EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110960/2018

Held in Glasgow on 14 June 2019
(Expenses Hearing, in chambers)

Employment Judge: C McManus
Tribunal Member A McFarlane

Ms P Rodger	**Claimant** **Written Representations by Mr Mark Allison - Solicitor**
Appropriate Services Ltd	**Respondent** **No Written Representations**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is to make an award of expenses against the respondent, in terms of Rule 76(1)(a) of the Employment Tribunals Rules of Procedure 2013, in the sum of £4,850.76 (FOUR THOUSAND, EIGHT HUNDRED AND FIFY POUNDS AND SEVENTY-SIX PENCE) in respect of the claimant's expenses reasonably and necessarily incurred in conducting these Tribunal proceedings.

REASONS

Background

1 This Judgment follows on the Judgment of the Employment Tribunal in respect of these parties dated 3 January 2019, which was issued to parties and entered into the Register on 8 January 2019 ('the January Judgment'). In summary, the unanimous decision of the Tribunal in the January Judgment was that the claimant's claim of pregnancy and maternity discrimination under section 18 of the Equality Act 2010, and the claimant's claim of victimisation under section 27 of the Equality Act 2010 were successful. Compensatory

awards were made in respect of each of those successful claims. The claimant's claim of unlawful deductions from wages in respect of (a) non-payment of statutory maternity pay and (b) unpaid accrued holiday pay was successful, but for the reasons set out in the January Judgment, nil award was made in respect of that head of claim. The January Judgement also set out a recommendation under section 124(2)(c) of the Equality Act 2010.

2 The January Judgment was made by a Tribunal comprised of EJ McManus and Tribunal Members Mrs L Crooks and Mr A McFarlane. Sadly, Mrs Crooks died suddenly before this Expenses Hearing. On the agreement of the claimant's representative, and on there being no response from the respondent to correspondence from the Employment Tribunal office in respect of the issue, this consideration on the claimant's representative's application for expenses to be awarded against the respondent was determined by a Tribunal comprised of EJ McManus and Mr A McFarlane only.

3 The January Judgment followed a five day Final Hearing. On 22 January 2019. The claimant's representative wrote to the employment tribunal requesting that an extract of the award be issued to allow enforcement to be carried out. I response was sent on behalf of the Glasgow Employment Tribunal office on 24 January 2019, stating that the Tribunal was unable to accept an application for an extract of award until 42 days had passed since the issue of the Judgement (in this case 18 February 2019).

4 On 22 January 2019, the claimant's representative made an application for an expenses order against the respondent in terms of Rule 75(1)(a) of the Employment Tribunal Rules of Procedure 2013. That application was set out in their email to the Employment Tribunal office of that date, which was copied to the respondent's then legal representative (William Lane at Peninsula). The application was made on the basis that the respondent has acted unreasonably either or both in the bringing of the defence of this to this claim, or/ and in the conduct of the proceedings and /or it was clear that response advanced had no reasonable prospects of success. In support of the

application, matters set out in that email in seven numbered paragraph were relied upon, which are referred to below.

5 On 23 January 2019, the respondent's representative replied to that application for an expenses order against the respondent in the following substantive terms:-

> *"In keeping with Rule 77 of the Employment Tribunals Rules of Procedure 2013, we respectfully request that the respondent is afforded a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.*
>
> *We also note that (i) the application states that 'the claimant reserves the right to submit further and better particulars in support of this application', and (ii) an expenses schedule has not yet been submitted. We respectfully request that the respondent is also afforded a reasonable opportunity to make representations in respect of any such further and better particulars or expenses schedule, in the event that either is submitted."*

6 An Information Order was issued on the claimant's representative (copied to the then respondent's representative) on 29 January 29, in the following terms. Response was ordered on or before 11 February 2019.:-

> "Arising from the application on behalf of the claimant, the claimant's representative shall:-
>
> (i) Identify, by reference to the appropriate rules of procedure within the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 (Rules 74 to 84), the type of costs sought (i.e. Expenses. Preparation Time Order or Wasted Costs Order, as the case might be),
>
> (ii) identify the specific grounds for the claimant's costs application,

(iii) identify the factors which the claimant relies upon in advancing their application for costs,

(iv) specify the amount of costs sought, including an explanation of the basis of calculation for those costs, with any relevant vouching documents,

(v) identify the legal authorities which the claimant's representative seeks to rely on in respect of their costs application."

7 An Information Order was issued on the then respondent's representative (copied to the claimant's representative) on 29 January 29, in the following terms. Response was ordered on or before 25 February 2019 (i.e. 14 days after the date of response in respect of the Information Order served on the claimant's representative). This was in the following terms:-

"Arising from the application on behalf of the claimant for an award of 'costs', the respondent's representative shall submit a written reply to the claimant's application:-

(i) setting out their grounds of resistance to the claimant's application,

(ii) addressing the respondent's ability to pay any such costs, if ordered by the Tribunal, with appropriate vouching documents, so as to give the Tribunal and the claimant's representative advanced fair notice of the respondent's whole means and assets and ability to pay any such costs awarded by the Tribunal against the respondent."

8 Those Orders were issued to the claimant's representative and the respondent's then representative by the Employment Tribunal office with a letter headed 'Application for a wasted costs order'. This letter notified that EJ McManus had directed that the application and any objections to the application will be considered by way of written representations.

9 On 6 February 2019, William Lane of Peninsula wrote to the Tribunal, copied to the respondent's representative and to the email address enquiries@appropriateservices.com, in the following terms:-

> "We write to inform you that Peninsula no longer represents the respondent, Appropriate Services Ltd, in respect of the above proceedings.
>
> We would be grateful if all future correspondence could be directed to the respondent at the following contact details:
>
> Appropriate Services Limited
>
> Abercromby Business Centre
>
> 279 Abercromby Centre
>
> Glasgow
>
> G40 2DD
>
> Email address: enquiries@appropriateservices.com
>
> In accordance with Rule 92, we confirm that this email has been copied to the claimant's solicitors."

10 On 12 February 2019, the claimant's representative wrote by email to the Tribunal office, copied to the respondent's email address, applying for variation of the Order issued on them to the extent that the date for compliance be varied from 11 February to 15 February 2019. The following was set out in that variation request:-

> "Unfortunately, due to the principal agent's engagement in two running cases, it has not yet been possible to collate the necessary information, but that will be with the Tribunal by the proposed amended deadline. In our respectful submission, the short extension causes no meaningful prejudice to the respondent. If the respondent applies for an extension of time for the respondent's compliance to take account of any such extension being granted to the claimant (or if the Tribunal

considers that it is appropriate to grant such an extension of its own motion), there is, for the avoidance of doubt, no opposition to same."

11 On 14 February 2019, correspondence was sent from the Employment Tribunal office to William Lane, copied to the claimant's representative and to enquiries@appropriateservices.com, confirming that the Tribunal's records had been updated with regard to the withdrawal of representation.

12 Also on 14 February 2019, the claimant's representative wrote to the Employment Tribunal requesting that an Extract of the Order of the Tribunal be issued to the claimant.

13 On 15 February 2019, an email was received from the claimant's representative, copied to the respondent's email address, with substantive submissions for the claimant in respect of the application for expenses. These submissions were made in response to the Information Order issued on the claimant's representative and are referred to below. A schedule of costs was attached to those submissions.

14 On 21 February 2019, an email was sent from the Employment Tribunal office to the claimant's representative, granting the claimant's representative's application to vary compliance of the Information Order until 15 February, and noting that the case file would be diarised for 25 February to await the respondent's response to the Order.

15 On 28 February 2019, the Employment Tribunal office received a copy of correspondence sent from the Employment Appeal Tribunal (Scotland) acknowledging receipt of a notice of appeal in respect of the January Judgment, which had been lodged on 18 February 2019 by Peninsula for the appellant (Appropriate Services Ltd).

16 Also on 28 February 2019, the claimant's representative wrote to the Tribunal office, copied to Peninsula, in the following substantive terms:-

"We have not received intimation from or on behalf of the respondent making any submissions in response to the Expenses Order

Application. We note that same was due to be lodged by 25 February 2019. Are you able to advise whether that has been received?

Secondly, we have received intimation of an EAT appeal at the instance of the respondent, brought by the same representatives who represented her at first instance. We recall that those representatives have indicated to the Tribunal that they no longer acted. In relation to extant proceedings at first instance, has the Tribunal had any notification to suggest that Peninsula are now back on record as representing the respondent? We sought to clarify this directly with them as well, but are mindful that - until that is clarified - we are still in a situation where we (and indeed the Tribunal) are corresponding with the respondent directly in circumstances whereby they be may represented. We have, accordingly, copied in the email address which is given as the representative's on the Note of Appeal.

Lastly, we refer to our correspondence in relation to the request of an extract award. We would be grateful if that could be sent as soon as possible."

17 On 2 March 2019, correspondence was sent from the Employment Tribunal office to the claimant's representative and to the respondent in the following terms:-

"I refer to the above named proceedings and the correspondence received from the claimant's representative on 28 February 2019.

Employment Judge M Kearns to whom this was referred has directed that I confirm with the claimant's representative that now there is a live EAT case the Tribunal is not able to issue an extract of an award until that case has been determined.

This case will now be sisted pending the outcome of the appeal and no further action will be taken until this outcome

The claimant's representative is asked to copy both the respondent and only the respondent's representative should correspondence be

relevant to them; as per Rule 92, as the respondent's representative has confirmed they are no longer acting on behalf of the respondent."

18 On 8 March 2019, an email was received by the Employment Tribunal office from Peninsula, which had been copied to the respondent's representative, with the heading 'Tribunal Case Number 4110960/2018 P Rodger -v- Appropriate Services Limited' and in the following terms:-

"We write to inform you that Peninsula has been re-appointed to represent Appropriate Services Limited in the above case.

We would be grateful if all future correspondence could be addressed to us on their behalf, to legalservices@peninsula-uk.com, quoting our reference number 68503.

We confirm this correspondence has been copied to the claimant's solicitor under Rule 92."

19 On 13 March 2019, correspondence was sent from the Employment Tribunal office to the claimant's representative and to the respondent's re-appointed representative confirming that the Tribunal's records had been updated accordingly.

20 On 3 April 2019, the Employment Tribunal office received a copy of correspondence sent from the Employment Appeal Tribunal (Scotland) to Peninsula Business Services Limited, copied to the claimant's representative of 3 April 2019, with reference to the notice of appeal in respect of the January judgement. The substantive terms of this correspondence are as follows:-

"The appeal has been referred to HIS HONOUR JUDGE SHANKS in accordance with Rule 3(7) of the Employment Appeal Tribunal Rules (amended) 1993 and in His opinion your Notice of Appeal discloses no reasonable grounds for bringing the appeal. He states:

"*The Notice of Appeal discloses no reasonable grounds for appealing.*

> *Grounds 1 and 2 are misconceived. The ET found that the reason the Appellant did not pay the Claimant SMP was because of her protected act in bringing proceedings; they therefore assessed her compensation for victimisation in part by reference to the SMP she would have been paid if they had not victimised her; they did not award her SMP as such.*
>
> *Ground 3 seeks to attack an award of compensation for injury to feelings caused by victimisation. Such an appeal is only sustainable if the award was manifestly excessive or wrong in principle: there is no suggestion that either of these apply."*
>
> For the above reasons, the learned judge considers that this appeal has no reasonable prospect of success and that, in accordance with Rule 3(7), no further action will be taken on it.
>
> Your attention is drawn to Rule 3(10) of the EAT Rules. A copy of Rule 3 is enclosed with this letter."

21 On 8 April 2019 (by email received at 12:27) the Employment Tribunal office received correspondence from the claimant's representative copied to William Lane at Peninsula in the following terms:-

> "We write with reference to the above and to previous correspondence. We have received notice that the appellant's appeal has been struck out at sift stage in terms of Rule 3(7). Whilst the appellant does have the right to seek a 3(10) hearing, it is our view that the practical effect of the Rule 3(7) decision is that - unless and until a hearing is sought - there is no appeal dependent before the EAT.
>
> Accordingly, we write to you to seek that the Tribunal now:
>
> 1. Satisfies the appellant's previous request for an extract, and that an extract is issued as soon as possible;

2. Considers the appellant's application for expenses (it is a matter for the Tribunal as to whether the respondents should be given a further opportunity to make representations in response)

22 Also on 8 April 2019 (by email received at 15:07), Peninsula wrote to the Tribunal, copied to the respondent's representative and to enquiries@appropriateservices.com, in the following terms:-

> "We write to inform you that Peninsula no longer represents the respondent, Appropriate Services Ltd, in respect of the above proceedings.
>
> We would be grateful if all future correspondence could be directed to the respondent at the following contact details:
>
> Appropriate Services Limited
>
> Abercromby Business Centre
>
> 279 Abercromby Centre
>
> Glasgow
>
> G40 2DD
>
> Email address: enquiries@appropriateservices.com
>
> In accordance with Rule 92, we confirm that this email has been copied to the claimant's solicitors."

23 On 25 April 2019, correspondence was sent to the claimant's representative, the respondent's previous representative and the respondent, informing that both the correspondences of 8 April had been referred to EJ Mary Kearns, who had directed that the correspondence be acknowledged; that an extract be issued in due course; to advise that 'the application for wasted costs will now be considered' and 'to advise the respondent's representative that although the Tribunal has taken them of record, there is still an outstanding wasted costs application against them'.

24 On 29 April, William Lane of Peninsula wrote to the Tribunal office copied to the claimant's representative and to the respondent in the following terms :-

> "I am writing on behalf of Peninsula. I note that the Employment Judge has directed that an application for wasted costs will now be considered.
>
> I am conscious that Peninsula has been both on and off record for the respondent at various points during the proceedings. For this reason, I am uncertain of the precise wasted costs application that is being referred to.
>
> In light of this uncertainty, I respectfully request that:
>
> - the Tribunal sends me a copy of the wasted costs application that is being referred to, and
> - Peninsula is offered a reasonable opportunity to make representations in response to that application.
>
> I confirm that this email has been copied to the claimant's solicitors and the respondent"

25 The Extract of Order in the Register of the Employment Tribunals for Scotland in respect of the January Judgment was issued on 30 April 2019.

26 On 9 May correspondence was sent from the Employment Tribunal office to Peninsula and to the claimant's representative, informing that the correspondence of 29 April had been passed to EJ C McManus. The chronology and content of correspondence from 22 January to 30 April was summarised. It was stated that 'the Information Order issued on the respondent's representative dated 29 January 2019 is varied to a compliance date of 31 May 2019. Thereafter, EJ McManus will consider the claimant's representative's application as set out by them on 15 April 2019 and the respondent's representative's response to that application, as set out in their compliance with this now varied Information Order.'

27 On 14 May 2019 correspondence was received by email from the claimant's representative to the Employment Tribunal, copied to William Lane at Peninsula and to the respondent, in the following substantive terms:-

> 'We write to confirm that - as set out within our correspondence of 22 January 2019 - the application, which was made before the Tribunal is an application for expenses, in terms of Rule 75 (1)(a). The application made not include a Wasted Costs Application against the respondent's representative.
>
> That being so, we would respectfully request the following further procedure from the Employment Tribunal:
>
> 1. Confirmation to Peninsula that they no longer require to participate in the proceedings; and
>
> 2. That correspondence is issued to the respondents directly (rather than Peninsula) confirming that they have until 31 May 2019 to comply with the Information Order of 29 January 2019, issued to their then agents, and that what is required of them is a response to the Expenses Order application.

28 On 15 May 2019. The claimant's representative and Peninsula were given notice of a Wasted Costs Hearing, to take place by way of consideration of written submissions, on Monday, 3 June 2019.

29 On 17 May (at 14:36), correspondence was sent from William Lane at Peninsula, copied to the claimant's representative and to the respondent direct, noting that the claimant's representative had confirmed that they are not making a wasted costs application against Peninsula, and seeking confirmation that the wasted costs hearing referred to in the Tribunal's letter will be vacated and that Peninsula no longer require to participate in the proceedings.

30 Also on 17 May (at 14:52), an email was sent by the claimant's representative to the Tribunal office and to William Lane at Peninsula, copied to the respondent, in the following substantive terms:-

> "I assume the Tribunal's letter of 15 May 2019 has crossed with my own correspondence of 14 May 2019. Given that we have clarified this is an expenses order application and not a wasted costs order application, we have no difficulty with part 2 of the request. We do, however, take issue with part 1 (the request that the hearing be vacated). As we understand it, the hearing is for the Tribunal only and no attendance is required. Our correspondence of 14 May 2019 asks for the Tribunal's earlier Order to be varied, to provide that it is now for the respondent to personally respond to the expenses order application. Assuming that is done, then we presume the hearing would be used (and would still be necessary to determine) that application.

31 On 21 May 2019, an email was sent to the claimant's representative and to Peninsula, noting that the claimant's representative's correspondence of 14 May had been referred to EJ C McManus, who had directed that the Information Order be re-issued to the respondent, for compliance by 31 May 2019, and that Peninsula confirm if they are now withdrawing from acting and whether they should be removed from the tribunal's record response was requested from them by 28 of May 2019. The Information Order was sent by post to the respondent directly on 21 May 2019, in the same terms as the Order previously issued on the respondent's representative, with a varied compliance date, to by 31 May 2019.

32 On 21 May (at 17:33) email correspondence was received by the Employment Tribunal office from William Lane at Peninsula, copied to the claimant's representative and to the respondent, confirming Peninsula's withdrawal from acting for the respondent in respect of the these proceedings.

33 On 22 May email correspondence was sent from the employment Tribunal office to the claimant's representative and to the respondent copied to William Lane at Peninsula in the following terms:

> "We refer to the above matter and write to acknowledge receipt of correspondence from the claimant's representative and Peninsula dated 17 May 2019.
>
> We confirm that Peninsula have now been removed from the record.
>
> We also write to inform parties that the Tribunal office is liaising with the Tribunal members in respect of their availability to attend the Expenses Hearing (at which parties or other representatives will not be in attendance). We confirm that parties will be informed of the date of that hearing, but it will not now proceed on 3 June 2019, due to one of the members unavailability. We confirm that parties' written positions will be considered at the Expenses Hearing.
>
> Parties will note that comments from the respondent on the Expenses application and the respondent's ability to pay are required no later than 31 May 2019."

34 On 23 May 2019, the claimant's representative and the respondent were sent an 'Amended Notice of Wasted Costs Hearing', scheduled to take place by way of written submissions, with parties not required to attend the Tribunal, on 14 June 2019. That Notice referred to this Expenses Hearing.

35 On 10 June 2019 email correspondence was sent to the claimant's representative and to the respondent referring to the hearing listed on 14 June 2019, where no attendance is required by the parties. That correspondence informed that the CBI member, Mrs L Crooks had sadly passed away. The claimant's representative and the respondent were asked to contact the Tribunal as soon as possible if they had any objections to the hearing proceeding with EJ McManus and Mr A McFarlane only.

36 The claimant's representative by their reply on 10 June 2019, which was by email to the Employment Tribunal only, stated they had no opposition to the hearing continuing with the Employment Judge and Mr McFarlane in the circumstances. They also stated:

> "As a courtesy, we would make the Tribunal aware that in the efforts expended this far in relation to diligences, it came to our attention that there is a proposal for compulsory strike off in relation to the respondent. Although we had anticipated that it might be dealt with by this date, it has not been, and as at today's date Companies House continues to show the company as active. In those circumstances, we do not think that this affects the ability of the Tribunal to determine our expenses application (including making an award against the company), albeit that may change if a compulsory strike off is granted on or before the date the Tribunal makes an expenses determination."

37 On 12 June email correspondence was sent to the claimant's representative and to the respondent in the following substantive terms:

> "We write to acknowledge receipt of the claimant's representative's email dated 10 June 2019 and confirm we note the position. Employment Judge McManus has directed that we remind the claimant's representative of their obligation to copy correspondence to the other parties under Rule 92.
>
> We also write to advise both parties that, in the absence of any objections from the respondent, the case will proceed as already set down i.e. in chambers meeting between Employment Judge McManus and Mr McFarlane on 14 June 2019. The parties do not require to attend.
>
> Employment Judge McManus has also directed that the claimant's representative confirm whether they have notified Companies House that there is ongoing litigation against the respondent before the Employment Tribunal. Please reply by return.
>
> We also note that an Order to Provide Information was issued to the respondent on 21 May 2019 and required to be complied with by 31 May 2019. To date, it would appear that no response has been received."

38 On 14 June 2019 (at 19:26) email correspondence was received from the claimant's representative, copied to the respondent, in the following terms:

> "We refer to the undernoted and apologise for the delay. We have not notified Companies House. As we understand it, the need for that would only arise if the company was likely to be struck off before the litigation concluded. We assume that the hearing proceeded today so this does not arise."

39 On the basis of all of the foregoing, and on application of Rule 2 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 ('The Procedure Rules'), this Expenses Hearing proceeded on 14 June 2019, with consideration by EJ McManus and Mr McFarlane of written submissions received by that date.

Issues for Determination

40 The issues before the Tribunal for determination at this Expenses Hearing were whether or not the claimant's representative's application for expenses against the respondent (as set out on 15 February 2019) was well-founded and, if so, whether or not to make an award of expenses against the claimant, and, if so, on what basis and in what amount, having regard to the information available to the Tribunal about the respondent's ability to pay any such award of expenses, if ordered by the Tribunal.

Claimant's Representative's Application for Expenses against the Respondent

41 The claimant sought an Order requiring the respondent to pay to her expenses in respect of her fees and disbursements incurred in this case, in terms of section 75(1)(a) of the Procedure Rules. In terms of those Procedure Rules, the Order was sought on the basis that (1) in defending and conducting the claim, the respondent has acted unreasonably in terms of Rule 76(1)(a) (2) that the respondent's case had no reasonable prospects of success in terms of Rule 76(1)(b). It was noted that the claimant was legally represented

at all material times by a qualifying representative for the purposes of Rule 74, specifically a representative falling within the terms of section 74(2(b).

42 In his written submissions, the claimant's representative referred to the following authorities:

Gee v Shell UK Ltd [2003] IRLR 82
Davidson v John Calder (Publishers) Ltd ICR 143
Dyer v Secretary of State for Employment UKEAT/183/83
Daleside Nursing Home Limited v Mathew UKEAT/0519/08
Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797
Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330
Blockbuster Entertainment Ltd v James [2006] EWCA Civ 684
Sunuva Limited v Martin UKEAT/0174/17
McPherson v BNP Paribas [2004] IRLR 558
Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78

43 In his written submissions, the claimant's representative set out his position in respect of his submission that the respondent's conduct during the proceedings was unreasonable in terms of Rule 76(1)(a), so as to meet the threshold for an award of expenses. It was submitted that *Daleside Nursing Home Limited v Mathew UKEAT/0519/08*, as referred to in *Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797,* was analogous to the present case. Reliance was placed on '*the overall character and import*' of the findings made in the January Judgment . It was submitted that the findings of the Tribunal make clear that Mr Roberts on behalf of the respondent (the respondent's only witness and the party instructing the respondent's representative throughout the hearing and the named contact for the respondent on the ET3) '*was viewed as not credible and was viewed as being untruthful in material parts of his evidence that went to the heart of this claim*'. It was submitted that the conduct of the respondent was unreasonable within the meaning of Rule 76(1)(a). It was submitted that the respondent

'has acted unreasonably in advancing and maintaining their defence; in failing to offer concessions which the evidence (and therefore their

direct knowledge) clearly called for; in failing to offer a candid and clear response to the Tribunal in respect of the claim; in failing to put before the Tribunal honest and full evidence; and thereby in putting the claimant to the trouble and expense of this prolonged litigation'.

44 Further, or in the alternative, reliance was placed upon rule 76(1)(b), on the basis of the claimant's assertion that the respondent's case had no reasonable prospects of success. It was submitted that that test is in the past tense, meaning that the Tribunal is assessing that at the conclusion of the proceedings, with reference to what it now knows. It was accepted that that there is '*a high bar*' for an award on that basis. It was submitted that the case law in relation to the striking out of claims or responses on that ground may be of assistance, although it was noted that that exercise is different as the tribunal is assessing the *prima facie* merit of a case or defence in the knowledge that it has not yet heard the evidence. It was submitted:

"In this case, the Tribunal is looking at the actual merits of the defence as advanced, in the knowledge it now has, and posing the question, 'knowing everything we now know, did that defence have any reasonable prospects of success?' In the claimant's submission, on the facts as they have now been proven, the respondent had no arguable case which could be said to have any reasonable prospect of success."

45 It was submitted that if the Tribunal concludes that either or both of the threshold tests set out Rule 76(1)(a) or (b) are met, it must separately consider and satisfy itself that it is appropriate in the whole circumstances to make a costs award.

46 The claimant's representative relied upon the findings in fact made by the Tribunal in the January Judgment *en cumulo*, and made specific reference to those findings in fact at paragraphs 28 (k), (p), (r , (s), (t), (u), (x), (cc), (dd), (ee), (jj), (oo), (rr), (ww), (aaa), (ccc), (eee), (hhh), (lll), (mmm), (ooo), (ppp),(qqq) and (sss).

47 Reliance was placed on the January Judgment having noted Frederick Roberts to be '*inconsistent and evasive'* in his evidence and having referred to conduct of the respondent as showing '*an utter disregard for the respondent's duties as an employer of a pregnant employee or of the effect on the claimant of the respondent's actions and failures.*' It was submitted that paragraph 37 of the January Judgement highlights that Frederick Roberts gave various evidence which was not put to the claimant and that much of that was inconsistent with the documentation before the Tribunal. It was submitted that '*the general tenor of the Tribunal's assessment of the evidence of Mr Roberts was that he was repeatedly dishonest with the Tribunal about material matters, both in terms of events which had occurred and his / the respondent's motives or reasons for actions and omissions'*. And '*As such, it is clear that in presenting a position to the Tribunal (and, indeed, to the claimant from the outset) that her reduction in hours was due to a diminution in income, the respondent was dishonest.*' It was submitted that that is unreasonable conduct throughout the course of the proceedings.

48 Reliance was placed on the January Judgement paragraphs 37 – 67 as being '*peppered with various examples of unsatisfactory, inconsistent and laconic evidence from Mr Roberts*'. It was submitted that these give rise to inferences of dishonesty and '*clear knowledge on the part of the respondent from the commencement of these proceedings that, even if true, their position did not afford a defence to the claimant's material heads of claim*.' Specific reference was made to the final two lines of paragraph 37, and to the negative inference taken by the Tribunal at paragraph 33 on the failure of Suad Abdullah to give evidence. It was submitted that the Tribunal's conclusions in relation to the evidence as a whole '*are sufficiently stark as to take matters beyond the margin of appreciation to be afforded to an unsuccessful party in contested litigation determined on balance of probabilities*.' It was submitted that the Tribunal's conclusions in the January Judgment '*go beyond a simple preference of the claimant's account of events over Mr Roberts' in a finely balanced scenario'* and that '*their conclusions represent an unavoidable inference of consistent and egregious dishonesty, dissemblance, and a lack of candour',* reliance was placed on the respondent, 'as at the date of

conclusion of these proceedings, having '*singularly failed to produce any evidence at all of financial difficulties as at the date it unilaterally varied the claimant's terms of employment (hours of work).*

49 Reliance was made on the 63 discrete primary facts listed in the January Judgment (at paragraph 72) as giving rise to an inference of section 18 discrimination and / or victimisation. Reliance was placed on the Tribunal describing these at paragraph 73 as including '*clear, positive findings that the reason for the treatment was the claimant's pregnancy, her exercising her right to take maternity leave and / or the fact that she had done protected acts.'* It was noted that on the basis of its findings in fact, the Tribunal did not require to address the shifting burden of proof. It was submitted that such conclusions '*demonstrate the egregious nature of the respondent's conduct, and in consequence highlight the unreasonableness of the respondent's defence of each and every aspect of these proceedings from service until conclusion without making any concession at any time'.* It was submitted that that was unreasonable conduct and is also indicative of the defence having had no prospects. It was submitted that the respondent, being at all material times legally represented, knew or ought reasonably to have known that their defence had no prospects of success.

50 Reliance was placed on Mr Roberts evidence before the Tribunal, being a concession only given during the merits hearing, that he assumed the claimant would be unable to do direct care work due to her pregnancy beyond the work she had identified as problematic. Reliance was placed on Mr Robert's position in evidence before the Tribunal that he had to prioritise the payment of wages and allocation of hours for staff doing direct care work. It was submitted that it was immediately apparent that there was a causal link between the claimant's pregnancy and treatment complained of. It was submitted that the maintaining of a blanket denial of that and the defence advanced by the respondent in respect of the section 18 claim was completely without merit and that, having heard the evidence, the Tribunal is entitled to conclude that it is one that had no reasonable prospects of success. In respect of the victimisation claim. Reliance was placed on paragraph 82 of

the January Judgment, noting concessions made by Mr Roberts in cross and cross during recall. It was submitted that '*these concessions were not only never given previously, but rather the cross examination of the claimant was contra-indicative of those positions'* and, *had that position being known at any time earlier in the proceedings, it would have been obvious that the respondent's defence to that head of claim had no reasonable prospects of success'.* It was submitted that '*in not only failing to be forthcoming with that position, but in conducting and instructing the conduct of the proceedings in a manner at odds with that known, true position, the respondent acted unreasonably and frivolously.'*

51 It was submitted that but for the respondent's persistence in those defences without merit, the claimant would not have incurred the level of legal fees and disbursements that she incurred, as detailed by the claimant's representative. It was submitted that the claimant has been directly prejudiced as a result of the unreasonable conduct and/ or maintenance by the respondent of defences with no reasonable prospect. It was submitted that the claimant would not have been substantially delayed in securing the outcome she has now secured, in particular as a consequence of the respondent's unreasonable conduct and / or maintenance by the respondent of defences with no reasonable prospect. The Tribunal was reminded that the claimant has had no maternity pay or employment income at all since the commencement of her maternity leave. In the circumstances it was submitted that it is appropriate that an expenses award is made.

52 In respect of the quantification of the expenses order sought the claimant sought an expenses order covering her costs for the whole proceedings as set out in a detailed time statement provided by the claimant's representative. That statement set out the dates, activity type, description, initials of the individual having carried out the work, time spent in minutes and units and individual charges, totalling to £4864.20. (It is here noted by the Tribunal that that timeline accords with the chronology of events as per the Tribunal's casefile). It was submitted that there is no need for the Tribunal to be satisfied as to a strict causative link between the expenses incurred to specific

unreasonable conduct. Reliance was placed on *McPherson v BNP Paribas* [2004] IRLR 558 and *Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78.*

53 It was submitted that 'whilst it is not necessary for the claimant to demonstrate a strict causal link between the total costs incurred and the unreasonable conduct, the claimant must demonstrate that the unreasonable conduct occurred or persisted, or otherwise can be traced back, to a point of time before the commencement of the merits hearings, and the Tribunal should consider the whole circumstances of the case, including the effect of any unreasonable conduct. It was submitted that in this case '*the unreasonable conduct has its genesis at the point the proceedings are defended, and persisted throughout the proceedings.'*

54 An order was sought equivalent to the claimant's total costs incurred. It was noted that the claimant was in receipt of Legal Aid but has an obligation to account to her solicitors where she makes recovery or preservation and that those fees must be paid in priority to any other debt (section 12(3)(c) Legal Aid (Scotland) Act 1986), that the onus is on the claimant to enforce any award or otherwise to exhaust her options to do so, and that as such, the claimant will have a liability to her solicitors for the fees incurred in the conduct of this case because she secured an award. Reliance was placed on the time statement submitted by the claimant's representative as being the total of the claimant's fees and outlays incurred in respect of these proceedings, being £4868.60. It was submitted that these costs were all reasonably incurred and that the full account was produced for transparency. It was submitted that the costs were calculated automatically in accordance with the Scottish Legal Aid Board's table of fees for civil advice by way of representation (ABWOR), which covers employment cases, and that the work was calculated based upon time and line. On the basis that the claimant is liable for VAT on her fees, totalling £973.72 an expenses order was sought in respect of the total expenses incurred on her behalf in respect of these proceedings, being £5842.32.

Respondent's Position

55 Other than as noted above, no response was received from the respondent or, when represented, their legal representative, in respect of this application. No response was received to the Information Order issued on the respondent's then representative on insert, for compliance by insert, or to the the Information Order issued in the same terms to the respondent direct on insert with compliance by 31 May 2019. The claimant's representative's application for expenses was dealt with in chambers on an unopposed basis. No detail or specification of any grounds for objection was provided, nor was any statement of the respondent's means and assets provided.

Relevant Law

56 The relevant statutory provisions, relating to Costs / Expenses Orders, are set out in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('The Rules'). These are:-

57 Rule 2: -

> *The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly.*
>
> *Dealing with a case fairly and justly includes, so far as practicable -*
>
> *(a) ensuring that the parties are on an equal footing;*
>
> *(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
>
> *(c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
>
> *(d) avoiding delay, so far as compatible with proper consideration of the issues; and*
>
> *(e) saving expense.*

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

58 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—

(b) is an advocate or solicitor in Scotland; or

59 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;

60 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.

61 Rule 77

A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

62 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;

(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;…

(e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(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.

63 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."

64 In the Court of Appeal's judgment in *Barnsley Metropolitan Borough Council v Yerrakalva* [2011] EWCA Civ.1255, reported at [2012] IRLR 78, Lord Justice Mummery, former President of the Employment Appeal Tribunal, at paragraph 39 of his judgment, stated as follows:

"*I begin with some words of caution, first about citation and value of authorities on costs questions and, secondly, about the dangers of adopting an over-analytical approach to the exercise of a broad discretion."*

65 Following the Judgments of the Court of Appeal in *Gee v Shell UK Ltd* [2003] IRLR 82, *Lodwick v London Borough of Southwark* [2004] IRLR 554, and *McPherson v BNP Paribas* [2004] IRLR 558, expenses orders in the Employment Tribunal remain the exception and not the rule. In the majority of Employment Tribunal cases, the unsuccessful party will not be ordered to pay the successful party's costs. Costs are compensatory and not punitive.

66 Following Oni *v Unison* [2015] ICR D17, the Tribunal is required to go through a three-stage process. Firstly, it must decide that the conduct in question is unreasonable. Secondly, it must then decide whether to exercise its discretion whether to make an award of expenses. Thereafter, it will assess the amount of an award having had regard to the paying party's submissions and his means and assets. Following the Court of Appeal, in *Arrowsmith v*

Nottingham Trent University [2012] ICR 159, at paragraph 33, that it is a fact-sensitive exercise.

67 Judicial guidance on the application of the relevant law on costs / expenses applications has given by the Employment Appeal Tribunal, particularly by the Honourable Mr Justice Singh, in *Abaya v Leeds Teaching Hospital NHS Trust* [2017] UKEAT 0258/16 (01 March 2017), and its cross reference to, amongst others, *Ayoola v St Christopher's Fellowship* [2014] UKEAT/0508/13, [2014] ICR D37, a judgment by Her Honour Judge Eady QC on 6 June 2014. At paragraphs 17 to 20, in *Ayoola*, Her Honour Judge Eady QC states, as follows:-

> "*17. As for the principles that apply to an award of costs in the Employment Tribunal under the 2004 Rules, the first principle, which is always worth restating, is that costs in the Employment Tribunal are still the exception rather than the rule, see Gee v Shell UK Ltd [2002] IRLR 82 at page 85, Lodwick v London Borough of Southwark [2004] ICR 884 at page 890, Yerrekalva v Barnsley MBC [2012] ICR 420 at paragraph 7. Second, it is not simply enough for an Employment Tribunal to find unreasonable conduct or that a claim was misconceived. The Tribunal must then specifically address the question as to whether it is appropriate to exercise its discretion to award costs. Simply because the Tribunal's costs jurisdiction is engaged, costs will not automatically follow the event. The Employment Tribunal would still have to be satisfied that it would be appropriate to make such an order, see Robinson and Another v Hall Gregory Recruitment Ltd UKEAT/0425/13 at paragraph 15.*
>
> *18. On this point, albeit addressing the previous costs jurisdiction under the 2001 Employment Tribunal Rules, the EAT (HHJ Peter Clark) in Criddle v Epcot Leisure Ltd [2005] EAT/0275/05 identified that an award of costs involves a two-stage process: (1) a finding of unreasonable conduct; and, separately, (2) the exercise of discretion in making an order for costs. In Criddle there was no*

indication in the Tribunal's Reasons that the Tribunal Chairman had carried the second stage of the requisite exercise and the EAT was not satisfied, in the absence of such indication, that the Chairman had in fact done so. The appeal was thus allowed against the costs order.

19. The extension of the Tribunal's costs jurisdiction to cases where the bringing of the claim was misconceived has been seen as a lowering of the threshold for making costs awards, see Gee v Shell UK Ltd per Scott Baker LJ. In such cases the question is not simply whether the paying party themselves realised that the claim was misconceived but whether they might reasonably have been expected to have realised that it was and, if so, at what point they should have so realised - see Scott v Inland Revenue Commissioners [2004] ICR 1410 CA per Sedley LJ at paragraphs 46 and 49. Equally, in the making of a costs order on the basis of unreasonable conduct, the Tribunal has to identify the conduct, stating what was unreasonable about it and what effect it had, see Barnsley MBC v Yerrekalva per Mummery LJ at paragraph 41.

20. That said, an appeal against a costs order will be doomed to failure unless it is established that the order is vitiated by an error of legal principle or was not based on the relevant circumstances; the original decision taker being better placed than the appellate body to make a balanced assessment as to the interaction of the range of factors affecting the court's discretion. Again, see Yerrekalva per Mummery LJ at paragraph 9, and note also the observation at paragraph 49 that `...as orders for costs are based on and reflect broad brush first instance assessments, it is not the function of an appeal court to tinker with them. Legal microscopes and forensic toothpicks are not always the right tools for appellate judging`."

68 In his Judgment in *Abaya*, at paragraph 20, Mr Justice Singh places specific reliance on the reasoning of HHJ Eady QC in the *Ayoola* case, at her paragraphs 50 to 53, and it is helpful, in that regard, to note here what,

so far as relevant for present purposes, HHJ Eady QC said there, as follows:-

> *"50. Against that background, the question for me is whether the Employment Judge erred in granting costs at £10,000 or in failing to provide adequate reasons for granting that sum.*
>
> *51. Although no particular procedure is laid down in the Tribunal Rules for a summary assessment of costs, the discretion as to the amount of an award must still be exercised judicially. One can take it a bit further. Although not bound by the same rules as the civil courts and although the discretion under the 2004 Tribunal Rules is very broad, the costs awarded should not breach the indemnity principle and must compensate and not penalise; there must, further, be some indication that the Tribunal has adopted an approach which enables it to explain how the amount is calculated for the purpose of Rule 30(6)(f).*
>
> *52. The Claimant, rightly, does not suggest that the question of procedural justice on a costs application requires the prior service of a Schedule of Costs or any particular process. Nor is he saying here that there is insufficient reasoning in terms of the calculation of costs such as to amount to a breach of Rule 30. He does contend, however, that this is a surprising sum given how little had transpired by this stage.*
>
> *53. That is not an entirely fair picture. The case had previously been listed for hearing in July and apparently aborted late in the day. There had had to be various procedural steps taken as a result of the lack of clarity on the Claimant's case. More generally, Tribunal litigation costs tend, as with most civil cases, to be front-loaded. That said, it is fair to observe that £10,000 is a high award and the overall sum said to have been incurred, over £15,000, might seem surprising. I reach no final view on that. My concern is that there is no written explanation by the Employment Judge of her*

> *scrutiny of the figures sought by the Respondent. Although she has set out, as the Respondent no doubt did in submissions, some detail as to the amount the Respondent was seeking, what she does not do is indicate that she has conducted any independent scrutiny of those sums herself or set out the reasons for her conclusion that it was appropriate to award £10,000. That may be an error of approach in terms of the lack of scrutiny of the sum claimed or it may simply be an error in terms of adequacy of reasoning. I cannot be sure as to which….. "*

69 In his own judgment, in *Abaya*, Mr Justice Singh says, at paragraph 20, that all cases are fact-sensitive, and everything depends on the particular circumstances of each case, and in quoting from HHJ Eady QC, in *Ayoola,* at paragraph 51, he states that: ***"****the discretion under the 2004 Tribunal Rules is very* broad [and I would say the same of the 2013 Rules]".

70 As per Lord Justice Mummery at paragraph 41 of *Yerrakalva*: -

> "*The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and 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."*

71 "*Unreasonable*" has its ordinary English meaning and it is not to be interpreted as if it meant something similar to vexatious, per the EAT's judgment in Dyer v Secretary of State for Employment EAT 183/83, although it will often be the case that a Tribunal will find a party's conduct to be both vexatious and unreasonable.

72 Guidance was given on the meaning of 'vexatious' in *Attorney-General v Barker [2000] 1 FLR 759* at paragraph 19:

> *"Vexatious" is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the*

proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process"

73 In ET *Marler Ltd v Robertson* [1974] ICR 72, NIRC, a vexatious claim was described as one that is not pursued with the expectation of success but to harass the other side or out of some improper motive.

74 In Marler, and in particular the paragraph, at page 76E/F, Sir Hugh Griffiths, learned Judge of the NIRC stated:

"If the employee knows that there is no substance in his claim and that it is bound to fail, or if the claim is on the face of it so manifestly misconceived that it can have no prospect of success, it may be deemed frivolous and an abuse of the procedure of the tribunal to pursue it. If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously, and likewise abuses the procedure. In such cases the tribunal may and doubtless usually will award costs against the employee."

75 Further, it is helpful to note, at page 76H, the learned Judge also stated :

"*It is for the tribunal to decide if the applicant has been frivolous or vexatious and thus abused the procedure. It is a serious finding to make against an applicant, for it will generally involve bad faith on his part and one would expect a discretion to be sparingly exercised*",

76 In the final paragraph of his judgment in Marler, at page 77B, Sir Hugh Griffiths stated :

"*Ordinary experience of life frequently teaches us that that which is plain for all to see once the dust of battle has subsided was far from clear to the combatants when they took up arms*".

77 Guidance on the consideration of a party (in that case, the claimant's) ability to pay was given in *Vaughan v London Borough of Lewisham and Others* [2013] IRLR 713, EAT, applying *Arrowsmith v Nottingham Trent University* [2012] ICR 159, CA. It was held that there was no error of law in the Tribunal's approach, and, in particular, it was not wrong in principle to make an award which the employee could not in their present financial circumstances afford to pay where the Tribunal had formed the view that the claimant might be able to meet it in due course. The decision in *Vaughan* judgment was referred to in *Oni.* There, Mr Justice Underhill said (at paragraphs 26 to 29):-

> *26. We come finally to the question of the Appellant's means. The Tribunal was not in fact obliged as a matter of law to have regard to her ability to pay at all: rule 41 (2) gave it a discretion. However, it chose to do so (no doubt mindful of the decision in Jilley v Birmingham and Solihull Mental Health NHS Trust (UKEAT/0584/06)); and it has not been suggested that it was wrong in that regard. As appears from paras. 12-13 of the Reasons, the Tribunal accepted that the Appellant was not at present in a position to make any substantial payment, but it took the view that there was a realistic prospect that she might be able to do so in due course, when her health improved and she was able to resume employment. It referred to the judgment of Rimer LJ in Arrowsmith v Nottingham Trent University [2012] ICR 159, where he upheld an award of costs against a claimant who on the evidence was unable to pay them on the basis – in part at least – that "her circumstances may well improve": see para. 37 (pp. 169-170). The Appellant does not say that that approach was wrong; but she says that its application in the circumstances of the present was perverse. She says that there is no realistic chance that she will ever be in a position to pay anything like the (say) £60,000*

which the Tribunal's order represents. She referred in her written and oral submissions to her continuing mental ill-health; to the obstacle which the stigma of dismissal presents to her finding other employment; to her inevitable de-skilling the longer she is away from work; and to the present climate of cuts in the public sector. She said that she told the Tribunal in evidence that even if she were eventually to get back into employment she could not expect to earn at the level that she was at the time of her dismissal, i.e. around £30,000 p.a.

27. This part of the Appellant's submissions has given us some pause. It is not hard to accept that she may face real difficulties getting back into employment in the foreseeable future, let alone at her pre-dismissal salary levels. And even if she were in fact able to do so a liability of this size – representing, on our assumed figures, twice her pre-tax earnings at the date of her dismissal – would take very many years to pay off. It is a serious matter to saddle an unsuccessful claimant with a liability of this kind. In the end, however, we can see no error of law in the Tribunal's decision. Our reasons are as follows.

28. The starting-point is that even though the Tribunal thought it right to "have regard to" the Appellant's means that did not require it to make a firm finding as to the maximum that it believed she could pay, either forthwith or within some specified timescale, and to limit the award to that amount. That is not what the rule says (and it would be particularly surprising if it were the case, given that there is no absolute obligation to have regard to means at all). If there was a realistic prospect that the Appellant might at some point in the future be able to afford to pay a substantial amount it was legitimate to make a costs order in that amount so that the Respondents would be able to make some recovery when and if that occurred. That seems to us right in principle: there is no reason why the question of

affordability has to be decided once and for all by reference to the party's means as at the moment the order falls to be made. And it is in any event the basis on which the Court of Appeal proceeded in Arrowsmith, albeit that the relevant reasoning is extremely shortly expressed. It is necessary to remember that whatever order was made would have to be enforced through the County Court, which would itself take into account the Appellant's means from time to time in deciding whether to require payment by instalments, and if so in what amount.

29. On that basis the question for the Tribunal – given, we repeat, that it thought it right to have regard to the Appellant's means – was essentially whether there was indeed a reasonable prospect of her being able in due course to return to well-paid employment and thus to be in a position to make a payment of costs; and, if so, what limit ought nevertheless be placed on her liability to take account of her means in that scenario and, more generally, to take account of proportionality. As to the former question, views might legitimately differ as to the probabilities, but the Tribunal was well-placed – better than we are – to form a view that there was indeed a realistic prospect, and we see no basis on which that judgment can be said to be perverse. As to the latter, we see the force of the argument that it would be pointless, and therefore not a proper exercise of discretion, to require the Appellant to pay more, even in the optimistic scenario envisaged, than she could realistically pay over a reasonable period; and we have been concerned whether the cap was simply set too high. But those questions of what is realistic or reasonable are very open-ended, and we see nothing wrong in principle in the Tribunal setting the cap at a level which gives the Respondents the benefit of any doubt, even to a generous extent. It must be recalled that affordability is not, as such, the sole criterion for the exercise of the

discretion: accordingly a nice estimate of what can be afforded is not essential. Approached in that way, we cannot in the end say that the limit of one-third of the Respondents' costs – whether that comes to £60,000 or some other figure in the range – was perverse. It was of course rough-and-ready, but there is in truth no means of arriving at a more precise figure. We cannot conscientiously say that a proportion of, say, a quarter would have been right while a third was wrong. The Respondents are the injured parties, and even if the order does indeed turn out to be recoverable in full at some point in the future, they will be out-of-pocket to the tune of two-thirds of their assessed costs: it is difficult to say in those circumstances that the award is disproportionate. It is also worth bearing in mind that until the introduction of the current Rules in 2004 tribunals were positively prohibited from taking into account the means of the paying party (as is the case in ordinary civil litigation) – see Kovacs v Queen Mary & Westfield College [2002] ICR 919, esp. per Simon Brown LJ at para. 16; so there is nothing axiomatically unjust in such a state of affairs. (We have considered whether it might not have been preferable for the Tribunal to express its cap as a specific sum rather than as a proportion of the costs, but the point was not argued before us; and we can in any event see nothing wrong in principle in the Tribunal taking the course it did even if the alternative of identifying a specific sum might have had advantages.)

78 In *A Q Ltd v Holden* [2012] IRLR 648, EAT, His Honour Judge Richardson, the EAT Judge, held that that 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, and that lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. That case was specifically dealing with a challenge on various grounds to an Employment Tribunal's decision to refuse the successful employer's application for costs at the end of a full Hearing. Paragraphs 32

and 33 of that judgment address the relevant statutory provisions on awarding costs found in what was then Rule 40 of the 2004 Rules of Procedure, as follows:-

> *"32. The threshold tests in rule 40(3) are the same whether a litigant is or is not professionally represented. The application of those tests should, however, 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 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 Mr Davies submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. Tribunals must bear this in mind when assessing the threshold tests in rule 40(3). Further, even if the threshold tests for an order for costs are met, the Tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice.*
>
> *33. This 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 and lack of objectivity. But the Tribunal was entitled to take into account that Mr Holden represented himself; we see no error in its doing so; and we do not accept that it misdirected itself in any way."*

79 Mr Justice Underhill, a former EAT President, stated in *Vaughan v London Borough of Lewisham* [2013] IRLR 713, at paragraph 25, that it is established

that the fact that a party is unrepresented is a relevant consideration in the exercise of discretion, agreeing with the position in *A Q Ltd v Holden*.

80 Following *Lothian Health Board v Johnstone* [1981] IRLR 321, it is preferable for a Tribunal, when making an award of expenses, to award a fixed sum.

81 In terms of Rule 90 of the Procedure Rules, where a document has been delivered to a party's address, as per Rule 86, given on the claim form or response, it shall, unless the contrary is proved, be taken to be received by the addressee on the day on which it would be delivered in the ordinary course of post, or if sent be electronic means, e.g. email, on the day of transmission. In terms of Rule 91 f the Procedure Rules, a Tribunal may treat any document as delivered to a person, notwithstanding any irregular service, if satisfied that the document in question, or its substance, has in fact come to the attention of that person.

Decision

82 The Tribunal's letter of 21 May 2019 was sent to the respondent at the address on the ET3 claim form, that having been confirmed by Peninsula on both occasions of their withdrawal from acting for the respondent that that is the respondent's correspondence address. Other correspondence sent by the Tribunal office to the respondent was sent to the respondent's email address as noted by the Peninsula as being the respondent's correspondence email address, on both occasions of their withdrawal from acting for the respondent. No change of the respondent's address has been intimated to the Tribunal. The Tribunal is satisfied that the respondent has had a reasonable opportunity, to which they are entitled under Rule 77, to make representations in response to the claimant's representative's application for expenses against it. They have not done so, with no explanation for that failure provided.

83 The Tribunal is satisfied that in terms of Rule 75(1) of the Procedure Rules of Procedure 2013, the claimant is the "*receiving party*" and the respondent is the "*paying party*".

84 The respondent was legally represented in pursuit of their resistance to the claims brought against them in these Tribunal proceedings, by Mr William Lane, a solicitor with Peninsula Group Limited, who acted as their representative in the course of these proceedings before the Employment Tribunal, as set out above.

85 It is noted in respect of the application for expenses under Rule 76(1)(a) that the claimant's representative does not rely on the respondent having acted vexatiously, abusively or disruptively. Reliance is placed on the respondent having acted unreasonably, as set out by the claimant's representative in his application and in his written submissions and as summarised above.

86 It is noted that there was a Case Management Preliminary Hearing in this case held on 19 September 2018, where both parties were legally represented. It is noted that at no time has the claimant's representative, made any application for the Tribunal to consider strike out of the defence to this claim, under Rule 37(1)(a) or (b) , or otherwise, nor to consider a Deposit Order against the respondent, under Rule 39. It is noted that, even if such a strike out application had been sought, it may not have been granted, discrimination cases being generally regarded as fact sensitive, and Tribunals tending to take a cautious approach to strike out applications where there are crucial facts in dispute and there has been no opportunity for parties to lead evidence in relation to those disputed facts : the well-known case law authorities of *Anyanwu v South Bank Students' Union* [2001] IRLR 305, HL, *Ezsias v North Glamorgan NHS Trust* [2007] IRLR 550, CA, and *Balls v Downham Market High School* [2011] IRLR 217, EAT, all refer.

87 As at the date of this Expenses Hearing, the Tribunal is not aware whether any payment has been made to the claimant in terms of the January Judgment, or whether the respondent had taken any action in respect of the recommendation set out in that January Judgment.

88 The Tribunal first considered whether or not any of the circumstances set forth in Rule 76(1) apply. On consideration of the terms and findings in fact in the

January Judgment, the Tribunal determined that, in circumstances where the respondent knew from the outset of these proceedings:-

- That the claimant was pregnant
- That the claimant had had her hours reduced (with resultant drop in wages) because she was pregnant (on the basis of Fredrick Roberts erroneous presumption that the fact of the claimant's pregnancy had implications on her ability to work beyond those notified by the claimant, and where that presumption was made without a risk assessment having been carried out)
- That the claimant was on maternity leave
- That the SMP1 form had not been signed by or on behalf of the respondent
- That the claimant had received no income during her maternity leave

And where Fredrick Roberts' evidence at the Final hearing was that the failure to sign the SMP1 form in respect of the claimant was an '*oversight*', and that proper payments had not been made to the claimant by the respondent to the claimant because the respondent did not have the money to pay her, their continuing defence of this claim before the Tribunal was unreasonable conduct. In these circumstances, and where no evidence vouching the respondent's financial situation has been produced to the Tribunal and the respondent is believed to be an active company, with continuing obligations to meet its debts, including those to employees in respect of wages, on the basis of the claimant's representative's submissions, the Tribunal accepted that the respondent had acted unreasonably in conducting their defence of these proceedings at the Final Hearing. For these reasons, the Tribunal was satisfied that the respondent has acted in a way that an Expenses Order may be made by the Tribunal.

89 The Tribunal then considered whether to exercise its discretion in favour of awarding expenses against the respondent. Following Lord Justice Mummery at paragraph 41 of Yerrakalva: - "*The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and 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."*

90 On the basis of the claimant's representative's submissions, the Tribunal was satisfied that the respondent's conduct of these Tribunal proceedings, has resulted in significant expense in terms of legal fees incurred (albeit by way of Legal Aid) which could have been avoided had the respondent dealt with their obligations towards the claimant reasonably. The implications for the claimant and her family, as noted at paragraph 28 (ooo) of the January Judgment, were taken into account. It was recognised that it was Fredrick Roberts position in evidence that he was not aware of those consequences which his actions had had on the claimant. Fredrick Roberts knew or ought to have known that circumstances where the claimant had no income during her maternity leave as a consequence of the respondent's actions and failures to act would cause the claimant hardship. In all the circumstances of the present case, the Tribunal was satisfied that an award of expenses against the respondent is appropriate. In coming to this decision, it is noted that the respondent has failed to provide any vouching of its financial situation and has failed to respond to this application for expenses. Nothing has been submitted by or on behalf of the respondent that this is a case where expenses should not be considered appropriate, despite the opportunity to do so being given, and indeed being the subject of the Information Orders.

91 Having decided to make an expenses award against the respondent, the Tribunal considered the quantum of that award of expenses. The claimant reasonably chose to be professionally represented by solicitors. The costs incurred, being at Legal Aid (Scotland) ABWOR rates, are proportionate and seem to the Tribunal to be fair and reasonable in all the circumstances. The Tribunal had no vouching on which to take into consideration on the

respondent's ability to pay, nor any objections on the amount sought by the claimant's representative. The Tribunal is not required to assess the claimant's ability to pay under Rule 84. Following *Jilley v Birmingham and Solihull Mental Health NHS Trust* [2007] UKEAT/0584/06, there is no *'absolute duty'* on a Tribunal to take ability to pay into account, although His Honour Judge Richardson commented there that it would in many cases be desirable to take means into account before making an Order, as the ability of a party to pay may affect the exercise of an overall discretion. Affordability is not the only criterion for the exercise of the discretion. Despite the Tribunal's Information Orders issued on the respondent's former legal representative, and on the respondent directly, with significant extensions of time for compliance, no statement of the respondent's means and assets have yet been produced. As at the date of this Expenses Hearing, the Tribunal can note and record that the respondent has delayed, if not refused, to comply with the Tribunal's earlier Order for disclosure of such information.

92 Although in the Final Hearing the respondent relied on their precarious financial situation as their defence to the claim, as noted in the January judgement. There was no evidence before the produced to the tribunal in support of that position. There was evidence from the claimant at the Final Hearing, which was preferred by the Tribunal in the January Judgment, that Frederick Robert's position in respect of the respondent's income was not true. On the basis of the information before the Tribunal it could not be said that this is a case where, the respondent does not have financial means. It continues to be an active company. It is not possible to conclude on the information before the Tribunal that there is no realistic prospect that the respondent will be able to pay any significant amount of expenses in the future.

93 Having made its decision on the basis of the respondent having acted unreasonably in terms of Rule 76(1)(a), the Tribunal did not require to consider whether expenses should be awarded in terms of Rule 76(1) (b). Had it required to do so, for the same reasons as stated above, and on the

basis of the claimant's representative's submissions, an award for expenses would have been made under that Rule.

94 In coming to its decision on this opposed expenses application, the Tribunal takes into account that the respondent is now an unrepresented, party litigant. That factor does not in any way make the respondent immune from any liability for expenses being awarded where the Tribunal decides that it is appropriate to do so.

95 The Tribunal may specify the sum sought by the respondents, provided that sum does not exceed £20,000. The amount of expenses sought is less than £20,000, i.e. less than the amount that need be referred for taxation. Rule 78 (1)(b), requires an Employment Judge to act *"applying the same principles*" as the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993.

96 Having regard to the Tribunal's overriding objective to deal with the case fairly and justly, in terms of Rule 2 of the Procedure Rules, which includes, so far as practicable, dealing with the case in ways which are proportionate to the issues, and seeking to avoid delay and ensure saving of expense, taxation is considered to lead to further delay, and further expense, occasioned by a remit to the local Auditor of Court. A summary assessment is considered to be appropriate under Rule 78(1) (a) and also proportionate.

97 In all the circumstances, the Tribunal decided that an award for expenses should be issued against the respondent in respect of legal costs reasonably incurred by the claimant from 16 October 2018 i.e shortly before the commencement of the Final Hearing on November 2018 (allowing for costs in incurred in preparation for that Final Hearing). The Tribunal was satisfied that the January Judgment clearly shows that the respondent had discriminated against the claimant because of her pregnancy and maternity leave and that that was compounded by their defence of the claims in the Employment Tribunal. The respondent had failed in their obligations as an employer towards the claimant and acted unreasonably in their conduct of their defence of these claims.

98 The Tribunal took into account the matters discussed at the Preliminary Hearing on 19 September 2018, as recorded in the PH Note following that Hearing, in particular that no Orders were necessary, are taken into account. The position set out at paragraph 13 of the January Judgment and the Tribunal's reasoning at paragraph 23 was significant in the decision to make this Expenses Award.

99 For these reasons, the Tribunal makes an expenses award against the respondent in the sum of £4,850.76, being the legal costs incurred as set out in the submitted time statement 16 October 2018 to 14 February 2019 ((£4,864.20 less £821.90) plus VAT @20% (20% of £4,042.30) of £808.46) £4,850.76.

100 The Tribunal has no statutory power to make an order for payment by instalments, unless both parties agree to something specific, in which case they can jointly invite the Tribunal to vary this Expenses Judgment, and make a Consent Judgment under Rule 64 of the Employment Tribunals Rules of Procedure 2013 to reflect any agreed, and timetabled, instalments repayment plan.

Employment Judge: C McManus
Date of Judgement: 27 June 2019

Entered in Register,
Copied to Parties: 02 July 2019