EMPLOYMENT TRIBUNALS

Claimant: Mr A Ghaffar

Respondent: Age UK Calderdale and Kirklees

Heard at: Leeds **On:** 9 March 2020

Before: Employment Judge D N Jones

REPRESENTATION:

Claimant: In person
Respondent: Mr T Falcao, Solicitor

JUDGMENT was sent to the parties on 10 March 2020. A request was made by the claimant by letter of 17 March 2020, in accordance with Rule 62 of the Employment Tribunals Rules of Procedure.

REASONS

1. The Tribunal provided a summary of its reasons at the hearing and informed the parties that more extensive and full reasons would be provided upon request. These are the comprehensive reasons for the decision.

The applications

2. The claimant makes an application for wasted costs against Mr Falcao, the representative of the respondent and costs against the respondent. It is contained in an email dated 8 August 2019 from his representative, Mr Wharton. Mr Wharton stated that he had entered into an agreement to represent the claimant on a no-win no-fee basis at an hourly rate of £33 per hour and he seeks £6,468 for wasted costs. The claimant tells me at this hearing that there was no written agreement with Mr Wharton. He has paid him £2,090 but £4,378 is outstanding.

3. The basis of the wasted costs application is improper, unreasonable or negligent behaviour of the representative of the respondent. In the written application Mr Wharton also says the respondent had acted improperly and unreasonably. In particular, he focuses upon the non-disclosure of the sickness scoring matrix which it is said was indefensible and was only provided at the eleventh hour. Had it been provided earlier, it is said that a

compromise would have been reached avoiding the need for tortuous exchanges and applications requiring Preliminary Hearings.

4. The respondent applies for a costs order against the claimant by a written application dated 6 August 2019. The basis of this unreasonable conduct concerns the conduct of the litigation and a failure to accept an offer which was marked 'without prejudice save as to costs'. The unreasonableness includes bringing claims which had no merit and running arguments which were bound to fail. In addition, the respondent refers to a number of remarks made by the claimant's representative which were unnecessary, rude and hurtful to the respondent's officers. Mr Falcao drew attention to a number of disobliging remarks made about him and the Tribunal and, although he does not rely upon them as the basis for unreasonable conduct, he says they were symptomatic of the approach taken by the claimant and his representative to the respondent's employees and officers.

The Law

4. By rule **74:**

(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.

(2) "Legally represented" means having the assistance of a person (including where that person is the receiving party's employee) who—

(a) has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates' courts;

(3) "Represented by a lay representative" means having the assistance of a person who does not satisfy any of the criteria in paragraph (2) and who charges for representation in the proceedings.

5. By rule **75**:

(1) A costs order is an order that a party ("the paying party") make a payment to—

(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;

(b) the receiving party in respect of a Tribunal fee paid by the receiving party; or

(c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.

(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

6. By rule **76:**

(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

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

7. By rule **78:**

(1) A costs order may—

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

8. By **rule 80:**

(1) 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 are described as "wasted costs".

(2) "Representative" means a party's legal or other representative or any employee of 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.

(3) A wasted costs order may be made in favour of a party whether or not that party is legally represented and may also be made in favour of a representative's own client. A wasted costs order may not be made against a representative where that representative is representing a party in his or her capacity as an employee of that party.

9. By rule **81**, a wasted costs order may require the representative to pay the whole or part of any wasted costs of the receiving party, or disallow any wasted costs otherwise payable to the representative, including an order that the representative repay to its client any costs which have already been paid. The amount to be paid, disallowed or repaid must in each case be specified in the order.

10. By rule **84**, in deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

The application of the claimant for costs against the respondent and wasted costs against its representative

11. As developed at this hearing, the complaints in respect of both the respondent and its representative overlapped. For the purpose of the costs application the test is whether it or its representative conducted the proceedings *vexatiously, abusively, disruptively or otherwise unreasonably*, or the response had *no reasonable prospect of success*. For the purpose of the wasted costs order it is whether any costs have been incurred as a result of *any improper, unreasonable or negligent act or omission* of the representative of the respondent.

12. The first concern relates to the failure to disclose the scoring matrix. The claimant says the document was not disclosed in good time after he issued the claim and when it was disclosed, it was not possible easily to identify it and there was reluctance of the respondent to place it within the Tribunal bundle.

13. In addition, the claimant says the respondent had sought to conceal evidence of a witness, Mr Shahzam Sadiq, and that an email Mr Sadiq had sent to Mrs Butland was only disclosed following an order from the Tribunal. That too was not initially placed in the bundle for the hearing after it was disclosed.

14. I found in the liability hearing that there was no evidence that the scoring matrix of the claimant had been disclosed during the procedures which led to his selection for redundancy, see paragraph 67 of the Reasons. Mrs Rodmell gave evidence to me in these costs proceedings but could not categorically say, one

way or the other, if it had been disclosed but she thought it would have been in the bundle which was sent to the claimant to prepare for the appeal. I have already made a finding about this and do not propose to revisit it.

15. The claimant issued his case in the Tribunal on 5 June 2018. Employment Judge Morgan held a Case Management Hearing in this case as early as 30 July 2018 and he ordered, at paragraph 4, that the parties disclose documents in their possession or control which were relevant to the issues and which ether support their own case or that of their opponent by 28 September 2018. It does not appear the scoring matrix was disclosed by that date and it plainly was an important and significant document which should have been disclosed.

16. On 1 November 2018 the scoring matrix was disclosed together with a number of other documents. It had not been identified distinct and apart from the others but it would have been read when all were considered. Mr Ghaffar said he found it in January 2019. That document was not then included in a draft bundle of documents prepared by an assistant to Mr Falcao and this was pointed out in correspondence between the parties in early February 2019.

17. In a letter from the representative of the respondent of 11 February, it was acknowledged that there had been an omission of two or three documents from the draft bundle, including the scoring matrix and Mr Sadiq's email. Form that date the position was rectified and they were included in the Tribunal bundle. The Liability Hearing took place before me on 13 – 17 May 2019.

18. For the reasons I gave the claimant should have had a copy of the scoring matrix, with his own scoring by reference to it during the procedures which led to the termination of his employment. He submitted that this was part of the unreasonable conduct for the purpose of costs applications. On questions relating to the fairness of the dismissal, its non-disclosure was unreasonable, but I did not consider that it followed that it was unreasonable conduct for the purposes of Rule 76, because it preceded the bringing of the proceedings. I am required to address unreasonableness in the conduct of the proceedings. That is not to say that such an omission might never be relevant, but it would involve the subsequent conduct of the party or its significance to the question of whether a response had no reasonable prospect of success.

19. This was a significant document in respect of the complaint of unfair dismissal. It should have been obtained and disclosed by 28 September 2018, in compliance with the Order of Employment Judge Morgan. It should also have been included in the first draft bundle of documents, given its relevance to the issues. That would have been proper and reasonable conduct of the proceedings. Taken overall, however, in the conduct of the pre-trial preparation of this case I am not satisfied that those failures constituted unreasonable conduct of the proceedings, because the document had been disclosed by 1 November 2018, so the defect was corrected within 6 weeks and the contents of the document and its significance would have been apparent when the claimant and his advisor considered the disclosed materials in preparing the case. In respect of the omission from the bundle, this was cured when it was raised in correspondence in February 2019, 3 months before the case came to trial.

20. In an ideal world, parties would comply with orders to the letter without the need for further correspondence and rectification of earlier oversights and omissions. In reality, litigation of this type raises complex points which generate a large volume of documentary materials. These require processing, itemising and exchanging within a defined timeframe, both by the party to its representative and then between parties' representatives who must then take instructions on them from their respective clients. Experience shows that the proper but proportionate exchange of relevant documents and production of Tribunal bundles takes time to perfect. Because the failures I have described were rectified in good time, I do not regard it fair to characterise the conduct as unreasonable.

21. For the same reasons I do not regard these matters as amounting to improper, unreasonable or negligent actions or omissions by the representative of the respondent. In the leading authority of **Ridehalgh v Horsefield [1994] EWCA Civ 40**, Lord Bingham MR said, "*'Improper'…covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can fairly be stigmatised as such whether or not it violates the letter of a professional code"*. He said unreasonable "*aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference the conduct is the product of excessive zeal and not improper motive.* He rejected the suggestion that negligent conduct required establishment of an actionable breach of duty but said it denoted, in an untechnical way, the failure to act with the competence to be expected of ordinary members of the profession. I do not regard the belated disclosure and inclusion of the document in the bundle as reaching, by some margin, these definitions.

22. The late disclosure of the email of Mr Sadiq requires some more detailed analysis. After the case was initiated and a response was submitted, Mrs Butland, the Chief Executive of the respondent, was charged with collating evidence to defend the claim. She sent an email to Mr Sadiq on 23 August 2018. It is headed strictly confidential and not to be discussed with others. She said that the claimant had raised concerns about Mr Cormack having misused charitable funds by recruiting his wife to the post of Insurance Manager and that the recruitment practice in respect of two other employees appeared highly suspect. She asked him to inform her as a matter of urgency whether he recalled the claimant raising anything and when. In his reply on 28 August 2018, Mr Sadiq did not answer the questions, but asked what concerns the claimant had raised and when. Mrs Butland answered on 29 August 2018. She explained what claims had been issued by the claimant, that the respondent believed there was no unfairness or discrimination and regarded the claims as not having any prospects. She informed him he had been cited by the claimant as a witness to an event and that she wished to hear his version of events. She informed him he was required to tell the truth, whatever it was and that it would be used in a Tribunal or court of law. She asked him to say exactly what he saw or heard. She said it was important that he replied.

23. Mr Sadiq replied 30 August 2018. He had not initially wished to be drawn into the matter. He stated that he had been in the office in Batley and that a discussion corresponded with specific points that had been raised by the claimant in her email. The claimant had pointed out to Mr Hillyard his reservations concerning the respondent's management procedures and the misuse of charitable funds by Colin Cromack and recruitment of his wife and the promotions of Mrs Horner and Mrs Rodmell. He said that he had not independently raised these concerns with anyone. On 31 August 2018, Mrs Butland wrote to Mr Sadiq to inform he had been named as a comparator, as he had retained his job in the redundancy exercise, and that their solicitors might be in touch.

24. The email of Mr Sadiq of 30 August 2018 was not disclosed on 28 September 2018. It was a disclosable document and clearly should have been.

25. On 9 November 2018 the claimant's representative sent a request to the respondent for statements from three of the claimant's employees to provide answers to six questions. These employees had been in the pool for redundancy selection. He posed additional questions for a number of those witnesses and to Mr Sadiq he sought confirmation that he had been at a meeting with the claimant and Mr Hillyard in September 2017. Pursuant to that request, an email was sent to Mr Sadiq by Mrs Rodmell, on 14 November 2018. Having posed the questions, she added that it was entirely a matter for him as to whether or not he provided the evidence or a witness statement. She said they had asked the claimant and his representative to contact Mr Sadiq through themselves, but it was a matter for him if he wished to respond to any direct approach. She emphasised there was no obligation one way or the other and no reward or penalty either way, but it was a matter of personal choice.

26. Mr Sadiq did not reply to that immediately. On 10 December 2018 Mr Wharton wrote directly to Mr Sadiq by email and copied in Mrs Rodmell. His questions reflected those which Mrs Rodmell had put. Mr Sadiq replied to Mrs Rodmell on 13 December 2018 and copied in the claimant's representative. He answered the questions directly and in the sixth answer, concerning his presence at a meeting with Mr Hillyard, he stated he had sent emails to Mrs Rutland in August. It is that email which prompted applications to the Tribunal for disclosure which were initially heard by Employment Judge Rostant and later by myself. Although Judge Rostant made orders for disclosure it is not entirely clear from his order to what they specifically referred. He required further clarification in his order and that was provided by the time the case came before me on 8 January. I ordered disclosure of a number of documents which included the email of Mr Sadiq.

27. The circumstances in which the existence of the email of 28 August 2018 from Mr Sadiq to Mrs Butland came to light raised suspicion on the part of the claimant and his representative that there had been concealment of evidence which might have assisted the claimant's case.

28. Mrs Rodmell gave evidence in the costs hearing that she recalled a conversation with Mrs Butland about the email with Mr Sadiq which she could not find, but she found it the following day. Her evidence was vague and unspecific as to when this occurred. I regarded it as of limited assistance, but I considered she was doing her best to assist. The absence of any adequate explanation is a proper

basis on which to invite the inference that there was bad faith, with the objective of advantaging the respondent and disadvantaging the claimant in this litigation. Whether such an inference should be drawn involves consideration of the context and all the circumstances.

29. Mr Wharton alleged on a number of occasions that the respondent's senior officers had attempted to intimidate Mr Sadiq and others and discourage him and others from having any involvement in the proceedings. The first email of Mrs Butland makes no reference to the proceedings at all. The second gives greater detail, but it is in response to questions raised by Mr Sadiq, before he provided an answer. The content of both of the emails from Mrs Butland are measured and make it absolutely clear that Mr Sadiq was required to tell the truth. They do not apply pressure or seek to influence him. I find it very difficult to construe that language with the type of behaviour which Mr Wharton accused the respondent of. Pursuant to Mr Wharton's request for witness statements from a number of employees, Mrs Rodmell wrote and asked Mr Sadiq on behalf of Mr Wharton for information. The content of her letter is also balanced and could not be said to place pressure on Mr Sadiq not to take any part in the proceedings or to have no direct contact with the claimant and Mr Wharton. She said it was a matter of personal choice.

30. Whilst it was unreasonable conduct to fail to disclose the email of 28 August 2018, I do not infer dishonest and calculating behaviour as invited. I accept the submission advanced by the respondent that this was an error which was later corrected. The response to Mr Wharton's request for information by Mrs Rodmell demonstrated a willingness to assist and no pressure was placed upon Mr Sadiq not to co-operate. Whilst his email was relevant to the issue of a qualifying disclosures, the unfair dismissal claim for having made protected disclosures failed for other reasons.

31. I do not consider that it would be appropriate to make a costs order against the respondent for the failure to disclose and the subsequent late service of that document. I have rejected the serious connotations attached to that allegation. The failures relating to disclosure on this matter did not have any significant effect on the case. In the event neither party chose to call Mr Sadiq. I do not regard it as just to award costs for that aspect of the conduct of the proceedings.

32. In respect of the wasted costs, I advised the respondent that they were entitled to be separately represented and I explained the conflict of interest. They did not seek an adjournment and were content to speak for themselves.

33. The wasted costs claim with regard to Mr Falcao is said to be advising his client to hide key documents and omit them from the bundle and obstruct access to witnesses. There was no evidence to support any of these allegations either directly or by way of reasonable inference.

34. There were said to be numerous acts of negligence but Mr Wharton said the greatest one was failing to acknowledge the unfair dismissal of the claimant and unreasonably applying to strike out claims or for deposit orders. He said that had the unfair dismissal been acknowledged at the time of Mr Falcao's engagement or earlier, some compromise could have been reached which would

have precluded the necessity for endless tortuous exchanges in pursuit of documents.

35. The respondent formally accepted that the dismissal was unfair because of a misapplication of its redundancy policy on 2 May 2020, within a fortnight of the final hearing. I do not infer that such a late concession arose from negligent, improper or unreasonable advice. The concession was qualified in that the respondent sought to argue the claimant would have been dismissed had the procedure been undertaken properly and fairly. The concession only reduced one of many findings which were required in this case and did not make any material difference to the length of the hearing. The same evidence had to be considered for the purpose of evaluating the *Polkey* issue and other procedural and substantive allegations of unreasonableness remained to be determined.

36. The suggestion that an early concession would have led to the settlement of the case is not one I accept. It is clear from the negotiations in correspondence, which were disclosed in the costs hearing, that the claimant was not prepared to accept an offer in compensation which exceeded that ultimately obtained. This was an increased offer and, in respect of both, Mr Wharton made it very clear that he and the claimant would not readily be persuaded to agree any compromise which did not acknowledge that Mr Cormack was culpable of gross misconduct. The tone of the rejection of one of the offers is reflected by Mr Wharton's remark that the judge would be invited to consider the implication of an officer of the court [Mr Falcao] apparently constructing a defence built upon a bald lie and then knowingly encouraging his witnesses to perjure themselves in the advancement of that lie.

37. In respect of the more general criticism about unreasonable applications for strike out or deposit orders, this was not supported by any grounds or specifics. I was not aware of any application which would warrant the serious criticism of it being a result of improper, unreasonable or negligent conduct of Mr Falcao.

38. Had I considered making a costs order against the respondent or a wasted costs order against its representative I would have expected to have been provided with more satisfactory evidence of the circumstances in which Mr Wharton had been engaged by the claimant. The regulation of employment advisors is governed by the Financial Conduct Authority with whom all representatives who act for reward must be registered. I would have ordered further evidence to be produced about what had been paid to Mr Wharton, when and upon what basis as well as confirmation that Mr Wharton, as a paid representative, was registered and authorised by the regulator, as required under the Financial Services and Markets Act 2000 and the Claims Management Activity Order 2018.

The application for costs of the respondent

39. A significant large part of the criticisms upon which the application for costs is based is the conduct of the claimant's representative, although no wasted costs application was made. Rule 76 provides that conduct of the representative as well as that of the party is relevant. I say at the outset that I have taken into account the fact that Mr Wharton is not a legal representative. The claimant said he was not aware that Mr Wharton had been involved in his own proceedings

which had led to him having to pay costs against a respondent for his own conduct. The claimant informed me that he knew very little about Mr Wharton, and his credentials or experience in conducting Tribunal proceedings. Mr Wharton had been recommended by a friend as a person who knew about employment law procedures and this area of the law.

40. I do not find that the claimant acted unreasonably in bringing claims of race and age discrimination, the first ground of the application. The claimant withdrew those claims at a Preliminary Hearing before me, 7 months after the proceedings were issued. He recognised the evidential difficulties he faced when I pointed them out, given that the comparators shared the very protected characteristics which he says were the basis for the discrimination. Had the claimant pursued those claims then that would have been unreasonable. Mr Falcao alleges that these were revisited by the claimant at a later stage, but I do not consider that was of any real significance, or added significantly to the proper management of the issues in the case.

41. In respect of the pursuit of the protected disclosure, or whistleblowing claim, I also do not find that the claimant acted unreasonably. This is a difficult area of the law for specialists and I bear in mind the fact the claimant did not have the benefit or advice from solicitors in pursuing that claim. Determination of whether the disclosures were qualifying and, if they were, protected involved hearing the evidence and making findings by reference to technical and precise statutory definitions. Whilst before the evidence was heard the prospects of succeeding on the disclosed materials may have seemed remote, I do not accept that the pursuit of that claim to a final hearing was unreasonable conduct. That said, at the hearing when full disclosure had been completed, issues were explored in evidence and arguments pursued which were hopeless. The proposition that the respondent had falsely constructed a redundancy situation in circumstances in which it had been faced with an immediate cut in income was doggedly pursued to the end. That was unreasonable conduct. The claimant and Mr Wharton could have acknowledged there was a redundancy situation but suggested that the reason the claimant had been selected out of the pool was down to the alleged whistleblowing, but they would give no quarter, however irrational that stance was.

42. I do not regard the refusal of the claimant to accept offers to settle this case, made on 12 April 2019 in the sum of £10,500 and on 26 April 2019 in the sum of £14,121.80, as unreasonable. They were marked without prejudice save as to costs. The claimant recovered £12,350 in compensation and Mr Falcao says the rejection of an offer in excess of that establishes unreasonable conduct. I take into account that these offers were made within 5 weeks of the hearing and the claimant and his advisor were not legal professionals. In my judgment they were entitled, albeit unwisely, to pursue the case to a hearing without being found to have conducted themselves unreasonably.

43. Features of conduct, principally of the representative, but also the claimant, about which complaint was made have been listed in a table, prepared by the respondent's representative. I cite a number of examples:

    a. On 23 September 2018, Mr Wharton wrote, "*Senior officers, in collusion with a member of the board of trustees have colluded in*

perperation [sic] and concealment of (at least) one act of fraud, and of misappropriating charitable funds".

b. On 3 October 2018 Mr Wharton wrote, "*There are unfortunately too many instances of individuals using charitable purposes as a cloak to hide sinister intent. The principal allegation is against Colin Cromack; however it also appears as if trustees have either been complacent or complicit in the wrongdoing*".

c. On 16 October 2018 Mr Wharton alleged Mrs Rodmell had sent an email in which she had described Mrs Butland intimidating key witness Tony Hilliard.

d. On 4 December 2018, Mr Wharton said the respondent's solicitor had determined to misuse his position as officer of the court to delay and disrupt proceedings.

e. On 3 January 2019 Mr Wharton stated that Mr Falcao had breached his duty as an officer of the court and that Mrs Butland was guilty of contempt of court for the same concealment. He referred to vital evidence being concealed and that it would be referred to the Attorney General's office for consideration of criminal charges.

f. On 23 January 2019 the claimant said his representative would be making an application for criminal charges to be brought against the management of the respondent for witness intimidation.

g. On 25 February 2019 Mr Wharton repeated the allegation of witness intimidation as well as concealing evidence against the respondent's managers and asked them to be referred to the Attorney General for perverting the course of justice along with Mr Falcao.

44. At the hearing Mr Wharton made a number of offensive remarks about the respondent and their representative. He said they had attack dog lawyers who used every underhand trick in the book to intimidate and threaten legitimate claimants, the casual and brazen dishonesty of Mr Cromack, that he would not want Sue Cromack within 100 miles of his elderly mother's finances, that the managers and trustees were so determined to reject the claimant's claim that they had entered into a collective psychosis, that they were unwilling to admit to the scale of corruption, that they had deliberately and purposefully attempted to pervert the course of justice either on the advice from Mr Falcao or under their own volition, that the witness and trustee Mr Hillyard was not the happy daft dullard he would have us believe, that Mrs Butland had attempted to engage in perjury and apparently attempt to pervert the course of justice. In his written submissions he said the respondent was using clients as a human shield and it was a Jimmy Saville defence which was being run. He said the respondent was an insurance brokerage company masquerading as a charity which flogged over-priced insurance and funeral plans to the same client base and it had been infiltrated and taken over by fraudsters, bullies and liars. He said nice people did not behave as the respondent behaved sacrificing decent, honourable, honest and conscientious people in order to protect sly evasive, self-serving and dishonest individuals.

45. Those are illustrations. The correspondence, which is extensive, is replete with serious allegations conveyed with an aggressive and bellicose tone. This was reflected in the manner in which the witnesses were questioned by the representative of the respondent. I touched upon this in paragraphs 15 to 20 of the reasons for the remedy decision, which were relevant to the question of whether it would have been practicable for the respondent to re-instate or re-engage the claimant. The many accusations that witnesses had been intimidated was not supported by the documentation, as I have explained in paragraph 29 above. There was no sound basis on which Mr Wharton could maintain it.

46. I have regard to what was said by His Honour Judge Richardson in ***AG Ltd v Holden [2012] IRLR*** 648:

> "*The threshold tests in rule [76(1)] are the same whether the litigant is or is not professionally represented. The application of those tests, however, must take into account whether a litigant is professionally represented. A tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals; and since legal aid is not available and they will not usually recover their costs if they are successful, it is inevitable that many lay people will represent themselves. Justice requires that tribunals do not apply professional standards to lay people who may be involved in legal proceedings for the only time in their life. As [counsel] submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal advisor. Tribunals must bear that in mind when assessing the threshold tests in rule [76(1). Further, even if the threshold tests are met for an order, the tribunal has discretion whether to make an order. The discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little access to no or little specialist help and advice…That is not to say that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience or lack of objectivity".*

37. In this case the claimant did not represent himself but chose to be represented and to pay, conditionally, for that service. I must consider these remarks in that context as well as my duty, under rule 2, to apply the overriding objective which includes placing the parties, so far as is practicable, on an equal footing. Mr Wharton was not a legal representative and so the claimant was not on an equal footing to the respondent. I do not measure the conduct of this case by the claimant or his representative by the standard I would have applied to a legal professional.

38. I regard it a significant that the claimant did not distance himself from Mr Wharton's conduct of the case. To the contrary, he agreed with the entire approach and allied himself with it. Albeit he offered an apology for that conduct at the costs hearing and cites a passage from Mr Wharton's written submission, I have had no communication directly from Mr Wharton about his non-attendance

today. The apology is explained in the context of an excess of zeal in pursuit of the claim rather than improper and malicious behaviour. I drew the claimant's attention to the provisions concerning wasted costs against one's own representative, but he did not wish to pursue that.

39. I am satisfied that the conduct of the case, as illustrated above, was unreasonable, abusive and vexatious, even giving every allowance for the lay status of the representative. I recognise this was a whistleblowing case which had wrongdoing as an essential component. That wrongdoing was, or should, have been focussed upon the alleged nepotism. The alleged protected disclosures did not reasonably allow for the wholesale attack on the integrity of the respondent and its managers and trustees which took place, including allegations of financial irregularity and dishonesty including the taking advantage of its client group. I agree with Mr Falcao's observation that there was a callous disregard for language. That cannot be passed off as excessive zeal or excused as the inexperience or lack of understanding of a litigant in person or his lay representative. It was designed to harass the officers of the respondent and I am satisfied it did so, causing upset and offence. All of that could and should have been avoided. Whilst the failure to disclose the email of Mr Sadiq gave rise to understandable and reasonable suspicion that evidence was being deliberately withheld, when the documents were disclosed they did not support the serious allegations which followed of witness intimidation and attempts to pervert the course of justice. No doubt that was why Mr Sadiq was never called to give evidence.

47. Under Rule 84 I have regard to the claimant's ability to pay. I also bear in mind that he is not well. I have read the medical evidence which indicates that he is on medication for mental health conditions and is suffering from anxiety.

48. The claimant mitigated his losses after having been made redundant by obtaining employment with HMRC. His anxiety state led to him losing that job at the beginning of this year. His doctor, Dr Patel described him as suffering from anxiety and depression from 7 November 2019. There is reference to the litigation and the effect that has had on him. He is not currently receiving benefits.

49. The claimant owes money to a professor in Singapore, for whom he has collected rent on properties of £4,900. He also has borrowed money from his son of £2,250. He has credit card debts which he did not quantify. In respect of capital he has £4,000 in the bank and half ownership of the property with his wife, which is worth £160,000 to £170,000. She does not work and is in receipt of benefits by way of Personal Independent Payments. That does not release any money for the claimant to discharge any debts.

50. The claimant recovered £9,946.96 in compensation after the balance was paid to the DWP in respect of recouped benefits. I am not clear how that has been spent save for £2,007 which has been paid to Mr Wharton. The claimant chose to make that payment when there was an outstanding costs application, thereby giving it priority to any legal costs the respondent may recover by depleting the remaining capital. The claimant says he pays £1,000 per month in living expenses, which is realistic.

51. Having found that there has been unreasonable conduct by the claimant and his representative in the conduct of the proceedings, I have to consider whether to make an order in all the circumstances. I am satisfied that unreasonable conduct added to the complexities in the case and the costs of preparation. Allegations of financial impropriety in respect of clients and more general aspersions of corrupt behaviour, intimidation of witnesses and not recognising an obvious redundancy situation all added unnecessarily to the cost of the hearings. I take into account the claimant's limited resources and current ill health. He has £4,000 in the bank but I recognise he has many demands on that limited fund with the debts he has and his every day expenditure. I do not feel able to ignore the fact he has received over £9,000 in compensation from the respondent and he was aware of this potential liability to costs when he paid his own representative over £2,000. I have taken into account the guidance that there must be a realistic prospect that the claimant might be able to pay at some point in the future, see ***Chadburn v Doncaster v NHS [2015] UKEAT0259/14/LA***. Having regard to all the circumstances I consider it is appropriate to make a costs order.

52. The respondent seeks costs in the sum of £12,060 excluding Value Added Tax. That would be the legal expenses incurred for representation at the liability and remedy hearing. An order for that amount would not be appropriate in the light of the that conduct I held was unreasonable. The majority of the costs would have been incurred, regardless. In ***Barnsley MBC v Yerrakalava [2012] IRLR*** 78 Mummery LJ said: "*the vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the 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 and passages 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 had to be analysed separately so as to lose sight of the relevant totality of the relevant circumstances.*

53. Having regard to that guidance I would quantify the extra cost for the work summarised at paragraph 51, as £2,000. I consider the claimant should pay that sum, having had regard to his ability to pay, the fact he has recovered compensation from the litigation, his respective liabilities and responsibilities.

Employment Judge D N Jones
Date 4 May 2020

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