EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms K	**v**	**1. NN Limited** **2. Mr N**

Heard at: Watford **On**: 16 and 17 December 2020

Before: Employment Judge R Lewis
Members: Mr A Scott
Mrs I Sood

Appearances

For the Claimant: Mr R Robison, Trainee Solicitor
For the Respondents: Mr P Maratos – Consultant, Peninsula

RESERVED REMEDY JUDGMENT

1. The First Respondent is ordered to pay to the claimant holiday pay of £350.00.

2. The First and Second Respondents are jointly and severally ordered to pay to the claimant £10,000.00 in respect of injury to feelings and interest of £1,176.00, a total therefore of £11,176.00.

3. The claimant's application for a costs order is dismissed.

4. The respondents' application for a costs order is dismissed.

5. The respondents' application for an order for permanent anonymity is refused, and the anonymity order sent to the parties on 5 November 2019 is discharged.

ORDER

6. In exercise of its powers under Rules 41, 50(3)(b) and 61, the tribunal postpones implementation of the final paragraph of the above judgment

pending any appeal proceedings. It is the duty of the parties to inform the tribunal of the progress of any appeal proceedings. It is confirmed for complete avoidance of doubt that this paragraph applies only to the final paragraph above, and only in the event of appeal proceedings which relate to paragraph 5 above.

REASONS

This hearing

1. The reserved liability judgment of this tribunal (54 pages) was sent to the parties on 5 November 2019, and on the same occasion, remedy was listed to be heard on Thursday and Friday 23 and 24 January 2020. In these Reasons we refer to our liability judgment as LJ, so LJ121 refers to paragraph 121 in the judgment sent to the parties on 5 November.

2. After close of business on 22 January Ms Montaz of Peninsula wrote to the tribunal,

> "The parties are very close to agreeing terms of a settlement agreement by Acas. We therefore respectfully request that the Remedy Hearing is stayed for 7 days to enable the agreement to be finalised."

3. A few minutes later the claimant wrote to the tribunal as follows:

> "I can confirm we have spoken and I have agreed to this. Ms Montaz has given me her word and I have accepted that."

4. Without having asked for the permission of the tribunal, neither party attended on 23 January. The tribunal had convened, and was ready to proceed. It is perhaps idle to speculate how much work and anger could have been avoided if the parties had taken the trouble to come to the tribunal on 23 January 2020 so that matters could have been finalised promptly that day.

5. In those circumstances, the tribunal ordered a stay until 20 February. The case was to be dismissed on that date unless a party applied for relisting. On 7 February the claimant applied for relisting.

6. In March 2020 the parties were told that the remedy hearing would take place in July and formal notice of hearing was sent to them on 11 May. In light of further correspondence, and the first lockdown, the judge converted the listed hearing in July to a telephone hearing. On that occasion and for the first time the claimant was represented (by Mr Robison). Mr Maratos was temporarily replaced by a colleague. The present hearing was listed on that occasion, and a case management timetable sent, confirmed by order sent a few days later.

7. In light of the imposition of Tier 3 conditions in Watford, the hearing was converted to CVP, with consent of the parties, on Tuesday 15 December. While we do not underestimate the last minute difficulty caused by conversion

to CVP, this was a hearing which took place over a year after the parties had been on notice of the need for a remedy hearing, ten months after what they thought was an eleventh hour settlement, and five months after the final telephone directions hearing.

8. There was not an agreed bundle; we had a paper bundle provided by Peninsula and a PDF bundle provided by Mr Robison. (References in these Reasons are to the pagination of the paper bundle). The two were similar, but not identical. Organisation of the bundles defied logic, being neither sequential, chronological or thematic. One brief illustration is that the paper bundle contained five letters from the claimant's psychiatrist. In chronological order their numbering was 105, 162, 11, 12B and 12A. The bundles were internally repetitive. Both contained email trails which were incomplete and in reverse chronological order.

9. Mr Robison had prepared skeleton arguments. Mr Maratos had prepared a draft skeleton argument which was in the paper bundle. There was a witness statement from the claimant and one from Mr N. Both gave evidence by CVP and were cross examined. The tribunal completed hearing submissions by the end of the first day, and reserved judgment.

The questions for decision

10. It was agreed that there were before the tribunal the following questions to be decided:-

    10.1 Calculation of compensation for injury to feelings;

    10.2 A claim for aggravated damages;

    10.3 Calculation of statutory interest on the above;

    10.4 The claimant's application for a costs order against the respondent;

    10.5 The respondents' application for a costs order against the claimant;

    10.6 The respondents' application for an order for permanent anonymity.

General approach

11. We were told that while this matter is no longer before the EAT, there remain live disputes before, at least, the GMC; potentially before the Civil Courts in a claim for clinical negligence; potentially before a regulator of private hospitals known as ISHAC; and we heard reference to the Information Commissioner. It was evident when the claimant and Mr N gave evidence that the emotion in this case remains raw on both sides. It was sadly apparent that this hearing would not conclude matters, hence the terms of the order at #6 above, to which we alerted the parties at the end of the first day when we reserved judgment.

12. The findings in our liability judgment are conclusive and binding on the parties. It is therefore undesirable that we say anything in this judgment which might appear an interpretation or gloss on our judgment.

13. There was reference at this hearing, repeatedly, to the claimant's relationship with Mr N as patient/doctor, as well as that which was material to our determination, of worker/employer. We repeat the findings which we have made at LJ121 and 151. Mr Robison reminded us of the second sentence of LJ262.

Injury to feelings

14. It was common ground that the claimant was entitled to compensation for injury to feelings for the matters found at LJ 251 to 263. It was agreed that there was no claim for financial loss. It was common ground that the approach is to be compensatory not punitive.

15. The claimant had produced a witness statement. What was required was an analysis, so far as the claimant could define it, of the injury caused to her feelings by the matters for which she was entitled to compensation in accordance with our findings set out at LJ 251 to 263 inclusive. That analysis was lacking from the claimant's witness statement.

16. Instead, the claimant's statement was a reiteration of the history of her dealings with Mr N. We noted that in the statement, the claimant used the words 'patient' or 'doctor,' 'consultant' or 'surgeon' about 20 times. That was a powerful indication of a misunderstanding which underpinned the claimant's approach to this hearing. Our task was to compensate the claimant for unlawful discrimination suffered as a worker. We have wholly excluded consideration of the doctor/patient relationship from our approach.

17. We turned then to the medical evidence, all of it written by Dr Parsonage, a psychiatrist, who we understand has treated the claimant for some time. We summarise his evidence chronologically. On 10 June 2019 (105) Dr Parsonage reported, "a diagnosis of severe general anxiety disorder and adjustment disorder." His report dealt with the impact on the claimant of litigation, and the desirability of achieving a speedy conclusion.

18. On 13 November 2019 Dr Parsonage wrote in support of the claimant's application for reconsideration of our first judgment (which the present Judge refused in accordance with rule 71). He wrote that she has a diagnosis of "depression and anxiety." He wrote that she felt that she was "not able to give good representation of herself during the court hearing" and that he wished to "support her in her appeal" (162).

19. On 22 January 2020 Dr Parsonage wrote 'To whom it may concern.' That report seemed to us the single most useful medical document in the bundle. The document should be read in full, and we find the relevant portions as follows (all emphases added):

> "She struggles with severe generalised anxiety disorder, depression, and adjustment disorder …

> It is my opinion that the ongoing situation with her ex doctor, Mr N, has been the cause of her mental health difficulties.
>
> All the texts and comments which Mr N made to the claimant have had a severe detrimental effect on her wellbeing. She has been significantly affected by Mr N's lack of an apology or any sort of acknowledgement of the impact his actions have had on her wellbeing. Ms K is struggling to come to terms with how Mr N broke her trust and recorded her without permission and she feels betrayed by him… I see her frequently to help her to work through the impact Mr N has had on her and to help her to accept that she was not at fault for putting her trust in a doctor who she thought would only act in her best interests.
>
> This case has caused Ms K severe distress and anxiety… This ordeal has left Ms K significantly unwell… It is likely that it will take years to fully recover from this episode, and she may never get back to how she was before she met Mr N.
>
> It is my clinical opinion that Ms K's mental health difficulties were triggered by her involvement with Mr N and this is the main causative factor in her current psychiatric conditions.
>
> The ongoing litigation has had a further significant detrimental impact on Ms K and her mental wellbeing."

20. On 23 September 2020 Dr Parsonage wrote again 'To Whom it may concern' (12B). He described the impact of the prolonged litigation on the claimant's studies and the importance to her of concluding the legal proceedings.

21. On 2 December 2020 (two weeks before this hearing) Dr Parsonage wrote again 'To Whom it may concern' (12A):

> "The primary precipitant for Ms K's ongoing mental health problems is the medico legal case that she has brought… and the ongoing nature of this case.
>
> As a result of the index incident and the ensuing litigation her mental health has been significantly affected…
>
> Having supported Ms K throughout her medico legal case I can vouch that she has been profoundly affected by the index incident and the ongoing case and due to the fact the case has been drawn out for a prolonged period of time and not been resolved."

22. The third quoted sentence of the January 2020 letter ('All the texts ..') contains the totality of the evidence presented to us, from any source, which linked the specific points on which the claim succeeded with injury to feelings. That sentence stands in contrast with Dr Parsonage's recurrent use of generalised language which embraces not just those points, but all the points on which this claim failed, and the doctor / patient points which were not before this tribunal. Where Dr Parsonage writes of 'ongoing situation,' 'episode,' 'involvement,' or the 'index incident' and 'medicolegal case' we understand his remit to go far beyond ours in subject matter and chronology. It was not clear to us what was meant by 'index incident' in this context, and we do not

regard this claim as 'medicolegal proceedings,' a term more suitably applied to the other disputes identified at #11 above.

23. Mr Robison's submission did not add a great deal to the above, because he focussed on the breach of trust which the claimant claimed to have suffered as a result of Mr N's behaviour towards her as a doctor. That is precisely material upon which we made no finding, and award no remedy.

24. Mr Robison did not ask us to find that the claimant was entitled to compensation for the mental illness which she has suffered over a period of time. He invited us to make an award including aggravated damages in the midpoint of the middle Vento band.

25. Mr Maratos submitted that had the claimant objected to the first time of usage, Mr N would have avoided a recurrence, and that therefore the claimant contributed to escalation and aggravation. We agree that Mr N would probably have respected a request to avoid gender-related language. We do not however agree that the claimant contributed to Mr N's actions. We repeat what we have said in general at LJ250 and 259 about the absence of objection.

26. Our approach has been that this case was presented at a time when the lower band was up to £8,600 and the middle band was between £8,600 and £25,700. The bands include uplift.

27. We have found that the acts of discrimination were a series of incidents, not a single incident. We have found that they occurred between 10 January and 7 February 2018, and therefore spread over a period of exactly four weeks.

28. We note that Mr N's language referred to job specific events, and was, to repeat the language of our earlier findings, unnecessary and demeaning. The language devalued any justifiable pride or sense of achievement which the claimant may have felt for recognition of work well done. We accept Dr Parsonage's advice that the language contributed to the totality of the claimant's illness, but we cannot find, on the totality of the evidence, that it was more than one factor in the totality of the general words used by Dr Parsonage, which we have quoted above. If the claimant asked us to find that as she succeeded on one point of her claim, we should compensate her for the totality of her reaction to all the events which she alleged, we decline to do so.

29. We find that this case falls in the lower end of the middle band which was available at the time. In light of the factors set out in this section of this Judgment, and in light of our findings at the relevant portions of the liability judgment, we set the award for injury to feelings at £10,000.00.

30. We reject the submission that the claimant should be awarded aggravated damages. We could see nothing in the events of the time which could meet the traditional test of action which was high handed or malicious or oppressive. We find that there was no discriminatory motive. We deal in the

costs context with one aspect of conduct which post-dated the end of employment. The application for aggravated damages fails.

Statutory interest

31. We calculate interest from date of the first communication on 10 January 2018 to date of this hearing 17 December 2020. It is therefore interest at one half of (8% over 2.94 years). Our calculation is therefore as follows:

    (£10,000 x 2.94 x 8) ÷ 100 ÷ 2 = £1,176.

Costs applications

32. Both sides applied for costs orders. The costs applications were made under the provisions of Rules 74 to 80. The framework is a familiar one. The party who applies must first demonstrate that the paying party has behaved in a way which falls within the broad framework of Rule 76, which, without repeating all the adjectives, constitutes unreasonable behaviour. At the second stage, the tribunal must accept that it is in the interest of justice to make a costs order, and at the third stage it must consider whether to do so in a fixed amount or order assessment, having regard at any stage to any information it is given about ability to pay. Neither party put before the tribunal information about its own ability to pay.

The claimant's application

33. The claimant's written submission referred to five separate points. They were in order that she was upset by an email sent by Ms Montaz on 27 January 2020, which she interpreted as a threat (28 to 29). The second and third related to case management orders made in June 2019 by Employment Judge Heal, who made two unless orders in relation to disclosure by the respondent, and a deposit order in relation to the submissions of the respondents on employment status. The claimant also made the broad submission that the respondents' conduct of the litigation had affected her adversely, including making new documents available at a final stage. In oral submission Mr Robison put greater emphasis on the correspondence trail evidencing attempts to settle the litigation, indicating, he said, that the respondents had made no true attempt to settle.

34. Mr Robison said that the claimant's actual preparation time exceeded 1800 hours, which would represent a costs figure (if all calculated at £39.00 per hour) in excess of £70,000; however, he limited the application to a fixed figure of £20,000.00, ie the maximum figure which the tribunal has power to order without assessment.

The respondents' application

35. Mr Maratos' submission on costs was likewise in two stages. His written submission (62) was that the claimant had behaved unreasonably by conducting correspondence which was unnecessary, excessive and

provocative; by making irrelevant subject access requests; and by making unjustifiable demands.

36. Mr Maratos referred to the claimant's original quantum on the claim as in excess of £200,000.00 and her costs figure in excess of £70,000.00. He submitted that the claimant had used the tribunal as a means of inflating a personal injury claim, and he referred to the settlement negotiations. He asked the tribunal to make an order in favour of the respondents in respect of 100 hours work of preparation time, ie £3,900.00.

Approach to costs

37. At the first stage the tribunal must in each instance ask whether the test of unreasonable conduct has been met. It is possible in theory for a claim to have been conducted unreasonably on both sides. It is possible that a successful or part successful party may be ordered to costs, and / or that a part unsuccessful party may not be ordered to pay costs.

38. We approach the costs issues consistently with the remainder of our Judgment. We remind ourselves of LJ 28 to 73 inclusive, in which we set out extensively the case management challenges which this tribunal faced. We set out at LJ67 our consideration of the medical issues, as we perceived and understood them. We made findings at LJ 28 and 65-73 which we repeat.

39. This has been an acrimonious dispute. At times, ugly language has been used, unjustified by the evidence of fact which we heard. The passage of time appears if anything to have inflamed emotion, rather than dampened it down. We are sceptical that this hearing will give either party closure. That said, there remains one significant distinction to be drawn between the two sides. This litigation has, as ever, been driven by the claimant's exercise of judgment and free choice. The respondents do not have choice about whether to participate in this claim; they are defending. That is a litigation commonplace.

40. We have approached the applications for costs by considering events up to 22 January 2020 separately from those thereafter.

Discussion: matters before 22 January 2020

41. On the claimant's application, we have not been convinced that Judge Heal's imposition of an unless order or a deposit order is an indication of unreasonable conduct by either respondent. Both are orders provided within the standard case management powers of the tribunal in accordance with Rules 38 or 39. Neither automatically indicates unreasonable conduct. Given the disarray of the documentation presented both at the 2019 hearing and at this hearing, we are unable to make a finding that the respondents' disclosure processes have indicated unreasonable conduct. We say so because it is commonplace for claimants to pursue mirages of disproportionate disclosure, often fuelled by the unwieldy and indiscriminate obligations imposed by subject access requests. We accept with Mr Maratos that disputes about employment status are commonplace; we pointed out that they have led to

multiple litigation in the higher courts in recent years; and we note that the deposit order met its purpose in this case, namely that the point ceased to be in issue.

42. The claimant's assertion, supported by Dr Parsonage, that Peninsula's conduct of the case has affected her mental health, does not of itself prove unreasonable conduct. Her assertion represents the perception of conflict by a person embroiled in the conflict, who, in Dr Parsonage's words, became, "very preoccupied by the ongoing case and is all *(sic)* she can ever think about" (105). That proposition is supported by Mr Robison's submission that the claimant had devoted to this case the equivalent of 1800 hours (the equivalent of an entire year of full time work).

43. Our findings have been that as a litigant in person the claimant faced significant difficulties, and that she presented exceptional challenges to the tribunal's case management. The claimant acknowledged at the original hearing, and in subsequent correspondence, and implicitly through Dr Parsonage, that many issues and difficulties had been driven by issues of her mental health. We find that in her correspondence with Peninsula, the claimant sent an excessive number of excessively long emails. We accept that she was, for Mr Maratos and a number of his colleagues, a challenging opponent.

Discussion: events on and after 22 January 2020

44. We then turn to the negotiation position. Given the amount of emotion and energy devoted to this point on both sides, it would have been truly helpful to have been provided with a single agreed chronological, indexed bundle of the relevant emails, without repetition and not in reverse order.

45. As stated above, the parties were on notice well in advance that there would be a remedy hearing on 23 January 2020. The claimant continued to act in person.

46. In the course of January the claimant was in correspondence with Ms Montaz of Peninsula (standing in for Mr Maratos). On 21 January Mr N wrote an apology which was sent to the claimant that day, which we set out in full, because it seems to answer the claimant's issue that Mr N had failed to apologise (179):

> "Dear [Forename]
>
> I have had time to read and fully digest the Judgment that was given in December.
>
> The Tribunal in my view were entitled to reach the conclusion that they did in finding that I should not have used gender related words in some of the texts that were sent to you.
>
> At the time I genuinely did not think that they would cause offence, but that said, I do apologise.
>
> With best wishes

Yours sincerely

[Forename]."

47. It was evident from the email trails that two issues were being negotiated. One was a sum of money. The other was whether the parties would agree to the continuation of the restricted reporting order/anonymity order set out in our liability judgment. (It was not clear to us at this hearing whether it was clear to the claimant that continuance of that order would require the agreement of the tribunal, and could not be a matter of pure consent by parties; Mr Maratos made that point in submission, but it did not appear to be anywhere in the correspondence, which focussed instead on the separate issue of the terms of a non-disclosure agreement between the parties).

48. On 22 January, ie the day before the remedy hearing, the parties thought that they had reached agreement and both emailed the tribunal in terms quoted above.

49. We do not have the full evidence or email trail which then followed. It is obvious that by 27 January, the negotiation had broken down. In an email of that day (31) the claimant wrote to Ms Montaz (caps and bold in original):

> "I am extremely upset and angry over what you tried to do in the last few days. You have **misrepresented** yourself to the Tribunal and me as we were **NEVER** close to agreeing terms. You wanted the gag clause but did not want to compensate me for it. **You were trying to trick me**."

50. This short email illustrates much of what could be criticised in the claimant's correspondence. There was first no evidence whatsoever of deceit or trickery; the possibility of mutual misunderstanding appears not to have been in her mind. Secondly, the parties were close to agreeing terms. The claimant's email of 22 January said so. If either had thought that that was not the case, they could have come to the tribunal the next day. Thirdly, the penultimate sentence shows the dissonance between the claimant's purported concern for publicity and the public interest; versus her evident willingness to agree to confidentiality if she were offered acceptable financial terms.

51. The following day Ms Montaz forwarded the claimant an email which Mr Maratos agreed should not have been sent to her (28). It was a serious error of judgment to forward it, even if Mr N gave instructions to that effect. The email was presumably from Mr N to Peninsula, and was written in anger. It is unlikely that he intended it to be sent as a cut and paste to her, and its language was near incendiary. It made no difference that Ms Montaz a few hours later stated that it should have been headed "Without prejudice," as that would not in any way diminish its impact on the claimant.

52. By 7 February the claimant had asked for this hearing to be relisted. Negotiations did continue, but it was clear by 11 February that agreement could not be reached. On that day the claimant made proposals of £20,000

to £25,000 to settle, provided settlement was reached the following day, but if not, she wrote that her settlement figure would increase by £500 per day thereafter. That was a reflection of her anger: the claimant cannot have had any reasonable expectation that that was a realistic proposal.

53. Neither side can re-read this correspondence with pride. We are not in a position to judge whether either was at fault for the breakdown in negotiations. The correspondence indicates unreasonableness on both sides: on the claimant's side, in escalating unrealistic demands and expressing a financial demand increasing in a way which she must have known would never be met; and likewise, in her failure to resolve the dissonance identified at #50 above. Ms Montaz made a bad mistake by forwarding the 28 January email, and would have been well advised to admit the mistake and apologise for it, but that was a litigation mistake, not unreasonable conduct.

Discussion of costs

54. Our general finding is that we do not agree that the respondents' conduct of the proceedings has in any respect been shown to meet the rule 76 test of unreasonable conduct. We find that when we take together our general finding that the claimant's correspondence was disproportionate and excessive, and our findings at LJ28-73, we make the general finding that the claimant conducted the litigation unreasonably, both before and during the hearing in 2019.

55. We then turn to the question of the interests of justice. In so doing, we must bear in mind the various interests at stake. It is in the interests of justice that unrepresented members of the public have access to workplace justice, in a system which is relatively informal and (save for a brief period) free to use. The tribunal must also bear in mind its responsibility to safeguard employers and respondents from unmeritorious or vexatious claims. Equally, the tribunal must be astute to ensure that its limited judicial resource is well used, as every day spent on one case is judicial resource not available to another case. Although there is no legal requirement to consider exceptionality, we approach costs applications on the understanding that the CPR costs regime (under which the general approach is that the unsuccessful party contributes towards the costs of the successful party) does not apply in the tribunal, and that costs awards are in practice exceptional.

56. Balancing all of those matters together in this case, we step back and look at the totality of the circumstances.

57. We have found that the claimant succeeded in part of her claim. We accept that she was mentally ill for much of the period of preparation and presentation of this case. This dispute proceeded as hostile litigation, and regrettably, seems likely to continue in that vein. The claimant has represented herself, and has struggled to work according to the disciplines of the system of justice.

58. In our judgment, this is not a case which on its facts was inherently exceptionally demanding. It demanded no more than a cool objective

approach on both sides. We are unable to see an interest of justice which puts the conduct of either side in context into an exceptional category such as to warrant an award of costs. We decline to make any award.

59. Although it is not necessary for us to do so, we add that we were not helped by the figures put on both sides. While the claimant's figures may represent time which she actually devoted to the litigation, they were disproportionate and excessive to a degree, and we would not have made an award approaching £20,000, let alone assessment of up to £70,000. While we could see the rough rationale of Peninsula's application, and while we accept that they undertook many more hours work than the stated figure, there was no evidence to support the calculation of 100 hours work.

Anonymity

60. We have at LJ29-32 set out how this issue was dealt with at the first hearing. It is useful to be reminded that we made a restricted reporting order within the framework of rule 50(3)(d), and Employment Tribunals Act s.11(1)(b). The case presented as a case involving allegations of sexual misconduct. We made an order which was to take effect until promulgation of the decision. When we came to make our decision on liability, it seemed to us right, for the reasons stated in LJ, to extend the order until promulgation of the remedy judgment, by which time the parties would have had the opportunity to make further representations. We have repeated that cautious approach at this stage.

61. Much of the emotional drive at this hearing, particularly from the respondents, came from this issue (#10.6 above). The claimant applied for the Rule 50 order to be discharged. The respondents applied for it to continue indefinitely, although their application was, in effect, for an order under rule 50(3)(b), ie for permanent anonymity of the parties.

62. Mr Robison in submission referred to Fallows v News Group [2016] IRLR 827; Roden v BBC UKEAT/0385/14 and Ameyaw v Pricewater Cooper [2019] IRLR 611. Mr Maratos in reply drew to the tribunal's attention the further cases of EF v AB UKEAT/525/13 and F v G UKEAT 0042/11.

63. We paraphrase Mr N's submissions. The claimant succeeded on a small proportion of her claim, and failed on a significant proportion. We accept that that is a correct factual statement, which requires a reading of the liability judgment as a whole, so that the totality of the claim is understood, including those parts which succeeded, and those which failed.

64. Mr N said in evidence at this hearing that the claimant had admitted in the 2019 hearing to having a history of employment litigation. The judge's manuscript notes indicate two potentially relevant answers given by the claimant: that she had never before brought a claim of sex discrimination; and that in 2006 she had settled an employment dispute (it was not clear whether a claim had been presented). There was no evidence of the claimant having

been a repeat tribunal litigant, and no evidence to support Mr N's assertion to that effect.

65. Mr N said that he continues in practice as a surgeon. The First Respondent is a family business which has his surname. An adult child of Mr N, who we understood shares Mr N's surname, works within the business. There was brief reference at this hearing to a minor child, who played no part whatsoever in any of the evidence or events in this case, and who we take it also shares Mr N's surname.

66. The respondents relied on a major point, which had a number of aspects. Mr N asserted that the claimant, with a social media following potentially of millions (as he said) could cause untold damage to his professional reputation by publication of his name. That damage would be enhanced, he submitted, by the ambiguity of the words, "sexual harassment," which in this case engage the statutory definition in s.26, but which are widely understood to mean unwanted physical contact. Mr Maratos submitted that the claimant was motivated by revenge and blackmail, and that the claimant's capacity for 'extortion' (in Mr N's word) would become unlimited if his name were published.

67. We take as our starting point, as the parties agreed, that the tribunal proceeds on the basis of open and public justice. That is a fundamental principle. This case was heard entirely in public. The language of both our judgments is in the public domain. We proceed on the basis that a member of the public who wishes to be informed about this case will read, in their entirety, both the liability judgment and this one, and will understand the difference between allegations and determinations.

68. The tribunal proceeds on the basis of rights of freedom of expression in accordance with ECHR Article 10. Those rights apply, irrespective of the lack of press interest in a case (to date) and are not affected by the extension of publicity afforded to all cases by online posting of judgments. Cases may involve sensitive or intimate matters of fact, and there are occasions when the tribunal must weigh those rights in balance with Article 8 rights of privacy, and the right of private and family life. The tribunal must take particular care where any such right is that of a non-party, especially if the non-party is vulnerable, eg a child.

69. This is a balancing exercise; no right prevails over another in general terms. It is our task to consider in the circumstances how the balance is to be applied in this case. We do so on the basis that the burden rests with Mr N to justify by cogent evidence any departure from a principle of openness. In short, he failed to do so, because his submission was an expression of anger, distrust and embarrassment, but, in our view, no more.

70. As stated above, we approach our task on the basis, perhaps unrealistically, that a member of the public will read both our judgments in full, and understand them correctly. That correct understanding includes reading that our findings on sexual harassment go no further than the use of gender-

related language. In particular, LJ 251 to 263 inclusive set out the entire extent of the claims which have succeeded.

71. We reject in principle all of the respondents' submissions which were based on allegations of the claimant's motive. Open justice is a fundamental principle, the protection of which is not lost just because one party wishes to embarrass another, or has become, accepting Mr Maratos' word, fixated with her opponent. We agree, as we have said, that the claimant appears likely to pursue all avenues open to her long after this judgment is sent out. In the absence of cogent evidence, (and even if it were relevant in principle) we do not find that she is motivated by blackmail or revenge, nor do we understand the logic which exposes Mr N to the risk of blackmail if the entirety of this case is placed in the public domain.

72. We have some sympathy with Mr N's concern that publication of his name might have a negative impact on the business of the First Respondent, or on his adult child who works within that business, or on the minor child who, as we say, played no part whatsoever in these proceedings. We were not, in relation to the second respondent, invited to consider the relationship between open justice and commercial reputational damage. We heard that the adult child works in the first respondent; there was no evidence whatsoever about the minor child. Identification of Mr N by name would, we accept, identify them as the children of the first respondent in this case, and no more. We do not find that the existence of a mere shared surname gives rise in this case to an Article 8 issue on behalf of either of Mr N's children, or of the First Respondent.

73. Finally, Mr N referred to other matters between the parties, notably the GMC and the possibility of civil proceedings. We can attach no weight whatsoever to those submissions. Both the GMC and the court will have paperwork which identifies Mr N, and both operate within their own procedures which deal with publicity or anonymity.

74. It follows in our judgment that it has not been shown that any Article 8 right, or competing right, is such as to outweigh in the balance the issues of open and public justice and freedom of expression, and that the restricted reporting order must be discharged, and no anonymity order made. As this judgment was reserved, and in light of the manner in which this hearing proceeded, we explained to the parties at the close of proceedings on 16 December that if that were our decision, we would extend the duration of the existing order pending any appeal.

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Employment Judge R Lewis

Date: ………25/01/2021…………..

Sent to the parties on: ..12/02/21..........

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For the Tribunal Office