EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mrs Karen Barron	v	**York Teaching Hospital NHS Foundation Trust**

Heard at: **Hull** **On:** **18 December 2020**

Before: **Employment Judge Rogerson**

Appearance:

For the Claimant: **In Person**

For the Respondent: **Mr A Sugarman, of counsel**

RESERVED JUDGMENT ON COSTS

The claimant is ordered to pay the respondent costs in the sum of £17,000.

REASONS

1. This costs application is made by the respondent following a reserved judgment with reasons sent to the parties on 30 June 2020, dismissing the claimant's complaints of unfair and wrongful dismissal.

2. The claimant's application to reconsider that judgment was rejected. A certification of correction was issued in relation to a minor error and the corrected judgment was sent to the parties on 23 July 2020.

3. The respondent's written application for costs dated 15 July 2020 is made relying on rules 76(1)(a) and 76(1)(b) of the Rules of procedure. The grounds relied upon are that the claimant and her representative, her husband, Mr Barron, have acted "*vexatiously, abusively, disruptively or otherwise unreasonably*" in bringing and conducted these proceedings (rule (76(1)(a)) and that the claim had no reasonable prospects of success (rule 76(1)(b).

4. The claimant provided a written response to that application which I have set out in full in these reason because of limited representations were made at the hearing. She has also provided a copy of the judgment by Her Honour Judge Belcher in relation to the claimant's personal injury claim against the respondent heard on 19 – 22 October 2020. In those proceedings the claimant represented

herself, and although her claim was dismissed, she relies upon Judge Belcher's comments about her credibility to resist the costs application.

5. The respondent prepared a bundle of documents for use at this hearing. The respondent has also provided the claimant with a schedule of costs setting out the total sum claimed of £22,156.64 with a detailed breakdown of those costs, prepared by a costs draughtsman (pages 122 – 127).

6. Prior to this hearing the claimant was also directed to rule 84 of the Rules of Procedure which provides that: *"in deciding whether to make a costs order and if so in what amount, the Tribunal may have regard to the paying party's ability to pay".* If she wanted information about her means (income/expenses/capital assets/liabilities/savings/or other relevant information) to be considered she was ordered to provide that information with supporting evidence before this hearing. In her written response to that order she did not provide any documentary evidence but states:

> *"I do not believe that I should pay any costs to the respondent for the reasons set out in my response letter - I have been a nurse for over 35 years, of good character, unblemished record and unsanctioned throughout (prior to this), while suffering mental illness, stress all I did was cry for help and was ignored and subsequently dismissed for begging to return to work as a nurse.*
>
> *My husband is currently on job seekers allowance (£75 per week), we are unable to foster (£500 per child per week as we agreed to foster severely disabled/very vulnerable children) my husband was told that if I remain in the house, it is not safe, and if we appealed to the foster panel then it would be on our record and therefore we would be unlikely to foster in the future, my husband was advised to resign as a foster parent. We had re-mortgaged (nearly two years ago) our house to build a disabled ground floor access extension. I have no savings and currently I/we are getting into debt at a rate of around £500 per month.*
>
> *I do pay £17 per month to the RCN which I now believe to be of no benefit to me at all and I pay to various charities around £35 per month, and so I respectfully request that if costs are awarded then they be limited to £52 per month so that I/we will not be accelerated into further debt. My current job may be stopped if the NMC decide I am not fit to practice – as I have been declared to be a heinous bully by writing pleading for help letters to my union to remain on the NMC register!"*

7. By letter dated 2 November 2020 the claimant confirmed she was representing herself in these proceedings because her representative, her husband, Mr Barron was currently '*unfit to be her proxy*'. The claimant requested the costs application was heard by another judge and for the hearing to be 'delayed' until the outcome of her appeal. Those requests were refused. The claimant's request for an in-person hearing was accommodated.

Respondent's Written Application for Costs.

8. The respondent's written application for costs sets out the findings of fact from the judgment that are relied upon to support the costs application as follows:

   8.1. Paragraph 56 – *"the claimant accepted … all emails were inappropriate some were derogatory and some were threatening (Police action)".*

The respondent's reason for dismissal was the claimant sent inappropriate emails and had bullied another employee. As the Tribunal Judgment records the claimant accepted in cross-examination, contrary to the case she had sought to advance, that *"the content of her emails was inappropriate and had the effects described. Although she offered an apology … it did not appear to be genuine".*

8.2. Paragraph 73 – The claimant's case was put on the basis that there had been a predetermined dismissal at the behest of the respondent's Chief Executive. To support this contention Mr Barron referred to non-existent emails (paragraph 10 of his witness statement). The contention was entirely scurrilous and vexatious and, as found by the Tribunal, Mr Barron was not "*a credible or honest witness*" (paragraph 46). This was not a peripheral issue but central to the claim advanced by the claimant.

8.3. Paragraphs 46 & 83 - The Tribunal found that the evidence had "*been used to deliberately mislead to bolster the claimant's case and to try to portray Miss Cowley in an unfairly negative way*". The Tribunal found the allegation made against Miss Cowley was a serious one which was '*completely unfounded*' (paragraph 48). The Respondent contends that the claimant, through Mr Barron, attempted to bolster a claim which had no reasonable prospects of success by deliberately misleading the Tribunal.

8.4. The Judgment states as follows at Paragraph 47:

"*Mr Barron's conduct in this regard is a serious matter and is viewed by the Tribunal as 'unreasonable conduct' of these proceedings by the claimant's representative. While the claimant's witness statement is silent on this matter, she has, it appears, been content for a case to be advanced in this way by Mr Barron. She has not taken the opportunity she had under oath to tell the truth and distance herself from that approach. She is by her silence complicit in the deception of Mr Barron.*

8.5. Paragraph 16 The Tribunal found "*the claimant has deliberately misinterpreted the letter (of 5 April 2019) to imply a pre-judged outcome to fit the case presented at this hearing"*,

8.6. Paragraph 51 "*the claimant's lack of credibility in respect of some aspects of her evidence was also exposed during cross-examination".* The Tribunal found the claimant's evidence was not credible. The claimant's explanation for using different fonts in the email sent was not accidental it was deliberate. The Tribunal found the claimant '*could only have done this deliberately demonstrating the lengths the claimant was prepared to go, to ensure the emails she sent had the desired effect*".

8.7. Paragraph 69: The respondent submits that in making his closing submissions Mr Barron ignored the guidance given to him by Employment Judge Rogerson and used the time allowed to him to make *"personal derogatory accusations about individuals in this case whom, have worked for and may still be working for the respondent, knowing those individuals had no right of reply. He attacked the Trust for incurring costs in defending these proceedings and he misrepresented the evidence that was given at the hearing".* The respondent submits this conduct was 'plainly vexatious conduct'. Mr Sugarman addressed me further on this ground in his oral submissions.

8.8. The respondent also relies on the costs warning and the 'drop hands' offer made to the claimant and her representative before the liability hearing. The claimant was warned that a false case of a conspiracy to dismiss was being made in Mr Barron's witness statement relying on four mysteriously disposed emails and that if the claim was not withdrawn and failed on that basis, the respondent would apply for costs at the end of the case. The warning was ignored and the offer was rejected. The respondent relies upon the findings made about this issue and the rejection of a drop hands offer to show this was plainly unreasonable conduct by the claimant/her representative.

Claimant's Written Response

9. The claimant's written response to the costs application is set out as written but separated into numbered paragraphs for ease of reference. Her response is as follows:

9.1 *"I never denied that I had written inappropriate letters to the Trust or written letters to my union that caused harm to Carol Popplestone, my union representative, in fact I confirmed I had to both the court and my employer, my claim was that the penalty of summary dismissal was way over board, particularly as the Trust had treated me so badly and the only intention for me writing those letters was to get back to work* (Sensky Report). *In other word's unfair summary dismissal. Incidentally both the Trust and my union (Dame Donna Kinnair) confirmed (and apologised) for Carol Popplestone unlawfully forwarding confidential emails to my employer, and these form the substantial basis of my dismissal – in effect Carol Popplestone had taken a union matter to my employer and claimed that she was being bullied at work. The Judge made no reference to this in her report".*

9.2 *"200 pages of documentation which in Mr Barron's opinion showed a clear conspiracy to dismiss Mrs Barron at any cost – initially by making out I was chronically bitter. The preliminary Judge, in effect told Mr Barron that this was irrelevant to the case and he should not include it in his witness statement. Mr Barron wrote to Mr Davidson explaining that he was following the Judge's advice and not pursuing the matter – regrettably the Preliminary Judge's advice has come two days after we had swapped witness statements, Mr Barron mooted that he would withdraw reference to this conspiracy but was not sure if he could simply retract parts of his statement so he left it in"*.

9.3 **"***On the first day of the trial the defendant's barrister raised the issue of Mr Barron claiming a conspiracy and I think wanted the Judge to dismiss the case, after some argument from Mr Barron, the Judge said, (or words to this effect) "I am not going to find for you Mr Barron because if you had done what the defendant had done, I would not have found in their favour. I took this to mean the Judge had accepted that Mr Barron had not acted inappropriately, and that the defendant had (withheld documents for 10 days and then producing them not just incomplete but copied repeatedly making 200 pages into 500 pages, as if Mr Barron on his inkjet printer would have had time and inclination to copy the 200 pages of my statement of case".*

9.4 **"***Regarding the remaining silent – I can only testify to what I am aware of. I was not bolstering any claim. My claim was straight forward and in writing I had been unfairly summarily dismissed for writing some letters to my bosses begging to get back to work (my bosses incidentally had not responded to any of my concern letters in over 6 months) and I had written to my union two confidential letters pleading for their help to get back to work. The punishment did not fit the crime and was therefore unfair".*

9.5 *"Regarding the letter of 5 April - the letter does not change, it says what it says. The letter states the reader has got letters from an unknown 3rd party who has raised allegations of me bullying them, and stop writing further letters- ergo those letters were bullying letters".*

9.6 *"Paragraph 51. I gave my evidence in an open and honest way possible, and point out that Judge Belcher highlighted inconsistencies in my testimony in her findings but stated that this was quite normal, particularly in people suffering from mental health problems, they simply remember things according to their mental state at the time, and is not lying or vexatious adding I believe Mrs Barron believed what she was saying was the truth.*

9.7 *"Mr Barron in his closing summation* ***did ignore the Judge's advice*** *and sent an email (prior to the meeting) to the Judge explaining why – we were desperate to be foster parents, and had invited a person from Child Services to attend the Skype meeting,* ***in one last desperate attempt to show that Mrs Barron had been summarily dismissed for writing some letters,*** *and Mr Barron spent significantly most of the 45 minutes reading out the letters and Professor Sensky's report. How reading out the actual written evidence in full is deliberately representing the evidence is deceptive or vexatious* ***in my opinion*** *does not hold water. Again, in the Judge's report she makes no reference to Mr Barron informing her of his deliberate intention to ignore her advice, he told her in emails that he was going to try to get the press to attend the Skype meeting in addition to Child Services,* ***it was a last ditch desperate attempt to continue as foster parents and I agree this approach looks like Mr Barron was trying to forward my case".***

9.8 *The Judge stated that any discussions between me and the defendant's counsel were 'ex parte'. As previously stated the defendant's counsel raised the issue of conspiracies and the Judge determined that the defendant had indeed withheld documents, and when this was pointed out to them that took 10 days to "find them" and disclose them, these documents in my opinion clearly showed an intention of the defendants to dismiss Mrs Barron at all costs even trying to persuade Profession Sensky to declare Mrs Barron was mad – chronically bitter.*

(highlighted text my emphasis)

Respondent's Submissions

10. Mr Sugarman made detailed oral submissions supplementing the written reasons provided which were divided into six parts as follows:

1. Unreasonable conduct on the part of the claimant and her husband
2. Vexatious conduct

3. No reasonable prospects of success
4. Costs warning and the rejection of the offer made at the hearing
5. Why discretion should be exercised and a costs order made.
6. The amount of the costs order.

Unreasonable conduct on the part of the claimant and her husband

11. The central part of the claimant's case was her contention that the dismissal was a pre-determined act, and that senior figures up to and including the CEO were conspiring to dismiss her. At paragraph 83 of the judgment the Tribunal concluded there was no conspiracy to dismiss or a predetermined outcome and the evidence presented in that regard by the claimant has been used to deliberately mislead the Tribunal to bolster her case and to try to portray the respondents witness in an unfairly negative way. The claimant was found to have made serious and unfounded allegations against the dismissing officer. The findings made at paragraph 47 – *"Mr Barron's conduct in this regard is a serious matter and is viewed by the Tribunal* ***as unreasonable conduct of this proceedings by the claimant's representative. While the claimant's witness statement is silent on this matter. She has, it appears, been content for her case to be advanced in this way by Mr Barron. She has not taken the opportunity she has had under oath to tell the truth and distance herself from that approach. She is by her silence complicit in the deception".***

12. Mr Sugarman submits that this is not a case where the claimant and her representative can argue they were mistaken or accidentally presented false evidence or accidently mislead the Tribunal. They were not credible witnesses. They were not honest witnesses. The inconsistencies and false accounts and false evidence was exposed at the hearing. The Tribunal's finding that it was unreasonable conduct deliberately done to bolster the claimant's case means it cannot be treated as accidental conduct by the claimant or her representative. The claimant presented false evidence herself and under oath continued to present a misleading and false case created to bolster her claim. She was found by the Tribunal to be complicit by her silence in the deception perpetrated by her husband. Mr Sugarman submits that the conduct of these proceedings by the claimant and her husband was very clearly unreasonable conduct meeting the threshold required to make a costs order.

Vexatious Conduct

13. Mr Sugarman's second ground is that the conduct of the closing submissions supports a finding of vexatious conduct by the claimant through her representative. At the conclusion of the liability hearing in March 2019, it had been agreed with the parties that written submissions would be made and the appropriate orders were made. Subsequently on 1 May 2020, the claimant applied to vary the orders made and to make closing submissions remotely via Skype. Mr Barron argued that the hearing should be in public so that the public/press could access the hearing to observe it and hear the submissions made and that his time should be uninterrupted. At the time he concealed his improper motive for making this application which became clear later.

14. In the order made following the hearing the claimant's representative was directed to paragraph 10.4 of the Presidential Guidance on case management which confirmed the purpose of closing submissions. Mr Barron was informed he "*may summarise the important evidence",* "*highlight any weak parts of the other side's case" and that a* party may also refer to legal authorities which might be relevant. Time was set for each party to have 45 minutes each to make oral submissions then 15 minutes each to respond to the other party's submissions.

15. While it was known that Mr Barron had contacted the press with his 'story' about the case to generate press interest, the claimant was reminded of the purpose of closing submissions, and he was urged to focus only on matters that should be included in preparing his closing submissions.

16. Unfortunately, neither the claimant or her representative heeded the guidance that was intended to assist them. At paragraph 69 the liability judgment finds the time was not used for a proper purpose but was used "*to make personal derogatory accusations about individuals in the case who, have worked for and may still be working for the respondent, knowing those individuals had no right of reply".* Mr Barron "*attacked the Trust for incurring costs in defending these proceedings and he misrepresented the evidence that was given at the hearing".*

17. Mr Sugarman submits this was 'deliberate' conduct that cannot be explained as a mistake/misunderstanding by a non-legally qualified representative given the steps taken by the Judge to explain the proper purpose. It was calculated deliberate conduct by the claimant and her representative intended to cause maximum damage to the respondent and to other employees of the respondent.

18. Mr Barron has admitted his premediated intention in email correspondence he sent after the orders were made. In particular, page 77 is an email sent by Mr Barron to a variety of recipients including his MP, the CEO Mr Morritt, the respondent's solicitors and copied to GMB, ITV, The Sun, The Express, the Mirror (**but not copied to the Tribunal**). Mr Sugarman draws my attention to the relevant parts of that email as follows;

> *"Now she (**Mrs Barron) just wants retribution and has told me I must cause as much damage as I can** in my 45 uninterrupted public speech and has listed those people she wants publicly named and hopefully humiliated (if they feel humiliation) and I am working on that right now.*
>
> It continues.
>
> *"**All due process was followed in court, except I tactically, by more luck than judgement, grasped the opportunity to have the summations on Skype (business) and specifically 45 minutes uninterrupted,** I didn't know for sure but I always thought the Judge would want the public spectacle – not Judge Rinder but Judge Rogerson – these Judges always have an ego. I told Mrs Barron we were not using a solicitor because he (or she) would only be interested in a financial settlement and I believe Mrs Barron needs her day in court and I was proved right.*
>
> ***If you want to help and avoid the public spectacle and possibly the press/media attention** you may want to have a chat with Mr Morritt and see if he might want to **revert back to negotiating via ACAS or direct***

> ***with me a way out of this*** *– Mr Morritt can't be embarrassed or humiliated or hurt financially these Chief Executives believe they can do as they like, as he once pointed out in the House of Commons but you have some influence on his tenure* ***you will/would be very surprised how little Karen Barron wants, not even an apology, or possibly a back-handed one, and a negligible financial cost".(all highlighted text my emphasis)***

19. Mr Sugarman recalls that Mr Barron was very keen to have his time 'uninterrupted' and although it was an odd request to make, the purpose is now clear. He wanted to pursue his vexatious agenda without interruption. The claimant and her representative had an improper motive. They wanted retribution and to use the threat of what would be said in his closing submissions as leverage to get a settlement from the Trust. Mr Sugarman submits that in effect the claimant and her representative were trying to blackmail the Trust *"unless you do this I am going to humiliate you and cause you as much damage as possible"*

20. Mr Sugarman also draws my attention to page 84 in the bundle another email 11 May 2020, sent by the claimant to the same individuals and the Media and Press. The relevant paragraph of that email states:

> "*More importantly Judge Rogerson has Ordered that I have 45 minutes uninterrupted to say what I want on Skype live and* ***I intend to cause as much damage to people that I consider caused damage to myself and Nurse Barron*** *by naming them personally and as* ***the media have indicated that the only thing lacking*** *in my 45 minute speech is some* ***salacious gossip***"

He continues:

> *"My 45 minute live speech,* ***my main audience being the media, can be avoided at a very negligible cost to the NHS*** *but common sense must prevail. Let me know if you want the 1180 pages sending".* (all highlighted text my emphasis)

21. Mr Sugarman's submits this was a clear case (and he had never seen a better example) of vexatious conduct. Mr Barron was using these proceedings to include 'salacious gossip' to generate press interest and to blackmail and damage the respondent to get a settlement. At page 88 is another example of the vexatious conduct of Mr Barron and Mrs Barron jointly pursuing the same agenda. The email sent on 13 May to the same group of recipients' states:

> *"basically the audience is the press and the public to some extent,* ***I intend to cause as much damage as I can live on public Skype to as many people as I can****, I've been given 45 minutes to make my speech in public uninterrupted"* it continues *"I* ***will make sure that my speech has plenty of stuff that will sell newspapers in it, but I realise that may not be sufficient to guarantee they take up the story*** *– we'll all have to wait and see.*
>
> ***Neither Mrs Barron or myself are really interested in the outcome of the hearing, just the damage I can cause in 45 minutes to people's reputations, personal lives, breaking up marriages*** *etc.* ***I, and my wife to some extent, but not nearly as much as me, feel that we'll feel a lot better for exacting public revenge*** *on those that have caused us harm*

and harm to the other toxic four and I will be naming them by name, cold bloodedly referring to their sexual indiscretions – they thought and still think they are untouchable and can cause any harm they want without any comeback – and may still get away with it, but I will feel I have at least gone down roaring like a lion rather than squeaking like a mouse".

The Prospects of success.

22. The third ground is that the claim of unfair and wrongful dismissal had no reasonable prospects of success based on the undisputed contemporaneous evidence (the inappropriate emails the claimant had written) the false evidence and false allegations made of a conspiracy to dismiss/predetermined outcome. The judgment records that the claimant was taken in cross examination to each email/letter she wrote. She accepted they were all inappropriate some content could be perceived as threatening and some derogatory and some had the effect of bullying the recipient. In the claimant's closing submissions, Mr Barron sought to misrepresent the evidence given at the hearing and attempted to backtrack from the concession made at the hearing arguing *"the context justified the content"*.

23. Although the respondent's assessment of the inappropriate content was agreed, the claimant has advanced a case on a misconceived basis that her conduct should not have resulted in any disciplinary process let alone a decision to dismiss. The claimant also knew she was trying to bolster her case using false evidence and false allegation but continued with the claim regardless of its merits. He submits the threshold has been met, the claim had no reasonable prospects of success.

Rejection of the offer made at the hearing

24. Mr Sugarman relies upon the claimant's unreasonable refusal of the offer made by the respondent prior to the liability hearing. The claimant was invited to withdraw the false and misconceived claim she sought to advance in return for the respondent agreeing that no costs order would be sought. The offer was rejected. The respondent is an NHS Trust and Public Body and has incurred substantial costs in defending this claim. The claimant's representative even tried to use the costs consequences to his advantage in his closing submissions. If the claimant had accepted the costs warning and withdrawn the claim before the hearing she could have avoided being at risks of a costs order. The claimant and her representative knew that false evidence was being advanced she was warned about the risk of proceeding on that basis but decided to ignore the warning and continue.

Exercise of Discretion

25. Mr Sugarman accepts that even if the threshold for making a costs order is met, the Tribunal has to exercise its discretion in making a costs order. He submits this is an unusual case where findings of dishonesty have been made against the claimant and her husband. These proceedings have been vexatiously pursued by the claimant and her husband, using attempts to blackmail the respondent by threatening to expose 'salacious gossip' in closing submission for personal gain and retribution. Costs warnings have been ignored as has the guidance issued by the Tribunal. The respondent is an NHS body having to use public funds to defend a vexatiously pursued unmeritorious claim.

Amount of Costs

26. Finally, the respondent seeks costs of £22,156.64 as set out in the schedule of the work carried out as prepared by a costs draughtsman (pages 125 to 126 of the bundle). Mr Sugarman explained how Mr Barron as the claimant's representative has added to the costs by engaging in a wide range of unnecessary correspondence which has been persistent lengthy and unnecessary. For the respondent the consequence has been that more time has had to be spent dealing with that correspondence adding to the costs incurred in defending the claim.

27. In relation to the claimant's ability to pay he submits 'scant' evidence has been provided of any lack of means, despite the claimant being ordered to provide that evidence if she wanted it to be taken into account. The claimant is in work. Her actual earnings are unknown. It was clear that the claimant and her husband own a house, and they have the ability to pay. There is no evidence of impunity which may justify a costs order not being made. Given that the grounds for making a costs order have been met, the Tribunal is invited to exercise its discretion in awarding the reasonable costs incurred by the respondent in defending the claim in the amount claimed.

The claimant's submissions

28. Unfortunately, the claimant provided very limited response to the detailed submissions made by Mr Sugarman before she left the hearing. Her conduct in that regard was surprising when she had requested and insisted upon having an 'in person' hearing to allow her to make representations. She was upset at being described as 'dishonest'. She does not accept the findings made by the Tribunal. She says it the respondent that has acted vexatiously not her or her husband. They didn't have a legal team behind them to help them make decisions. She feels her character has been 'defamed'. Mr Sugarman, doesn't know her and has made false accusations and assumptions about her. She wants to remind me of the decision made by Judge Belcher in the Leeds Court, while it was not in her favour did not find her to have been 'dishonest'. Her family/friends would be very upset, to hear her being accused of being 'complicit' in the deception and of deliberately lying. It is all false and very upsetting.

29. To hear she and her husband had deliberately done this was also upsetting because if it wasn't for her husband who had been so supportive to her during this process she doesn't know what she would have done. She has been reliant on him and she does not blame him in any way for the decisions they made together. They have acted as one and without him she would have struggled to continue. She didn't care about what was going to happen now, Yes, she had a house but the NHS had taken her pension, her career, and they may as well take her house. In terms of her livelihood she is working and the Tribunal could '*do their worst*'. As far as costs were concerned, she had nothing more to say and was going to leave. I warned the claimant that if she left I would have to decide the application on the available information. Her response to that was she didn't care, she was leaving and with that she left.

Rule of Procedure 2013

30. Rule 71 provides that a party may apply for a costs order and that '*no such order may be, made unless the paying party has had a reasonable opportunity to make representations at a hearing or in writing*'.

31. Rule 76 provides that a Tribunal '*may make a costs order and shall consider whether to do so where it considers that*
    (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted': or
    (b) any claim or response had no reasonable prospects of success'.

32. The definition of 'vexatious conduct' was considered in Scott-Russell 2013 EWCA Civ 1432 and the definition given by Lord Bingham in an earlier case was approved by the Court of Appeal: "*the hall mark 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*'.

33. Where a Tribunal exercises it discretion to make a costs order then the amount awarded should normally reflect the Tribunal's assessment of what is both reasonable and proportionate, with any doubt to be resolved in the favour of the paying party. This is the standard and usual basis of assessment. In **Yerraklava-v- Barnsley Metropolitan Borough Council 2012 ICR420,** the Court of Appeal provided guidance that costs should be limited to those '*reasonably and necessary incurred*' as a consequence of the unreasonable conduct. 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.

34. 'Costs' means fees charges, disbursements or expenses incurred by or on behalf of the receiving party (Rule 74: Definitions)

35. Rule 84 provides that in deciding whether to make a costs order and in deciding the amount the Tribunal may have regard to the paying party's ability to pay.

36. In assessing means, account must be taken of information (if it is provided) of capital as well as income and expenditure. In **Shields Automotive Ltd -v- Grieg** the EAT stated that *"assessing a person's ability to pay involves considering their whole means. Capital is highly relevant aspect of anyone's*

means. To look only at income where a person has capital is to ignore a relevant factor'.

37. A Tribunal is not required to limit the costs that the paying party can afford to pay - **Arrowsmith -v- Nottingham Trent University 2012 ICR 159 CA.** There is "*no reason why affordability has to be decided once and for all by reference to a party's means as to the moment the order falls to be made".*

38. If a costs order is made, it would have to be enforced through the county court, which would itself, take into account the individual's means from time to time in deciding payment methods and amounts. **Vaughan-v- London Borough of Lewisham and Others 2013 IRLR 713.**

39. The regulations do not mean that "*poor litigants may behave without impunity and without fear, that a significant costs order will be made against them, whereas wealthy ones must behave themselves otherwise a costs order will be made"* **Kovacs -v- Queen Mary and Westfield College (2002) IRLR 414**.

Conclusions.

40. Firstly, I will address the two grounds for making a costs order that are relied upon by the respondent that the claimant and her representatives have conducted these proceedings unreasonably and vexatiously. The respondent has carefully set out the findings of fact made by the Tribunal and the course of conduct by the claimant and her representative that is relied upon to support the application.

41. Two key aspects of the claim advanced by the claimant were false and deliberately created to bolster the claim: the predetermined dismissal outcome and the conspiracy to dismiss. At paragraph 47, the Tribunal treated this conduct as serious and unreasonable conduct of these proceedings by the claimant and her representative. The claimant does not seek to disassociate herself from her husband's conduct of these proceedings on her behalf and identifies him as her 'proxy'. She has confirmed how their joint conduct of these proceedings was an agreed and deliberate course of action. The emails sent by Mrs Barron refer expressly to the claimant's position on the issue he is writing about. At this hearing the claimant expresses gratitude to Mr Barron for his conduct and support and does not express any regret for the decisions they made despite the findings of fact that have been made.

42. The claimant relies on Judge Belchers assessment of her credibility in other proceedings to resist the costs application. She suggests the Tribunal should also have viewed her as a credible and honest witness in these proceedings. She recognises that assessments of credibility are subjective and different Judges '*can form different opinions*' but submits that Judge Belcher made the correct assessment about her credibility, inferring I have made the wrong assessment. The claimant says I should have 'believed' that what she told me was the 'truth'. My assessment of the claimant's credibility and how that assessment was made have clearly been explained in the written reasons which have been recited in the respondent's application (see paragraph 8.3 above). The claimant directly and through her representative presented a false

case, using false evidence, making false allegations against the respondent and its employees to try to mislead the Tribunal to bolster her case.

43. In her oral submissions the claimant refers to the fact that she and her husband where acting as litigants in person without a legal team behind them and that affected their ability to reasonably conduct these proceedings. Many claimants appear before me as litigants in person without a legal team and are still able to reasonably and honestly conduct their cases. In these proceedings even when the claimant and her representative were given guidance to assist them with the process that guidance was deliberately ignored. While the claimant does not agree with the findings of fact that I have made, those are the findings of fact. I considered the claimant representations made prior to and at this hearing and the respondent's representations. I agree with Mr Sugarman's submissions which are supported by my findings of fact, to conclude that the claimant and her representative have unreasonably conducted these proceedings.

44. As to whether their conduct of the proceedings is 'vexatious' conduct, Mr Sugarman has highlighted a number of emails sent by the claimant's representative sent with the claimant's knowledge, her approval and input. Despite making clear the ordinary and proper purpose for closing submissions so that the claimant could prepare for that purpose, the claimant through her representative, sought to 'tactically' engineer a situation where they could use these proceedings for a significantly different and improper purpose. At the time I agreed to the claimant's request to vary the (agreed) order for written submission to an order for a public hearing of the submissions, I was completely unaware that the claimant and her representatives real motive in making that application was to threaten the respondent and abuse the court process for their own retribution.

45. I was unaware of the claimant's representative's emails of 7 and 11 May 2020 disclosing the clamant and her representative's true intention. The emails were not copied to the Tribunal but were widely circulated to the press/media, the claimant's MP the respondent's Chief Executive and the respondent's solicitors. Mr Barron states "***All due process was followed in court,*** **except I** ***tactically****….grasped the opportunity to have the summations on Skpye and 45 minutes uninterrupted"…… "If you want to* ***avoid the public spectacle and possibly the press/media attention you may want to …revert back to negotiating via ACAS or direct with me, a way out of this****"…."* ***You will/would be very surprised how little Karen Barron wants****, not even an apology, well possibly a back handed one, and at* ***negligible financial cost****".* He persists in pursuing that course of action 4 days later in another email stating "*More importantly Judge Rogerson has ordered that I have 45 minutes uninterrupted to say what I want on Skype live and* ***I intend to cause as much damage to people that I consider have caused damage to myself and Nurse Barron by naming them personally and as the media have indicated that the only thing lacking in my '45' minute speech is some salacious gossip***. His email ends "*my* ***main audience being the media*** *can be avoided at a* ***very negligible cost to the NHS***".

46. In the claimant's written response to the costs application she agreed that her representative, deliberately '*ignored the Judges advice*'. She tries to justify that decision by stating that it was done out of 'desperation', and was one last

'desperate' act to show that the claimant had been summarily dismissed for 'writing some letters'. I do not agree. The claimant and her representative had intended, planned and marketed their intention to abuse the process and use salacious gossip in their closing submissions to cause maximum damage to the respondent. When their attempt to blackmail the respondent failed, they did not stop. They still used the salacious gossip as planned. I agreed with Mr Sugarman that this was a clear case of vexatious conduct falling squarely within the definition. The intention and effect of that conduct was "*to subject the defendant to inconvenience, harassment, and expense out of all proportion to any gain likely to accrue to the claimant"* and it involved *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*'.

47. The claimant's response (paragraph 9.4) that she was summarily dismissed for '*writing some letters*' leads me to the third ground relied upon for making a costs order, that the claim had no reasonable prospects of success. The claimant's complaint of unfair dismissal was based on the premise that the matters she was dismissed upon ought not to have formed the basis for any disciplinary process let alone a decision to dismiss. The Tribunal concluded the claimant had sent many inappropriate letters some derogatory some threatening some bullying to a wide range of people over a long period of time. The claimant did not show any genuine remorse or offer any assurance that her behaviour would stop and would not be repeated in the future. The claimant has sought at this hearing to again misrepresent the findings of fact made to diminish the seriousness of the proven misconduct by referring to it as 'writing some letters'.

48. Mr Sugarman had made a valid point that this was not a claim where the facts were unknown and would only be clear to the claimant and her representative at the liability hearing. The claimant wrote the emails and chose the words, which did not change. This was a case where an early assessment of the merits of the claim was possible. The weaknesses in the merits of the claim may be the reason why the claimant and her representative resorted to using underhand tactics to succeed. It would have been clear to the claimant and her representative that they were presenting false allegations and false evidence to the Tribunal to bolster the claim. I do not agree that the findings of fact made support the claimant assertion (paragraph 9.4) that "*Mr Barron mooted that he would withdraw reference to this conspiracy but was not sure if he could simply retract parts of his statement so he left it in".* The claimant and her husband knew exactly what they were doing when they relied on that false evidence that put the claimant at risk of costs. The respondent had already warned the claimant of the potential cost consequences and offered the claimant a way out which she rejected. The claimant was complicit by her silence in the deception perpetrated by her husband. I found the respondent has shown this ground for making a costs order is also made out.

49. Having decided that all the grounds relied upon by the respondent for making a costs order are met I considered whether it was appropriate for me to exercise my discretion to make a costs order. Costs orders are the exception rather than the rule. They are compensatory not punitive. Mr Sugarman highlights that the respondent is an NHS body that is publicly funded using use public funds to

defend a vexatiously pursued unmeritorious claim. It should therefore be compensated for the reasonable costs it has incurred in defending this claim of £22,156.64. The amount claimed is supported by the detailed schedule of works prepared by the costs draftsman. The claimant is working and has a capital asset in her home and has not provided any evidence of impunity. She has provided some limited information (paragraph 6) which does not set out the amount of equity in the home or her actual earnings and actual expenses. Looking at the whole picture I have found serious deliberate unreasonable conduct (dishonesty making false allegations presenting false evidence to bolster a claim) and vexatious conduct tactically designed to harass the respondent rather than advance the case on its merits. A clear abuse of process. The claimant was given a 'way out' at the hearing with the drop hands offer which was rejected putting her at risk of the costs now sought by the respondent. For all those reasons I am persuaded a costs order should be made.

50. As to the amount of the costs order the respondent has provided a detailed schedule of the works done. It was submitted and I agreed that the claimant and her representative have added to the costs by engaging in a wide range of unnecessary correspondence which has been persistent lengthy and unnecessary. For the respondent the consequence was more time spent dealing with that correspondence adding to the costs incurred in defending the claim. The claimant has not commented on the amount of costs sought or challenged the evidence the respondent relies upon. I considered what was a proportionate and reasonable amount to award having regard to the costs incurred and the information the claimant has chosen to provide about her ability to pay. My view was the costs should be capped at £17,000 which is a reasonable and proportionate amount of costs to award to compensate the respondent in full for the disbursements incurred and award a substantial part of the costs claimed in the schedule of works. The claimant has requested that "*if costs are awarded then they be limited to £52 per month".* Enforcement of costs is not a matter for the Tribunal.

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Employment Judge Rogerson

5 March 2021