints of harassment under section 26 of the Equality Act 2010 and discrimination arising from disability under section 15 of the 2010 Act, despite these heads of claim being absent from the proceedings and no evidence having been led on those points.

21. With regard to the assertion that the claims had no reasonable prospect of success, Ms Mannion turned first to the disability discrimination claim, under sections 13 and 20/21 of the 2010 Act.

22. She argued that the claimant failed to put forward a case that she was directly discriminated against on the grounds of disability when she was asked to increase her working week from 1 to 3 days at the County Buildings Annexe. Her evidence as to the conversation with Mr Machin which was important in this context was disbelieved, but the claimant was already well aware by the time of the hearing what the respondent's reasons for asking her to do this were.

23. The claimant, she submitted, also failed to put forward any evidence or make a case that she suffered a substantial disadvantage as a result of the PCP, that all members of the team spend the majority of their working week at the County Buildings Annexe, and further failed to make a case that the OH recommendations for her absence due to work related stress were related to her disability and as such "there was a failure there".

24. Ms Mannion submitted that the Tribunal required to spend considerable time listening to evidence relating to these matters where the claimant failed to put forward her case, and in circumstances when the claimant had substantial information from the respondent in advance of the hearing which would have informed her view as to whether there was a case to answer there.

25. She said, finally, in her application that the claimant's case was that she suffered detriment as a result of making a protected disclosure on 16 March 2016, but failed to put forward any evidence making her case for detriment. The claimant failed to prove that others were aware that she had made the protected disclosure, which had been submitted anonymously, and substantial Tribunal time was taken up in discussing this matter without the claimant making her case that she suffered detriment as a result of having made a protected disclosure.

Submission – Respondent

26. In her oral submission before this Tribunal, in support of her application, Ms Mannion reiterated much of what was contained in the application, and made reference to a number of cases, which are summarised below by the Tribunal.

27. She pointed out that although neither the claimant nor her representative are legally qualified, that does not mean that they can act in a manner which is disrespectful to the Tribunal or the witnesses. Both were warned about their conduct but it continued.

28. When considering a costs order, the Tribunal must consider whether there was unreasonable conduct, what was unreasonable about it and what effect it had. It is not necessary to find a precise causal link between the unreasonable conduct and the costs claimed.

29. Although the Tribunal may take the means of the claimant into account in determining the level of any award, it is not necessary to do so. The ability of the claimant to pay any award is not determinative. She asked the Tribunal to consider that the respondent is a public sector body required to seek external legal assistance and pay for that in order to pay the claim. The hourly rate which is set out in the respondent's schedule is far less than the normal commercial rate, and is set at £115 plus VAT per hour.

Submissions - Claimant

30. For the claimant (and her representative), Mr Edwards commenced his submission by observing that under the Rules of Procedure there are two possible orders, one against the claimant and the other against her representative.

31. He submitted that the Tribunal has no jurisdiction to make an award against the claimant's representative because he was not acting in a business capacity whereby he could make a profit. He was not paid for his representation.

32. With regard to the application to make an award against the claimant, it is necessary to decide whether a party has acted unreasonably. It is, he said,

well-established what unreasonable means: that with the benefit of hindsight, proceedings which have been brought and failed must have been hopeless. Just because proceedings have been conducted with a misconceived over-optimism, that does not meet the test of unreasonableness. This is not a case in which the jurisdiction is met.

33. However, if the Tribunal were against him, Mr Edwards moved on to submit that the Tribunal must then decide whether or not to exercise the discretion to make the award. It is clear, he submitted, that the purpose of the award is to compensate, not penalise. The thrust of the respondent's submissions was to seek a punitive basis for the award.

34. The fact that a party is unrepresented may be a factor, but in this case both the claimant and her representative were lay people. Her means to pay should be considered in deciding whether to make an award against the claimant.

35. The costs incurred do not have to be directly caused by the conduct, but there is still relevance in the conduct. Each case is fact-specific, and therefore there may be little wisdom in relying too heavily on previous decisions.

36. Mr Edwards acknowledged that the Tribunal made some complaints about the conduct of the claimant and her representative during the course of the hearing on the merits. It would not be the first time that a Tribunal has come across awkward witnesses, and it is not unusual to encounter evasive witnesses. He observed that delays may be caused by the witness, or also by the questioner. It is not unusual for a witness to find it awkward to answer questions under cross-examination. In this case, the claimant had no legal advice in advance of the hearing, and so the first time she came up against difficult questions appears to have been in the Tribunal hearing itself.

37. He noted that the Tribunal had complained that on several occasions the claimant was expressing opinions on the witnesses and on the evidence they were giving. There was also reference to the email sent by the

claimant to Fraser Thomson during the course of the hearing. That was, he said, certainly unwise. Had he been acting for the claimant, he would have advised her not to have done that.

38. The claimant had worked for more than 20 years for the respondent, and had a number of long-standing colleagues and friends. A lot of emotion was brought into this case. Contacting Mr Thomson in this case is quite different from any witness intimidation, and must be seen in the context. He was not called as a witness after this, and therefore it was not part of the proceedings.

39. It was not unreasonable to have continued this conversation by email, nor was it disruptive as it did not take place in the Tribunal. That email, he submitted, should therefore be disregarded.

40. Mr Edwards said that much was made of the decision not to call either Ms Fleming or Mr Findlay. Mr Bonelle said that he made the decision not to call them after hearing the evidence of Ms Burton, and acknowledging that neither witness would make a difference in the case. As a practical matter, he submitted, it is for the claimant to decide how to present her case. It is not unusual for decisions in a long case to be made not to call witnesses, and it is not to be faulted. If there were to be sanctions to parties for not calling witnesses, that would represent an interference by the Tribunal with the decisions of parties to present their case the way they choose. The only way in which it would fall within the Tribunal's jurisdiction would be if the decision were malicious, and there is no suggestion of that.

41. As it turned out, Mr Edwards observed, the decision meant that time was saved.

42. He went on to say that Ms Mannion had said that it was unclear what effect the conduct of the claimant and her representative had upon the respondent. The Tribunal's Judgment records that it did not have any effect on the Tribunal's own assessment of the matter (paragraph 231 of the Judgment). The Tribunal managed the matter. No adjournments appear to

have been necessary. He said that the Tribunal seemed to be perfectly able to manage the claimant and her representative.

43. It may be, he suggested, that it was unwise for the claimant to have been represented by such a close relative. It is likely that a representative who is closely related to a claimant whose case is not going well will show that in his demeanour and actions. It had no impact. The Tribunal was not impressed by the claimant or her evidence, but does not say that she lied or that the whole claim was confected.

44. Reviewing the authorities, Mr Edwards submitted that the conduct of the claimant and her representative fall far short of unreasonable conduct. Although there was some disrespect, there was no waste of time, and the Tribunal managed the situation. The claimant and her representative's conduct must be viewed in light of the long history of the case and the relationship with the respondent.

45. Just being "a bit of a nuisance" is not enough to attract an award of costs against the claimant. It is "all part of the fun of the fair" in litigation. The claimant and her representative were properly reprimanded and told to mend their ways.

46. So far as the proceedings being hopeless is concerned, Mr Edwards submitted that it is clear that the respondent did not think so, as they instructed external legal advisers. That does not sit easily with the idea that the case was hopeless. It is a very long Judgment, of which only a small part is related to the conduct of the claimant and her representative. The rest of it is a careful examination of the facts and of the complexities of one of the most difficult areas of the law.

47. Ms Mannion, he said, focused on the absence of a comparator, but this is one of the notoriously difficult areas of the law. For lay people, even CAB advisors, discrimination law is notoriously difficult. A lot of people bring claims which are not fully thought through, and these are tested at the hearing. In this case, having been over-optimistic at the start, it became

clear to the claimant and her representative during the hearing that things were not as good as they had thought.

48. There was, he submitted, a clear case on reasonable adjustments set out, and that was pursued. The Tribunal had to hear and assess the evidence on this point, and did so. The Tribunal had to make a finding. That is what courts and Tribunals do. It is very difficult to say that the claimant had no reasonable prospect of success. There was no prior attempt to strike out any of the claims in advance of the hearing on the merits.

49. With regard to the protected disclosures case, this had a long and messy history, in the context of a very difficult area of the law.

50. Mr Edwards submitted that this is not a case in which the claimant or her representative were guilty of unreasonable conduct, nor could it be said that there were no reasonable prospects of success at the outset of the case. Costs should not be awarded. If the Tribunal does not accept this, Mr Edwards made submissions as to the exercise of discretion by the Tribunal in terms of an award. The application is punitive rather than compensatory in nature. It is not possible for the respondent to show that large sums of money were wasted as a result of the conduct of the claimant and her representative in pursuing this claim.

51. He referred to the short financial statement tendered by the claimant, which had been accepted by the respondent. He submitted that any award should be low owing to the low level of income available to the claimant. He accepted that she owns her own house with her husband, and noted that the claimant has two disabled sons who live with her.

52. Ms Mannion briefly responded to this submission. She denied that her purpose was punitive rather than compensatory. She reiterated that her submission is that the claimant and her representative behaved in an unreasonable manner in their conduct of the claim, and that an award should be made by the Tribunal.

The Relevant Law

53. Rule 76 of the Employment Tribunals Rules of Procedure 2013 provides:

"(1) 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."

54. Rule 80(1) provides:

"A Tribunal may make a wasted costs order against a representative in favour of any party ('the receiving party'), where that party has incurred costs –

(a) As a result of any improper, unreasonable or negligent act or omission on the part of the representative; or

(b) Which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.

Costs so incurred as described as 'wasted costs'."

55. Rule 80(2) goes on:

"'Representative' means a party's legal or other representative or any employee or such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit."

56. In the case of **Beat v Devon County Council & Another UKEAT/0534/05/LA**, (to which I was not referred by the parties in this case) the EAT provided guidance as to the making of expenses awards. At

paragraph 25, the EAT (His Honour Judge Altman) said: *"Having found the areas of unreasonableness and misconception, a Tribunal, it seems to us, is bound to pause; to stand back and to look at all the factors that are to be taken into account when assessing the appropriate level of compensation. This involves balancing the amount of costs incurred by the unreasonableness, or the misconceived part of the claim against other parts of the claim and by taking account of the need, if the Tribunal considers there is a need for some compensation and costs."*

57. In **Power v Panasonic (UK) Ltd UKEAT/0439/04**, the claimant, who had succeeded in her complaints of discrimination, unfair dismissal and breach of contract, appealed against an award of costs against her in the sum of £10,000. The award was made on the application of the respondent, in light of the fact that an offer of settlement had been made in advance of the hearing, but rejected by the claimant, unreasonably in the mind of the Tribunal. In rejecting the appeal, the EAT set out, at paragraph 12, some guiding principles by which Tribunals should abide when determining whether or not to make a costs order on the grounds of unreasonable conduct, summarised briefly as follows:

    1. Costs orders in the Employment Tribunal remain the exception not the rule, though the question is not whether the case is exceptional but whether the party has brought themselves within the meaning of the relevant Rule of Procedure;

    2. A two stage exercise is envisaged, namely to determine firstly whether the paying party has acted unreasonably, and secondly, if so, whether the Tribunal should exercise its discretion in favour of awarding costs against that party;

    3. Costs are compensatory, not punitive;

    4. The rule in relation to Calderbank offers is not applicable in the Employment Tribunal;

5. The discretion of the Tribunal is not limited to those costs which are caused by or are attributable to the unreasonable conduct found;

6. Where a party has obstinately pressed for some unreasonably high award despite its excess being pointed out and despite a warning hat costs might be asked for against that party if it persisted, the Tribunal could in appropriate circumstances take the view that that party had conducted the proceedings unreasonably;

7. Any appeal against the exercise of the Tribunal's discretion will not succeed unless it can be shown that the Tribunal disregarded relevant factors or was just plain wrong; and

8. An appeal court should read the reasoning of the Tribunal as a whole, and not scrutinise it for error line by line.

58. Some of these principles were derived from the Court of Appeal decision in **McPherson v BNP Paribas [2004] EWCA Civ 569**.

59. **Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255** is a decision in which it was found, at paragraph 41:

*"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 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. The main thrust of the passages cited above from my judgment in **McPherson** was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In*

rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances."

Discussion and Decision

60. The respondent has made an application for expenses under Rule 76 of the Employment Tribunals Rules of Procedure, on two grounds: firstly, that the conduct of the claimant and her representative during the course of the hearing on the merits was unreasonable and disruptive; and secondly, that several of the claims had no reasonable prospect of success.

61. Dealing first with the allegation that the claimant and her representative conducted themselves in a manner which was unreasonable and disruptive during the course of the hearing, we note that the respondent has founded upon particular instances of that conduct and accordingly address these in turn.

62. The respondent referred to sections of the Judgment issued by this Tribunal, namely paragraphs 222-230) in which the claimant's conduct was described as unacceptable and disrespectful before us, and her evidence evasive and unhelpful.

63. In our judgment, the context in which these findings were made is important. The section of the Judgment from which the respondent derived these comments is headed "Observations on the Evidence". The purpose of such a section and the findings made therein is to set out the Tribunal's views of the credibility and reliability of witnesses called by both sides, in order to explain why certain factual conclusions have been reached. It amounts, as a section, to an explanation of the Tribunal's reasons for rejecting certain evidence and accepting other evidence.

64. The Tribunal was quite clear that the claimant's behaviour during the hearing was, in a number of ways, unacceptable, and made strong criticism of her in its decision, in order to allow her to understand the reasoning

behind the findings in fact made in circumstances where there was a direct factual conflict.

65. Mr Edwards submitted that nowhere in the findings by the Tribunal was it found that the claimant had lied in the course of her evidence. It is quite true to say that no specific statement is explicitly made to this effect by the Tribunal in the Judgment, but paragraph 227 cites the stark example of an allegation of fact made by the claimant which the Tribunal not only rejected but also said "There was no basis, in our judgment, for this accusation, which was made in order to undermine Mr Machin's credibility and to damage his standing in the Tribunal's eyes." The meaning of that statement is entirely clear: the Tribunal considered that the direct factual conflict between the claimant and Mr Machin could only be resolved by finding that the claimant only made the allegation in order to damage the interests of Mr Machin. In our view, this was a very strong criticism of the claimant's credibility, and was entirely justified by our findings.

66. Mr Edwards also pointed out that a claimant who embarks upon litigation without the benefit of legal advice may find that the first time they are challenged by difficult questions is when they enter into the witness box. The Tribunal considered this a much more helpful submission. The claimant's behaviour arose, in our judgment, from her very strong sense of injustice at the hands of the respondent, and, as Mr Edwards observed, from the long history of her employment with the respondent. The Tribunal accounted for the fact (in paragraph 223) that the claimant was represented by an experienced CAB representative who was also her husband, and that she herself had little or no direct experience of being in an Employment Tribunal hearing room.

67. While her behaviour was unacceptable, and warranted the very strong criticism which was directed at her both during the hearing and in the course of the Judgment, the Tribunal has concluded that it did not reach the stage where we can find that it amounted to unreasonable or disruptive conduct in the proceedings. We were satisfied (paragraph 231) that the claimant's conduct actually had "little impact upon the evidence itself". In other words,

the respondent's witnesses were not put out of stride by her behaviour, and the Tribunal itself managed the process to the point where it was not necessary to adjourn the hearing or issue any final warnings to the claimant about her conduct. It was necessary to issue warnings, and to seek to calm the claimant down, by directing that she conduct herself differently, but ultimately the Tribunal was not in any way prevented from either hearing the evidence or assessing its value.

68. Put shortly, the claimant's conduct harmed only her own interests, by damaging her credibility, but did not prejudice the respondent's position nor interfere with the administration of justice.

69. The claimant's conduct, therefore, was unacceptable, which we made clear in our assessment of the credibility and reliability of her evidence, but in the context of the application made by the respondent for expenses, we do not consider that the claimant's conduct was unreasonable or disruptive to the extent that we should make any award of expenses against her.

70. The fact that we were unable to find the claimant's evidence to be wholly credible or reliable, and preferred the evidence of the respondent's witnesses, does not, in our judgment, mean that the high threshold of unreasonable conduct has been reached in this case. In many cases Tribunals require to make a choice between conflicting evidence, and do so by rejecting the evidence of particular witnesses and accepting that of others; that may be a matter of regret but it does not mean that the exceptional circumstances envisaged by Rule 76 have taken place. It is a regular feature of cases before this Tribunal that witnesses may not be found to have told the whole truth, nor been entirely candid, but in this case, it is our judgment that the consequences for the respondent and for the Tribunal were limited.

71. The claimant's behaviour was, on occasions during the hearing, unacceptable, but on each of those occasions, was managed by the Tribunal.

72. We do, not, therefore, find that the claimant's conduct was such as to warrant a finding that she conducted the proceedings in a manner which was disruptive and unreasonable.

73. The respondent also referred to the claimant's email of 17 August 2018 to Mr Thompson following his evidence before us. The email simply attached an earlier message and pointed out that this was the email which he said under oath he could not remember.

74. We agree with Mr Edwards that the character of this conduct was, while unwise, not part of her conduct of the proceedings. The witness had finished his evidence and was not recalled further, and therefore this email had no impact upon him in the course of the proceedings. While it may have been disturbing to receive such an email (though we have no evidence as to Mr Thompson's reaction to it), it has had no impact on the proceedings. It caused no disruption to the proceedings. There was no threat to the witness in the email. It did not amount to interference with the witness, as he no longer had a part to play in the proceedings.

75. Again, it is our judgment that this conduct does not fall into the category of unreasonable or disruptive conduct in the proceedings.

76. We should make clear that while the respondent relied upon the whole terms of the Rule, little reference was made to the conduct as having been "vexatious", and we do not find that the claimant acted vexatiously either, for the avoidance of doubt.

77. Accordingly, it is our conclusion that the claimant did not conduct the proceedings in a manner which could be described as vexatious, disruptive or otherwise unreasonable, and therefore the respondent's application for expenses on this basis is refused.

78. The application for expenses against the claimant also seeks, however, to take into account the conduct of her representative during the hearing.

79. This arises from criticisms made by the Tribunal against Mr Bonelle, particularly in paragraph 232. Again, it was made clear in the Judgment

that Mr Bonelle's behaviour was unacceptable, on occasions. We consider, however, that his conduct, which required to be managed by the Tribunal on more than one occasion, falls short of being unreasonable or disruptive in the context of an application for expenses. Mr Bonelle is the husband of the claimant, and it was clear to us that he was taking his role as her representative very seriously indeed, to the point that he became so lacking in objectivity as to fail to observe properly the conventions of the Tribunal.

80. The particular conduct which the respondent has picked out related to his mannerisms during the evidence of different witnesses, but particularly his attempts to assist the claimant while he could see that she was becoming overwrought, and, as he put it, in danger of saying something which could damage her case.

81. While the Tribunal firmly criticised such conduct on his part, its effect was minimal. The claimant was not prevented from acting in such a way as to damage her own interests during her evidence. Mr Bonelle's apparent attempts to assist her, or restrain her, were fruitless. He should not have tried to do so, of course, but it made no difference to the proceedings that he did. While disapproving of his conduct, the Tribunal considers that his close relationship with his wife must have added an emotional burden to the responsibility he was already carrying as her representative. The Tribunal has to have some appreciation of the human aspects of cases such as this, and it is our view that Mr Bonelle's conduct fell short of vexatious, disruptive or otherwise unreasonable conduct in the proceedings before us.

82. The respondent also criticised Mr Bonelle for taking the decision not to call two witnesses in particular, during the course of the hearing, in reaction to have having heard from a third witness whose evidence did not prove to be as helpful as had been hoped. It is true that the respondent had to prepare for those witnesses giving evidence, and as a result, were doubtless put to further expense which turned out to be unnecessary.

83. Mr Edwards described this as an ordinary litigation decision made in light of the developing circumstances of a hearing. We agree with that proposition,

though would not go so far as to accept his submission that this is "all part of the fun of the fair" of litigation. Mr Bonelle hoped that his case would be assisted by witnesses whom he wanted to call. It dawned on him that this was not going to be the case, and as a result, negotiated a retreat. We consider that Mr Bonelle was not acting vexatiously, disruptively or otherwise unreasonably in doing so. Had there been any suggestion that he only sought to call the witnesses in order to cause them stress or inconvenience, or to cause the respondent's legal representatives additional work, that might be a different matter, but there is no evidence that that was the case, and certainly that was not how the Tribunal interpreted what he did.

84. The fact that he chose not to call those additional witnesses shortened the hearing, and therefore although additional preparation was needed in advance, his decision meant that no further expense was incurred in the course of the hearing itself.

85. Finally, the respondent criticised Mr Bonelle for having raised in submission matters for which he had no pleadings. In our judgment, this was a minor matter, easily dealt with by both the respondent and by the Tribunal, and of itself does not amount to vexatious, disruptive or otherwise unreasonable conduct by the claimant's representative. He did not handle that aspect of a complex legal case well, but that does not justify the making of an award of expenses against the claimant on this basis.

86. Accordingly, we find that the respondent's application for an award of expenses on the grounds that the conduct of the claimant and her representative in these proceedings was vexatious, disruptive or otherwise unreasonable is refused.

87. The second aspect of the respondent's application is that the claim, or certain aspects of the claim, had no reasonable prospect of success. In fact, on closer examination, the respondent's argument in relation to some aspects of the case is that the claimant, having made certain claims before

the Tribunal, did not present evidence in support of those claims, or that she sought to advance claims which were not pled, in submission.

88. The question for this Tribunal is whether it can be said that any of the claimant's claims had no reasonable prospect of success. The context of the application is, of course, that the Tribunal has heard all of the evidence, reviewed it against the claims pled, and has rejected the claimant's claims on that basis.

89. Ms Mannion attacked the direct discrimination claim first, by arguing that the claimant failed to put forward a case that she had been directly discriminated against on the grounds of disability when asked to change her working days at the County Buildings Annexe. In our judgment, this was a claim which was clearly set forth, and could not be said to have been hopeless in advance. That it was based on evidence which the Tribunal did not accept does not mean that it was unquestionably hopeless. A great deal of evidence was heard about this matter by the Tribunal. This is not an uncommon experience for Tribunals.

90. We concluded that the claim for direct discrimination did not have no reasonable prospect of success, as it required the full and lengthy evidence to be led in order to allow us to reach our conclusion.

91. Again, Ms Mannion argued that the claimant failed to put forward evidence that she suffered a substantial disadvantage as a result of the application of the PCP to her. This therefore amounted, in her submission, to a case which had no reasonable prospect of success.

92. The difficulty for the Tribunal in this matter is that the claimant was being represented by an unqualified, retired CAB representative, who was also her husband; and that while he may have had some experience of the Employment Tribunal, it would be an exaggeration to describe Mr Bonelle as having expertise in the very complex field of discrimination law. That he failed in a difficult case does not, in our judgment, mean that the case had no reasonable prospect of success. The respondent, quite fairly, accepted in the case management discussions before the full hearing that they had

notice of the claims being made, and did not make any applications for strike out of those claims on the basis that they had no reasonable prospect of success. While that does not mean that they cannot make such an application at this stage, it may be more accurate to characterise the situation in the way that Mr Edwards did, namely to say that the claimant and her representative took a rather over-optimistic view of the prospects of success in this claim, only to find out in the course of the hearing and thereafter that their optimism was not justified.

93. To find that an award of expenses should be made in such circumstances would not, in our judgment, be in the interests of justice. The claimant was entitled to have access to the Tribunal in order to advance her claims. That she failed in those claims does not mean that expenses should therefore be awarded against her.

94. We reached the same conclusion in relation to the criticisms made of the claim that she suffered detriment as a result of having made protected disclosures. That the claimant failed to present evidence in support of her claim in this regard does not suggest to the Tribunal that the claim clearly had no reasonable prospect of success. The claim went ahead, but failed. Such claims are notoriously difficult and complex for legally qualified representatives, and for unqualified representatives and parties they present even greater challenges.

95. Accordingly, the Tribunal is not prepared to grant the respondent's application for expenses on the basis that the claims lacked any reasonable prospect of success. The claimant attempted to advance her claims before this Tribunal. She was allowed a substantial hearing of the issues which she wished to raise. She did not succeed in her claims, and was the subject of strong criticism by the Tribunal for the manner in which she behaved during the proceedings. The Tribunal considers that the matter should rest there.

96. The respondent's applications for expenses are therefore refused.

Date of Judgment: 4th November 2019

Employment Judge: M MacLeod

Date Entered In Register:5th November 2019

And Copied to Parties