Case Number: 2303478/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON**
Mrs J Forecast
Mr M Walton

BETWEEN:

Ms K Rogers **Claimant**

AND

Picturehouse Cinemas Limited **Respondent**

ON: **13 October 2020 and 20 October 2020 in Chambers**

Appearances:

For the Claimant: Mr C Khan (Counsel)

For the Respondent: Mr T Croxford QC (Counsel)

For Thompsons Solicitors: Mr S Brittenden (Counsel)

RESERVED COSTS JUDGMENT

The unanimous decision of the Tribunal is that both:

1. the Respondent's application for costs against Ms Rogers under Rule 76 of the Tribunal Rules; and

2. the Respondent's application for wasted costs against Thompsons Solicitors under Rule 80 of the Tribunal Rules

fail and are dismissed.

REASONS

Background

1. By a claim form presented on 28 November 2017 the Claimant, Ms Rogers , presented to the Tribunal claims of:

    a. Detriment in breach of s 146(1)(a) and/or (b) Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA");
    b. Unfair dismissal under s 152 TULRCA; and
    c. Ordinary unfair dismissal under Part X Employment Rights Act 1996 ("ERA");

    arising from her dismissal for gross misconduct. She had sought reinstatement and compensation for injury to feelings. The hearing took place from 8-10 January 2019.

2. By a judgment sent to the parties on 1 March 2019 the Tribunal found unanimously that Ms Rogers was automatically unfairly dismissed pursuant to s152(1)(b) TULRCA although it dismissed her claim for detriment under s 146 TULRCA.

3. At a subsequent remedy hearing the Tribunal refused Ms Rogers' applications for re-engagement and reinstatement and awarded her compensation for unfair dismissal.

4. An application for costs was made by the Respondent following the liability hearing. The application is pursued against Ms Rogers, or alternatively Thompsons solicitors, who were acting for Ms Rogers in the initial stages of her unfair dismissal claim. The partner responsible for Ms Rogers' case was Victoria Phillips. The Respondent relies on various interlocutory matters we refer to in our findings of fact below and on elements of the evidence that was given at the liability hearing. It originally sought to have the costs application dealt with at the remedy hearing but this was not possible owing, inter alia, to Ms Phillips' unavailability and a separate hearing was therefore listed to deal with the application.

5. At the hearing we heard evidence from Ms Rogers and from Ms Phillips. There was also a witness statement from Mr O'Keeffe, but its relevance to the issues we had to decide was marginal. He gave no oral evidence. There was no witness evidence from the Respondent, which relied on the matters that had come to light at the liability hearing and on contemporaneous documents. We were referred to a bundle of documents containing 202 pages. References to page numbers in this judgment are references to page numbers in that bundle.

Basis of the Respondent's application

6. The gist of the Respondent's complaint is that the Respondent was put to unnecessary cost as a result of the Claimant's case not having been

consolidated with those of three other BECTU members, Marc Cowan, Natalie Parsons and Tom McKain (the "Cowan Claimants"). It is the Respondent's contention that the claims were not consolidated because of what it considered to be misrepresentations by either Ms Rogers or Ms Phillips. Mr Croxford set out the Respondent's position in his opening skeleton argument as follows:

> **"Ms Rogers states, in summary (see in particular §§6-9, 14-16) that:**
>
> **1. she wished for her case to be heard together with those of Cowan and Parsons;**
>
> **2. she was able to attend at the hearing of their complaints on 2 to 15 March 2018;**
>
> **3. she was told by Ms Phillips to claim that she was in fact not available to attend the substantive hearing, despite this being untrue;**
>
> **4. The reason to tell this untruth was to prevent consolidation.**
>
> **7. The position of Ms Phillips (see in particular §§31-36) is that Ms Rogers told her she was unavailable for the hearing on 12-15 March 2018 and she believed Ms Rogers. Ms Phillips also asserts that it would have been impossible to prepare Ms Rogers case for a hearing in the time available (§§38-40). Both of these points will be explored further in cross-examination.**
>
> **8. It should be noted that Ms Phillips position is most unusual and surprising:**
>
> **1. The Claimant says she was able to attend the hearing;**
>
> **2. There are contemporaneous WhatsApp messages from the Claimant supporting this position [Bundle, p60];**
>
> **3. The Claimant's evidence to the Tribunal was clear and coherent on this topic, despite appearing to be against her own interests.**
>
> **As to the supposed inability of Thompsons to get Ms Rogers case ready in time, it should be noted that Judge Elliott at the hearing on 28 February 2018 plainly considered it possible to get the case ready in time. The reasons for this should be apparent to the Tribunal – all of the factual issues had been subject to detailed consideration by Thompsons when preparing the cases of Cowan and Parsons, they considered that disclosure had been provided and the addition of one more Claimant to the existing 3 would have had only a limited impact that could have been managed by the parties and the Tribunal."**

The relevant law and the issues

7. The relevant law on costs and wasted costs is set out in the following provisions of the Tribunal Rules and in a number of authorities to which the parties referred us in their submissions and to which we refer as necessary in our conclusions:

> **76 When a costs order or a preparation time order may or shall be made**
>
> **(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;**
>
> **(b) any claim or response had no reasonable prospect of success; [or**

(e) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.]

(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.

80 When a wasted costs order may be made

(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.

8. The Tribunal had not been provided with a list of issues but we determined at the start of our deliberations in chambers that the issues we needed to decide were as follows:

Claim against Ms Rogers

a. Was there conduct by Ms Rogers that amounted to unreasonable conduct of the proceedings under Rule 76?
b. If so was the Respondent put to additional cost as a result of that conduct?
c. What was the extent of the additional cost that was caused by the unreasonable conduct?
d. Would it in all the circumstances be just to exercise the Tribunal's discretion to make an award of costs?

Claim against Thompsons

a. Was there conduct by Thompsons that was improper, unreasonable or negligent?
b. Did such conduct amount to a failure in relation to Thompsons' duty to the Tribunal?
c. If so was the Respondent put to additional cost as a result of that conduct?
d. What was the extent of the additional cost that was caused by the unreasonable conduct?
e. Would it in all the circumstances be just to exercise the Tribunal's

discretion to make an award of costs?

9. The Tribunal was assisted by skeleton arguments from all parties and by additional oral submissions made at the end of the hearing. We were grateful to Counsel for their careful and detailed submissions.

Findings and conclusions on the issues

10. The background to this hearing is set out in unchallenged evidence in Ms Phillips' witness statement at paragraphs 5-16. There is no need for us to recite that background in detail. The salient points are that Ms Rogers first met Ms Phillips in a group setting at the BECTU conference in May 2017 at a time when there was an ongoing trade dispute between the Respondent and BECTU in relation to the Respondent's non-payment of the London Living Wage. Ms Rogers' dismissal and that of the Cowan Claimants arose from an email Ms Rogers sent in the context of that dispute on 18 April 2017 on the subject of cyber-picketing.

11. It was common ground that the proceedings relating to the Cowan Claimants and those relating to Ms Rogers were following a different timetable owing to ill health on Ms Rogers' part that had postponed the disciplinary proceedings relating to her and her ultimate dismissal. The Cowan Claimants were dismissed on 14 June 2017 and Ms Rogers was dismissed on 6 July 2017. Proceedings in relation to the Cowan Claimants, which began with interim relief applications, therefore commenced earlier in 2017 than Ms Rogers' claim.

12. Ms Phillips had conduct of Ms Rogers' claim from August 2017. She obtained instructions from BECTU on 7 September 2017 and was aware that Ms Rogers might bring a claim for unfair dismissal against the Respondent. She was subsequently instructed to meet with her. Their first substantive meeting was on 22 November 2017 when Ms Phillips took instructions from Ms Rogers in relation to her employment by the Respondent and her dismissal. The relevant file notes in manuscript and typescript are at pages 19-24.2. The following passage appears at the end of the note.

> **"Will be at least a month before get response.**
>
> **Gave warning that given circumstances (she wrote email, doesn't seem to have been entirely honest) her case had less than 50% chance of success. Cowan and others listed for March 2018. See what happens with theirs. Her case could have a negative effect on the other cases."**

13. Ms Phillips' evidence was at this point she did not consider that there was an outright conflict of interest between Ms Rogers and the Cowan claimants (which would have required her to decline to act), but that it might not be in the best interests of the Cowan claimants for Ms Rogers' case to be heard with theirs. Although it became apparent at a later stage that there was a conflict arising from difference in the way the respective claimants wished to put their cases, this seemed to the Tribunal to be a reasonable and proper exercise of professional judgement at that point in time and we accepted Ms Phillips' account of her thinking.

14. When she submitted Ms Rogers' ET1 on 28 November 2017, Ms Phillips ticked the box to indicate that the claim was part of a multiple. There was no application for consolidation of the claims at that point. There was no evidence before us that the issue of consolidation was formally considered by either party until the preliminary hearing before Judge Elliott on 28 February 2018. Significantly, in our view, no application for consolidation was made in the Respondent's response and grounds of resistance which was received by Thompsons on 14 February 2018 (and therefore presumably prepared some weeks before the preliminary hearing before Judge Elliott). The Tribunal continued to treat Ms Rogers' claim as separate from the Cowan claims and listed it for hearing for one day in April 2018, giving automatic directions. We note that on 12 February the Respondent's solicitors made an application for Ms Rogers' claim to be relisted for a three day hearing (page 58-59), and had notified Ms Phillips of its intention to do so by means of a letter received by Thompsons on or about the same date. In an email sent by Thompsons to the Respondents' solicitors on 1 March, which is set out in full at paragraph 24 below, Ms Phillips wrote: "*We received your ET3 on 12 February together with your letter to the ET saying that one day was insufficient, that a three day listing be (sic) appropriate and providing convenient dates between April and October 2018*" (page 126). It is apparent from this exchange of correspondence that consolidation of the claims was not a priority for the Respondent at that point in time, namely when it was preparing its response to Ms Rogers' claim, even though it would have been clear from Ms Rogers' claim from that her claim was part of a multiple.

15. At the Preliminary Hearing on 28 February 2018, which was conducted by EJ Elliott, the issue of consolidation was raised as an ancillary issue – it was not the subject of a formal application as the hearing had been listed to address a specific disclosure application made by the Respondent. Paragraph 20 of the Preliminary Hearing order records that "*The parties said today that they would consider the position of Miss K. Rogers … as to whether her claim should be consolidated and heard at the same time as in [the Cowan multiple] and if so they would make a joint application*" (page 123).

16. The Tribunal pauses at this point to note that this part of Judge Elliott's order contemplates that the parties would consider whether there should be consolidation of the claims and would make a joint application if so. There is no order for consolidation and the paragraph cited appears to allow for the possibility of disagreement as to whether this would be the best course of action. Had the matter been clear cut, we consider it likely that the order would have been expressed in more forceful terms.

17. Following the hearing Mark Stroud of the Respondent's solicitors wrote to Thompsons as follows:

> **Victoria – I refer to the discussion this morning at the preliminary hearing in relation to Kelly Rogers. As you know, the Notice of Hearing dated 19 February 2018 included Kelly Rogers' name as a Claimant. Notwithstanding this, when we raised the issue of whether Ms Rogers' case should be joined with the other three Claimants, your counsel said that he did not have instructions. Employment Judge Elliott made it clear however that she thought it was a good idea for Ms Rogers' case to be joined with the**

others because if not, she explained that Ms Rogers' claim is unlikely to be heard before June/July 2019. As stated by our counsel at the hearing, our client has no issue with Ms Rogers' case being joined with the others (and therefore dealt with during the hearing listed for 12 to 16 March 2018). Given that your counsel did not have instructions, the Judge asked the parties to agree their position on this and if they agree that Ms Rogers' case is to be joined, for the parties to make a joint application to the Tribunal. Could you please let us know your clients' position on this as a matter of urgency.

18. The terms of this email reinforce the point made in the paragraph 16. Judge Elliott had begun to explore the possibility of consolidation with the parties, but from the account given by Mr Stroud, recognised that there was room for disagreement, even if ostensibly the cases looked suitable for consolidation. It is also notable that the Respondent's own position was far from emphatic – "we have no issue with" is hardly a statement communicating a conviction that consolidation is the only course, or even the obvious course.

19. Having received that email Ms Phillips telephoned Ms Rogers the same day. Ms Rogers was out at the time and was in fact standing outside a tube station and the conversation was short. Ms Rogers made no notes of it and Ms Phillips made a short contemporaneous handwritten note at page 103.1 which stated as follows:

"Kelly. 28/2/2108. Dissertation proposal. Away. Not available. Not ready".

20. At page 103 there was a typewritten note which was dated 28 February 2019 and which stated as follows:

Attendance note file ref: VMP/BECTU/NI770003
Date: 28 February 2019
Time: 16.30
Attending: Kelly Rogers
I telephoned Kelly following the request of the PH concerning joining her case with Cowan and Others. I explained I had been asked whether her case could be joined with Marc, Natalie and Tom's case [12 to 17 March 2019].
I explained that I had just got the defence in her case (14 February) but had not had a chance to send it to her yet. Her case was not ready and so I did not think it should be heard at the same time as the others.
She said that she was in the middle of her dissertation proposal and was going to be away so could not attend.
I confirmed that I would advise the other side that her case was not ready and she was not available.
6 mins

21. The Tribunal was not entirely satisfied with Ms Phillips' evidence about when the typewritten note was created, particularly given that it twice refers to the year 2019, despite being produced, according to Ms Phillips, long before she had any inkling that the Respondent's costs application would be made. Mr Croxford justifiably drew attention to various discrepancies between the handwritten note and the much fuller typed note, which cast some doubt on when the typewritten note was created. However that in itself has not made any difference to our findings of fact or the conclusions we have reached. We note that there is nothing in either document that suggests that Ms Rogers had informed Ms Phillips during the course of that conversation that she positively wanted to have

her case heard alongside the others, which was what she would later say her position had been at the time.

22. Ms Rogers' evidence on the exchange that took place on 28 February 2018 was that she could not improve upon the evidence she had given to the liability hearing eleven months later, which was as follows:

> **"I got a phone call from Vicky from Thompsons shortly before the Hearing saying it's in the interests of Tom, Natalie and Marc that my hearing be heard separately as they felt it was sufficiently different to theirs. They had a lower view of my case and they didn't want to prejudice them. Vicky asked me 'are you ok with me saying that you can't make the Tribunal hearing?' I said ok, if that's the right thing to do. I never wrote to the ET. The only thing was Vicky asking if she could say I couldn't attend. I could have made that hearing but it was the view of Thompsons that it was in the interest of the three Claimants that it was heard separately".**

23. In cross examination however she also accepted two important matters: firstly that she had mentioned her dissertation. What she said was "*I do think it was clear that me writing my dissertation proposal was true, but it was understood by both of us that this was a reason I was giving, because it was better that the cases were not heard together*". She also accepted that Ms Phillips had said that it would not have been possible to prepare her case in time (we note that at that point Ms Phillips had not even sent the ET3 to Ms Rogers and no other preparatory steps had been taken). The Tribunal was cautious about placing reliance on Ms Rogers' statement that "I could have made that hearing". It is not clear that she ever addressed her mind to the difference between preparing to participate in a hearing as a party and merely attending it, potentially as an observer.

24. Following the conversation with Ms Rogers, Ms Phillips wrote the following email to the Respondents' solicitors (page 126):

> **"Dear Mark**
> **Thank you for your email of 28 February 2018. We have now received the Order from the ET and note at paragraph 20 it states: 'The parties said that they would consider the position of Miss K Rogers in case number 2303478/2017 and if so they would make a joint application'.**
> **The ET listed Miss Rogers' case for one day on 17 April 2018 on 15 January 2018.**
> **We received your ET3 on 12 February together with your letter to the ET saying that one day was insufficient, that a three day listing be appropriate and provide inconvenient dates between April and October 2018.**
> **Until this afternoon we did not understand that you sought the consolidation of Miss Rogers' case with the Cowan and Others Claimants.**
> **It was not intended that Miss Rogers be a witness of the Cowan and Others cases.**
> **Her case is not prepared as yet. I urgently contacted her yesterday evening but she is not in any event free that week.**
> **I do not consider it is in the interests of justice for Miss Rogers' case to be joined at such a late stage with the Cowan and Others case. Apart from the fact she is unable to attend there is simply not the time to prepare her case. Equally, given the Cowan and Other Claimants cases have been listed since 10 August last year, following their dismissals on 14 June 2017, it is not in the interests of justice for their cases to be delayed (although it does not appear that the Judge was suggesting that they should be).**
> **In the circumstances, we do not consider that Miss Roger's case should be joined and do not consent to a joint application at this late stage."**

25. Sarah Keeble of Mishcon de Reya replied on 2 March 2018 as follows:

> **"Victoria - thank you for your email.**
> **Given the terms of your email, it seems that Miss Rogers' claim will need to be heard separately. As the Judge indicated on Wednesday, this is unlikely to be until mid-2019 - we would agree with the Judge that it is surely not in Miss Rogers' interest for her case to be delayed for so long and of course, the Tribunal (and the parties) will now be put to the cost of two separate hearings in relation to identical facts.**
> **We note that Miss Rogers applied to ACAS towards the end of the three month filing deadline (in late September 2017), obtained the ACAS certificate in late October 2017 and you filed her claim with the Tribunal in late November 2018. You were presumably therefore on notice from late September (at the latest) that you wished to file a claim. However, at no stage did you notify the Tribunal (or us) that her claim could easily be joined with that of the other three Claimants, which as I say, would have saved both the Tribunal and the parties the time and costs involved in an additional (and wholly unnecessary) hearing. It would appear that in fact, Miss Rogers' claim was deliberately held back for as long as possible, so that it would not be joined with that of the other three Claimants. We reserve our client's rights in this respect and in particular, in relation to the significant additional costs that will be incurred given that Miss Rogers' case will now been proceeding on a separate track."**

26. We note that at this point in the proceedings, 14 calendar days before the Cowan Claimants' hearing was due to start, Ms Phillips did not yet have the Respondent's documents relating to Ms Rogers' disciplinary hearing (Thompsons does not ordinarily become involved in a case until proceedings become a likelihood). However she accepted in cross examination that in principle a case can be prepared for hearing in a short space of time and that she is accustomed to making urgent and last minute applications. In cross examination by Mr Croxford she maintained that the email at page 126 disclosed a number of reasons for not agreeing to consolidation at that point: that Ms Rogers' case was not yet prepared, that Ms Rogers was not available that week and that it would be prejudicial to the Cowan Claimants to have their hearing potentially vulnerable to delay. She said that the email at page 125 from Mr Stroud had come as a surprise given that the letter accompanying the Respondent's ET3, sent two weeks earlier, had made no mention of consolidation. She said that she considered Ms Keeble's email of 2 March "a bit rich", considering that until then the Respondent had neither mentioned consolidation nor made a formal application for consolidation when it responded to Ms Rogers' claim. When being cross examined by Mr Khan she made the same comment. She also elaborated on her thought processes at the time, saying "*I just didn't think there was time. I had to ask her if she was available. If she had been I would have had to take instructions from the Cowan Claimants*". When asked by Mr Khan whether, if Ms Rogers had said that she was available and wanted to participate in the Cowan Claimants' hearing, Ms Phillips would have had to act on those instructions even though the case was not in her view ready, she answered in the affirmative. She reiterated that Ms Rogers had told her that she was working on her dissertation, that she had not probed, but that there had definitely been a discussion about the Claimant's time commitments. She also reiterated that what was uppermost in her mind was not to lose the Cowan listing.

27. The Tribunal was charged with making a finding of fact as to whether during the

exchange with Ms Roger on 28 February Ms Phillips either told Ms Rogers to misrepresent her availability, or colluded with her to misrepresent the situation so as to mislead the Respondent and the Tribunal as to the viability of consolidating the claims. We find as a fact that Ms Phillips did neither of these things. She took instructions as to the Claimant's availability, she accepted what she was told and she proceeded to seek the Claimant's consent to inform the Respondent and the Tribunal that she was not available to participate in the hearing due to commence to weeks later. What she was principally concerned about was not jeopardising the hearing of the Cowan Claimants' claims.

28. A week later Ms Rogers sent a WhatsApp message to a group of other BECTU Union Reps (page 60). The exchange was as follows:

> **Q: Are any of you planning of (sic) going to any tribunal hearings?**
> **KR: I don't think I'm allowed to. I've had to tell the Tribunal there's absolutely no way I could make this hearing, so that they didn't hear my case with the others. It's shame. I'm interested to see what happens".**

29. The Respondent placed considerable reliance on this exchange in asserting that both Ms Rogers and Ms Phillips had misled the Tribunal. Ms Phillips, reasonably in the Tribunal's view, said that she was not responsible for what Ms Rogers said in private exchanges with her colleagues. She had not told Ms Rogers to say that she could not make the hearing in the way that the WhatsApp message suggested. She said that she had had not and never would tell a client to lie to a tribunal. The Tribunal accepted this evidence as truthful and find as a fact that Ms Phillips did not tell Ms Rogers to tell the Tribunal directly, or instruct Ms Phillips to tell the Tribunal, that she was unavailable to attend the hearing, when that was an untrue state of affairs. Ms Phillips was entitled to rely on Ms Roger's assertion that she was unavailable because she was busy with her dissertation proposal and would be away on the relevant dates, as noted in the file notes referred to in paragraphs 19 and 20.

30. Following the correspondence between the parties cited above there was no further discussion of consolidation and the claims proceeded on separate tracks, with Ms Rogers eventually easing to instruct Thompsons to represent her.

Conclusions

Ms Rogers

31. In our judgment, Ms Rogers did not do anything that amounted to unreasonable conduct of the Tribunal proceedings in the manner suggested by the Respondent for the purposes of this application for costs. On the specific issue of whether she deliberately misled the Tribunal as to her availability to participate in the Cowan proceedings, thus meaning that her own case continued to be dealt with separately, we found no evidence of her having done so. When Ms Phillips asked about her availability she informed Ms Phillips that she was busy with her dissertation proposal and that she was agreeable to the Tribunal being told that she was unavailable for the hearing on 18 March. Neither of these statements was untrue. As we have observed earlier, we do not

think it right to place much emphasis on her statement during her evidence to the liability hearing (see paragraph 22) that "*I could have made that hearing*" as it is unclear whether in saying so she had properly addressed the difference between merely attending a hearing and being fully prepared to participate in one. We accept Ms Phillips' account of her thoughts and motivation for the reasons elucidated above and further considered below. That being the case, we inevitably reject the Respondent's suggestion that there was collusion between Ms Rogers and Ms Phillips for the express purpose of avoiding the consolidation.

32. We find that what Ms Rogers said subsequently - to her fellow Union Representatives on 7 March and latterly in her evidence to the liability hearing as set out in paragraph 22, cannot be easily reconciled with our findings of fact as to what Ms Phillips had said to her. But that is immaterial to this application, which is predicated on the Respondent's assertion that the Tribunal was deliberately misled at the beginning of March 2018 about consolidation and that the Respondent unnecessarily incurred costs as a result.

33. To elaborate on that point, as regards the WhatsApp exchange at page 60, we consider that in all the circumstances Ms Rogers may have wanted to paint herself as supportive of her colleagues, for whose predicament she felt responsible and as a result she misrepresented what she had been told by Ms Phillips to explain why she would not be going to attend. We have found as a fact that Ms Phillips did not tell her to be untruthful about her availability in order to avoid consolidation. But in the context of the Respondent's application for costs, the important point about the WhatsApp message at page 60 is that it was not a representation to the Tribunal, the Respondent or even to Ms Phillips. It was a representation to Ms Rogers' fellow Union Representatives and accordingly, whether it was true, untrue or partially true is irrelevant to the issues before the Tribunal.

34. As regards Ms Rogers' evidence to the liability hearing as set out in paragraph 22, we find that it cannot have been true, given our other findings of fact in this case. But that evidence, given long after the point at which consolidation was under discussion, caused no additional costs in these proceedings. It merely served to cast doubt, after the event, on whether what the Respondent had been told at the beginning of March 2018, was in fact true. Giving untruthful evidence to the Employment Tribunal is in principle capable of being unreasonable conduct of the proceedings. But it is not inevitably unreasonable, as it may result from genuine confusion, or imperfect recall and it may also be explained by a perceived need to stand by one's own evidence when being accused of lying. An award of costs is discretionary and all such factors may be relevant to the exercise of the discretion. However all of that is irrelevant here. Ms Rogers' conduct, whether unreasonable or not, did not cause the Respondent the loss it asserts in this part of the proceedings as there is no evidence of her making any untrue statements to the Tribunal or to Ms Phillips about her availability to participate in a hearing at the material time, that is, when decisions were being made about whether her claim should be consolidated. There is therefore no basis for making an award of costs against Ms Rogers.

35. We also allow for the possibility that the discrepancy between the accounts given by Ms Phillips and Ms Rogers could have arisen from an imperfect recollection of events that occurred over two years ago, or a misunderstanding on Ms Rogers' part of the nature of Ms Phillips' reservations about consolidation of the claims. The different accounts do not inevitably point to behaviour that would justify an award of costs, even if a causal link could be established between the behaviour in question and the additional costs claimed.

Ms Phillips

36. We have found as a fact that Ms Phillips did not misrepresent Ms Rogers' availability to the Respondent or to the Tribunal. To reiterate, her position is set out at page 126. She makes two references in that email to Ms Rogers' availability but that was on the basis of what Ms Rogers had told her – that she was busy with her dissertation proposal. That point is supplemented by the other practical matters she refers to, in particular the fact that the Respondent's suggestion of consolidation was a new development, that preparation for Ms Rogers' case was at an early stage and that she was concerned at the potential prejudice to the Cowan Claimants of losing the listing in March 2018. It is not self-evident that consolidating the Claimant's claim with that of the Cowan Claimants would have been the course of action most likely to further the overriding objective in Rule 2 of the Tribunal Rules. We see nothing in that email or any of Ms Phillips' evidence that came to light at the hearing before us that could amount to unreasonable conduct of the proceedings. That finding, is, as submitted by Mr Brittenden, dispositive of the application. Accordingly we find no basis for any award of costs against Thompsons.

37. The email from Ms Keeble at page 127 was in our judgment disingenuous. In particular the suggestion that Ms Phillips had not at any stage made any suggestion towards consolidation was simply wrong – Ms Phillips had on Ms Rogers' ET1 notified the Tribunal at the earliest possible opportunity that this claim was part of a multiple. The Respondent by contrast made no reference to consolidation when it filed its response and instead made an application for Ms Rogers' case to be relisted for three days, an omission that it is difficult to reconcile with the suggestion that consolidation was not only an appropriate course, but one that Thompson was remiss in not pursuing. By making that application furthermore the Respondent gave credence to the concern alluded to in Ms Phillips' email to the Respondent's solicitors on 1 March 2018 (page 126) that consolidation would have jeopardised the hearing of the Cowan multiple within the time allocated.

38. In our judgment this costs application should not have been pursued. Even if there had been any conduct by either Thompsons or Ms Rogers relevant to the making of a costs award, the evidence that consolidation would have been an appropriate course of action was clearly lacking, so that the necessary causal link that would justify an award of costs is also absent, as should have been clear to the Respondent. As Mr Khan reminded the Tribunal in his submissions on behalf of Ms Rogers the Court of Appeal in Yerrakalva v Barnsley MBC [2011] EWCA Civ 1255 held that there must be a causal link between the relevant conduct and the costs sought: see Mummery LJ at para 41:

> **"41. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. […]"**

39. As Mr Brittenden submitted on behalf of Thompsons, the requirement of causation relevant in the claim against Ms Phillips is set out in Ridehalgh v Horsefield [1994] Ch. 205 CA and Medcalf v Mardell, Weatherill & Another [2003] 1 AC 120. In Ridehalgh, the Court of Appeal set out a three-stage approach to determining whether a Wasted Costs Order can be contemplated (p.231):

    (1) Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently?

    (2) If so, did such conduct cause the receiving party to incur unnecessary costs?

    (3) If so, is it, in the circumstances, just to order the legal representative to compensate the receiving party for the whole or any part of the relevant costs?

40. Even if we had found that either Ms Phillips or Ms Rogers had misrepresented Ms Rogers' ability to join her case to that of the Cowan Claimants, it is unlikely that the parties would have reached a common position on consolidation in the available time, or that the Tribunal would have been persuaded that it was an appropriate course of action. There were a number of reasons for this:

    a. There was insufficient time available properly to prepare Ms Rogers' case for hearing. As Mr Khan submitted, had the attempt been made, preparation would inevitably have been rushed and Ms Rogers would not have been on an equal footing with the Cowan Claimants or the Respondent, in terms of the time allotted to the preparation of her case. That in itself would have represented a departure from the overriding objective;
    b. The willingness of the Cowan claimants to agree to consolidation could not have been guaranteed. It is likely that had the options been explained to them, they would have objected to a course of action that would either have entailed the relisting of their own cases or restricted the time available for the hearing of the evidence (if the original listing had been retained);
    c. The emergence of the conflict of interest between Ms Rogers and the Cowan Claimants as to how their respective claims should be argued is likely to have made consolidation inappropriate;
    d. The issue of consolidation was raised very late in the day for reasons that must to some considerable extent be laid at the door of the Respondent. Ms Phillips correctly discharged her duty to the Tribunal by indicating on Ms Rogers' ET1 that the claim was part of a multiple, whilst the Respondent omitted to raise the possibility of consolidation when it put in

its response.

41. Mr Brittenden made the further important point that Ms Phillips' duty in deciding on the appropriate course of action was to the Tribunal, not to the Respondent (Medcalf). Her actions and the decision she made not to support an application for consolidation should therefore be judged not by its impact on the Respondent, but on its appropriateness in all the circumstances, including her obligation to further the overriding objective That in turned involved a weighing of the impact of a consolidation application on her two separate clients, the Cowan Claimants and Ms Rogers and her perception of the impact not only on the Cowan Claimants but on the Tribunal itself, of losing an established listing.

42. Given these factors, in our judgment it was foreseeable from the outset that the Respondent's costs applications would have failed on the matter of causation.

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Employment Judge Morton
Date: 19 November 2020