EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs A Vatish	**v**	**The Crown Prosecution Service**

Heard at: London Central
On: 23 and 24 January 2020

Before: Employment Judge Hodgson

Representation

For the Claimant: in person
For the Respondent: Ms G Leadbetter, counsel

DECISION

1. **The claimant's application to strike out the respondent's claim for costs is refused.**

2. **The respondent application to extend time for exchange of skeleton arguments and service of the bundle is granted.**

3. **The respondent's application to convert the preliminary hearing to a detailed assessment is refused.**

4. **The claimant's contention that the costs assessed at a detailed assessment will be less that £60,000 has no reasonable prospect of success.**

5. **The claimant shall pay to the respondent costs of £60,000 within 14 days.**

REASONS

Introduction

1. The liability hearing in these claims was dealt with by a tribunal chaired by Employment Judge Pearl (the Pearl tribunal). I understand that there are a number of outstanding claims, but they do not concern me. The matter has been referred to me following an order for a detailed assessment of costs made by the Pearl tribunal. I need to set out the background.

Background

2. In November 2017, the Pearl tribunal considered an application for costs. In so far as it is material to my decision, it gave the following judgment:

> **The claimant shall pay costs to the respondent, such costs to be assessed by the tribunal, but not to exceed £60,000.**

3. Other than by reference to a cap of £60,000, no limitation was placed on the costs. It follows that the costs that fall to be considered are 100% of the entire costs from the commencement of the proceedings to the date of the order. Costs were not limited by time, issue, or percentage.

4. The order does not provide for indemnity costs. The default position is assessment on the standard basis.[1] The reason for ordering costs does not directly concern me at present. It is apparent that this has been a difficult piece of litigation. Paragraph 10 of the Pearl tribunal judgment dated 4 December 2017says the following:

> **…At this point we summarise some of the more salient points. We described this as a "protracted and bitter piece of litigation." We were alive as to the numerous allegations at each of each representative made against the other and we determined those disputes in a limited way, and only for the purpose of adjudicated undisputed issues of primary fact. We noted that there were 46 claims of discrimination/harassment and that the claim had massively expanded from the original 5 pages of narrative in an ET 1…**

5. In reaching its conclusion that the claimant's conduct of the claim was unreasonable, it did state that the case "lacked veracity or truth," but was wary about employing what it described as the "blunt formula" that the claimant "lied."

6. We should note that the respondent's application for costs against the claimant was initially limited to £88,852.98 which is described as "one third of the total costs it says were incurred up to the judgment." As to the resolution of this, the Pearl tribunal says this at paragraph 31:

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> **Next, there is some imprecision in the sums claimed. The application is for a third of the overall legal costs to the end of the hearing to be met by the claimant. A further third of the overall bill is sought against Mr Sykes (see below). One third figure is £88,852.98. This approach to the two orders that are sought is said by Mr Bryan to be "pragmatic." Beyond this, no rationale is given for the one third apportionment. It is not justified by reference to a chronological split, or any other reason. We also note Mr Sykes's observation that the figure sought against him is more than a third of the costs incurred from the outset the hearing. (About £150,000 in total.)**[2]

7. As to the order made at paragraph 32 the Pearl tribunal said the following:

> **The assessment of the amount of the costs order is not a simple one. The claimant would, in all probability, struggle to meet a large order out of income or savings. Whether she has an ability to borrow is unknown. Whether she has an equitable interest in the home is unknown, as is its valuation if (as we might presume) she has an interest. In the outcome, we are prepared to recognise a financial situation by reducing the £88,852 figure to £60,000, a reduction of a little under one third. This is a cap we impose on the assessed costs. We do not adopt a proportionate approach.**

8. I have noted that the judgment imposes no limit on the cost to be assessed. It simply records that the costs are to be assessed. The total award that may be made against the assessed cost is capped at £60,000. I conclude that it is envisaged the entirety of the costs incurred by the respondent may be included in any detailed assessment.

Further developments

9. On 26 February 2019, I considered the claim for costs. At that stage, the claimant's appeal against the costs order had been rejected by His Honour Judge David Richardson, on 10 October 2018. In giving his judgment, the judge stated, "the practical effect of the judgment was to make an order for costs against the claimant capped at £60,000, there can be no real doubt that the respondent costs far exceed the sum." Having regard to that judgment, I was concerned that it may not be necessary or proportionate to list the matter immediately for a full detailed assessment. I therefore made an appropriate case management order is as follows:

> **It is ordered**
>
> **1. On or before 16:00, 22 March 2018, the respondent shall complete County Court form N260 sufficiently to identify:**
> **a. the number of fee earners used, the relevant grades of those fee earners, and the hourly rate applied to each fee earner;**
> **b. the time engaged on all relevant attendances with the respondent, the claimant and any advisers, and all others**
> **c. the time engaged on all hearings; and**
> **d. all disbursements, including counsel's fees.**

[2] The claim for wasted costs was refused and we need consider it no further.

> **2. The N260 must be signed by a partner in the firm instructed by the respondent who must confirm that the indemnity principle is not breached and that the costs stated do not exceed the costs which the respondent is liable to pay in respect of the work undertaken.**
>
> **3. On or before 16:00, 29 March 2018, the claimant shall write to the tribunal and confirm the following:**
>
> **a. Whether she accepts that the respondent has incurred costs with solicitors and counsel which it is liable to make payment for as set out in the form N260;**
>
> **b. whether the claimant accepts that the total costs incurred by the respondent exceed £60,000;**
>
> **c. whether the claimant alleges that there is any reasonable prospect, upon a detailed assessment, of the respondent's costs being reduced below £60,000, and only if so, the claimant should clarify the areas of dispute by stating the following:**
>
> **i. is it accepted that solicitors and/or counsel where instructed;**
>
> **ii. is it accepted the fee earners identified were used;**
>
> **iii. if there is dispute as to the hourly rate of any fee earner, what is the rate which the claimant says should be allowed for each fee earner;**
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> **iv. what is the claimant's offer for counsel's fees, and how has she arrived at this figure; and**
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> **v. in relation to each of the attendances identified in form N260, the claimant should state whether she disputes the hours claimed, and if she does dispute the hours, whether she accepts that it is reasonable to make a charge, and if so, whether she proposes a sum that would be reasonable?**

10. It follows that the orders were designed to address two key matters: first, to establish, in broad terms, the level of costs incurred, and the respondent's obligation to meet those costs; and second, to identify if the claimant alleged there was any prospect of a detailed assessment leading to an order for less than £60,000, and if so why.

11. On 22 March 2019, the solicitors for the respondent confirmed the practical difficulties they had in accessing data to complete a formal bill for assessment. Whilst the information is still available, it involves accessing archived electronic data, which is likely to take several days before any work can be started on completing any draft bill.

12. On 28 June 2019, by letter, I noted that the claimant appeared to be in breach of the orders of 26 February 2019. I noted the following:

> **…If the claimant choses to not comply with those orders without good reason then it is likely the tribunal will form the view that it is appropriate to strike out the defence to the costs application for the following reasons: the claimants conduct is unreasonable; there is no reasonable prospect of resisting the claim for costs capped at £60,000; and the claimant's breach of order is preventing a fair hearing…**

13. The claimant was required to give her response by 11 July 2019.

14. On 30 August 2019, I gave further orders and directions with reasons. I declined to revoke the orders made on 26 February 2019 and confirmed that both parties must fully comply. I refused to transfer the matter to the County Court. I do not propose to repeat those reasons; they set out the continuing dispute, as illustrated by the correspondence, and should be read in conjunction with these reasons.

15. I indicated I was considering listing the matter for hearing to consider whether the defence to the costs order should be struck out, either for non-compliance with an order, or because there was no reasonable prospect of defending the order for costs of £60,000.

16. By an order dated 13 September 2019, I considered the claim for costs and gave directions. The relevant directions were as follows:

> **It is ordered**
>
> **1. There shall be a preliminary hearing (public). The purpose of the preliminary hearing will be to consider the following:**
> **a. if the defence to the claim for costs of £60,000 should be struck out pursuant to rule 37 Employment Tribunal Rules of Procedure 2013 on the ground that the defence has no reasonable prospect of success;**
> **b. if the defence to the claim for costs of £60,000 should be struck out pursuant to rule 37 Employment Tribunal Rules of Procedure 2013 on the ground that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious; or**
> **c. if the defence to the claim for costs of £60,000 should be struck out pursuant to rule 37 Employment Tribunal Rules of Procedure 2013 for non-compliance with any Rules or with an order of the Tribunal;**

Subsequent applications and correspondence

17. On 9 September 2019, the claimant's solicitor confirmed receipt of the N260 on 9 July 2019. It denied receiving a copy of the respondent's solicitors' letter of 22 March 2018. It alleged the respondent was in breach of the order of 26 February 2019. It stated that the claimant had answered paragraph 3 of the order of 26 February 2019 in the claimant's letter of 11 July 2019. A copy of the letter 11 July 2019 was attached. The letter of 9 September modified her response to paragraph 3 of the order as follows:

> **Notwithstanding that the Claimant's position was set out in our letter dated 11 July 2019, in respect of paragraph 3 of the order of 26 February 2019, the Claimant confirms:**
>
> **a) that she does not accept that the Respondent has incurred costs with solicitors and counsel which it is liable to make payment for as set out in the form N260.**
>
> **b) that she does not accept that the total costs incurred by the Respondent exceed £60,000**

c) that the Claimant alleges that there is a reasonable prospect, upon detailed assessment, of the Respondent's costs being reduced below £60,000 and by way of clarification:

i. it is accepted that solicitors and/or Counsel represented the Respondent;
ii. the Claimant cannot accept that the fee-earners identified were used;
iii. in respect of there being a dispute as to the hourly rate of any fee earner, the Claimant submits that the hourly rate claimed by the lead fee earner is hugely excessive given the extensive and wideranging
involvement of Counsel and the lack of complexity in the matter. There was nothing particularly complex or novel in this matter which warranted the involvement of West End solicitors. It is submitted that the work could have been done in a firm in Outer London or the Home Counties and the SCCO rates for Band 1 would have been more appropriate. In respect of the fees charged for the work undertaken by the lead fee earner, the Claimant offers a rate of £192 on the basis that the work could have been undertaken by a far more junior fee earner, especially given thigh level of counsel involvement. The rate for the Grade B fee earner of £160 is agreed.
iv. the Claimant does not agree that all Counsel listed were used in respect of this case and submits that the costs which relate to other cases should be excluded from the N260. Furthermore, Employment Judge Pearl stated in 'open court' that he discussed the trial listing with the then President of Employment Tribunals, Mr David Latham, and was advised that the case should have been listed for more than a week. The Claimant submits that the case should have been listed for at least three to four weeks (15 – 20 days). If at all the Claimant is liable for any Counsel's fees it should be for Counsel's attendance at the Employment Tribunal for 9 days. In this premise, the Claimant offers £5,500 in relation to Counsel's fees for this case of £1,500 brief fee and refresher fees of £500 per day. There being no offer for VAT charged by Counsel on the basis that clarification has not been provided as to the Respondent's VAT status.
v. The Respondent's N260 does not comply with the Order of Employment Judge Hodgson of 26 February 2019, when the N260 does not sufficiently identify the time engaged on all relevant attendances with the Respondent, the Claimant and any advisers, and all others, nor the time engaged on all hearings. The Claimant has significant concerns regarding the correspondence and attendances claimed. The N260 should be an accurate representation of the costs claimed, however it appears that the Respondent has not made any attempt to provide a detailed breakdown of the fees and has simply divided the hours spen 'off the cuff' throughout the document. The Respondent claims £29,120.00 for attending hearings with Counsel. This was unnecessary and led to costs increasing dramatically. The fee-earner attendance at trail should be disallowed.

18. It is clear that the claimant disputes both the value of costs and the respondent's liability to pay them, as she does not accept the indemnity principle has not been breached.

19. The letter also requested a transfer out of the London region.

20. The respondent made representations by letter of 10 September 2019. It stated the N260 was sent on 22 March 2019 and was acknowledged by the tribunal. The respondent stated it remedied any failure to send the N260 to the claimant followed the claimant's letter of 9 July 2019. It opposed the change of venue.

21. I made further orders on 13 September 2019 as follows:

> **3. The parties should each prepare a skeleton argument on the issue of strikeout. The skeleton arguments together with supporting case law, should be exchanged by on or before 25 October 2019. Skeleton arguments, but not the case law, should be served on the tribunal at the same time.**
>
> **4. If either party considers it necessary to rely on new documents or witness evidence, that party must apply to the tribunal for further directions.**
>
> **5. The respondent should prepare a core bundle which includes the orders of the tribunal, the N260, and the relevant correspondence. This should be served on the claimant on or before 1 November 2019. Three copies should be brought to the hearing.**

22. On 24 September 2019, Acting Regional Employment Judge Wade declined the application to transfer.

23. On 30 September 2019, the claimant's solicitor requested two issues be added to the preliminary hearing being first to strike out the respondent's claim for costs on the basis that it was scandalous, unreasonable, or vexatious, and second to strike out the respondent's claim for costs for non-compliance with a rule or order.

24. It appears there may have been a second letter of 30 September 2019 from the claimant. Unfortunately, that was not placed on file and was not dealt with until a further copy was forwarded on 17 January 2020. Neither letter dated 30 September 2019 from the claimant indicates the existence of another letter of the same date. The additional letter of 30 September 2019 requested Acting Regional Employment Judge Wade to reconsider her decision not to transfer. She dealt with that on 22 January 2020 and refused the application.

25. By letter of 16 October 2019, I confirmed that the hearing would proceed and that both parties should prepare in accordance with the directions given on 13 September 2019. I refused any request for variation of directions and noted that the merits of the potential strike out should be considered in the skeleton arguments.

26. There has been correspondence concerning the outstanding claims, which I do not need to record.

27. On 25 October 2019, the respondent applied to extend time to exchange the skeleton arguments and to serve the bundle.

28. On 28 October 2019, the claimant's solicitor objected to the respondent's application to vary the date for exchange of skeleton arguments from 25 October 2019. It was submitted that the respondent's claim for costs should be struck out on the basis the respondent's conduct was scandalous, unreasonable, or vexatious.

29. On 20 November 2019, the respondent sought further directions in relation to the costs hearing.

30. On 10 December 2019, the respondent solicitor made further applications which included a request that skeleton arguments be exchange by 16 January 2020. This was objected to by the claimant.

The outstanding applications

31. The correspondence generated in this matter has been considerable. Some of the points raised overlap or are unclear. I considered with the parties what applications remain outstanding. The following applications remain live and must be considered.

32. The respondent's applications:
    a. To vary the timetable and in particular to allow for exchange of skeleton arguments on 16 January 2020 and for late service of the bundle.
    b. To convert the preliminary hearing to a hearing for detailed assessment of costs and give consequential directions pursuant to CPR rule 47.

33. The claimant's applications:
    a. To strike out the claim for costs on the grounds that the conduct of the claim for costs has been scandalous, unreasonable, or vexatious.
    b. To strike out the claim for costs for non-compliance with orders.

The claimant's applications

34. I first consider the claimant's application to strike out the claim for costs. The claimant relied on four alleged breaches:
    a. Breach one is the failure to serve the N260 until 9 July 2019 in breach of the order of 26 February 2019 requiring its service by 22 March 2018.
    b. Breach two is the failure to exchange skeleton arguments by 25 October 2019 in breach of the order of 13 September 2019.
    c. Breach three is by failing to prepare the bundle by 1 November 2019, contrary to the order of 13 September 2019.

d. Breach four is by failing to apply within 7 days of 13 September 2019 to extend the time required for service of the skeleton argument and the bundle.

35. It is the claimant's position that these are serious and deliberate breaches. It is said the respondent has given no good reason for any breach. It is said the claimant has suffered prejudice; she relies on a number of points. First, it has been ten years since the claim started. Second, she has always acted promptly. Third, she is a litigant in person and this leads to inequality of arms. Fourth, it is important to abide by tribunal's orders. Fifth, it is asserted that the delay will prevent a fair trial now. Sixth, it is said that service by 15 January 2020 of the skeleton argument and the bundle has barely given the claimant a week to consider the papers and this was insufficient. Finally, the claimant says that it will not be possible to have a fair hearing in the future because the N260 is defective and it is not possible to determine what costs have been incurred. She says that the difficulty the respondent has with its computer system is no excuse for any breach.

36. The respondent accepts that it is in breach, but it does not accept that the claimant is prejudiced in any meaningful way, or that the ability to have a fair hearing, either now or in the future has been damaged.

37. The respondent accepts that, in principle, it is possible to strike out the claim for breach of a single order. I do not need **to consider the case of Duncan Lewis Solicitors Limited v Miss M Puar** EAT 0175/19 as relied on by the claimant.

38. The claimant also referred me to CPR 3.9, which concerns relief from sanction. No sanction has been applied, and therefore, the question of relief from sanction does not apply. I have discussed the operation of CPR 3.9 with the parties. I have referred both parties to the case of **Denton v TH White Ltd** 2015 EWCA civ 906, which concerns relief from sanction; it envisages there should be applied three stages as follows: first, assess the seriousness and significance of the breach; second, consider why the default occurred; and third, consider all circumstances of the case.

39. It is common ground that the tribunal may have regard to **Denton**, but is not bound by it. As noted, no specific sanction has been applied in this case.

40. In addition to relying on breach of order, the claimant says that the respondent's conduct is unreasonable, scandalous, or vexatious. In support of this allegation, she states the N260 is incomplete and does not contain full details of the costs. She says the breaches demonstrates vexation.

41. Strike out is at a draconian measure. It is rare strike out will be justified when it is possible to have a fair hearing and where it is possible for

defaults to be rectified in a manner which does not prejudice a fair hearing. It must be borne in mind that delay in itself may undermine the fairness of the hearing. Further, defaults which increase costs, but which cannot be dealt with by appropriate cost orders, may undermine a fair hearing. Where the default is deliberate and repeated, strike out may be justified. The discretion is broad, and each case must be considered on its merits.

42. The respondent accepts that it has breached the tribunal's orders as alleged for breaches 1, 2, and 3.

43. The claimant's suggestion that there was failure to apply for an extension within 7 days of the order (breach 4) is misconceived. An application for an extension of time may be made at any time (see rule 29 Employment Tribunal Rules of Procedure 2013).

44. I should explain the status of the N260. In a detailed assessment, if there is to be an assessment hearing, it is necessary to serve a detailed bill, as provided for in CPR part 47. The preparation of such a bill is expensive and time-consuming. It is necessary to detail the entirety of the work. It is common ground that the potential costs in this case are up to £200,000. The preparation of such a bill would be extremely time-consuming and expensive. Moreover, in order to complete that bill, the respondent will need to access archived digital information which will lead to further costs.

45. An N260 is a short summary of costs which is generally employed in interlocutory matters or fast-track cases. It is designed to assist the judge to reach a summary decision on costs at the conclusion of the hearing. It gives some detail, but is not designed to be a substitute for, or equivalent to, a detailed bill.

46. I required the respondent to produce a form N260 in order to give an indication of the likely costs. The purpose of this was to assist both the parties, and the tribunal, to understand the magnitude of the costs in order to consider whether there was any reasonable prospect of the claimant, on a detailed assessment, reducing the total cost to under £60,000. It follows that it was never envisaged the N260 would be a substitute for a detailed bill.

47. The order of 26 February 2019 neglected to say that the N260 must be served on the claimant. It was clear that it must be filed with the tribunal. It follows that there is an obligation to serve it on the claimant, in any event. I conclude that the respondent was in default of the order. It was an important document for the claimant to have and the default was serious. The explanation is that there was an oversight, and as soon as the claimant noted she had not received the N260, it was served. I accept that explanation. To the extent I need to consider the general circumstances I shall do so in a moment when considering all the beaches.

48. The respondent accepts that it failed to serve the skeleton argument until 15 January 2020. I understand the bundle was served at the same time.

49. The skeleton argument was due on 25 October and the bundle on 1 November 2019. It is unusual for the tribunal to require a skeleton argument to be served so early. I ordered early exchange in this case to promote settlement in the hope that the parties would be able to recognise the strengths of their cases. Early exchange was not necessary in order to ensure a fair hearing. The bundle contains documents which the parties were all familiar with. It could have been brought to the hearing without unfairness. The skeleton arguments should codify and expand on the arguments already raised. Service shortly before the hearing was sufficient to ensure a fair hearing.

50. The issues in this hearing are limited. The hearing is concerned with a simple question: is there any reasonable prospect of the claimant, on a detailed assessment, reducing the total bill to below £60,000.

51. It is clear that the default occurred because the respondent chose not to serve the skeleton argument earlier. There is no reason why the order could not have been complied with. However, the respondent did apply for an extension. That application was reiterated on 10 December 2019. I have not yet made a ruling on it. Making an application to extend is, in itself, no good reason for the default. Nevertheless, the respondent did seek to address the position, and it did seek the claimant's consent.

52. When I consider all the circumstances, I do accept that the respondent's conduct was blameworthy. The respondent overlooked service of the N260. The respondent chose to delay service of the skeleton and the bundle for no good reason. Nevertheless, the claimant could have consented, but she chose to give a blanket refusal.

53. As for the claimant's conduct, she served her own skeleton argument on the tribunal on 25 October 2019. She failed to give her skeleton argument to the respondent until she showed them a copy at the start of this hearing. She could have sent it on 15 January 2020. There was no good reason for that failure.

54. During the course of the hearing, when we considered the claimant's application, the claimant failed to refer to the fact that she had a further skeleton argument to produce. The claimant referred to her second skeleton argument, at the end of the hearing, during submissions. She did not produce any copies. I gave the claimant permission to serve that skeleton argument after the conclusion of the hearing and directed the respondent reply, albeit I had not seen the document.

55. The claimant’s second skeleton argument refers to detailed matters said to be relevant to the hearing. It follows that the claimant failed to

exchange her original skeleton argument at all. Thereafter, without any explanation, she has sought to rely on a further skeleton argument, which was not served until after the hearing.

56. It is possible the respondent's failure to serve a skeleton argument earlier inhibited any possibility of compromise. However, I find it is unlikely that early exchange of skeleton arguments would have led to any compromise.

57. The respondent's skeleton argument was served on 15 January 2020. (There has been some dispute as to whether in fact it was served on 16 January – I do not need to resolve this dispute as it is not material to my decision whether it was 15 or 16 January.) All the relevant documents where in both parties' possession. The relevant arguments had already been rehearsed. My orders of 26 February are designed to direct the claimant to consider the matters relevant to the question of whether there was a reasonable prospect of her resisting the claim for costs.

58. In all the circumstances, I conclude that in no sense whatsoever has any delay in serving the N260, the skeleton argument, or the bundle caused the claimant any prejudice or inhibited a fair hearing of the matters before me today.

59. I note the claimant is a litigant in person. She is a qualified barrister, but she does not practice in employment law. Service of a skeleton argument a week before hearing is for most litigants in person sufficient. It is sufficient in this case. The claimant has suffered no prejudice. Further, I cannot ignore the fact that the claimant has delayed service of the second skeleton argument, and I have extended time to allow her to do this.

60. Given all the circumstances this case I decline to strike out the claim for costs.

<u>The respondent's applications</u>

61. I must next consider the respondent's application to vary the timetable.

62. The respondent seeks to extend time for service of the skeleton argument and the bundle. I understand both were served on 15 January 2020. The claimant objects. She relies on the matters cited in support of her application to strike out the claim for costs. It is respondent's position that, whilst there was default, the application was made on 25 October 2019 and remains outstanding. It is the respondent's position that the claimant suffered no prejudice. Since the conclusion of the hearing it has become apparent that the claimant has, in default of the order of 13 September 2019, and without explanation, produced a further skeleton argument.

63. I have considered whether there is any prejudice to the claimant. There is none. I have already granted the claimant permission to serve and rely her skeleton argument, albeit her description of the documents in the hearing did not fully identify its nature. Having extended time for the

claimant, and noting there is no prejudice caused to the claimant by the late service of the respondent's skeleton or bundle, I grant the extensions of time sought by the respondent.

64. The final application by the respondent is for this preliminary hearing to be converted to a detailed assessment. I refuse this application.

65. It is common ground that there are two types of hearing in a tribunal. The first is a preliminary hearing and the second is a final hearing. Both parties agree that a detailed assessment is a final hearing. Further, in order to have a detailed assessment, it is necessary for a detailed bill to be served. For the reasons I have already alluded to, an N260 does not have the detail necessary for a detailed assessment. If there were to be a detailed assessment in this case, it would be necessary to list the matter for a final hearing and to give 14 day's notice. I am not convinced I can simply convert this hearing. Moreover, it would be necessary to order the preparation of a detailed bill. The purpose of this preliminary hearing is to consider whether such a process is necessary. For the reasons given, it is not appropriate to purport to convert this preliminary hearing to a detailed assessment.

66. When I considered the respondent's written applications, it appeared to be the respondent's position that it was not possible to strike out the claimant's defence to the claim for costs on the basis it had no reasonable prospect of success. To the extent that was a position ever taken by the respondent, the respondent has resiled from that position and now takes a neutral position.

67. For the reasons I will come to, I am satisfied that I am able to consider pursuant to rule 37 Employment Tribunal Rules of Procedure 2013, whether the contentions of the claimant have any reasonable prospects of success.

The issues

68. At the hearing, we clarified the central point in issue. The purpose of a detailed assessment is to consider the entirety of the costs and to determine what costs were reasonably incurred. I may refer to this as the total costs payable. Whatever the total costs payable, the respondent can recover no more than £60,000 because of the cap imposed by the Pearl tribunal. It is the claimant's position, as illustrated in the responses to my orders of 26 February, that the total cost payable can be reduced below £60,000 on a detailed assessment. It follows that her response or defence for these purposes is the assertion that the outcome of a detailed assessment will be an order for costs below £60,000. If the total costs payable are greater than £60,000, the cap applies. It follows that if there is no reasonable prospect of the total cost payable being reduced to below £60,000 on a detailed assessment, there is no reasonable prospect of the challenge to the costs succeeding. In those circumstances, it is appropriate that the defence to the limited costs order should be struck out

and the claimant should be ordered to pay the cost now. Put simply, if having a detailed assessment would be completely pointless, the respondent should not be put to that expense.

The Law

69. Rule 78 Employment Tribunal Rules of Procedure 2013 provides, in so far as it is applicable

> **(1) A costs order may—**
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> **…**
>
> **(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;**
>
> **….**
>
> **(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.**

70. It follows that pursuant to rule 78(1)(b) the tribunal can deal with a detailed assessment in two ways. It can be transferred to the County Court where the Civil Procedure Rules 1998 (CPR) will apply. It can be dealt with by the tribunal.

71. As to the procedure to be adopted by the tribunal, that is less clear. It would have been possible to import into the Employment Tribunal Rules of Procedure 2013 the relevant CPR rules. However, I do not read rule 78 in that way. Had it been the intention to incorporate the CPR, I think it is likely that the specific rules would have been identified. It appears to me that what is envisaged is looser. Rule 78 refers to "applying the same principles." It seems to me there must be a two-stage process. First, it is necessary to consider and identify the principles to be derived from the CPR, as they apply to costs orders leading to detailed assessments. Second, it is necessary to apply those principles. However, when applying those principles, the tribunal is not able to directly import the powers of the County Court. Instead, it seems to me, that the tribunal must stay within the limits of its own rules and use those rules to give effect to the principles discernible from the relevant CPR rules.

72. In the tribunal, there is no separate set of rules for dealing with detailed assessments. It is necessary to go back to first principles. Pursuant to rule 1(3) Employment Tribunal Rules of Procedure 2013 an order or other decision of the tribunal is either a case management order or judgment. Case management orders deal with the conduct of proceedings, but do not determine any issue which would be the subject of a judgment. A judgment is a decision, made at any stage of the proceedings, which

finally determines a claim or part of a claim as regards liability, remedy or costs.

73. The rules provide for preliminary hearings and final hearings. A final hearing will determine outstanding matters not otherwise dealt with under rule 26 or at a preliminary hearing. There may be different hearings (e.g., liability, remedy, or costs).

74. Preliminary hearings are dealt with under rule 53 as follows:

> **53(1) A preliminary hearing is a hearing at which the Tribunal may do one or more of the following—**
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> > **(a) conduct a preliminary consideration of the claim with the parties and make a case management order (including an order relating to the conduct of the final hearing);**
> > **(b) determine any preliminary issue;**
> > **(c) consider whether a claim or response, or any part, should be struck out under rule 37;**
> > **(d) make a deposit order under rule 39;**
> > **(e) explore the possibility of settlement or alternative dispute resolution (including judicial mediation).**
>
> **(2) There may be more than one preliminary hearing in any case.**
>
> **(3) "Preliminary issue" means, as regards any complaint, any substantive issue which may determine liability (for example, an issue as to jurisdiction or as to whether an employee was dismissed).**

75. It follows that at a preliminary hearing, a claim or response, or any part, can be struck out pursuant to rule 37 and preliminary issues may be determined. A preliminary issue is one which may determine liability and is broadly defined. Pursuant to rule 37 there are a number of grounds for striking out, which include the claim or response, or part or a claim or response, having no reasonable prospects of success.

76. In correspondence, the respondent refers to statements of case. The nature of claims and responses is not specifically defined in the Employment Tribunal Rules of Procedure 2013. The initial response must be in a particular format. However, it is possible for responses to be amended. There may be responses to counterclaims. As to what is the nature of a defence or response in a costs case, the rules are silent. However, it must follow that where there is a claim for costs which is resisted, there is some form of defence or response.

77. Under the CPR, a formal bill of costs is served, the paying party is required to serve points of dispute. The assertion that there is a defence to the costs, and production of the detailed points of dispute, in my view must all constitute some form of defence or response. In my view, the concept of a response under the Employment Tribunal Rules of Procedure 2013 is wide enough to encompass the grounds of resistance relied on by

claimant in order to resist an order for costs, whether that is a resistance to general liability, or a resistance to the quantum.

78. Where there is a response, rule 37 is engaged. If there is no reasonable prospect of a response, or part of a response, succeeding, it may be struck out.

79. It is necessary to consider the CPR and consider what are the relevant principles which may be derived which apply to this case.

80. Rule 78 does not refer to any specific part of the CPR. It seems to me that the key principles are is set out in part 44 and part 47 CPR.

81. The court has a general discretion as to whether costs are payable, the amount of costs, and when they are to be paid (CPR 44.2 (1)). The principle I derive from the CPR is that there is a discretion as to when the costs are paid.

82. When the court orders a party to pay costs subject to a detailed assessment, it will order the party to pay a reasonable sum on account of costs, unless there is good reason not to do so (CPR 44.2(8)) this rule derives from the recommendations in the Review of Civil Litigation Costs – Final Report 2009. The notes in the White Book explain the object of the rule is to enable the receiving party to recover part of its expenditure on costs before engaging with the possibly protected process of carrying out a detailed assessment. This is particularly important when the paying party has limited resources and the receiving party would otherwise be forced to engage in a detailed assessment proceedings before receiving any money at all (see **Allason v Random House UK Ltd** 2002 EW H C (CH), 22 February 2002, unreported (Laddie J). Payment on account may also avoid an application for an interim costs certificate pursuant to part 47.16 CPR.

83. It follows that payment on account is routinely ordered in courts. Part of the purpose is to ensure that a receiving party may receive costs before being forced to incur costs in preparing for a detailed assessment. It is recognised that the receiving party may wish to take a view as to what further expenditure may be incurred, when there is a limited prospect of recovering it. It follows an interim payment is a pragmatic way of ensuring recovery of a sum which the court considers is bound to be achieved on a detailed assessment. I derive a number of principles from this. First, payments on account are the norm and there must be a good reason to refuse them. Second, a judge should use discretion to order a sum which is substantial, but which is clearly justified having regard to the costs incurred. Third, payments on account are particularly important when the paying party is of limited means. Fourth, if the receiving party takes a commercial decision not to proceed with a detailed assessment, it is not obliged to do so, event when there has been an order for payment on account.

84. Part 44.3 CPR deals with the basis of assessment. As noted, in default of any specific order, it will be on a standard basis. This is a general principle.

85. Rule 44.4 CPR deals with the factors to be taken into account when in undertaking an assessment. They should be applied on any assessment.

86. Part 47 CPR is largely concerned with the procedure applicable to detailed assessments. There are provisions for commencing detailed assessment which are not reflected in the tribunal's rules (CPR 47.6 and 47.7). There are sanctions for delay in commencing detailed assessment (CPR 47.). The form of the bill is strictly governed (see practice direction 47 CPR). There is provision for service of points of dispute (CPR 47.9). The court has wide powers pursuant to CPR 47.16, after the receiving party has filed a request for a detailed assessment hearing, to issue an interim costs certificate for such sum as it considers appropriate. The effect of that rule is that prior to any consideration of the bill on its merits, the court may order the payment of such costs as it considers appropriate. Essentially, this is an interim payment.

87. The tribunal has no specific power to order a payment on account at the time when judgement is given. It has no power equivalent to the issue an interim certificate. Nevertheless, it is my view that the principles underpinning the provisions in the CPR are applicable in the tribunal. It is clear that the CPR recognises the difficulties the receiving party has when faced with a paying party of limited means. The ordering of a payment on account pursuant to part 44.2(a), or a payment pursuant to an interim certificate, is a summary procedure exercised at the discretion of the judge, in order to ensure payment of a sum which clearly cannot be disputed. It is recognised that may lead to a commercial decision not to pursue a full detailed assessment, having regard to the associated costs. It is my view that the tribunal's rules should be interpreted in a way which is consistent with those principles.

88. It seems to me that the appropriate way of applying the tribunal rules is to recognise that there may be no reasonable prospect of defending the totality of the claim for costs. Where it is clear that the sum realised on a detailed assessment will be not less than a specific figure, it is appropriate to say there is no reasonable prospect of defending that lesser sum. This is particularly important in a case where a tribunal has decided, having regard to the fact that the financial position of the claimant is unclear, to cap the award for costs. The way to achieve this is to apply the powers under rule 37 Employment Tribunal Rules of Procedure 2013.

Conclusions

89. Has the claimant any reasonable prospect of succeeding in reducing the cost to below £60,000 at a detailed assessment? If not, to the extent that the defence or response to the claim for costs makes that assertion, it should be struck out and judgment entered for the respondent. I need to

consider the amount of the costs incurred and consider the claimant's defence.

90. The N260 details part of the costs incurred. It is the respondent's position it does not include all the costs, as much of the detail of all the work undertaken is contained in archived electronic data, which is difficult to access. The N260 records the solicitors' costs, including attendance at the final hearing, to amount to £64,440. I am told this includes VAT. Counsel's costs amount to a total of £53,254.99 excluding VAT. The total sum claimed on the N260, including all VAT and expenses is £132,637.92.

91. I note there is reference to the fees of Jonathan Cohen, QC. Although he advised on different claims concerning the claimant and the respondent, his fees are not covered by the Pearl tribunal's order. I am satisfied his name has been included in error and I am satisfied that his fees have not been included in the N260.

92. I am satisfied that the solicitors' cost as included in the N260 are a fraction of the total costs. I am satisfied by the respondent representations that if this matter proceeded to a detailed assessment the solicitors' cost would be considerably higher and the total sum in issue would be nearer to £200,000. This sum is entirely consistent with other similar discrimination case that lead to lengthy hearings. As noted, this was a significant piece of litigation resulting in a 29 day trial. It is extremely unlikely that the total solicitors' costs for the entirety of the preparation for, and attendance at the hearing, would be as low as £64,440.

93. I note that there were two solicitors involved, Mr Javaid, a partner (grade A) at £295 per hour and Ms Hacking a grade B fee earner at £160 per hour.

94. I should consider the claimant's challenges to the costs. Her challenge at the hearing was based on the matters set out in her letter of 9 September 2019, which were the responses to my order of 26 February 2019; I will deal with each point.

95. The claimant resiled from her original position that the respondent was not liable to pay counsels' or solicitors' fees. The N260 is signed by a partner and it confirms that the respondent must pay the fees. I am satisfied indemnity principle has not been breached.

96. There is a general assertion that the respondent's costs do not exceed £60,000. To the extent she has put forward reasons in support, I shall consider those now.

97. It is accepted that solicitors and counsel represented the respondent.

98. The claimant does not accept that the fee earners identified were used. She has no basis for saying this. I have an N260 signed by a partner which confirms the use of particular solicitors and counsel. I have noted

the difficulty with regard to Mr Jonathan Cohen, QC, but his fees are not in the N260, and his name is there in error. I have seen counsels' fee notes which fully supports the claims made. There is no prospect of the claimant demonstrating that the fee earners and counsel named were not used.

99. There is a dispute as to the hourly rate. It is said there was nothing particularly complex and novel or anything that warranted the involvement of a West End firm of solicitors. The claimant offers an hourly rate of £192 for a grade A fee earner and accepts an hourly rate of £160 for a grade B fee earner.

100. I have considered whether it would be appropriate for me to consider, as a preliminary issue, the applicable hourly rate. However, I have taken the view that it is appropriate to consider initially whether the possible reduction of the hourly rate would be so significant as to reduce the potential recovery below £60,000. In the circumstances, I have considered it unnecessary to decide this point as a preliminary issue.

101. The claimant states she does not accept all the counsel listed were used. I have noted that Mr Jonathan Cohen, QC, has been referred to in error. I have seen fee notes for the other counsel. When considering whether to strike out a response, it is generally appropriate to assume that the allegations of fact contended for may be substantiated. However, were there is clear, and indisputable documentary evidence, that presumption may be rebutted. I have seen the relevant counsel's fee notes. I am satisfied that there is no prospect of the claimant arguing that the counsel referred to were not used.[3]

102. It is alleged the N260 does not comply with my order of 26 February 2019 and it does not sufficiently identify all time engaged and all the relevant attendances. It is alleged there is no attempt to provide a detailed breakdown of the fees. It is alleged the respondent's claim for £29,120 for attending the hearing with counsel was unnecessary.

103. To the extent the claimant alleges that the N260 should be more detailed than it is, I do not agree. I have noted the purpose of requesting the N260. It was to give an indication of the costs incurred, as confirmed by partner in the relevant firm. It was never envisaged to be, and should not be, a bill for a detailed assessment. I have noted the limitations of the N260. It has been served purely for the purpose of providing sufficient evidence for the tribunal to consider whether there is any reasonable prospect of the claimant reducing the costs on detailed assessment to below £60,000. Whilst I accept that the N260 has limitations, I do not accept it is insufficient for the purposes for which it is required.

[3] The Court of Appeal in *Ahir v British Airways Ltd* [2017] EWCA Civ 1392 made it clear there is no general proposition that where there is a potential for disputed facts a claim must proceed. It is necessary to look carefully at the facts, and to consider the nature of the dispute. See in particular paragraphs 16, 19 and 24.

104. During our discussion, I sought to ascertain the claimant's proposed best position should the matter proceed to a detailed assessment. The claimant conceded that, on detailed assessment, costs would be ordered. I asked her to confirm in relation to both counsel's fees and the solicitors fees, on the basis of her best case scenario, what would be a reasonable figure for the tribunal to order.

105. In relation to counsel's fees, the claimant indicated that the fees of Mr Heath would be reduced to £36,500. In relation to solicitors' fees, and in this case ignoring any further solicitors' fees which may be claimed for a detailed assessment, she indicated her best case scenario was a reduction to £30,000 against the £64,000 claimed. It follows that even on the claimant's best case scenario, the most she could hope for on a detailed assessment, was a reduction in the costs recoverable to figure in the region of £66,000. If that were the total cost payable, the cap would then be applied, and the respondent would recover £60,000. There is not indication from the claimant that she had arrived at these figures on the basis of the hourly rates contend for by the respondent. If she were successful in persuading a tribunal that the hourly rates are too high for a grade 1 fee-earner, it is clear the effect could not be so dramatic that the solicitors' costs would fall below £30,000.

106. It is necessary to stand back from the detail and consider whether there is any reasonable prospects of the defence to this claim, as put forward by the claimant succeeding. To succeed, the claimant must reduce the costs allowed on detailed assessment to under £60,000. The indemnity principle has not been breached. There is no prospect of arguing that the solicitors and counsel named were not employed or not paid. Even on the claimant's best-case scenario, there is no prospect reducing the total sum recoverable below £60,000.

107. I have considered the further representations made by the claimant. They raise some detailed objections which could be raised at a detailed assessment. They add nothing to the relevant analysis. To the extent that they seek to engage in a detailed assessment, that is not relevant to the matters I need to decide at this stage. I have no doubt that there would be a reduction of the respondent's cost on a detailed assessment. However, this case ran for 29 days and it is inevitable that the majority of the costs charged by counsel would be allowed. The level of cost that could and would be included for the solicitor would be significant and I have no doubt they would far exceed the £64,000 currently referred to. Even if the grade A rate were reduced, they would still far exceed £64,000. There can be no doubt that significant work was undertaken. It is inevitable that much of that work would be allowed. In order to succeed the claimant would have to persuade the tribunal to award a tiny fraction of the solicitors' costs incurred, and in my view such a possibility is fanciful. Ultimately, the claimant acknowledges this as even her most optimistic view does not envisage reducing the total cost payable below £60,000.

108. The reality is that this was an extremely complicated piece of litigation. The costs incurred reflects both the complexity of the case, the contentious nature of the proceedings, and the length of the hearing.

109. Before me the claimant suggested that cost should be limited to a shorter hearing of perhaps eight days, as a short hearing was envisaged initially. That was an argument which could have been raised before the Pearl tribunal. The Pearl tribunal could have limited the costs recoverable by reference to time or issue. It appears it was not raised and no such limit was imposed by the Pearl tribunal. It is not a matter the claimant can rely on.

110. I am satisfied that, if this matter were to go to a detailed assessment, there would be no prospect at all of the claimant reducing the costs below £60,000. In the circumstances, to the extent there is a defence and that sum, I strike it out. I give judgment to the respondent in the sum of £60,000, which shall be payable within 14 days.

111. As I have struck out the defence to the claim for costs on the basis is has no reasonable prospect of success. I do not need to consider any other basis for striking it out.

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Employment Judge Hodgson

Dated:02 March 2020

Sent to the parties on:

.02/03/2020

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For the Tribunal Office