Case Nos: 1404942/2018/V
1400172/2019/V
1401353/2019/V

EMPLOYMENT TRIBUNALS

Claimant: **Mrs M Heavey**

Respondents: **(1) The Governing Body of St Mary's Roman Catholic Primary School**
(2) Wiltshire County Council
(3) Mrs Mary Barnard
(4) The Interim Executive Board of St Mary's Roman Catholic Primary School

PRELIMINARY HEARING

Heard at: **Bristol** **On: 29 January 2021 and in Chambers on 17 & 23 February 2021**

Before: Employment Judge Midgley

Representation
Claimant: Miss M McGee, Counsel
Respondent: Mr A Griffith, Counsel

RESERVED JUDGMENT

The claimant acted unreasonably in her conduct of the claim against the third respondent and is ordered to pay her costs in the sum of £4,800.00 inclusive of VAT.

REASONS

Claims and Parties

1. The identities of the parties and the history of the claims are detailed in the Background section below, given that the cost application derives from them.

Procedure, Hearing and Evidence

2. In support of her application for costs contained in a letter from DAS Law dated 2 November 2020, the third respondent had prepared a skeleton argument and bundle of authorities. The claimant had provided a written response to the application, and further relied upon the content of a skeleton argument and a bundle of documents consisting of 172 pages.

3. Miss McGee, for the applicant, and Mr Griffiths, for the claimant, each developed their arguments orally, and responded to questions from me.

4. Mr Griffiths, in his skeleton argument for the claimant, proposed that it would be necessary for me to read the bundle for approximately two hours. Given that the hearing was listed for three hours, and I had to hear the parties' arguments, deliberate, and produce a reasoned judgement, it was somewhat surprising that the claimant did not make an application to extend the time required for the hearing in advance of the hearing itself. Consequently, it was necessary for me to reserve judgment and produced written reasons in respect of the application.

Factual Background

5. The claimant was employed as the School Business Manager of St Mary's Roman Catholic Primary School in Chippenham ("the School"), by the first respondent between 4 January 2000 and her dismissal by reason of redundancy on 10 October 2018. Her responsibilities in that role included planning and setting the School's delegated budget, maintaining all relevant safeguarding and other records, and running all non-academic functions of the school. She worked from the School office and reported directly to the head teacher and Board of Governors.

6. The School had previously been rated as outstanding by OFSTED but, at the time of the events which form the subject of the claims, was a struggling school. In May 2018 the chair of governors, Mrs Wilkie, resigned, and on 25 September 2018 OFSTED downgraded the School from 'outstanding' to 'inadequate' in all respects. In consequence on or about 15 November 2018 the second respondent exercised its powers to appoint an Interim Executive Board to take on the responsibility of the governors.

7. Against that background, in January 2018, the third respondent, Mrs Barnard, had been appointed as an Interim Deputy Head Teacher to support the existing Head Teacher but, following his resignation, had become the full-time Interim Head with effect from April 2018, her role ended in August 2018.

8. In May 2018 a financial audit of the School was conducted by the second respondent.

9. On 15 June 2018 the claimant was informed that she is at risk of redundancy and that the School required the School office to be open Monday to Friday, whereas the claimant had only previously worked Monday to Thursday. A consultation process was conducted, which the third respondent participated in, and on 18 July 2018 the claimant was notified she had been selected for

redundancy and was given notice of termination which would expire on 10 October 2018.

10. The claimant appealed that decision, and the appeal was heard on 25 July 2018. The appeal was rejected. The third respondent gave evidence to the appeal panel in relation to the process of consultation that had been followed.

The Tribunal Proceedings

11. By a claim presented on 23 November 2018, the claimant brought claims of disability discrimination, unfair dismissal, and automatically unfair dismissal and detriment on the grounds of having made protected disclosures against the governing body of the School (the first respondent) and Wiltshire County Council, the second respondent ("The Council"). Hereinafter, this will be referred to as "the First Claim".

12. The only allegations relating to the conduct of the third respondent, Mrs Barnard, in the First Claim were as follows:

    12.1. in May 2018 that she had sought to "control what the audit team could ask [the claimant] about [her] understanding of the school's governance and financial processes" (see paragraph 9) and

    12.2. in May 2018 she had "unilaterally and without good reason excluded [the claimant] from all budget meetings, stopped the auditors from giving [her] feedback on the most recent audit, and demoralised [her] to the point where [she] became ill…" (See paragraph 35 (a)).

13. It is also of relevance that the claimant alleged that the restructuring process was "decided by governors who had been included in my grievance and against whom I had whistleblowing" (see paragraph 25). It was not suggested that the third respondent had played any part in the decision to restructure. Furthermore, the claimant did not allege that any of the protected disclosures had been made to the third respondent, nor did she allege that the third respondent had had any part to play in the decision to dismiss (see paragraph 35(c)).

14. On 7 January 2019 the claimant notified ACAS of a dispute relating to the matters above in respect of the third respondent. A certificate was issued on 9 January 2019.

15. On 7 January 2019 the claimant presented a claim against the third respondent, and Mrs Wilkie (the fourth respondent, as matters then stood, to the proceedings) (hereinafter referred to as "the Second Claim").

16. A seven-page particulars of claim was attached to Second Claim. It was in all respects bar one identical to the particulars of claim that was attached to the First Claim. The only difference was that in paragraph 10 the claimant added the third respondent's name to an allegation that the governors had bullied her, and that the auditors had witnessed that bullying.

17. The Second Claim was a desultory document insofar as was intended to

plead a claim against the third respondent because it wholly failed to identify (in any sensible or clear way) the claims against her (as opposed to the School or Council, or indeed the fourth respondent) or what the factual allegations were that were relied upon in support of those claims.

18. It follows that the only claim against the third respondent identified in the Second Claim was the allegation at paragraph 35 (a) that the third respondent had subjected the claimant to a detriment by "excluding her (unilaterally and without good reason) from all budget meetings, had stopped the auditors from providing her with feedback on the most recent audit, and had demoralised her to the point where she became ill…." No details were given in relation to the conduct that was said to have formed the demoralisation of the claimant. As an allegation drafted by professional representatives it was desultory.

19. The Second Claim made no express reference to the claimant in relation to the claimant's dismissal or her selection for redundancy. It made no allegations that the third respondent's involvement in redundancy process was a detriment.

20. On 24 April 2019, the claimant issued a further claim against the Interim Executive Board (hereinafter referred to as the "IEB") and three of the individuals who sat on the board. The precise details of the claim are not material to this cost application.

21. On 24 May 2019, the first respondent filed a response, suggesting that it should stand as the response of the School and the IEB, and individual members of the IEB. That response put in issue the claimant's allegations that she had been selected for redundancy because of acts of whistle blowing. The first respondent averred that the redundancy process had been conducted in accordance with the advice of the Council's human resources Department, who had overseen the process and who were present during the consultation meetings.

22. On 19 August 2019 a preliminary case management hearing was conducted by EJ Cadney. Insofar as the Second Claim was concerned, he directed that a preliminary hearing should determine whether the response, which had been presented on 24 May 2019 and which appeared to be a response on behalf of all respondents (given that it covered the allegations against the third and fourth respondents) should be accepted out of time.

Identification of the claims and issues: November 2019

23. On 4 November 2019, a further preliminary case management hearing was conducted by EJ Livesey. During the preliminary hearing the Judge considered the effect of paragraph 7 of Schedule 22 of the School's Standards and Framework Act 1998. In particular, the Judge observed at paragraphs 10.3 and 10.4 that:

    23.1. as a consequence of the Education (Modification of Enactments Relating to Employment) (England) Order 2003, the governing body of a relevant school is to be regarded as all times as having been the employer of a teacher at the school.

23.2. Where a governing body is dissolved, all rights and liabilities which subsisted before the date of dissolution transferred to the local authority or, if the Secretary of State directed, to a governing body or temporary governing body of the new school if the direction by the Secretary of State have been made before the dissolution (paragraph 7 (2) (a) (i) and (ii)).

24. In consequence, in the context of this case, as the Judge observed at paragraph 10.5, all rights and liabilities of the first respondent transferred to the IEB, upon the dissolution of the Governing Body. The claimant therefore could have been in no doubt from 4 November 2019 the rights of action in relation to her dismissal persisted, and that as liability for her dismissal transferred to IEB she had an effective means of enforcement against them. Indeed, on that basis the claimant's solicitor, Mr Manson, accepted that the Council had no legal liability for any of the claims and that they should be dismissed from the proceedings (see paragraph 10.6).

25. The Judge identified with Mr Manson the claims in the three proceedings (see paragraphs 19 to 22). Mr Manson identified 11 protected disclosures which the claimant relied upon in the proceedings. It was not alleged that any of them had been made to the third respondent. The only allegation of detriment expressly identified as relating to the conduct of the third respondent was that of excluding the claimant from budget meetings from May 2018 (see paragraph 20.5.1). The third respondent was not referred to in relation to the detriment of dismissal.

26. As the Judge was not satisfied that the claimant had properly been served on the third and fourth respondents, he directed that the Second Claim should be re-served and listed a further case management hearing once that had taken place. The claims against the Council were dismissed by consent, and the claimant against the sixth, seventh, and eighth respondents (the individual members of the IEB) were dismissed on their withdrawal by the claimant.

27. On 20 January 2020, a further case management hearing was conducted by me. At that hearing, I observed that the claims against the third respondent appeared to be out of time, given that the only allegation made against her was that in paragraph 35 (a) of the particulars of claim, summarised at paragraph 20.5.1 of the case management order of 4 November 2019. That allegation was said to have occurred in May 2018, but the detriment could not have continued to beyond the claimant's absence from work which began in June 2018. The claim was issued on 7 January 2019 and was therefore in principle approximately seven months out of time. Given that the First Claim was issued within time, it was difficult to see how the claimant would demonstrate that it had not been reasonably practicable for her to present the claim within time.

28. In addition, I questioned Mr Manson as to the financial value of the claim against the third respondent and invited him to consider with the claimant whether it was in accordance with the overriding objective to pursue that claim. I noted that no application to amend the Second Claim (or indeed the First Claim) had been made. I directed that the claimant should confirm whether she wish to proceed with the claims against the third and fourth

respondents.

Confirmation that the claim against the third respondent was pursued

29. On 14 February 2020 the claimant confirmed that she wished to proceed against the third respondent. There was no suggestion that the claims against the third respondent extended beyond the single allegation identified by EJ Livesey in November 2019. Noticeably, it was not suggested by the claimant or her representative that the claim against the third respondent included any allegation in relation to the dismissal, or that the claimant was proceeding with the claim against the third respondent because of her uncertainty about her ability to bring claims about her dismissal against the Governing Body or the IEB on the grounds that either was vicariously liable for the conduct of the third respondent, nor was it suggested that there were any concerns about enforcing any such claim, such that it was considered prudent to proceed with the claim against the third respondent.

30. In contrast, the claimant clarified that the claim against the fourth respondent was that the fourth respondent had subjected the claimant to a detriment through her contribution to the claimant's dismissal, relying upon a Timis and Anor v Osipov [2018] EWCA 2321.

The third respondent's defence

31. On 31 July 2020 the third respondent applied for a response to be accepted out of time, and in the alternative made an application to strike out the claim against on the basis that it had no reasonable prospect of success. The third respondent attached a particulars of response, but not an ET3. The response identified the following matters which are relevant to this application:

    31.1. the claimant only worked with the third respondent for six weeks before the claimant began a period of sickness absence on or about 31 May 2018;

    31.2. the third respondent had no knowledge of any grievance or any protected disclosure raised by the claimant (see paragraphs 7, 16, 20, 21, 22, 30, and 32 to 34);

    31.3. the respondent was not employed by the school for the majority of the time during which the claimant suggested she had raised concerns and therefore had no reason to be influenced by them, even had she been aware (paragraph 8);

    31.4. in relation to the single specific allegation relating to the third respondent, the School underwent a high-level audit conducted by the Council because of concerns about its financial management. The chair of the finance committee and the third respondent met with auditors to discuss those concerns prior to the order taking place, and it was not appropriate and necessary for the claimant to be involved in that briefing at that stage given that she had had primary responsibility for the School's financial position and management (paragraph 9). Furthermore, the third respondent did not exclude the claimant from budget meetings,

but rather continued to have one-to-one meetings with her in relation to the finances, however, the claimant removed herself from Governors finance meetings, stating she "wasn't going to attend any more meetings" with the governors because of one of the governors who sat on the finance committee, whom the claimant stated was "a bitch" (paragraph 35 (a)).

31.5. In relation to the claimant's dismissal, the governor's personnel committee determined the nature of the redundancy process with advice from the human resources department of the Council. The third respondent did not make any decisions in relation to the process, although she participated in discussions relating to them, but merely acted upon the decisions of the personnel committee (paragraphs 12 and 16).

32. In the case management agenda that was filed in preparation for the preliminary hearing on 3 August, the third respondent again stressed that all decisions had been made by the Governing Body and not by her, that she was having to fund her defence personally, and that the claims against were not entirely clear.

33. I pause to note that at that stage, eight months after the claim against the third respondent was issued and over 2 years after the claimant was notified of her redundancy, the only pleaded claim against the third respondent was the detriment claim under section 47B ERA relating to the claimant's exclusion from budgetary meetings between in the month of May 2018.

34. In a schedule addressing the unfair dismissal and protected disclosure claims (which was submitted on 30 July 2020), the first respondent clarified that only the first protected disclosure identified in the orders of Employment Judge Livesey had come to its knowledge during the claimant's employment. That disclosure did not relate to the third respondent, but rather to a Mrs Thompson, who it was suggested had been overpaid. That added some force to the third respondent's defence that she was not aware of any of the protected disclosures and they would not have influenced her conduct. The first respondent also alleged that the claimant had chosen not to attend finance meetings in the circumstances described by the third respondent.

Clarification of the claims against the third respondent: August 2020

35. On 3 August 2020 a further case management preliminary hearing occurred before EJ Emerton. Further preliminary hearings were listed to:

35.1. clarify the issues between the claimant and the third respondent,

35.2. to hear any application to amend the claim against her,

35.3. to hear the third respondent's application to extend time to present a response, alternatively to strike out the claims against the third respondent;

35.4. to determine whether the claimant's claims against the third

respondent were out of time

36. EJ Emerton ordered the claimant to provide further particulars of the claim against the detriment complaints against the third respondent and permitted the third respondent to prepare an amended response to incorporate the further particulars.

37. The Judge noted that the claimant had not identified what compensation she sought to the third respondent, but rather at the preliminary hearing before him had sought substantially to broaden the claims against the third respondent. He observed that the claim against the third and fourth respondent seemed unnecessary (particularly as the claimant had not indicated what remedy she was seeking against those respondents). He expressed concern about the claimant's conduct in pursuing an overly complex claim, aspects of which remained unclear and which might not be arguable, and which may or may not require an application to amend. He noted that, subject to such an application to amend, the claim against the third respondent was limited to a claim of detriment, for which the first respondent would be vicariously liable. (In that suggestion the Judge was wrong only in the sense that the fifth respondent would be vicariously liable, the liability of the first respondent having transferred to the fifth respondent upon its dissolution).

38. Most notably, at the hearing Mr Manson, confirmed that the claim against the third respondent was limited to acts of detriment on the grounds of the protected disclosures. He relied on paragraphs 20.5.1 and 20.5.3 inclusive of the case management order of 4 November 2019. As the Judge observed that was contrary to the position that had been adopted by Mr Manson on behalf of the claimant at the hearing before me on 20 January 2020. In any event, paragraphs 20.5.2 and 20.5.3 did not name the third respondent or set out any basis on which it was alleged that the third respondent was responsible for either.

39. The Employment Judge observed that if the claim against the third respondent did not include the detriment of dismissal, the claims would be likely to be out of time. That was the second time on which the claimant had been advised of that risk.

Further particulars of the claim against the third respondent

40. On 19 August 2020 the claimant filed further particulars of the claim against the third respondent. The document ran to 6 pages in which the claimant sought to add significant additional factual allegations in respect of the existing claim of detriment and to add a claim that the third respondent had contributed to the claimant's dismissal on the Timis principle as a detriment. Following a concise summary of the heads of claim, the claimant set out in a further five pages a narrative of events. It was not clear from that narrative which of the factual matters contained within it was alleged to be an act of detriment, and which were merely background facts. New factual allegations were contained in:

40.1. paragraphs 4, 5, and 6 (in relation to the third respondent's management of the claimant),

40.2. paragraphs 7, 8, 9, 10, 11 (in relation to the audit process, only paragraph 11 provided further detail of the allegations at paragraph 35(a)),

40.3. paragraphs 17, 22 to 24 (including a new allegation that the third respondent had downgraded the claimant's role in the new structure and that the sole purpose of the restructure was to prevent the claimant from continuing in her role),

40.4. paragraphs 21, 26 to 28, and 30 (relating to the process adopted for the redundancy consultations and appeal).

41. The new allegations were presented between 27 months and 25 months after the events in question. Only a very few of the 36 paragraphs provided any further information in relation to the allegations that were identified in the Second Claim, the remainder raised entirely new matters that had not been foreshadowed in any sensible way in the claim form.

The third respondent's response and strike out application

42. On 9 September 2020, the third respondent (who at that point had appointed solicitors) applied for the claim claims against her to be struck out on the grounds that they were out of time, or in the alternative sought permission to file a response out of time and sought an order for costs in respect of defending the claims. The application was accompanied by a response to the further and better particulars of claim, consisting of an eight-page reply and a four-page witness statement in support of those applications. The response was a detailed rebuttal of the allegations in the further particulars of claim.

43. On 17 September 2019 the claimant responded to the strike out application, alleging that the last date of any act of detriment was the date of her dismissal, 10 October 2018, and not the date on which the decision to make her redundant was made (July 2018). The claimant argued that at the point she had issued the First Claim, the decision in Timis had not been handed down, and therefore she was unaware that she could bring a claim against the third respondent in respect of her dismissal. The decision in Timis was handed down on 19 October 2018, 3 months prior to the claim being issued in January 2019.

44. The claimant did not explain why she had not issued the claim in respect of the only claim which was identified in the Second Claim (namely the detriment of excluding the claimant from budget meetings, and/or preventing the Council for providing feedback in relation to the audit) within the three months immediately following those acts.

45. In addition, the claimant sought to suggest that she had brought a claim for victimisation pursuant to section 27 EQA 2010, relating to the decision to restructure the claimant's role, relying on the protected characteristic of her mother's disability. Suffice it to say that that claim was not identified in any

sensible way in the Second Claim, or indeed in any clear way in the Further Particulars (by way of example, the protected act which was relied upon for the claim was not identified, nor was it expressly stated that the restructuring was victimisation because the claimant had done such a protected act). If the claimant was truly meaning to pursue such a claim it is astonishing that it was not clearly pleaded in the further particulars. For the avoidance of doubt, I do not regard the mere reference to the word "victimisation" followed by a narrative of random facts as the proper pleading of such a claim.

The hearing of the strike out application

46. On 18 September 2020 a further preliminary hearing was conducted by EJ Cadney. At that hearing, the claimant informed the Judge that the only claims being brought against the third respondent were those of whistleblowing detriment outlined in the case management order of EJ Livesey paragraphs 20.5.1 (excluding the claimant from budgetary meetings from May 2018) and 20.5.3 (dismissing the claimant on the Timis principle). Mr Manson clarified that she was not pursuing a claim of victimisation or a claim of indirect discrimination and that she was not making any application to amend the claim to include any of the new allegations in the further particulars that had been filed on 9 September 2020.

47. At the hearing EJ Cadney concluded that the claims against the third respondent had little reasonable prospect of success and ordered the claimant to pay a deposit, the size of which was to be determined when she had provided evidence of her means (which had not been provided at the hearing, despite it being listed for a deposit or strike out application). EJ Cadney concluded that as there was a further telephone preliminary hearing listed, the question deposit could be resolved then, but in the interim the claimant could consider whether she wished to withdraw the claim against the third respondent. He observed in relation to that proposal "particularly as she will suffer no prejudice from withdrawing the claim for the reasons set out earlier case management orders of EJ Midgley and EJ Emerton."

48. The claimant seeks at this hearing to suggest that the Judge was thereby suggesting that there could be no application for costs (which would be a prejudice to the claimant). I reject that submission on the basis that Judge had no power to prevent a cost application, and that he had not thereby dismissed the cost application made on 9 September and (as paragraph 6.6 of the case management summary made clear), and the clear and ordinary meaning of the reference, given its context, was that the claimant would suffer no prejudice in her ability to pursue her claims given that she would still be able to pursue them against the first respondent or IEB. The claimant's argument on the issue is contrary to common sense.

Withdrawal of the claims and the costs application

49. On 26 September 2020, the claimant withdrew the claims against the third respondent.

50. On 2 October 2020, the third respondent made an application for her costs in

defending the claims against her. I directed that that application should be put in writing, which was done on the 2 November 2020, and that the claimant should respond, which it did by letter dated 2 December 2020.

51. The cost application then came before me for determination at this hearing.

The parties' arguments as to costs

52. The third respondent pursues her application possible to primary grounds: first, that the claims of whistleblowing detriment had no reasonable prospect of success and, secondly, that the claimant acted unreasonably in the manner in which she chose to pursue those claims against the third respondent.

53. The first argument in relation to the first ground was that the claimant had failed to plead any factual basis which suggested that the third respondent knew of the content of the protected disclosures prior to the dates of the alleged detriments. The second was that the claims were out of time, a point that had been made repeatedly by various Judges through the claim's history.

54. The third respondent's arguments as to the claimant's unreasonable conduct consisted of the following: first, that there had never be a need to issue the claim against the third respondent in respect of the claimant's dismissal, vicarious liability having been admitted by the first respondent. Secondly, that the claimant had maintained her pursuit of the proceedings against the third respondent notwithstanding concerns expressed by various Employment Judges throughout the claimant's progress (particularly that it was out of time, but also that it added little by way of value to the claim, more so where the claimant had failed to identify what remedy she was seeking against the third respondent).

55. The claimant's arguments may be summarised as follows:

55.1. First, section 47B(1A) ERA 1996 confers individual tortious statutory liability against an employee in respect of detriments on the grounds of protected disclosures. Put simply, the claimant argued that it could not be unreasonable to pursue a claim which was recognised in law.

55.2. Secondly, that a claimant was entitled to pursue a claim both against the individual tortfeasor (an employee) and against the employer on the grounds that the latter was vicariously liable for the acts of the former.

55.3. Thirdly, that it was prudent to pursue a claim both against the individual employee and the vicariously liable employer where there were risks in relation to recovery as the Tribunal could apportion damages between them (applying Sivanandan v Hackney Action for Racial Equality and Ors [2013] EWCA Civ 22.)

55.4. Fourthly, it could not be said that the claim had no reasonable prospects of success because EJ Cadney had determined on 9 September 2020 that the claim had little reasonable prospect of success

but had not been persuaded of the higher threshold for the claim to be struck out pursuant to rule 37.

55.5. Finally, it is not unreasonable conduct to pursue a claim known to law, and to withdraw it when a Judge determines it has little reasonable prospects of success.

The Relevant Law

56. The relevant rules are rules 76 to 78. Rule 76 provides:

(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 proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success.

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

57. Rule 77 requires that any such application must be made within 28 days of the date on which Judgment is sent to the parties.

58. Finally, Rule 78 provides:

(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(23), or by an Employment Judge applying the same principles;

(c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;

(d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or

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

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

(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.

59. Rule 76(1) imposes a two-stage test: first, a Tribunal must ask itself whether a party's conduct falls within rule 76(1)(a); if so, it must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party.

60. Vexatious conduct was defined in Attorney General v Barker [2000] 1 FLR 759, QBD (a decision which was affirmed with approval in Scott v Russell [2013] EWCA Civ 1432, CA) as follows:

> 'the hallmark of a vexatious proceeding is… that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings 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'.

61. 'Unreasonable' has its ordinary English meaning and is not to be interpreted as if it means something similar to 'vexatious' — Dyer v Secretary of State for Employment EAT 183/83.

62. In determining whether to make an order under this ground, a Tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct — McPherson v BNP Paribas (London Branch) [2004] ICR 1398, CA. There must be some causal link between the unreasonable conduct and the costs claimed, in the sense the causation is not irrelevant, but there does not need to be a precise causal link between the unreasonable conduct in question and the specific costs being claimed.

63. It is not unreasonable conduct per se for a claimant to withdraw a claim before it proceeds to a final hearing; the critical question in this regard is whether the claimant withdrawing the claim has conducted the proceedings unreasonably, not whether the withdrawal of the claim is in itself unreasonable (see McPherson above).

64. 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 (Yerrakalva v Barnsley Metropolitan Borough Council and

anor [2012] ICR 420, CA.) This process does not entail a detailed or minute assessment. Instead, the Tribunal should adopt a broad-brush approach, assessing the conduct against the background of all the relevant circumstances (Sud v Ealing London Borough Council 2013 ICR D39, CA).

Discussion and Conclusions

No reasonable prospect of success

65. The third respondent argues that the claim had no reasonable prospect of success because the claimant was unable in the pleadings to point to any evidence that demonstrated either that the third respondent knew of the protected disclosures or that she had influenced the decisions to restructure the school office, select the claimant for redundancy or confirm her dismissal, those decisions having been made by the Governing Body.

66. In my view, that argument is erroneous. Firstly, as the claimant argues, Employment Judge Cadney did not conclude at the preliminary hearing in September 2020 that the claims had no reasonable prospect of success. He found that they had little reasonable prospect of success. Furthermore, the third respondent's argument is inaccurate in the sense that her response identifies that she had attended the Governors' Personnel Committee meetings where the claimant's selection for redundancy was discussed and attended an individual consultation meeting the claimant during which the claimant complained that her grievance (which consisted of one of the protected disclosures) should have been resolved before the decision to select her for redundancy was made. That is not to say that that is evidence that she made those decisions, but it is evidence that she may have influenced them for the purposes of a claim pursuant to section 47B ERA 1996. Whether she did is a factual matter that would need to be determined at the final hearing and would turn on evidence and inference from that evidence.

67. There are significant disputes of fact between the parties as to the extent of the third respondent's knowledge of the protected disclosures and their details, and as to the reasons for the third respondent's actions. Her argument that the decision to dismiss was that of the Governors (made in the absence of the claimant, who merely advised as to the process that had been adopted) is a potentially compelling argument to defeat the claim pursuant to section 47B ERA 1996. Those are matters that would have to be determined by the Tribunal that heard the evidence, but in any event EJ Cadney found that that claim had little reasonable prospect of success, not no reasonable prospect of success.

Unreasonable conduct.

68. I address each of the respondent's arguments: first, that it cannot be unreasonable to pursue a claim that is recognised in law. That proposition is misconceived, given the numerous authorities establishing that a claimant or respondent may act unreasonably in pursuing a claim that is known in law in

circumstances where it was unmeritorious, was motivated by malice, or the claimant knew that it was predicated on a lie. I do not need to set out those authorities here as they are trite law. Similarly, if the manner in which one conducts the pursuit of a legitimate claim is unreasonable, that may be sufficient to found a complaint of unreasonable conduct for the purpose of rule 76 if, having regard to the nature, gravity, and effect of the conduct.

69. Secondly, the claimant argues that as there was joint and several liability between the third respondent and the other respondents in respect of any tort of discrimination (as joint tortfeasors), it was reasonable to pursue a claim against the third respondent. In every case where a claimant alleges acts of detriment by a manager or another employee is open to them to bring a claim against the individual employee or manager as well as the employer itself. Again, it does not automatically follow from the mere fact that that is a course permitted in law that it is a reasonable course to adopt it in every case. Here, the claimant argues that it was necessary to pursue a claim against the third respondent because of uncertainties as to whether the first respondent would be vicariously liable for the third respondent's actions, and further because of her concerns about her prospects of recovering any award that was made, given the dissolution of the first respondent.

70. That argument is factual unsustainable because in November 2019 EJ Livesey identified that liability for any acts or omissions of the first respondent (which would include any vicarious liability for the actions of its employees) transferred to the fifth respondent upon the first respondent's dissolution. In consequence, the claimant always had a means of recovering compensation against the fifth respondent, and was aware of that fact, from as early as 4 November 2019.

71. The claimant's suggestion that there was uncertainty as to whether the first respondent accepted vicarious liability for the acts of the third respondent is irrelevant and unsustainable, given that s.47B(1B) ERA 1996 provides for vicarious liability, and neither the first respondent nor fifth respondent was seeking to argue a statutory defence pursuant to section 47B(1D) ERA 1996.

72. The claimant's decision to pursue a claim against the third respondent must therefore be considered against that background. In addition, it was not until 12 August 2020, 21 months after the Second Claim was presented, that the claimant identified what remedy she was seeking against the third respondent, which was limited to a contribution of £5000. The argument therefore that the claimant needed to continue to pursue the claim against the third respondent to protect her ability to recover substantial compensation in respect of her dismissal is unsustainable given the remedy pursued against the third respondent. Moreover, the claimant was aware from an early stage that the third respondent was an elderly lady, who did not have the benefit either of being covered by the School's insurance policy or that of her union and was having to fund her defence herself (a point which she made in her case management agenda which she filed on 31 July 2020).

73. In that context, the third respondent's criticism of the claimant that she failed to engage with the concerns expressed about the course that she was taking

in pursuing proceedings against the third respondent, when it was unnecessary (albeit permitted in law) to do so and in circumstances where she had not identified what it was she was seeking from the third respondent, and the single allegation identified was out of time, have some force.

74. Given that those concerns were first raised in January 2020, at which time the claimant's claim against the third respondent consisted little more than a repetition of the claim against the first respondent, and were repeated in August 2020 by Employment Judge Emerton, and the claimant failed to take any or any reasonable steps between January 2020 and August 2020 to engage with that concern either by identifying what it was she was seeking from the third respondent, or the purpose of pursuing a claim against the third respondent, the failure was a significant one and unreasonable.

75. However, rather than reflecting in a sensible way on the manner which she was conducting these proceedings, the claimant elected through further and better particulars of claim filed on 19 August 2020 to seek to significantly expand the claims that she was bringing. The claimant did so in part, I have no doubt, to try to overcome the obvious limitation point in relation to the single pleaded allegation against respondent. However, the claimant sought to do far more than merely to pursue an allegation that the third respondent had sought to influence her selection for redundancy and subsequent dismissal. Rather, as described in the background above, she sought to multiply her claims and factual allegations against the third respondent beyond all recognition of the wholly inadequate pleadings that she had issued in January 2019.

76. She did so in circumstances where her solicitor had confirmed to me in January 2020 that the claims were limited to a single allegation of detriment contrary to section 47B, and then, despite identifying on 14 February 2020 that she was pursuing a claim on the Timis principle against the fourth respondent in relation to her dismissal, did not identify such a claim against the third respondent. That omission was identified by EJ Emerton on 13 August 2020, who indicated that the claimant would require permission to amend.

77. As indicated, the claimant did not apply to amend, but rather provided the extensive further particulars of claim on 19 August 2020.

78. The conduct in paragraphs 74 to 76 above was wholly unreasonable conduct. None of the matters that were included in the further particulars of claim were said to have come to the claimant's knowledge or notice after she issued proceedings in January 2019, indeed the vast majority of allegations occurred before the claimant's dismissal. Therefore, there was no reason why they could not have been included in the Second Claim. The third respondent was therefore caused to instruct solicitors to prepare a response to the amended particulars at considerable cost, and further to respond to the claimant's application that she should not be permitted to rely upon her amended response because it was filed out of time.

79. To compound the unreasonable conduct already identified, at the subsequent

hearing before EJ Cadney on 18 September 2020, the claimant's solicitor indicated that the claimant's claim was restricted to the existing allegation of detriment in May 2018, and an allegation of detriment in relation to the claimant's dismissal. The claimant had therefore needlessly been put to the trouble and cost of responding to allegations that were not pursued both in the preparation of a response and in relation to her application for the claims to be struck out. The third respondent was not to know that the claimant would not apply for an amendment to add the claims at the outset of the preliminary hearing, but rather would abandon all the allegations (save one) which were in the further particulars.

80. Reviewing the manner in which the claim was pursued by the claimant in the circumstances, I am satisfied that the claimant's conduct was unreasonable, having regard to its nature, its gravity, and its effect. The threshold for a costs order has therefore been met in this case. I am further satisfied, given those matters, that it is appropriate and in the interests of justice and in accordance with the overriding objective for me exercise my discretion to make a costs order; the third respondent has been put to significant expense and suffered significant stress due to the claimant's failure to comply with the overriding objective.

Amount of costs

81. The third respondent's solicitors had prepared a schedule of costs claimed through the application. Regrettably the schedule did not identify the grade of the fee earner, her hourly rate or the time spent in undertaking the work listed on the schedule.

82. During the hearing Miss McGee clarified with those instructing her that the solicitor's hourly rate was £225. Mr Griffiths did not seek to challenge that rate in itself, but rather argued that the third respondent should have secured the services a solicitor through the School's legal expense insurers. That was a deeply unattractive argument, given that the third respondent had tried to do just that but her application for cover had been declined by the insurer as she was no longer employed by the School, and she could not avail herself of a solicitor through her union as she had surrendered her membership upon her retirement. The claimant must take the third respondent's need to pay privately for such services as she found it.

83. Furthermore, I am satisfied that an hourly rate of £225 is a reasonable rate for an experienced solicitor of more than 8 years practice working from Bath and Cheltenham; that is in broadly in keeping with the Government's Guideline Hourly rates for National Grade 2 (which applies to the area) of £201. Here the claimant had needlessly made the claims more complex and more complicated than was required and charging a slightly increased rate of £225 an hour to unpick such claims was reasonable.

84. The only challenge Mr Griffiths made to the costs detailed on the schedule was in relation to the cost of liaising with DAS to endeavour to secure expenses cover, amounting to £250 +VAT. I accept that that cost cannot be recovered against the claimant. However, I am satisfied that all of the

remaining costs claimed are proportionate and reasonable and should be paid by the claimant. The tasks and times involved were as follows:

84.1. Consideration of papers and preliminary advice - 4.22 hours

84.2. Preparation for and attendance at CMO – 2 hours

84.3. Drafting ET3 and response and strike out application – 3 hours

84.4. Drafting the claimant's witness statement – 4 hours

84.5. Preparation for and attendance at the preliminary hearing – 5 hours

85. I remind myself that this is not a detailed assessment and I should consider matters in the round and take a broad-brush approach to the level of costs to be awarded. Whilst the costs do not have to be caused directly by the unreasonable conduct, here I am persuaded that they were. Consequently, in my judgment the appropriate sum to be paid would be £4800 inclusive of VAT.

86. Mr Griffiths did not suggest that the claimant could not pay any award of costs nor, despite the hearing being listed for a costs application, did the claimant put forward any evidence of her means. I therefore conclude that she has the means to pay any award, but in any event in the circumstances of this case I have concluded that the appropriate sum to be paid to the third respondent is £4800.00.

Employment Judge Midgley

Date: 22 February 2021

Judgment & Reasons Sent to the Parties: 25 February 2021

FOR THE TRIBUNAL OFFICE